PROSECUTOR-GENERAL
versus
SIMON MUTEKETA
and
EDMORE CHENGETA
and
TAFADZWA MAZERO
and
MAGISTRATE T. MHLANGA NO.

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 23 March 2017

Chamber Application for Leave to Appeal

E. Mavuto for the applicant
B. Taruvinga for the respondents

ZHOU J: This is an application by the Prosecutor-General for leave to appeal against the judgment of the Magistrates Court at Chiredzi in terms of which the first, second and third respondents were acquitted on a charge of assault as defined in s 89(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The application is opposed by the three respondents. The fourth respondent cited in the application is the learned Magistrate who presided over the criminal trial.

The allegations which were made against the three respondents and their co-accused persons named Dickson Murakata and Tafadzwa Kadenge were that on 19 December 2013, at Gazaland Garage, Chiredzi light industrial area and at about 1500 hours the respondents and their accomplices assaulted the complainant Nelson Gasva intending to cause him serious bodily harm or realizing that there was a real risk or possibility that bodily harm may result. It was alleged that the accused persons used a metal object to strike the complainant on the right hand, and further used clenched fists, open hands and booted feet to assault the complainant all over

the body resulting in the complainant sustaining internal severe back injuries. The respondents filed a defence outline in which they denied the allegations and stated that the complainant was, in fact, assaulted by a mob after he had been involved in an accident in which he had injured a pedestrian.

In support of its case, the prosecution led evidence from the complainant and four other witnesses. These are James Dhliwayo, Phillip Antonio, Makosine Sithole and David Munyaradzi Tarumbwa, a medical practitioner employed at Chiredzi General Hospital. At the close of the case for the prosecution accused three and accused 4 were acquitted. The first, second and third respondents were put on their defences. All three of them gave evidence. The Magistrate found the three respondents not guilty and acquitted them after they had given their evidence. The applicant has instituted the instant application seeking leave to appeal against the judgment of the Magistrate. In opposing the application the respondents first took the point that there was an unreasonable delay in making the application for leave to appeal. The applicant explained that the delay was due to the fact that the application was instituted following a complaint by the complainant regarding the correctness of the judgment of the Magistrate. After the complaint the applicant's representatives had to obtain and study the record of proceedings. The application was filed about two months after the judgment of the Magistrate was given. That period does not constitute an inordinate delay when one considers that the proceedings took place in Chiredzi and those who prepared the papers in this application had to study the record to assess the strength of the evidence led on behalf of the prosecution against that led by the defence in order to properly consider whether an appeal would be sustainable. The explanation for that delay is reasonable in the circumstances of this case. The other points raised in the heads of argument were not pursued in argument. The issue of the alleged bias of the deponent to the founding affidavit filed in this matter is difficult to comprehend. A deponent to an affidavit filed in an application merely swears to the facts averred on the basis of having knowledge of those facts. In the present case he stated that he perused the record and came to the conclusion that an appeal was justified. There can be no bias in that conduct.

As regards the merits of the application, s 61 of the Magistrates Court Act [*Chapter 7:10*] provides that if the Prosecutor-General is dissatisfied with the judgment of a court in a criminal matter on a question of law or because the court has acquitted or quashed a conviction of any

person who was the accused in the case on a view of the facts which could not reasonably be entertained he may, with the leave of a judge of the High Court, appeal to the High Court against that judgment. In the present case the applicant relies on the ground that the Magistrate acquitted the first, second and third respondents on a view of the facts which could not reasonably be entertained, and alleges gross misdirection on the part of the fourth respondent.

In the case of *Prosecutor-General* v *Muil* HB 171-16, MATHONSI J held that in an application of this nature the Prosecutor-General must establish "that the inference drawn from the primary facts is so inconsistent with logic and common sense that the judgment is perverse. It is not enough to state that the trial court made mistakes in the evaluation of the evidence or that he should have treated the assessment of the evidence in a particular manner." KORSAH JA, made the point as follows:

> "It is only when the inference drawn from the primary facts is so inconsistent with logic and common sense that the Attorney-General can succeed . . . if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together, point inexorably to the guilt of the accused beyond pre-adventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put in another way, if, on a view of the facts the courts could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it."
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> See *Attorney-General* v *Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR 24(S).

The rationale for the above approach is that in criminal proceedings the onus is on the prosecution to prove the guilt of an accused person beyond reasonable doubt. If a court comes to the conclusion that the state has failed to discharge its onus then the conclusion of the court can only be impeached if, having regard to the facts placed before the court, the conclusion reached is not reasonably sustainable. The court making an inquiry into that issue must assess the reasons for the judgment against the evidence led and the facts established by that evidence being sensitive, however, to the fact that at this juncture the court is not dealing with the appeal itself but merely inquiring into the issue of whether the prosecution must be granted leave to appeal.

In the present case the fact of the assault is established not just by the evidence of the complainant and the other witnesses who testified, but also by the medical evidence tendered. The only issue was therefore of the identity of the assailants or, put differently, whether the three respondents were involved in assaulting the complainant. The learned Magistrate appears to

have rejected the complainant's version of events merely because some of the witnesses who testified on behalf of the state gave evidence which was consistent with that of the accused persons in respect of three matters, namely (a) that there was a mob that was present at the scene of the assault; (b) that the assault took place at a public place outside the gate to the first accused's premises and a crowd was attracted to the scene; and (c) that more than seven persons had assaulted the complainant. But these factors are not exculpatory of the accused persons when considered in the light of the evidence of the complainant and the witnesses who identified the respondents as being among the assailants. The fact that only five (or even three) of the alleged seven assailants ended up before the court is not a defence, and could not be a ground for rejecting the evidence by which the first, second and third respondents were positively identified by the witnesses. The evidence of the witnesses must have been considered holistically and not piecemeal. The complainant's evidence which does not appear to have been discredited, was that he tried to drive his motor vehicle from the first respondent's garage before the first respondent closed the gate thereby hitting the complainant's motor vehicle. The same gate hit one of the accused persons. The first respondent then went to the complainant and assaulted him. The reference to "some of them" did not include the first respondent who is clearly identified by the complainant in his evidence. The complainant knew the first respondent well, so the question of mistaken identity did not arise. The complainant's evidence on the assault upon him by the first respondent was corroborated by James Dhliwayo who also knew the first respondent, and by Phillip Antonio and Makosine Sithole. Dhliwayo even tried without success to plead with the first respondent to stop assaulting the complainant. In the face of that evidence it is inexplicable how the Magistrate could acquit the first accused person. The mere fact that other persons participated in the assault is not a defence. The fact is that the first respondent was identified as one of those who assaulted the complainant.

As for the second respondent, James Dhliwayo knew him very well as they attended the same school. He identified him as one of the persons who assaulted the complainant by kicking him. The second respondent was also identified by Phillip Antonio as one of the persons who assaulted the complainant. The same respondent was also identified by Makosine Sithole. The statement by the learned Magistrate that the evidence of the witnesses was "merely consistent with facts which are not in dispute" is not based on the facts of the case. The accused persons

who are the respondents in this application denied ever assaulting the complainant. The evidence of the state witnesses clearly proved that they did assault him. It is difficult to understand where the above statement came from in the light of the case which was before the Magistrates Court.

The third respondent was identified by James Dhliwayo as one of the assailants.

The second and third respondent's case was that they were not even at the scene of the crime. The Magistrate does not deal with their *alibi* which is clearly disproved by the evidence of the witnesses who testified. From the above, it seems to me that the requirements for leave to appeal have been satisfied. The evidence led linked the first, second and third respondents to the offence. While there may have been inconsistencies in the evidence of the witnesses, the evidence taken as a whole could not just be rejected based on those inconsistencies. The Magistrate's view of the facts proved could not, therefore, be reasonably entertained.

In the result, the application succeeds and the following order is made:

1. That the applicant be and is hereby granted leave to appeal against the judgment of the Magistrates Court, Chiredzi, in terms of which the first, second and third respondents were acquitted.
2. The applicant shall file his notice of appeal within 21 working days from the date of this order.
3. Each party is to bear its costs.

National Prosecuting Authority, applicant's legal practitioners
Kwirira & Magwaliba, 1st, 2nd and 3rd respondents' legal practitioners