

JERRY MUSIMWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 22 January 2020

Criminal Appeal

C Ndlovu, for the appellant
M Musarurwa, for the respondent

MUZENDA J: The appellant was convicted at Mutare for contravening s 93 (1) (b) that is kidnapping or unlawful detention, it being alleged that on Saturday, 6 August 2019 at Zuva Service Station, near Mutare Polytechnic, Mutare, the appellant lifted and carried Pressly Tafara Mubaiwa, a juvenile, on shoulders and attempted to put him in the boot of a Toyota Runx. He had pleaded not guilty and he was sentenced to 24 months imprisonment. 6 months imprisonment was suspended for 5 years on the usual conditions of future good behaviour.

On 24 September 2019 the appellant noted an appeal against both conviction and sentence and spelt out his grounds of appeal as follows:

Ad Conviction

1. The learned magistrate erred and misdirected himself both on facts and the law when he failed to consider and appreciate that the appellant together with his co-accused had paid an admission fee of guilty fine at the police station and thereby deserved to benefit and obtain protection from the concept of a plea of *autrafois* convict.
2. The learned magistrate further erred and misdirected herself at law and fact when he convicted only the appellant and acquitted his co-accused yet all the accused had faced the same charge and evidence.
3. The learned magistrate erred and misdirected himself at law when he convicted the appellant when the evidence against him was insufficient to found and support such a verdict.

4. The learned trial magistrate erred and misdirected himself at law when he injudiciously failed to accord the appellant a fair trial.

Ad Sentence

5. The learned magistrate misdirected himself at law when he failed to exercise his sentencing discretion appropriately and properly
6. The learned magistrate misdirected himself at law when he failed to appreciate that the sentencing provision of the offended section reposed in a sentencing court the option of a fine.
7. The learned trial magistrate erred and misdirected himself at law when he failed to consider community service as an option when he had settled for a term of imprisonment of 24 months.

The appeal is being opposed by the respondent.

Background

Appellant is aged 25 years and resides at No. 79 Josiah Tongogara Street, Palmerstone, Mutare. The complainant is a male juvenile aged 12 years and resides at No. 9437 Dream House, Chikanga 3, Mutare. He is a student at Mutare Junior Primary School, Mutare. Complainant and appellant are strangers to each other. On 6 April 2019 at around 0645 hours the complainant and his school mate Nyasha Chitashara were on their way to school when suddenly upon their arrival at Zuva Service Station the appellant who was in the company of three other colleagues stopped their motor vehicle a couple of meters from where the complainant was. The appellant opened the door of the motor vehicle from where the complainant was seated in the car and disembarked. The complainant saw him, appellant broke an empty beer bottle and started running towards where complainant was shouting “mbavha, mbavha” (thief, thief). Complainant was shocked and overwhelmed by the fast unfolding of events, he tried to run away but unfortunately he could not go far, accused caught up with him, grabbed hold of him, lifted him up and placed complainant to his shoulders and carried him away. Complainant yelled out. Meanwhile Nyasha ran towards Zuva Service Station. Appellant took the complainant to where the car was parked, and tried to place complainant into the boot of the car. During that process perchance, the complainant wittingly decided to sink his molars into the hand of the appellant, out of pain appellant

fortuitously released complainant, who dropped to the ground and escaped from the appellant. When Nyasha ran towards Zuva Service Station he spotted a police detail who had gone to filling station to get fuel, he alerted him. The police detail got into his car and drove to the scene, but he was late, the appellant's co-accused sped off at high speed. Nyasha was convinced that his school mate was stashed in the boot of the appellant's motor vehicle. In a Hollywood style the police detail gave a chase but could not apprehend the quartet. The appellant and his colleagues were subsequently arrested and charged for public nuisance, they all paid a fine. However for kidnapping they were referred to court. They were prosecuted and at the conclusion of the trial, three other co-accused were acquitted and the appellant was convicted.

Mr C Ndlovu, who appeared for the appellant, in his heads, correctly admitted that the appellant detained the complainant albeit briefly but argued that the facts of the matter best present all features of the *de minimis* principle and relates to matters of time and also space and other factors, he pictorially portrayed the entire scenario to the children's game of *kutamba chikudo* ("baboon play") in other words he argued the court not to wary itself over children's play. Baboons are social animals which guard jealously against strangers, even from another baboon group, they will cooperate to light the intruder or stranger from their affiliate, it therefore necessarily means the game of *chikudo* is played by friends or acquaintances, socially close associates not between or among strangers. Equally so it is played by people known to each other and during leisure time not at a fuel station or in the streets. The appellant stays in Palmerstone, a low density suburb, in Mutare the complainant stays in the High density suburb of Chikanga 3. The two are not peers they are total strangers; even their age difference is so wide that the type of game alluded to by the appellant could not be played between the two, worse between strangers, and further could not be ideal between a drunken adult stranger and a school pupil. When appellant uplifted the complainant, the latter cried out apparently showing his displeasure about appellant's conduct, and bit the appellant when complainant realised that he was going to be stashed in a boot of a motor vehicle. We are not convinced by appellant that we should treat this offence as a *de minimis*. Section 93 (1) (a) or (b) of the Criminal law (Codification and Reform) Act [Chapter 9:23] incorporates the requirements of an accused's realisation of real risk or possibility that what he or she will be doing will be unlawful.

When complainant ran away from the appellant, yelled when lifted him up, and bit appellant, the appellant ought to have realised that complainant did not like what appellant was doing. Worse one would pose a further question what would have happened if the appellant had managed to place complainant into the boot? The appellant wants to bury his head in the sand and throw a red herring to the court by pleading intoxication, he failed to convince the trial court and worse still could not pursue it before us in any case that aspect is only but mitigatory, it is not a defence to the charge of kidnapping. In any case most facts of what happened on the day in question are to us common cause and from the defence papers they admit so. We are thus satisfied that the conviction of the appellant is unassailable and the appeal against conviction has no merit.

On the aspect of sentence, the appellant submitted that the court *a quo* failed to judiciously exercise its discretion. We have had the opportunity to scrutinise reasons for sentence preferred by the learned magistrate, we fail to see where the alleged misdirection is. Counsel for the appellant was asked by this court to fathom for a moment what was going on in the mind of the complainant when the appellant shouted “thief, thief,” brakes a beer bottle and run after complainant, grabbed him and ferry him towards a stationery motor vehicle and attempted to place him in that boot. For a child of twelve years, it was an emotionally packed experience, deep apprehension and scary which can lead to lifetime. Hallucinations and nightmares at night. The conduct of the appellant was reprehensible and terrible to imagine. Indeed we agree that the trial court was correct in stating that community service would trivialise the granting of the offence even if the unlawful detention was for a second, the hallmark of fear left on the complainant is unbearable in our view. The sentence passed by the court *a quo* is appropriate and befits the crime.

The appeal against sentence has equally no basis.

Accordingly the appeal is dismissed in its entirety, it is so ordered.

MWAYERA J agrees _____

Mupindu Legal Practitioners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners