HH 38-03
Crb MS 2046-8/00
CLEOPAS NHAMOINESU
and
FIBION MUTENGWA
and
EPHRAIM SHUMBANHETE
versus
THE STATE

HIGH COURT OF ZIMBABWE
SMITH and MATIKA JJ
HARARE, 20 February and 19 March, 2003

Criminal Appeal

Mr *Muzenda*for the appellants
Mr *Tokwe*for the respondent

SMITH J: The appellants were charged with one count of assault with intent to do grievous bodily harm and two counts of common assault. They pleaded not guilty.

The appellants were all constables in the Zimbabwe Republic Police. In January 1996 they were stationed at Chiredzi and were attached to the Crime Prevention Unit. On 10 January they and one other constable were deployed, under the leadership of Sgt T Moyo, to Ruware Range to investigate a suspected murder case in which the three complainants were implicated. The complainants were Petros Machaya, Boru Adam and Zvamuchaita Murambudzi. The charges alleged that the appellants hit the complainants on the soles of their feet with sticks, thereby causing certain injuries. In the first count a medical report was produced which showed that Machaya had massive swelling and blisters on both feet with septic wounds on each foot. The conclusion of the medical practitioner was that the injuries were likely to have been caused by impact from a rough wooden object and that they were serious. Although the assaults occurred on 10 January, 1996, the trial only commenced on 19 October, 2000 and was not completed until 20 September, 2001. Although there were four policemen who assaulted the complainants, one of them died in the interval and so only three appeared in court. The appellants were found guilty on the first two counts and not guilty on the third because the complainant, who was a female, did not testify. Both counts were treated as one for sentence and they were sentenced to 12 months imprisonment, of which 6 months were suspended on condition of good behaviour. They appealed against conviction and sentence. After hearing Mr *Tokwe*and having regard to the concession made by him, the conviction on count 1 was reduced to one

of common assault and the conviction on count 2 was confirmed. The sentence was set aside and the following substituted -

> Both counts as one for sentence. Each accused is sentenced to a fine of $10 000 or, in default of payment, 2 months imprisonment.

I indicated that our reasons would be handed down later. They are as follows.

It is not disputed that the complainants were assaulted whilst in police custody. The only issue was whether it was the appellants who assaulted them or some other members of the Zimbabwe Republic Police. One of the appellants, when cross-examining Machaya, put it to him that it was Sgt Moyo and constables Chagadama and Chingwena who had in fact assaulted him. The complainants sued members of the Zimbabwe Republic Police other than the appellants for damages arising from the assaults and were successful.

The complainants were picked up by the police on 10 January 1996 as suspects for questioning in connection with a person who had disappeared and was suspected to have been murdered. The four policemen interrogated the complainants and, in the course of so doing, they beat them on the soles of their feet. One of the complainants received such a severe beating that he had to get medical attention. After being taken by the police for questioning, they were detained at Chiredzi police station and the police post at Muteyo for more than two weeks. The body of the deceased was then found but the complainants were not immediately released. They were kept at Mkwasine police camp until their wounds had all healed. They were not detained in the cells but were kept in the quarters provided for witnesses. At no time were their particulars entered in the Duty Book. They were kept at Mkwasine for a period of 17 days after the body was recovered. The trial magistrate commented that it was clear that Sgt Moyo was aware that the complainants were being assaulted but he turned a blind eye to what was being done to them . In his judgment the magistrate said "it was only fortunate or unfortunate that their plans to hide the suspects until they healed were foiled by State witness 1's condition which worsened otherwise all this would not have come out".

Mr *Muzenda*argued that the evidence of the State witnesses should not have been accepted. Therefore the convictions should be set aside. As regards sentence, he submitted that it is excessive. Mr *Tokwe*supported the convictions but conceded that the convictions on count No 1 should be reduced to one of common assault. He also conceded, given the concession as regards the convictions for count 1, that some reduction in sentence would be appropriate.

The offences were committed in January 1996 but the trial did not take off until February 2001, more than 5 years later. The trial concluded in September when the appellants were convicted

and sentenced. Their appeals were heard in February 2003, which is more than 7 years after the offences were committed. Had the appellants been tried, convicted and their appeals heard within a reasonable period of 2 to 3 years, I would have had no hesitation in dismissing their appeals against sentence. Members of the Police Force must realise that they must not use force when interrogating suspects. It cannot be denied that there are many instances of members of the Zimbabwe Republic Police assaulting, and in some cases torturing, members of the public who are taken in for questioning or because they are suspected of having committed an offence. Unfortunately, all too few of the police who commit such acts are brought before the courts. As Mr *Tokwe*pointed out, there is need to protect suspects from "wayward" members of the Police Force. In this case, not only were the complainants assaulted by the appellants, but more senior members of the Police Force were aware of the assaults and did nothing to restrain the appellants. The complainants were kept in police custody, though admittedly not in the cells, for 30 days without appearing in court. There was a complete and blatant disregard of their rights. The complainants did not provoke their assailants, they were merely picked up for "questioning". Unfortunately it would appear that physical assaults are becoming a standard component of police questioning.

Because of the very long period that has elapsed since the offences were committed, it was considered that it would be inequitable to impose a custodial sentence at this late stage.

MATIKA J, I agree.

Muzenda and Partners c/o Debwe & Partners, legal practitioners for appellants
Office of the Attorney-General's Office, for the respondent