

KURAUONE CHITORO

versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J.
MASVINGO, 29 March & 5 April, 2017

Criminal Appeal

Ms P Mudisi, for the appellant

Ms S Busvumani for the respondent

MAWADZE J: On 29 March 2017 we dismissed the appeals in respect of both matters being CA 7/16 (Ref CRB MBE 286/16) and CA 9/16 (Ref CRB MBE 287/16). We gave the reasons for dismissing the appeals *ex tempore*. Our view is that it is prudent that we provide full written reasons for dismissing the appeals. These are they;

The appeals in respect of both matters were consolidated by my brother MAFUSIRE J on 14 March 2017 by consent under Ref CON 3/17. This was after an application by the appellant's legal practitioners. The basis for the consolidation was informed by the fact that both matters CA 7/16 and CA 9/16 relate to the same accused person, being the appellant. Both matters were also dealt with by the same senior Magistrate sitting at Mberengwa.

The background facts in both matters are as follows;

CRB MBE 287/16 (CA 9/16)

On 16 September 2016 the 42 years old appellant and the complainant (whose age is not given) were enjoying themselves drinking beer at Benzeni business centre, Chief Maziofa in Mberengwa at about 18.00 hours. They got involved in a misunderstanding whose cause is not agreed. The State alleges it was over an alleged love affair between the appellant's cousin and the complainant. The appellant alleges that it was related to an assault complainant had previously perpetrated on appellant's younger brother.

The appellant who was in the company of an accomplice who is at large teamed up to manhandle the complainant by holding complainant's hands and legs suspending him in the air. While in that position they proceeded to assault the complainant on the head and face until the complainant managed to escape. The medical report states that the complainant sustained bruises on the face and had a painful tender shoulder. The doctor described the injuries as serious and that moderate force was used to inflict those injuries. There was no potential danger to life and no permanent injuries.

The appellant was arraigned before the senior Magistrate sitting at Mberengwa on 23 September 2016 after which he pleaded guilty to the charge of contravening section 89(1)(a) of Criminal Law (Codification and Reform Act) [Cap 9:23] [The Code] which relates to assault.

After being duly convicted the appellant begged for a non-custodial sentence. In mitigation the appellant who was a first offender revealed that he has 6 children and that he survives on gold panning (most likely illegal). The appellant had US\$70 and owned 6 goats and 3 beasts as assets.

The trial Magistrate was not persuaded that the appellant deserved any measure of leniency, let alone a non-custodial sentence. The trial Magistrate reasoned that the appellant's conduct was intolerable and deserved what he or she called an exemplary sentence. The appellant was sentenced to 9 months imprisonment of which 3 months imprisonment were suspended for 3 years on the usual conditions of good behaviour, leaving the appellant with an effective term of 6 months imprisonment.

CRB MBE 286/16 (CA 7/16)

In this matter the appellant was convicted of 2 counts on 4 October 2016 after a trial.

In count 1 the offence relates to assaulting or resisting a peace officer in contravention of s 176 of the Code.

In count 2 appellant was convicted of contravention section 157(1)(a) of the Code which relates to possession of drugs, specifically dagga.

The facts proved in both count 1 and 2 are briefly as follows;

In count 1, the complainant a Constable in the ZRP and other two details went to the appellant's residence to investigate the case of assault which had occurred on 16 September 2016, that is relevant to CRB MBE 287/16. They were all in police uniform. When they located the appellant at his tuckshop at Village 4, Gwamasaka, Chief Maziofa, Mberengwa, the appellant took to his heels and locked himself up in his tuckshop. The appellant armed himself with an axe and threatened to kill the police officers if they dared to arrest him. The police officers were unmoved. They kept vigil at appellant's tuckshop. The appellant realising the futility of his threats decided to come out of the tuckshop. The police officers moved to handcuff him. The appellant would have none of that. He became violent and head butted the complainant twice on the left upper eye causing a swollen left eye and head. The appellant was nonetheless subdued by the three officers and duly arrested.

The medical report shows that the appellant suffered an injury described as "left periorbital oedema" which the doctor described as serious though not life threatening. Moderate force was used to inflict those injuries and did not cause permanent disability.

In respect of count 2, the appellant after his arrest in count 1 was taken to the police station and handed over to one Constable Muziwi who was on duty in the charge office. The appellant was then subjected to a routine search for purposes of being detained. During the search three twists of dagga weighing 0,010 kg were found in the pocket of a pair of shorts the appellant was wearing underneath a work suit trousers.

In count 1 two police officers and a local village head testified against the appellant. The appellant gave evidence and called his younger brother one Wilfred Chitoro as a defence witness.

In respect of count 2 the police officer who searched the appellant testified and the appellant also gave his evidence.

The trial Magistrate did not find favour with the appellant's evidence in both counts 1 and 2. The appellant was thus convicted in both counts.

In respect of count 1 the appellant was sentenced to 6 months imprisonment of which 3 months imprisonment were suspended for 3 years on the usual conditions of good behaviour.

In count 2 the appellant was ordered to pay a fine of U\$80 or in default of payment to serve 30 days imprisonment. The 3 twists of dagga were forfeited to the State for destruction.

In the reasons for sentence the trial Magistrate justified the sentence especially in respect of count 1 as follows;

“The police have to be respected so that they perform their duties without fear or favour. Offences involving violence are quite high in this district and have to be put to stop. Accused is serving on the other offence and hence does not qualify for community service. A fine will not do any justice and it will trivialize the offence. On the offence of possession of dagga a fine will do justice.”
(sic)

Nature of the appeal

The appeal in respect of CRB MBE 287/16 (CA 9/16) which relates to the offence of assault is in respect of sentence only. The appellant pleaded guilty to this charge.

Broadly the grounds of appeal in respect of CRB MBE 287/16, which are just repetitive, are that the court *aquo* should have considered a non-custodial sentence and at most impose the option of community service.

In respect of CRB MBE 286/16 (CA 7/16) the appellant's legal practitioner at the commencement of the hearing of this matter abandoned the appeal in respect of the conviction in count 1 which relates to assaulting or resisting a peace officer in contravention

of s 176 of the Code. This means that the appeal in count 1 is now only in respect of the sentence of 6 months imprisonment of which 3 months imprisonment were conditionally suspended.

In our view the decision to abandon the appeal in respect of conviction in count 1 is proper. The evidence against the appellant is overwhelming. A proper assessment of the appellant's own evidence clearly shows that he was not even denying that charge.

As regards count 2 on CRB MBE 286/16 the appeal is only in respect of conviction which relates to possession of dagga and not the sentence of a fine of US\$80 or in default of payment 30 days imprisonment.

Merits of the appeals

Before dealing with the merits of the appeals in both matters it is important to comment on the conduct of the appellant's legal practitioner *Ms Mudisi*.

During the hearing of the appeals it was abundantly clear that *Ms Mudisi* was ill prepared to argue the appeals. She was a stranger to her cases as it were. To put it mildly she was completely lights out. One wonders whether this was a result of inexcusable inexperience or simply the failure to prepare one's case or both.

After we realised that *Ms Mudisi* was virtually walking in darkness we inquired from her what the possible reason was. The excuse she gave was that she had been asked at the last minute that very afternoon by her senior in their law firm to proceed to this Court to argue the appeals. Naturally we inquired why the so called senior counsel in their law firm who should have prepared the heads of argument was unavailable. The answer we got was dumbfounding. The answer we got was that the senior legal practitioner had opted to attend to some disciplinary hearing at Zvishavane Town Council instead of appearing in this Court.

It is improper and unethical for the so called senior legal practitioner to behave in such a manner. A disciplinary hearing cannot take precedence over a matter set down in this court. Further, it is inexcusable for *Ms Mudisi* to have appeared before this Court and purport to argue the appeals when she was virtually clueless as to what both matters entail. As a

result, she spent most of her time fumbling through the papers and aimlessly gazing at the bench instead of addressing the mundane and simply issues we sought clarity on. The court's valuable time was thus wasted.

Ms Mudisi did not even know or appreciate what sentences were imposed in both matters! For some strange reasons she insisted that the court *aquo* had ordered the sentence in one matter to run concurrently with the sentence in the other matter. She did not even appreciate which witnesses testified in respect of count 2 on CRB MBE 286/16 which relates to possession of dagga or worse still where the dagga was allegedly found by the detail who detained the appellant. In a nutshell she had simply not read the record of proceedings. One is left wondering what sought of tuition *Ms Mudisi* received or is receiving in her law firm.

In order to curb this type of conduct and ensure that legal practitioners do not blindly walk into this Court without the necessary preparatory work expected of them, we shall in future seriously consider recommending disciplinary action to be taken. The conduct of *Ms Mudisi* and the said senior legal practitioner deserve censure. It is important that legal practitioners who are officers of this Court and play a key role in the administration of justice treat this Court with the respect and dignity it richly deserves.

We now turn to the merits of the appeals.

The grounds of appeal in respect of CRB MBE 286/17 are difficult to appreciate. No useful purpose would be served by outlining the grounds of appeal. Instead a brief comment on the grounds of appeal will drive the point home.

In the first ground of appeal it is stated without any hesitation that police officers are generally trained to mislead the court in giving evidence! It is difficult to imagine that such an allegation is put down as a ground of appeal by a legal practitioner who is an officer of this Court. Such a bold and unsubstantial statement deserve no further comment. Suffice to say that the evidence of any witness can be legitimately attacked or criticised on a factual and objective basis.

The second ground of appeal is equally confusing. It is simply stated that it was impossible for the appellant to head butt the police officer in count 1 when he was in

handcuffs. The simple question is why is this impossible? Needless to say that such a sweeping statement is not based on the evidence on record.

The third ground of appeal is that the trial Magistrate should have played what is described as an “investigatory role” in respect of count 1, whatever that means. It is therefore not surprising that the appellant’s legal practitioners abandoned all these three grounds of appeal at the eleventh hour when the appeal against conviction in count 1 was belatedly withdrawn. The point is however made that it is trite that the grounds of appeal should be precise and crisp.

The heads of argument in these matters also deserve comment. They are unnecessarily long, rumbling and repetitive. To cap it all they contain incorrect information in relation to the sentence imposed by the court *a quo* in that it is said the sentence in one of the matters was ordered to run concurrently with the sentence in the other matter. The inference one is inclined to draw is that the legal practitioner who prepared these heads of argument did not even bother to familiarise himself or herself with the sentences imposed by the court *a quo*, which sentences he or she sought to impugn.

The appeal in respect of conviction in count 2 on CRB MBE 286/16 lacks merit. The evidence adduced in the court *a quo* is clear and straight forward. The police detail who found the dagga on the appellant did so during a routine search of the appellant for purpose of detaining him. This police officer is not the one who had arrested the appellant at all. He was not part of the team of the three details who struggled with the appellant before he was subdued. If indeed police officers wanted to fabricate evidence against the appellant the arresting details would have alleged that they found dagga on appellant’s person. The court *a quo* rightly rejected the appellant’s version that dagga was planted on him by the police details in the charge office. The appellant was properly convicted for possession of dagga which was concealed in the pocket of his shorts underneath the work suit trousers.

We lastly turn to the appeal against sentence in both CRB MBE 286/16 and CRB MBE 287/16 which relate to assault.

Ordinarily in cases of assault the appropriate sentence depends on the severity of the assault see *S v Pedzisai* 2002 (2) ZLR 560 (H) at 561 C – D.

The appellant's contention is that the court *a quo* should have considered a non-custodial sentence in both matters and at most impose the option of community service.

In the case of *S v Dangarembwa* 2003 (2) ZLR 87 (H) CHINHENGO J with the concurrence of UCHENA J (as he then was) stated that in order to properly exercise its discretion in assessing the appropriate sentence, in assault cases, a court should *inter alia* consider the weapon used, the seriousness of the injury inflicted, the nature or degree of violence and the medical evidence. This should be juxtaposed with the mitigatory factors.

In both matters the appellant perpetrated the assault using his hands and the injuries inflicted on both complainants are not very serious and were not life threatening. Indeed, the appellant is a first offender.

If one was to consider the assault in CRB MBE 287/16 in isolation, indeed it may be true that the sentence imposed by the court *a quo* of 9 months imprisonment is unduly harsh. However, since the appellant sought to have both matters consolidated this Court is now enjoined to assess the overall moral blameworthiness of the appellant in both matters. The impression one gets is that the appellant is a person of violent disposition and a village bully.

The other practical problem is that is now not feasible to order the appellant to perform community service in respect of CRB MBE 287/16 even if we are of the view that an effective custodial sentence is appropriate on CRB MBE 286/16.

The general approach is that the courts should take a dim view where an assault is carried out for purposes of resisting arrest and with the clear intention to intimidate law enforcement agents. In the absence of special mitigatory factors such conduct richly deserve a custodial sentence. See *S v Masango* HH-196-86 in which an assault upon a policeman in uniform with a clenched fist on the chest in public attracted a penalty of 3 months imprisonment.

The appellant has no respect for the law. The police approached him in connection with the assault he had perpetrated in CRB MBE 287/16. They were in uniform. Instead of owning up to his wrongdoing he fled from the police and locked himself up in his tuckshop. He armed himself with an axe threatening to kill the police officers if they tried to arrest him. When he came out of the tuckshop he was still unwilling to submit to the law. He decided to fight the police officers in public. The presence of his village head did not even deter him. The views expressed by KORSAH JA in *S v Chipere* 1992 (2) ZLR 276 (S) at 281 F – G are apposite wherein the Learned Judge of Appeal said;

“In as much as the law would consider as a very grave offence an assault by an ordinary person on a member of the disciplined forces in execution of his duties, so also does it consider assaults by law enforcement agents in the execution of their duties on the ordinary man. In such cases unless there are special mitigatory factors, custodial sentences are almost invariably imposed to deter both the offender as well as would be offenders from creating animosity between the disciplined forces and the citizenry.”

In all the circumstances we cannot find fault with the trial Magistrate’s overall approach to sentence on both CRB MBE 286/16 and CRB MBE 287/16. The appellant should simply get his just dessert.

It is for these reasons that we dismissed the appeals in both matters.

Mafusire J. agrees

Mutendi, Mudisi & Shumba, appellant’s legal practitioners

National Prosecution Authority, respondent’s legal practitioners