HH 448/17
CA 49/12

THE STATE
versus
NESBERT DZONGODZA

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 18 MARCH 2014 & 19 JULY 2017

Criminal Appeal

J. Mutonono for the appellant
Mrs S. Fero, for the respondent

BERE J: The appellant in this case was arraigned before the court sitting at Bindura charged with the offence of contravening section 89 (1) of the Criminal Law (Codification and Reform) Act,[1] the offence being one of assault.

After trial the appellant who was unrepresented was convicted as charged and sentenced to 6 months imprisonment of which 3 months were suspended on the usual condition of future good conduct, leaving him with a 3 months imprisonment term as the effective sentence.

Aggrieved by both the conviction and sentence, the appellant lodged an appeal to this court. The appellant has raised basically three grounds of appeal viz;

(a) That the court *a quo* erred by not rendering assistance and guidance to the appellant who was unrepresented during trial.
(b) That the trial court failed to take cognizance of the fact that the evidence adduced by the state was inadequate to the extent that a reasonable court would not have safely convicted on such evidence, and
(c) That the court *a quo* misdirected itself by convicting the appellant on the strength of a single and unconvincing complainant.

1. Chapter 9:23

The respondent has in accordance with section 35 of the High Court Act filed a notice indicating that it does not support the conviction. We are satisfied that the attitude adopted by the respondent is well founded because of the following reasons.

A proper reading of the record of proceedings as filed clearly does not support a conviction in this case.

In the first place, the charge spoke to the appellant having assaulted the complainant using clenched fists "and stones" all over his body resulting in the complainant sustaining a laceration on the back of his scalp. In his evidence the only state witness called alleged that he was assaulted with a rod. The relevant exchanges on page 21 of the record of proceedings indicate the following:

"Q - How did accused attack you?

A - He was striking me with a rode he was yielding on my back. I was then struck with a stone and I don't know the perpetrator.(*sic*)"

One cannot fail to notice the discrepancy between the state case and the evidence of the single witness. The situation is compounded by the failure by the trial magistrate to seek clarification on this critical point. It was important that the court should have sought clarification on the size of the rod used, where on the body it was used. Further it was incumbent upon the court to have questioned the complainant on whether or not the appellant had used stones to assault him as alleged. Rather, the court *a quo* opted for a casual way of presiding over this case.

It will be noted that in his brief defence outline, the appellant was clearly speaking to the defence of person which defence is recognized in our law in terms of section 253 of the Code[2] but the court, again did nothing to assist the unrepresented appellant.

2. Chapter 9:23

The need to render assistance to an unrepresented accused person has been emphasised time and again by our courts and it can be a misdirection not to do so. See *S* v *Chikukutu*[3]; *S* v *Todzvo*[4] and *S* v *Nziradzepatsva*[5].

It is quite possible that when the appellant stated:

> "I deny the allegations, I restrained where I was rescuing my child whom he (complainant) was assaulting", the appellant was probably trying to defend his child against an attack by the complainant. Depending on the circumstances (which unfortunately were not explored by the trial magistrate) the appellant's actions may have been justified at law.

Whilst it is quite proper in appropriate circumstances to convict on the credible evidence of a single witness as provided for under section 269 of the Criminal Procedure and Evidence Act[6], it is clear that given the circumstances of this case, this was not one of those cases where the court could rely on the single witness' evidence.

This was a clear case where the court *a quo* could have on its own initiative sought the evidence of the appellant's wife who was said to have been at the scene of the alleged assault to have issues clarified. In doing so, the court would have invoked the provisions of section 232 of the Criminal Procedure and Evidence Act[7].

The several yawning gaps in the state case did not justify a conviction. It is precisely because of this that this appeal must be upheld. The conviction and sentence are set aside.

Hungwe J …….. I agree

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

3. 1996 (1) ZLR 702 (S)
4. 1997 (2) ZLR 162 (S)
5. 1999 (1) ZLR 568 (H)
6. Chapter 9:07

7. Chapter 9:07