JULIUS SISAR MUPATSI
versus
THE STATE

HIGH COURT OF ZIMBABWE
KARWI AND MAVANGIRA JJ
HARARE, 23 November 2010

Criminal appeal

A Demo, for the appellant
F I Nyahunzvi, for the respondent

MAVANGIRA J: After hearing the parties in this matter we dismissed the appeal against conviction and sentence in count 1 in its entirety and allowed the appeal against sentence in count 2. The following are our reasons for doing so.

The appellant, who is a Police officer, was charged with firstly defeating or obstructing the course of justice and secondly, malicious injury to property. He pleaded not guilty to both counts but was convicted after a trial. He was sentenced on the first count to 18 months imprisonment of which 9 months imprisonment was suspended for 5 years on condition of future good behaviour. On the second count he was sentenced to 18 months imprisonment of which 9 months imprisonment was also conditionally suspended for 5 years. A further 3 months imprisonment was suspended on condition the accused paid restitution of $15 000 000.00 to the Ministry of Home Affairs. Both sentences were ordered to run concurrently.

The accused now appeals against both convictions and sentences.

The facts are that police details from Chivhu Police Station were driving towards Mupatsi Business Centre where they intended to go and arrest one Mabasa Phoni Mupatsi. Whilst they were on their way they were flagged down by the accused who asked for a lift to Mupatsi Business centre. The accused called three colleagues who boarded the police vehicle with him. It was a pick-up truck and they jumped into the back of the truck. After travelling a short distance therefrom, one of the police details realised that Phoni Mabasa Mupatsi whom they intended to arrest at the business centre was one of the passengers who they had just given a lift in the vehicle.

The police stopped their vehicle. One Sergeant Munyaradzi alighted from the vehicle and went to where Phoni Mabasa Mupatsi (Phoni) was seated. He identified

himself to Phoni, placed his hand on Phoni's shoulders and told him that he was under arrest. Sergeant Munyaradzi told Constable Marufu who had also alighted to handcuff Phoni as he was a wanted person. Constable Marufu managed to handcuff Phoni's right hand. It was at this stage that the accused jumped out of the vehicle and stated that the police details were not going to take Phoni with them. The accused grabbed Sergeant Munyaradzi while the other occupants came to wrestle Sergeant Munyaradzi who was trying to handcuff Phoni's other hand. Sergeant Chatikobo who had alighted and left the engine running was holding Phoni's legs.

During the scuffle the accused shouted that they would destroy the vehicle. The accused started throwing stones towards Sergeants Chatikobo and Munyaradzi who were wrestling with Phoni as they tried to handcuff him. The accused threw stones which struck Sergeant Munyaradzi on the left thigh and the left shoulder. He also threw a stone which struck the windscreen of the truck on the driver's side. The details who were trying to handcuff Mupatsi then released him and also advised Constable Marufu who was being attacked by two of the accused's colleagues to retreat. The accused and his colleagues then went away with the handcuffs as well as the car keys which the accused had removed from the ignition during the scuffles. The police thus failed to arrest Mupatsi.

The accused was only arrested at his residence when the police returned with reinforcements.

The facts related above give rise to the two counts with which the accused was charged. The charges are that he defeated or obstructed the course of justice by making it impossible for the police to arrest Mupatsi who was wanted by the police in connection with certain criminal allegations. Secondly, that he maliciously injured the State in its property in that he struck and damaged the police vehicle windscreen with a stone.

The question to be determined is whether there has been an improper splitting of charges. In *R v Peterson & Ors* 1970 (1) RLR 49 at 51G-I BEADLE CJ stated:

> "In the earlier cases to which the learned judge referred with approval, two basic tests are set out. One is that where a man commits two acts, of which each, standing alone, would be criminal but does so with a single intent, and both acts are necessary to carry out that intent, then he should only be convicted of one criminal offence. Another commonly applied test, which is a useful one in certain circumstances, is that the same evidence which is essential to prove one criminal act should not be used again as essential evidence to prove another. Where the essential evidence in such cases proves two criminal acts, only one should be charged. There are, however, many instances where this test is inapplicable. This test, however, is only applicable where the evidence is essential evidence, proving an essential ingredient of the offence. The mere fact that evidence may be relevant to two separate charges has, of course, little bearing on this problem. … "

In *S v Simon* 1980 ZLR162 at 164B-C DUMBUTSHENA J (as he then was) stated:

> "On the evidence as disclosed in the record it is clear that accused held himself out as a policeman in order to induce the complainants to part with their property or money. The criminal acts thus separately charged, that is, the two counts of robbery on the one hand and the contravention of section 70 (1) (a) of the Police Act on the other hand, were done with one criminal intent and constituted one continuous criminal transaction, and the evidence necessary to establish the two counts of robbery involved proving the impersonation. See *R v Tarewa*, 1949 S.R. 158; 1949 (4) S.A. 347 (S.R.) at 348; *R v Malako*, 1959 (1) S.A. 569 (O.)."

In that case Dumbutshena J invited comments from the Attorney-General. He quoted the comments received from the Director of Public Prosecutions. The comments read in part:

> "The approach to be used in such cases was laid down by the Appellate Division in *S v Brereton,* 1970 (2) R.L.R. 272 (A.D.) where it was said at p 277A:
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> > 'In such cases, where the accused, in pursuance of the dominant intention, commits a number of offences, the proper thing to do is to charge him with only that offence which was his dominant purpose.'"

The headnote in *S v Jambani* 1982 (2) ZLR 213 (HC) reads:

> "It frequently occurs, during the course of criminal conduct, that several offences are committed. To charge the accused with all those offences, however, may well result in prejudice to him, since the whole of the criminal conduct imputed to him in substance only constitutes one offence. In such a situation, the correct course is to charge the accused with that offence which was his dominant purpose. This does not mean that the test of 'dominant purpose' is the only one to be applied; in some situations it may still be appropriate to charge the accused with more than one offence."

Further still, in *S v Mutawarira* 1973 (1) RLR292 at 296C - F BEADLE CJ said:

> "The law on the subject of splitting of charges was extensively examined by the Appellate Division of South Africa in *S v Grobler & Anor.,* 1966 (1) S.A. 507 (A.D.), and by the General Division of this court in *R. v. Peterson & Ors.,* 1970 (1)R.L.R. 49. *Peterson's* case *(supra),* in effect, adopted all the reasoning in *Grobler's* case (*supra*). The principle which appears from *Grobler's* (*supra)* (I quote from p.518 where Wessels, J.A., quotes from the judgment of KOTZE, J.P.. in the case of *Gordon v R,* 1909 E.D.C. 254), is that:
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> > "'It is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule, which will apply with justness in every instance …'"

WESSELS, JA, summed up the approach to this problem at p 523 thus:

> "Having regard to the genesis of the rule (which could in my opinion be more aptly described as a rule of practice against the duplication of convictions) I am of the opinion that it was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused".

In *casu*, it is clear that the appellant's dominant purpose was to prevent the arrest of his brother, Phoni. The police vehicle was damaged during the process of trying to achieve

that dominant purpose. From a perusal of the authorities, including those cited above, it would appear that what happened in this case was therefore an improper splitting of charges. For that reason the conviction on the second count, of malicious injury to property cannot be allowed to stand.

The appellant contends that on the merits of the case he ought not to have been convicted of defeating or obstructing the course of justice. He contends that he did not know that these were police officers. This contention is disproved by his own statement in his defence outline when he stated as follows:

> "… They now demanded fare and this made to suspect that they were not police officers."

If it was the alleged demand for fares which made him suspect that the persons who had given them a lift were not police officers, then it confirms that the police details had in fact, as they stated, identified themselves as police officers.

The appellant also contends that the lower court ought not to have convicted him on the basis that it did not believe his version. The case of *R v Difford* 1937 AD 370 at 373 was cited. GREENBERG J stated therein that:

> "No onus rests on an accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

The trial court having found the appellant's story to be false and unacceptable, it was justified in convicting the appellant. The appellant's contention to the contrary in this regard is based on a half-baked appreciation of the dictum in the *Difford* case. The conviction is properly justified and supported by the evidence on record. The court's judgment is clear and based on sound grounds. I thus find no valid concerns which have been raised in relation to the conviction.

Regarding sentence, the accused being a police officer, was dealt with appropriately by the trial court. His whole conduct during the whole incident is deplorable. It shows lawlessness which cannot be expected, let alone condoned or taken lightly, if exhibited by a police officer. Furthermore, knowing that these were police officers, he ought to have conducted himself in a manner as to complement their efforts, not to frustrate them. A custodial sentence was called for. The lower court's reasoning in this regard cannot be faulted.

In the result, the conviction and sentence in count 1 are upheld while in count 2 the conviction is quashed and the sentence set aside. These were the reasons for our dismissal

of the appeal against conviction and sentence in count 1 in its entirety while allowing the appeal against conviction and sentence in count 2.

KARWI J, agrees…….

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners