THE STATE

versus

NUNURAI MASHINGAIDZE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 17 January 2018

Criminal Review

MAWADZE J: Judicial officers like magistrates should always appreciate that it is not every complaint forwarded to them which should be simply forwarded to this court ostensibly to be resolved by way of this court's inherent review powers.

This record was placed before me endorsed with us following comments from the learned Senior Regional Magistrate in Chiredzi.

"Clerk of Court send this record for review 2/11/17"

This matter is not subject to automatic review provided for in the Magistrates Court Act. [*Chapter 7:10*.]. What is attached to the record is a letter by the complainant to the learned Senior Regional Magistrate at Chiredzi who is the trial magistrate in which the complainant expressed his displeasure over the acquittal of the accused on a charge of attempted murder as defined in Section 89 as read with Section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In that letter the complainant seems to request for what he terms "a review" of the proceedings. This letter does not at all lay out the basis or grounds for review and neither does it state how the trial magistrate misdirected himself or herself. All the complainant states is that he is disappointed by the acquittal. Just like a conveyer belt the trial magistrate simply forwarded the record of proceedings to this court.

While it is correct that this court has power to review a matter where an acquittal has resulted after a full criminal trial even at the behest of an aggrieved complainant as provided for in Section 29 of the High Court Act [*Chapter 7:06]* the basis upon which such review is being sought should be clearly set out. It should be clear as to whether any procedural irregularity or misdirection on substantive law or both is being alleged See S v Nivfo Prandini HH 94-10 in which my brother KUDYA J extensively dealt with this aspect. I simply decided to deal with this matter in order to give closure to whatever misgivings complainant may have.

The facts of this matter are as follows: -

The accused who is a school teacher is a brother in law to the complainant (as he is married to the complainant's sister). On 25th May 2015 the accused was visited at his residence by the complainant and his wife's relatives including the wife's father. The purpose of the visit is bitterly contested. This was at accused's residence in Tshovani Township in Chiredzi. According to the state case a dispute arose between accused and the complainant over the sufficiency of transport costs tendered by accused to his wife's relatives. It is alleged that in the ensuing argument he had stabbed the complainant on the right rib side and the right elbow with a knife.

A medical report compiled by Doctor Ngere however shows only one stab wound on the right side of the abdomen and not on the elbow. It shows that moderate force was used and that the injuries though serious were not life threatening. This calls into question the appropriateness of the charge preferred against the accused moreso as Doctor Ngere was not called to amplify on the medical report.

The accused maintained in his defence that the misunderstanding between him and the complainant was centred around demand for outstanding lobola (bride price) by his wife's relatives and payment of their transport costs. The accused insisted that the complainant threatened to harm the accused. The accused's case is that he tried to leave the house but the complainant blocked him on a number of times. The accused said as he tried to flee the complainant caught up with him and attempted to harm him with a sharp object. A tussle ensued between the two and the accused believes the complainant fell on his own weapon hence the injury was self-inflicted. The accused said he managed to flee. The accused who

was legally represented said all he did was to act on self-defence and prevent harm which was about to be inflicted upon him.

I find no procedural irregularity in the manner in which this criminal trial was conducted. The state led evidence from the complainant Tavonga Varanga and his father Keneth Ndarara. The medical report referred to earlier on was tendered. The accused gave evidence and called his brother one Enock Mapindure as a defence witness since he was also part of this gathering. The trial was therefore properly conducted observing all the dictates of a criminal trial.

The trial magistrate considered all the evidence led in the judgment. The applicable law was applied to the facts. I shall simply summarise the evidence for clarity purposes.

The complainant's evidence is that the purpose of their visit was not to demand any lobola but to attend to accused's sick wife. He disputed that any demand for transport costs was made. In fact, his version of events is that the meeting was held amicably hence the attack perpetrated on him was inexplicable.

In relation to the attack he said as he was going to his motor vehicle the accused followed him. It was at night. Only the two of them were present. The complainant said accused suddenly attacked him with what he later saw to be a knife in the abdomen exposing his bowels after which the accused fled.

Kenneth Ndarara the complainant's father was clearly a confusing witness. He testified that the dispute with accused was over his sick daughter the accused's wife. He corroborated the complainant that no demand for lobola or transport costs was made. What was unclear and consistent about his evidence is whether he witnessed the alleged attack on the complainant by the accused or how complainant was injured. Initially he said he witnessed the attack but in cross examination he said he did not see how the complainant was stabbed. He was inconsistent on whether he saw the weapon used. Indeed, the complainant's evidence suggests that only the accused and the complainant were at the place the complainant was injured.

The accused maintained his version on how the complainant was injured. The accused's father Enock Mapindure testified that the complainant was very violent on the night in question and would not allow the accused to leave the house where the discussions

were being held. He said when accused managed to leave it is the complainant who persued the accused and that no one else was present when the complainant got injured except the accused and the complainant.

In brief this was the evidence placed before the trial magistrate.

As already alluded to the trial magistrate gave a very lucid judgment. The trial court first grappled with the dispute around the purpose of the visit of the complainant and his relatives at accused's residence. Was it to attend to accused's sick wife or to demand outstanding lobola and reimbursement of transport costs? After dealing with the demeanour and credibility of the witnesses a finding of fact was made in which the trial court believed the accused's version as regards the purpose of the visit.

The next issue dealt with by the trial court is the graveman of this matter which is how the complainant was injured. In my view a proper finding of fact was made that only the accused and the complainant were at the place where the complainant was injured. Secondly the trial court discussed at length as to why it found accused's version to be credible. Further the law in relation to the defence of self-defence was outlined and applied to the facts found proved. The trial court rightly concluded that the accused should be believed in saying he acted in self-defence. The state case was found to be inadequate. Indeed it is clear that the state failed to discharge the onus thrust upon it to found a conviction on a charge of attempted murder or any other permissible verdict.

It is not uncommon that any complainant who reports a criminal matter to the police expects that the alleged culprit should be convicted. In casu the protestations by the complainant while understandable clearly lack merit.

The trial magistrate's findings cannot be faulted. In the premis I confirm the proceedings as in accordance with real and substantial justice both in relation to the procedural and substantive aspects of the law.

Mafusire J. agrees ……..