

GEORGE JONGONI

Versus

THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA AND MOYO JJ
BULAWAYO 22 JUNE 2015

Criminal Appeal

Advocate H. Moyo for appellant
Ms N. Ngwenya for the respondent

KAMOCHA J: The appellant pleaded not guilty to assault in contravention of section 89 (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] but was found guilty at the end of a trial despite his protestation.

He was then sentenced to pay a fine of \$250,00 or in default of payment 3 months imprisonment. An additional sentence of 6 months imprisonment was wholly suspended on the customary conditions of future good behaviour.

Aggrieved by the decision of the trial court he filed this appeal against both conviction and sentence.

When the appeal came up for a hearing respondent's counsel advised the court that the respondent had reconsidered its position and was conceding that the appeal should be upheld.

The court held the view that the concession was properly made and ordered as follows:

"It is, therefore, hereby ordered that the appeal be upheld.

The conviction and sentence are hereby set aside.

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The appellant is entitled to collect his \$250,00 in the event that he had already paid the fine”.

On 28 July 2015 the Chief Public Prosecutor addressed a letter to the registrar of this court in these terms:

“The matter mentioned above refers.

Our office is requesting for a copy of the written judgment in the matter mentioned above.

Thank you

M. Cheda
Chief Public Prosecutor
Western Division”

In this matter the sole issue for the determination of the court was whether or not the complainant was assaulted. In an endeavour to establish that the assault on the complainant took place, the complainant gave evidence and called one of her employees to support her story. The appellant on the other hand also gave *viva voce* evidence and called 4 council employees to support his story. So there were two warring camps.

The obvious situation that obtained at the relevant time was that while the complainant and her witness on the one hand told the court that an assault was perpetrated on her, the accused and his four witnesses strongly denied committing the offence.

The trial court concluded from the evidence adduced in court that there was bad blood between the complainant and council employees. It was the court’s finding that it was not disputed that the complainant had terrorized council employees for sometime to such an extent that her presence at council offices caused council employees to be very uncomfortable. The

court found further that the complainant was very provocative and she made the accused's life very difficult by imposing herself in the accused's office and insulting him.

The evidence also reveals that the complainant has not only caused a lot of discomfort to council employees each time she paid them her unpleasant visits but she has gone further and assaulted one Chaparadza and the town engineer. She has also made false reports to the police about council employees.

She is a bitter and violent woman who has made a nuisance of herself towards council employees. Her problem stems from the fact that as a business woman she was failing to keep abreast with her council bills. For instance she owed \$3 000,00 on one of the stands that she owns.

The trial court was correct in holding that despite her very unpleasant personality she can be a victim.

The trial court held that the complainant and her witness were truthful but the defence witnesses were untruthful because they gave conflicting evidence. The trial court did not give the details of the conflict in the defence case. It was not enough for the trial court to just state that there is conflict in the defence case without pointing out the conflicting portions of the evidence.

This is a case where probabilities favour the story of the appellant instead of complainant's story when regard is had to the fact that the court found the complainant to be a troublesome and violent woman towards council employees making unsubstantiated reports to the police about them. On the day in question the court made a specific finding that she was very provocative and made appellant's life very difficult by imposing herself in his office and insulted him.

The appellant told the court that complainant became angry when he told her that he would not reconnect water to those of her 35 properties which were in arrears with their bills. She started banging his desk shouting all sorts of words. He sneaked out of the office but she followed him out and chased after him in full view of his subordinates. She then went to her vehicle and drove off at high speed to the police station. She earlier on threatened to go and report the appellant to the police for extortion. It was not the first time that the complainant had humiliated the appellant in front of his subordinates. This story cannot be aid to be improbable and false.

The appellant vehemently denied assaulting the complainant in any way despite her story that she was pushed against the wall causing pain in her shoulder and a terrible headache. Quite clearly the terrible headache could not have been caused by being pushed. The complainant did not receive any medical treatment and no medical report was produced in court to support her story that her shoulder was painful. The court just accepted her story that her shoulder was painful when she did not even bother to seek medical treatment. The court simply relied on her word when the appellant's story was that she was not assaulted. There is no good reason why her story was proffered to that of the appellant. The appellant should have been given the benefit of doubt.

There was an allegation that her blouse or jacket got torn during the allege assault. The appellant denied that and explained that no blouse or jacket was torn at the time of the altercation. The one produced in court was tempered with by the complainant. His contention was based on the fact that the issue of the torn blouse was not mentioned in the state outline.

Secondly the alleged torn blouse was not taken as an exhibit by the police when the assault report was made. The exhibit was, for some unknown strange reasons, kept by the complainant who only brought it to court on the date of the trial. No explanation was given as to why the exhibit was not collected by the police at the time the report was made. That was highly irregular and prejudicial to the appellant as the trial court held that the torn blouse supported the

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evidence of the complainant and based its conviction on that evidence. There was a clear failure of justice by the police in failing to preserve the exhibit with meticulous care. The possibility that the complainant tampered with the exhibit cannot be ruled out when regard is had to the type of person she is.

The conviction cannot be allowed to stand, see S v Marias 1966 (2) SA 514 @ 517 where the court had this to say:-

“It is necessary to impress on officials that exhibit, records of evidence and the proceedings must be preserved with meticulous care. If during the trial anything happens which results in prejudice to the accused of such a nature that there has been a failure of justice, then the conviction cannot stand.”

Counsel representing the respondent at the hearing of the appeal was entirely correct in conceding that the appeal should be upheld.

We accordingly set aside the conviction and sentence on the matter.

Moyo J I agree

Chigariro Phiri & Partners appellant’s legal practitioners
Prosecutor General’s Office, respondent’s legal practitioners