

AGNESS CHIGWADA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 22 May and 20 June 2019

Criminal Appeal

Mr *C Ndlovu*, for the appellant
Mrs *J Matsikidze*, for the respondent

MWAYERA J: Pursuant to the conviction and sentence for Attempted Murder as defined in s 189 (1) as read with s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the appellant lodged the present appeal with this court. The appellant a girlfriend to the complainant was convicted of unlawfully stabbing the complainant one Josam Mapinge in circumstances where there was realisation that there was a real risk or possibility that murder may be committed. The Appellant who stabbed the complainant Josam Mapinge with a knife once in the abdomen was convicted of attempted murder and sentenced to 6 years imprisonment of which 2 years imprisonment was suspended on the usual conditions of good behaviour.

The brief circumstances informing the charge as discerned from the record are as follows. The appellant visited the complainant the boyfriend. She requested for his cell phone to read some text messages. The complainant gave her the cell phone and when he requested the phone back the complainant resisted and locked herself inside while complainant was outside. Later the complainant gained entry into the room and asked for his phone. The appellant was not forthcoming and she then picked the knife from the kitchen and stabbed the complainant.

Dissatisfied with both conviction and sentence, the appellant lodged 7 grounds of appeal against conviction and 4 grounds of appeal against sentence. The grounds as discerned from the notice of appeal are as follows:

“Conviction

1. The learned Magistrate erred and misdirected herself at law and fact when she convicted the appellant of attempted murder.
2. The learned Magistrate further erred and misdirected herself at law and fact when she used an armchair approach and stereotyped victims of sexual assault by the complainant.
3. The learned Magistrate further erred and misdirected herself when she rejected the appellant’s defence and explanation that she was a victim of sexual assault.
4. The learned Magistrate further erred and misdirected herself when she rejected the appellant’s contention that she was acting in self defence.
5. The Trial Magistrate further failed to apply her mind to the inherent dangers of accepting the complainant’s testimony (without corroboration) as a single witness to the incident. Ultimately she failed to apply caution to that evidence.
6. The Trial Magistrate further grossly erred and misdirected herself when she rejected the evidence of the Appellant’s witness(es).
7. The Trial Magistrate further erred and misdirected herself when she placed an onus on the appellant to prove her innocence of the charge.

Sentence

1. The sentence that was imposed by the Trial Court induces a grave sense of shock and disbelief and is not in tandem with other decided cases.
2. The Trial Magistrate erred and misdirected herself in her approach to sentence when she paid lip service to the highly mitigatory features in favour of the appellant.
3. The learned Magistrate further erred and misdirected herself when she injudiciously criticized and immortalized the appellant for engaging in an adulterous relationship with the complainant.
4. The learned Magistrate further erred and misdirected herself by sensationally refusing to impose community service or a hefty fine on the appellant.”

The grounds of appeal in respect of conviction are clearly repetitive. In summary the appellant took offence with the rejection of the defence proffered by the appellant. Further the appellant took issues with the court accepting the evidence of the complainant while rejecting that of the accused and witnesses. The appellant thus attacked the factual and legal finding by the court *a quo*. What falls for consideration here is whether or not the trial court properly rejected the accused’s defence of self-defence.

It is common cause the defence is provided for in s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In order for one to succeed in relying on the defence one must prove that he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent, his or her conduct was necessary to avert the unlawful attack or that he or she could not escape from or avert the attack, the means used were reasonable in all the circumstances, and that any harm or injury caused by his or her conduct was caused to the attacker. Clearly the defence is only available if the requirements are all met. Only when there is an unlawful or imminent unlawful attack can one motivate the defence of self-defence.

The Trial Court had to look at the circumstances presented before it and analyse the evidence to deduce if the appellant qualified for the defence. The court *a quo* believed the State witnesses and decided that the appellant did not satisfy the requirements of the defence and thus found her guilty as charged.

A close look at the record of proceedings reveals the following common cause aspects:

1. That the appellant and complainant were lovers and were together on the night in question.
2. That they parted ways after having a misunderstanding over a text message on the complainant's phone.
3. That the complainant followed the accused to her house and that he forced his way in using the back door after failing to be granted access through the front door.
4. That a misunderstanding ensued which culminated in the complainant being stabbed by the appellant.

The complainant was the only witness in the State case. There was need to be cautious of his evidence so as to eliminate the danger of false incriminations moreso given the common cause aspect that the complainant forced himself into the appellant's house when the latter had denied him access over the disagreement about the text message. Given the manner in which the complainant entered and the disagreement that existed there was need to consider the sufficiency of the evidence upon which the court convicted.

The complainant's evidence and the accused's evidence and probabilities ought to be weighed in such a manner as to eliminate the dangers of false incrimination. It is settled that the accused in a criminal matter does not have to prove his innocence but that the State has to prove the accused's guilty beyond reasonable doubt. See *S v Shack* 2001 (2) SA CR 185 SC 17 and *S v Ndlovu & Others* HB 81/06. See also *S v Kuiper* 2000 (1) ZLR 113. Once the accused's story is reasonably possibly true that the accused ought to be granted the benefit of doubt and be acquitted. In *S v Makanyanga* 1996 (2) ZLR 231 GILLESPIE J stated that:

“Proof beyond reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true...”

The accused in this case raised the defence of self-defence and the accused was to prove that she was under attack and that when she engaged in an altercation on the attacker it was to avert the unlawful attack in a reasonable manner. See *S v Tafirei Runesu* HMA 37/17,

S v Mabvume HH 39/16 and *S v Manzanza* HMA 2/16. In *Manzanza* case MAWADZE J made the following pertinent remarks on assessment of what is “reasonable” when he remarked:

“In deciding what is reasonable in the circumstances of each case the court as already alluded to should place itself in the shoes of the accused person and not expect the accused person to behave or act like a movie star novo, a super human with papal infallibility or an agent.”

In the present case the court was faced with the complainant’s evidence and appellant’s evidence. The court *a quo* in its judgment pointed out it had to juxtapose the complainant and appellant’s version and determine which one was true. Such approach in the absence of demonstration of reasoning of elimination of the danger of false incrimination would be faulty. It is permissible to convict on a single witness’ evidence but the evidence has to be properly weighed with the totality of circumstances and not just balance the evidence of the witnesses in the abstract ignoring the obvious requirement on the state to prove its case beyond reasonable doubt. It is appreciated the court *a quo* had the benefit of assessing credibility of the witness. Given the evidence of the complainant and appellant the court *a quo* ought to have considered that evidence against the defence raised. The key factor being that the accused has no onus to prove his or her innocence once his defence is reasonably possibly true then he ought to be granted the benefit of doubt. The court *a quo* in rejecting the appellant’s defence made inferences while at the same time disregarding other possibilities without justification. The court *a quo* had its own reconstruction of what it expected the appellant to have behaved like. This then leads to the dismissal of the defence of self without considering whether or not it was reasonable in the circumstances the appellant found herself in as enunciated in the *Manzanza* case (*supra*) and *S v Ntuli* 1975 (1) SA 429.

The court was dismissive of the defence of self-defence as it made a finding that the appellant was aggrieved by the fact that the complainant whom she had been in an adulterous affair with for 5 years was seeing another woman and that she was incensed with jealous since she anticipated marriage. This appeared to be an inference drawn by the court despite the common cause aspects that the complainant is the one who pursued the appellant at the house and despite being denied entry forced his way into complainant’s house. This intrusion is what the appellant sought to wade off. The appellant’s defence was that the complainant used the back door to enter and he sought to sexually impose himself on her. It is in the context of that attack that the self-defence was motivated and of course the issue of whether the means used were reasonable in the circumstances arises.

The court *a quo* rejected the defence version on the basis that there were 2 other people in the house and assumed the complainant would not have made sexual overtures. Further in its judgment the court *a quo* further remarked:

“It was impossible for the complainant to raise his chest whilst his hand was propping her private parts and the other taking out his penis If it happened in that manner it could not be true for the accused to say the complainant was pressing her down and could not have freed herself. What it means is that if the upper part of the complainant’s body was not in contact with accused’s body she could easily have managed to sit down and free herself from complainant’s grip. There was no way complainant could have entered her private parts whilst seated.”

This is clearly indicative of the court entertaining the appellant being under attack but then falling into the error of seeking to measure with nice intellectual callipers the precise bounds of the legitimate defence. The court *a quo* proceeded to draw inferences on the occurrences and discounted other possibility in circumstances where there is no justification for such findings. The appellant was under attack from the lover who forced his way into the house on the background of a misunderstanding over a cell phone message. That the appellant sought to impose himself on her is reasonably possibly true given forced entry into the house and the use of a knife. The use of a knife to stab him in face of a potential sexual abuse cannot be said to be disproportionate to the harm that would have been caused by the non-consensual intimacy or rape. That the appellant and complainant used to be intimate consensually in the past should not be held against appellant’s defence given the background of disagreement. In any event prior consent to intimacy in the past would not mean consent on that day. The forced entry into appellant’s house given the affair, could have been most likely actuated by the beliefs that he was entitled to special privileges. This on its own gives credence to the appellant’s defence of self-defence and in face of sexual imposition the limits of the defence were not exceeded. The appellant’s story was reasonably possibly true and she ought to have been acquitted.

The appellant had also appealed against sentence and the respondent conceded. I will not dwell much on the aspect of sentence as it does not arise given our finding on conviction. Suffices however, to point out that pursuant to a proper conviction for attempted murder the sentence of 6 years imprisonment with 2 years suspended on condition of good behaviour is in sync with sentences imposed for similar offences. There would have been no reason for interfering with the properly exercised sentencing discretion. In the present case the conviction cannot stand and consequently the sentence falls off.

Accordingly it is ordered that:

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted as follows:
The accused is found not guilty and acquitted.

MUZENDA J agrees _____

Gonese & Ndlovu, Appellant's legal practitioners
National Prosecuting Authority, State's legal practitioners