

ABRAHAM MBAMBE
and
ARTWELL MBAMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 2 & 9 February 2023

Criminal Appeal

G S Unzemoyo, for the appellants
F I Nyahunzvi, for the respondents

ZHOU J: This is an appeal against conviction and sentence. The appellants were convicted after a trial, of attempted murder as defined in s 189(1)(b) as read with s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were each sentenced to 5 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of good behaviour, leaving an effective imprisonment period of 3 years.

The facts upon which the appellants were convicted and which are not being challenged on appeal are as follows: On 31 December 2020 the appellants together with other persons who are not before this court went to complainant's residence. The ostensible reason for the visit was to discuss the issue of a woman who was married to the complainant's relative. The said woman had previously been married to a relative of the appellants. The court *a quo* found that once they were at the complainant's place the appellants attacked the complainant with the intention to kill him, hence a verdict of guilty was passed.

At the hearing, the appellants through counsel abandoned grounds of appeal 4, 7 and 8 but advised that they would persist with grounds 5 and 6. Ground number 5 attacks the court *a quo* for placing weight on the evidence of witnesses who are said to be interested parties while disregarding the medical evidence which, it is suggested, contradicted the oral evidence of the

witnesses. The 8th ground avers that the court *a quo* erred in imposing a custodial sentence in circumstances where non-custodial sentences were available as options. In this regard, the appellants move this court to substitute the custodial sentence with community service.

From the evidence which was placed before the court *a quo* it is common cause that the complainant was assaulted. The witnesses who testified on behalf of the state identified the appellants as the assailants together with some other persons who are not before the court. None of the grounds of appeal challenges the identification of the appellants as the assailants. The assault was committed in broad daylight around 1100 hours. One of the witnesses, Beulah Matsiko, knew both appellants very well. She had previously stayed with the first appellant during the time that she was married to a nephew of the two appellants.

In the submissions before this court Mr *Unzemoyo* for the appellants focused on the extent of the injuries and effectively abandoned any challenge to the participation of the appellants in inflicting the attack upon the complainant. The essence of his submissions was that the injuries inflicted did not point to the offence of attempted murder but to that of assault. He also submitted that the medical report contradicted the oral testimony of the witnesses.

The relevance of injuries to a charge of attempted murder must not be over-stated. Injuries are not a requirement for a conviction on a charge of attempted murder save to the extent that they may reflect on the degree of force applied, the nature of the weapon or weapons used and the targeted parts of the body of the victim. In this case, the unchallenged evidence of the appellant was that the assailants used stones, button sticks and sticks. The descriptions of these weapons show that the stones were 15 centimetres in diameter, which makes them very big. The sticks were actually logs when regard is had to the diameter of 4 centimetres that was stated in evidence. The assailants even targeted the complainant's head, and left him bleeding profusely. They left the complainant for dead. Appellant gave evidence which was not disputed that he was passing urine with blood and that he was vomiting blood as consequence of the assault. The weapons used, the degree of force and the parts of the body targeted show an intention to kill. The injuries sustained are also consistent with an intention to kill the appellant.

While the evidence of the weapons used, the injuries suffered and the targeted parts of the body came from the complainant and Beulah Matsiko who was at the centre of the dispute, the evidence was never challenged. Thus, even if it was to be said that by being the person at the

centre of the dispute Beulah Matsiko was a witness with an interest, the fact that her evidence was not disputed leaves the evidence intact.

The medical reports do not in any way contradict the evidence of the witnesses who testified. While noting that the force used to inflict the injuries may have been moderate, the reports state that the injuries suffered were serious and that there was a likelihood of permanent disability or injury.

Injury to the kidney is evident from the two reports, and is consistent with the complainant's testimony that he was passing urine with blood. Both reports mention that a blunt object was used to inflict the injuries, an observation which confirms the evidence of the witnesses that the appellants used button sticks, logs and stones to assault him. In other words, contrary to the submission made on behalf of the appellants, the two medical reports corroborate the evidence of the complainant and Beulah Matsiko

In respect of the sentence, the appellants submit that community service ought to be imposed. The trite position of the law is that sentencing is a matter that falls within the discretion of the trial court. This court does not readily interfere with the sentencing discretion unless it is shown that the discretion was not exercised judicially. The appellate court cannot substitute the discretion of the trial court with its own views. *In casu* the court *a quo* considered the mitigating factors and weighed them against the aggravating circumstances of the case, and came to the conclusion that only a custodial sentence would meet the justice of the case. The court *a quo* considered the status of the appellants as first offenders and, in the case of the first appellant, the fact of having family responsibilities. On the other hand, there is the fact of the seriousness of the offence, the fact that the attack on the complainant was unprovoked since he was not the one who had married the woman at the centre of the dispute, the careful planning of the assault, the fact that the victim was attacked at his own home, among other factors. When all these factors are considered, the court *a quo* cannot be faulted for holding that a custodial sentence was warranted.

However, the sentence of 5 years imprisonment seems to us to be excessive as to induce a sense of shock when one considers the evident lack of sophistication of the appellants and the fact that this is a crime of passion in a sense. The thinking by the appellants that their nephew "Braziyo is the owner of the wife" illustrates the type of society from which the appellants come.

The emotions were clearly very high when the offence was committed. There is the additional factor that the first appellant behaved as if he was possessed by some spirit or as if he was in a trance which the court *a quo* did not consider which might be a reflection of the emotive nature of the dispute. The court *a quo* fell into the error of judging this society from the perspective of a different standard, hence the intemperate remark by the Learned Magistrate that the appellants had behaved “like baboons” or “dogs.” For this reasons, this court is of the view that a sentence in the region of 36 months, with 10 months suspended on condition of good behavior would be a reasonable starting point.

The second misdirection that we note in relation to the sentence is the failure to distinguish the penalties for the two appellants bearing in mind the age difference between them. At the time that the sentence was passed the first appellant was only 18 years old, which means that he had only just graduated into a major. On the other hand, the second appellant was 28 years old. This age difference of 10 years ought to have been considered. Youthfulness and the immaturity associated with it may have played a part in the commission of the offence. The fact that the first appellant at 18 years was already married with two children does not affect his youthfulness. His judgment capacity is not improved by getting married. The facts suggest that he actually “married” when he was still a minor, a factor which ought to have been given serious thought. For these reasons, we believe that 24 months of which 6 months imprisonment is suspended on condition of good behavior would be just in respect of the first appellant. However, even though the sentence falls within the basket of cases qualifying for community services, the compelling reasons given by the Learned Magistrate to justify a custodial sentence remain intact. Notwithstanding his youthfulness, the first appellant played a leading role in attacking the complainant. He was unrepentant. As correctly observed by the Learned Magistrate, he “decided to join the criminal business at a deeper end.” Accordingly, the effective prison term of 18 months must be served.

Before concluding, the court must comment on the language used by the learned magistrate during the proceedings. Regrettably, this trend of use of intemperate, gratuitous and insulting language seems to be a recurring feature of the proceedings that come before the same magistrate. In the reasons for sentence, unwarranted language which denigrates accused persons and even one state witness is used, such as: “people... behave like baboons...”, “... such dog

behaviour...” “what is so special about her? (Beulah Matsiko)’. This kind of language does not only violate the dignity of the persons affected but impairs the integrity and dignity of the court. A judicial officer must exercise restraint and use measured language at all times in order to protect the dignity of the court.

In all the circumstances, the appeal against conviction is devoid of merit.

In the result, IT IS ORDERED THAT:

1. The appeal against conviction is dismissed.
2. The appeal against sentence partly succeeds to the extent that the sentence imposed is set aside and the following is substituted:

“(a) Accused 1: 24 months imprisonment of which 6 months imprisonment is suspended for a period of 5 years on condition that during that period the accused does not commit an offence involving violence upon the person of another for which he is sentenced to imprisonment without the option of a fine or to community service. Effective: 18 months imprisonment.

(b) Accused 2: 36 months imprisonment of which 10 months imprisonment is suspended for 5 years on condition that during that period he does not commit an offence involving violence upon the person of another for which he is sentenced to imprisonment without the option of fine or to community service.” Effective 26 months imprisonment”.

ZHOU J:.....

CHIKOWERO J: Agrees.....

Musara, Mupawaenda & Mawere, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners