Judgment No. HB 61/2003
Case No. HCA 117-119/2001
CRB MAD 293-5/2000

BUSANI NCUBE

And

METHULI SIBANDA

And

JOHN DUNGENI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 2 SEPTEMBER 2002 AND 22 MAY 2003

T Ndlovu for the appellants
Mrs M Cheda for the respondent

Criminal Appeal

NDOU J: The appellants were charged with assault with intent to do grievous bodily harm. Notwithstanding their protestations they were convicted and each sentenced to 9 months imprisonment with 3 months suspended on the usual condition of good behaviour. They appeal against both conviction and sentence. We upheld the appeal and quashed the conviction and set aside sentences. Our reasons for doing so are covered in this judgment.

The facts of the matter are the following. The three appellants are members of the Zimbabwe Republic Police stationed at Madlambuzi. On 12 September 2000 at about 2300 hours the appellants and another police detail arrived at the complainant's residence in Dombodema. The appellants went to arrest the complainant after receiving a report against him by one Godfrey Tshuma and other villagers that he had been threatening to kill the former and had thrown stones at his home.

It is common cause that the appellants and the other policeman approached the complainant's homestead under the impression, rightly or wrongly, that he was a violent person. They had previously arrested him for violence. Upon arrival at the complainant's home hey knocked at his bedroom hut and announced their presence. It is common cause that the complainant delayed in coming out. What transpired after when he eventually came out is hotly disputed. What seems to be beyond dispute is that a scuffle ensued.

The prosecution case, on the one hand was that as the complainant was opening the door the appellants flung the door open, grabbed and pulled out the complainant. The appellant's case on the other hand is that when the complainant came out he went straight to the first appellant and grabbed him and they both fell to the ground. The two other appellants came to rescue their colleague and subdued the complainant and handcuffed him. Their case is that whatever force or assault perpetrated on the complainant the objective was to effect the arrest of the complainant and to overcome his apparent resistance. The trial court found in favour of the prosecution version. This finding is resulted in this appeal. In support of its case the prosecution called the complainant and his wife. The main thrust of their testimony is that when the appellants knocked at their bedroom, they asked who it was. The appellants forced the door to open and started assaulting the complainant. The wife says the complainant was quiet throughout the assault.

From the record, it seems that most issues are common cause. It is beyond dispute that the appellants, in the course of their duties as policeman, received a report of a criminal offence levelled against the complainant by one Godfrey Tshuma and other villagers. In essence it was reported that the complainant was accusing Tshuma

of being a Movement for Democratic Change supporter and was threatening to kill him and was also throwing stones at his home. The appellants and the other police officers went to the complainant's home believing he was a violent person. They had previously arrested him for acts of violence and the objective was to effective an arrest on him. They knocked at his door and he came out. From this stage onwards there seems to be conflicting evidence on what transpired. It is however beyond dispute that the first appellant assaulted the complainant. The only issue is whether he did so in order to apply reasonable force to effect arrest. As far as the rest of the appellants what is at issue is whether they assaulted the complainant as well or they merely assisted their colleague to subdue the complainant. The main thrust of the issue is whether the complainant was resisting lawful arrest. Resisting arrest is itself an offence – see section 42(1) and 101 (1) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] and *R* v *Putter & Ano* 1962 R & N 73 (FS). It is trite that a person whose arrest is attempted resists the attempt and cannot be arrested without the use of force, the person attempting to carry out the arrest has the right to use such force as it reasonably justifiable in the circumstances to aver any resistance put up to the arrest – see *Criminal Procedure of Zimbabwe* by John Reid Rowland at 5-17 (g) and also *R* v *Howard* 1966 RLR 318 A; *R* v *Ncube* 1962 R & N 16 and *R* v *Karambe and Ano* 1958 R & N 469. The court must place itself in the shoes of the accused when looking into whether or not the force applied to effect the arrest was reasonable. In this case the violent character of the complainant was known to the appellants and the other police officers. The offence for which the intended to effect the arrest was threats of death directed at Tshuma (his neighbour) and throwing stones at his homestead. The complainant, according to evidence, was an abuser of dagga. His

wife confirmed this in her testimony. The state concedes that the "Police went to the complainant's home believing he was a violent person." It is common cause that the police had previously arrested the complainant for violence. The evidence establishes that when the appellants knocked at the door of the complainant's bedroom he emerged therefrom naked. The evidence of the appellants is that the complainant rushed out of his bedroom and immediately attacked the first appellant. It is common cause that before the complainant emerged naked the appellants had knocked on his bedroom door and announced that they were police officers. This occurred at night with moonlight being the only source of lighting. The state alleged that the complainant lost two teeth as a result of the assault. The judgment of the court a quo is scant and at times very difficult to follow. The trial court did not make findings of credibility in respect of the various witnesses who testified except the complainant and to some extent the appellants. There was no finding of credibility in respect of witnesses Godfrey Tshuma, Bhekinkosi Mabhena and Doctor Ogundipe. The testimony of these witnesses impact on the credibility of the complainant. Mabhena's account is as follows:-

> "I remained at a spot about 4-5 metres away. Ncube (1st appellant) knocked there was no answer. Later female voice was heard answering. Some match was lit and put out. Complainant came out holding his pair of trousers and was naked. Complainant <u>came out hurrying and they fell down together</u>. Ncube then assaulted accused one (complainant) with baton stick. Sibanda (2nd appellant) and Dungeni <u>then joined assisting in arresting complainant. After they had arrested complainant</u> I then gave them his clothes to wear … <u>First accused struck the complainant when they were on the ground. Accused 2 and 3 did not assault complainant. I did not notice any injuries on complainant's body.</u> (my emphasis)

Under cross examination by the public prosecutor this witness further stated –

> "A - Ncube (1st appellant) was trying to free himself from complainant …

> Q - But you did not say complainant grabbed accused so what was he freeing himself from?
> A - I said complainant was hurrying and grabbed him."

Godfrey Tshuma said –

> "Police knocked. We saw a person coming out and grabbed police officer … after grabbing each other they fell each other to the ground. I noticed police office hitting (complainant) with baton stick. There were 4 police officers only complainant and one officer grabbed each other."

The testimony of these two witnesses is consistent with the appellants' defence yet the court a quo made no findings thereon. Are we to discern from the judgment that the trial court made adverse findings on their credibility? Further, the complainant was examined by Dr Ogundipe. He testified –

> "I found multiple bruises on the back and thighs. He had loose teeth and fractured ones. Wounds were fresh. He was still bleeding from the mouth."

Ex facie, this testimony supports the complainant's story. A closer scrutiny, however, will show that that is not the case. The alleged assault occurred on night of 12 September 2000. Dr Ogundipe only examined the complainant on 21 September 2000. Could he still be bleedings and having fresh wounds after so many days? There is a doubt that wounds that Doctor Ogundipe saw have anything to do with the incident of 12 September 2000. The trial court did not do the basics in arriving at its decision. It did not follow steps that a trial court should take and techniques it should follow in reaching a decision. I think the word of the learned author John Reid Rowland in his work – *Criminal Procedure in Zimbabwe* are instructive in this regard. At 24-10 the learned author remarked –

> "Essentially, the judgment should contain a brief summary of the facts found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving reasons for its decision. It is of no help simply to outline the evidence of all the witnesses and made bald comments such as –

> "The state witnesses gave their evidence well and the appellant gave his badly. Accordingly I found the accused guilty." (Magistrates' Handbook pp 81-82)
>
> Where there are questions of law, the application of the law to the facts found proved should then be dealt with."

What is required is a complete and meaningful judgment touching on all material evidence led during the trial. Magistrates should always bear in mind that in criminal trials the giving of judgment or reasons for conviction is very important part of the trial to avoid creating the impression that the decision is arbitrary or capricious. For a magistrate not to record what he considered amounts to a gross irregularity, which will usually result in a conviction being set aside on appeal or review, although the conviction may still be upheld if the evidence on record supports it – see *S* v *Makombe* HH-120-86 and *S* v *Rusero* HH 151-86. *In casu*, the court a quo failed to give a brief summary of the facts it found proved and its appraisal of the credibility of witnesses Tshuma, Mabhena and Dr Ogundipe. The testimony of these witnesses is material. Their evidence is consistent with appellants' defence and contradict the complainant's version in several material respects. This failure by the trial court amount to a gross irregularity. The other evidence on record does not support the prosecution case. On the contrary, the bulk of the evidence should have created a doubt in the mind of the trial magistrate and the appellants should have been given the benefit thereof.

The appellants' defence raised a question of law i.e. whether the appellants were justified in assaulting the complainant in the face of evidence that he was resisting arrest. There is no application of the provisions of section 42(1) of the code to the facts of the case. It should be borne in mind that it is the state that should prove its case beyond a reasonable doubt and not the other way.

In light of the foregoing, it is our view that the conviction is not safe. We, therefore, upheld the appeal on 2 September 2002, and quashed the convictions and set aside the sentences imposed.

Cheda J ……………………… I agree

Cheda & Partners appellants' legal practitioners
Attorney-General's Office respondent's legal practitioners