INNOCENT MUNAMATI
and
TAWANDA MUNAMATI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 1 March 2017

CRIMINAL APPEAL

J Sithole, for the appellant
S Fero, for the respondent

CHATUKUTA J: The appellants appealed against the decision of the Magistrates Court in which they were convicted after contest of contravening sections 189 as read with *s* 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) and s 89(1) of the Code. They were each sentenced in respect of the first count to 30 months' imprisonment of which 9 months were suspended on condition of future good behavior. Each appellant was sentenced to a fine of US$100 in default of payment 20 days' imprisonment in respect of the second count. Dissatisfied by both the conviction and sentence, the appellant appealed. The appeal was opposed. On 1 March 2017, we dismissed the appeal against conviction, the appellants having abandoned the appeal against sentence. We gave *ex tempore* reasons for our decision. The appellants engaged a new legal practitioner who has now requested written reasons for our decision. These are they.

The following facts are common cause: The appellants are brothers. On 5 March 2016 the first appellant was driving along Mutare Road heading towards the city centre with the second appellant being a passenger. The first and second complainants were driving in separate vehicles also along Mutare Road heading in the same direction as the appellants. The second complainant and the appellants' vehicles were involved in a side swiping accident. The first complainant witnessed the accident. The appellants and the complainants pulled off the road. The appellants

and the complainants alighted from their vehicles. An altercation ensued between the appellants and the second complainant. The first appellant collected a hammer from the boot of his vehicle. The first complainant sustained head and cheek injuries after being struck with the hammer and received medical attention.

The appellants in their defence outline had denied assaulting the first complainant. Their defence was that the first appellant and the second complainant were shoving each other when a commuter omnibus stopped at the scene. The passengers from the omnibus alighted and started assaulting the second appellant. It is at this stage that the first appellant took the hammer from their vehicle to ward off the attack on the second appellant. One of the passengers grabbed the hammer from the first appellant and in the process struck the first complainant.

The State adduced evidence from the two complainants, the first complainant's daughter Moreblessing Njitimani, Lorraine Chinamano, the first complainant's cousin and Pamhayi Mhike, one of the passengers in the commuter omnibus. The appellants testified in their defence.

The court *a quo* made a finding from the evidence that was adduced by the State that the altercation between the appellants and the second complainant degenerated into an assault on second complainant, with the appellants jointly kicking the second complainant and assaulting him with fists and open hands. Upon collecting the hammer from his vehicle, the first appellant intentionally struck the first complainant. The appellants were only restrained from further assaulting the complainants, by passengers from a commuter omnibus that had arrived at the scene during the assault.

The issue before us was whether or not the court *a quo* erred in finding that the State witnesses were credible and in the process discounting the appellants' defence. It is trite that the determination of the credibility of witnesses remains the domain of the trial court. An appeal court will interfere with the findings of a trial court on the credibility of witnesses only where the findings are not supported by the evidence adduced during the trial. (See *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62E-H to 63 D and *S* v *Hollington & Anor* 2002 (2) 163.)

The trial magistrate's findings on the credibility of the State witnesses cannot be faulted. The evidence of the witnesses is consistent, that the appellants were uncontrollable and in a rage. The first complainant testified that she pulled off the road because the appellants had almost side swiped her as well. She had to swerve to avoid an accident. The appellants were driving in a reckless manner. In fact, the second appellant pointed his middle finger at her in an insulting

manner through an open window as the appellants passed her vehicle. The first and second complainants, Moreblessing, and Lorraine corroborated each other on not only the first appellant's manner of driving, but also on the attack on the complainants. Pamhayi's evidence was pivotal to the conviction of the appellants. The witness's evidence was that she knew the first complainant. The first complainant sought refuge in the commuter omnibus. The complainant got into the omnibus before the driver had even alighted staining the driver's clothes with her blood. It is then that the other passengers alighted, gave chase and apprehended the appellants. The first complainant's conduct exhibited her desperation and that she was fleeing from an attack. She therefore could not have been accidentally assaulted with the hammer by the passengers who were still in the commuter omnibus.

It is inconceivable that the first complainant would have been struck accidentally three times on the head and the cheek as rightly concluded by the trial magistrate. The first appellant fully appreciated what he was doing when he went to fetch the hammer, and he fully appreciated that he was beating the first complainant over the head with the hammer. The second appellant did nothing to restrain his brother and in fact chased the first complainant as she ran towards the commuter omnibus and this time round he was in possession of the hammer.

Although the injuries suffered by the first complainant as per the medical affidavit were not serious and were not likely to result in permanent injuries, that cannot be a basis for making a finding that a lesser charge should have been preferred. As rightly observed by the trial magistrate, the degree of the injuries does not detract from the fact that a weapon which would have caused a fatality was used and was directed at a sensitive part of the body. It was fortuitous, with the appellants' road rage that the first complainant did not sustain permanent injuries. Further, it is fortuitous that commuter omnibus came by at the time it did.

As indicated earlier, the appellants did not address us on sentence and we accordingly deemed the appeal against sentence abandoned. We however would not have upset the sentence as the sentence does not induce a sense of shock.

In the result, we dismissed the appeal.

MUSAKWA J agrees……

Mugiya & Macharaga Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners