HH 639/17
CA 1397/13
CRB REG 169-70/13

MUSA RUKUNI
and
KUDAKWASHE RUKUNI
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 11 NOVEMBER 2014 & 27 SEPTEMBER 2017

Criminal Appeal

S. Hofisi, for the appellants
T. Mapfuwa, for the respondent

BERE J: After a trial the two appellants were convicted of attempted murder as defined in section 47 as read with section 189 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. They were each sentenced to 10 years imprisonment of which 4 years were suspended for 5 years on the usual condition of future good conduct.

Dissatisfied by both conviction and sentence, the appellants noted this appeal.

The grounds of appeal against conviction as they appear in the notice of appeal can be summerised as follows:

> "The learned magistrate misdirected himself in convicting the appellants when the totality of the evidence led by the state did not support such a conviction.
>
> The learned magistrate misdirected himself when he unjustifiably chose to accept the evidence led by the state at the expense of the accused persons' own evidence.
>
> That generally the court a quo misdirected itself by convicting the appellants in circumstances which called for their acquittal."

When the respondent initially filed its heads of argument it vehemently opposed the appeal in its entirety. However, when the matter was argued, *Mr Mapfuwa* for the respondent made a concession that there was no evidence upon which a conviction of the offence charged would have been sustained. Counsel expressed the view that the proper verdict should in fact have been assault. In so arguing counsel appeared to have been persuaded by the fact that the evidence suggested that all the parties appeared to have been drunk.

As regards sentence, the respondent's counsel urged the court to consider that the period of 11 months which the appellants had already served before being granted bail be deemed to be sufficient or the court could consider the imposition of a fine.

Appeal against conviction

I propose to start by considering the appeal against conviction.

Briefly the state allegations were that on 22 December 2012 and at Makotore Business Centre, Gokwe North the two appellants teamed up and attempted to kill the complainant by assaulting him with fists and booted feet all over the body.

In his defence, the first appellant denied the charge and stated that he acted in self-defence when he came under a barrage of attack from the complainant who was armed with a knobkerrie. He stated that apart from the complainant he was also attacked by two other individuals, *viz*, Edmond and Shadreck.

The second appellant's defence was that he was attacked by the complainant and other assailants as he tried to refrain the parties from fighting. He also raised the defence of self- defence and alleged that the complainant was also attacked by some other people at the centre.

Both appellants in their defence outline disputed the complainant's injuries by alleging that at one stage prior to the commotion on the day in question the complainant had been a victim of a road traffic accident.

As rightly summerised by the court *a quo* the evidence of Chibaya Rukuni and Clemence Mubhawa confirmed that the complainant was assaulted by the appellants and that the appellants were indeed the aggressors. There was nothing to suggest that the appellants were trying to defend themselves as they alleged in their respective defence outlines. The court *a quo's* findings on the assault can therefore not be reasonably attacked.

All the state witnesses in this case testified to the fact that the vicious assault on the complainant persisted even at a time when he was down and unconscious and that the appellants were uncompromising in their aggressive conduct leading to serious head injuries on the complainant.

The medical report which was produced during the trial spoke to very serious head life threatening injuries. The trial magistrate properly summed up the injuries as follows:

> "The medical doctor observed a swollen face, red eyes, marked confusion and that the scan showed that the complainant sustained some brain injury. The doctor also concluded that severe force was used to inflict the injuries and that there is a possibility of permanent injury to the complainant. Even the second state witness confirmed that after the assault the complainant could no longer talk or sit on his own. This on its own shows the severity of the assault."[1]

There was a hysterical suggestion by the appellant's counsel that the court a quo had adopted a "boxing approach"[2] in dealing with this matter. I do not agree. A reading of the evidence recorded clearly suggests that the court did not only rely on the evidence of the complainant and

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[1] Record page 7 paragraph 6

[2] *S* v *Temba* SC-81-91

that of the two appellants. The evidence of Clemence Mubhawa qualified for that of a independent witness who was able to give well-balanced evidence and even the appellants were unable to put across to him meaningful questions to demonstrate their innocence. There was really no justification in criticising the court *a quo's* judgment.

In coming up with the appropriate verdict, the court *a quo* reasoned as follows:

> "The court is also satisfied that the accused persons' conduct was both the factual cause and the legal cause of the complainant's injuries and therefore by assaulting the complainant with fists and booted feet several times on his body, both accused persons actually foresaw the risk or possibility of causing the complainant's death. It is for this reason that the court is equally satisfied that the state managed to discharge its evidential burden against both accused persons and it is for this reason that I find both accused persons guilty as charged."[3]

This sound reasoning by the court *a quo* cannot be questioned and no wonder why even on appeal the appellants' counsel remained mum on this critical issue.

There is generally a misconception by many that attempted murder is associated with the use of weapons. That misconception of the law must be dispelled. Even booted feet can turn out to be either murder or potential murder weapons as what almost happened in this case. There can be no doubt that the injuries sustained by the complainant were both serious and life threatening.

In my view, given the nature of the assault and the circumstances under which it was carried out coupled with the extent of the injuries as captured in the medical report, the 11th hour change of heart by the respondent's counsel was not well made.

Consequently the appeal against conviction is dismissed.

Appeal against sentence

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[3] Record page 8 paragraph 5

There can be no doubt that the sentence of 10 years imposed by the court *a quo* was on the extremely high side and indeed induces a sense of shock – it was disturbingly excessive. In some cases that sentence can qualify for a murder conviction.

It is a fact that even in culpable homicide matters, such sentence would in general terms still be regarded as excessive.

As observed by CHINHENGO J in *S* v *Mavhundura*.[4]

> "… before an appellate court can agree that a sentence imposed by a lower court is so severe as to induce a sense of shock it must satisfy itself that the sentence not only appears to be severe but that it is disturbingly so"

Whilst I accept that this was a brutal and evidently a bad assault one gets the impression that the court *a quo* placed too much emphasis on the aggravatory features of this case and failed to properly address the factors in mitigation which were evident from the record of proceedings.

The first issue that catches my attention which escaped serious consideration by the court *a quo* is the fact that the appellants were drunk although they fully appreciated what they were doing. Section 221 of the Code[5], while it does not recognize voluntary intoxication as a defence, does accept that the court may regard it as mitigatory.

The second observation that I make is that there were no weapons used in carrying out the assault.

In the light of all these considerations, I propose to set aside the sentence of the court *a quo* and substitute same with the following:

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[4] 2002 (1) ZLR 598F-G

[5] Criminal Law (Codification and Reform) Act [Chapter 9:23]

Each accused: 4 years imprisonment of which 1 year is suspended for 3 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction, he will be sentenced to a term of imprisonment without the option of a fine.

Hungwe J …… I agree

Nyemba & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners