**RAMSON MASHONGA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND CHEDA JJ
BULAWAYO 1 FEBRUARY AND 29 APRIL 2010

*S S Mazibisa* for appellant
*F Museta* for respondent

Criminal Appeal

**KAMOCHA J:** After hearing submissions from both counsels we dismissed the appeal in its entirety although the state counsel had held the view that the conviction was unsafe. We did not agree with him and indicated that our reasons would follow. These are they.

The appellant who is a sergeant major in the Zimbabwe Republic Police at Plumtree Police Station was charged with contravening section 89 (1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on 23 March 2007 at the Plumtree Police Station the appellant, with intent to cause bodily harm or realizing that there was a possibility or real risk that bodily harm may result, assaulted Thobekile Gumbo by striking her with a fist on her left ear. He pleaded not guilty when arraigned but was found guilty despite his protestations.

He was then sentenced to undergo 15 months imprisonment of which 3 months imprisonment was suspended for 5 years on the customary conditions of future good behaviour.

Aggrieved by both conviction and sentence the appellant launched this appeal challenging their propriety on the basis that the state had not proved beyond reasonable doubt that he had the requisite *mens rea* to assault the complainant. This was based on the fact that the assault was not witnessed by anybody not even Inspector Charles Bendembe who had been standing about 20 metres away.

The appellant further complained that it was not clear from the evidence what caused the injury to the complainant's ear. Was it caused by a blow with a fist as alleged by the complainant or the butt of the rifle when the appellant was disarming her as she wielded it?

He also complained that since he was unrepresented he should have been advised of the need to call the doctor who examined the complainant to give *viva voce* evidence showing whether or not the injury was caused by a fist or the barrel or butt of the rifle.

It was appellant's contention that the court *a quo* had failed to appreciate that since the other state witness was close to the scuffle, if any injuries occurred or assault occurred, it was clearly accidental.

The appellant went on to allege that the trial court was biased in its reasons for judgment because it preferred the version of the complainant to that of his. This suggestion is clearly untenable. The fact that the court rejected the appellant's story does not mean that it was biased. The assertion is baseless. This ground of appeal is therefore disposed of at this stage.

On conviction appellant finally complained that all facts and evidence, taken together did not justify a conviction of an unrepresented accused as there was no proof beyond a reasonable doubt.

As against sentence the appellant complained that it induced a sense of shock in him. This assertion was based on the fact that it was a direct term of imprisonment without the option of paying a fine or community service.

Appellant complained that since he was a first offender he should have been kept out of prison. Only a single blow with a fist was delivered and yet the court treated the matter as if there had been pre-meditation and as if it was a wanton attack on the complainant.

He went on to complain about the fact that the trial court took into account that the appellant assaulted a woman and submitted that the complainant had been wrong in the first place to argue with and struggle with the appellant who was her sergeant major in charge of discipline.

He claimed that the court ignored his character, age, and social status, that he was ascending in the administrative ladder within the police force, has a family to look after and that jobs were hard to come by.

His penultimate complaint on this head was that the court did not give any cogent reasons for dismissing the other forms of punishment. He then concluded by alleging that all the mitigatory factors in his favour had not been considered at all or objectively, otherwise a non-custodial sentence ought to have been imposed.

The state evidence was opened by way of documentary evidence in the form of a medical report compiled by a doctor at Plumtree District Hospital on the day the assault was allegedly committed. Upon examining the complainant the doctor observed that she had a painful left ear, with loss of hearing and damage to the ear drum. He formed the opinion that a blunt object was used with severe force to inflict the injury. His view was that the injuries were serious as the complainant was likely to suffer permanent disability in that there was going to be loss of hearing in the left ear.

The medical report had been served on the appellant who had no objection to its production as evidence. The need to call the doctor to give *viva voce* evidence did not arise. Since there were no external injuries or bruises around the ear there was no way the doctor would have ascertained whether the injury was caused using a butt or barrel of the rifle or a clenched fist. All he was able to establish was that a blunt object was applied with severe force to inflict the injury.

I pause here to observe that if the appellant had been trying to disarm the complainant of the rifle and accidentally came into contact with the complainant's ear he would not have used severe force resulting in serious injuries being inflicted.

The complainant's evidence was that on the day in question the appellant phoned her asking her to report for duty. She, however, informed him that Inspector Muchineuta had told her that she would be off duty. The appellant did not accept that and insisted that she should report for work. She ended up going to another inspector called Tshuma and explained her predicament. Tshuma suggested that she should phone the appellant telling him that she was not supposed to be on duty. Instead she gave Inspector Tshuma her mobile phone who then spoke to the appellant. After the conversation, Inspector Tshuma told her to go to her house.

The appellant did not accept what Inspector Tshuma had told him instead he sent one Constable Nhamo to go and tell her to report for duty. She put on her uniform and proceeded to work. On arrival she went to see Chief Inspector Mlilo – the officer-in-charge and explained to him that she had been ordered to report for duty when she was not supposed to. The officer-in-charge told her to go and call the appellant. The two went before the officer-in-charge in his office where it was explained to the complainant that she had to be on duty due to a shortage of manpower. They then left the officer-in-charge's office. Complainant went out first while appellant followed.

From there they went to the charge office where appellant instructed Constable Kotyoka to give complainant a rifle. The rifle had a loaded magazine. She went out to check

whether or not there was a bullet in the chamber of the rifle. But before she could clear the rifle she was called back and instructed to go and call out for the lowering of the national flag which she did. The appellant did not like the way she called out for the lowering of the national flag and told her that he was not satisfied with the way she did it and further instructed her to go outside the gate and call out again. She obliged. After the flags had been lowered she called out time for people to start moving as usual.

Thereafter the appellant called her to go to where he was. Before going to where appellant was she decided to remove a chair from under a tree where it had been placed. Her reason for doing so was that she did not want it to be defiled by birds' droppings over night. Unluckily for her the chair fell over exacerbating a bad situation. The appellant there and then accused her of abusing state property as she walked towards him. He allegedly started shouting at her and said if she had wanted to show off he would do something bad to her.

Fearing that there could be an accidental discharge from the rifle she was carrying, she cleared it before getting to where the appellant was. Thereafter she went and stood next to him face to face to listen to a barrage of critisms to which she did not respond except to say "Sir". He then instructed her to go and perform her duties at the gate.

She then turned round intending to go to the gate. While she had her back towards the appellant she felt a blow landing on her left ear and while the appellant was still behind her he grabbed hold of her by her neck and took the rifle from her. She started crying as he let her free. Appellant called Constable Kotyoka from the CIO but Inspector Bendembe was the first to be at the scene and told the complainant to get into the charge office which she did and then reported the assault.

Thereafter she went to hospital for medical examination and treatment. The doctor who examined her compiled the medical report whose contents I have already detailed *supra.*

In as far as the actual assault was concerned the complainant reiterated that she had cleared the chamber of the rifle and she had it in her right hand facing upwards not downwards. The appellant struck her on left ear while he was behind her. He was in no danger from the complainant since she had cleared the chamber of the rifle and had her back towards him as she was about to walk away to go to the gate. She did not know what appellant used to strike her with. She was certain that she could not have been struck with any part of the rifle because she had it in her right hand facing upwards. She did not retaliate. She said she would not have been a match to a man of the size and stature of the appellant. She had never suffered from loss of hearing in her left ear before the alleged assault.

According to her the appellant was a sergeant major at Plumtree Police Station in charge of disciplining junior officers. The discipline was, at times, enforced by pouring water on errant junior officers, making them dig pits while others are just made to roll on the ground.

Her reason for wanting to know why she was being called to report for duty on that particular day was that she had been attached to the Victim Friendly Unit and would be on duty the following day. Inspector Muchineuta, who was senior to appellant, had told her that she was off duty on that particular day. Another senior officer Inspector Tshuma went further and told the appellant that the complainant was indeed not supposed to be on duty on that day but would be on duty the following day. Inspector Tshuma even phoned the appellant telling him that much. He even, thereafter, told her to go to her house.

I pause here to observe that the complainant's inquiries did not go down well with the appellant. That explains why he sent Constable Nhamo to summon the complainant irrespective of what Inspector Tshuma had told him over the phone. Worse still, when the complainant arrived at the office she went to see the officer-in-charge Chief Inspector Mlilo who summoned the appellant to his office.

The appellant was infuriated by all this and tried to find fault with complainant even where there was none. He accused her of not calling out the time for lowering the national flag properly and ordered her to do it again. Yet, Inspector Charles Bendembe said she had done so in a proper manner. Appellant did not end there, he went further and accused her of abusing state property when the chair she was removing from under a tree fell over. Again Inspector Charles Bendembe told the court *a quo* that the falling of the chair was not a deliberate act but just a mistake.

Under cross-examination the appellant asked the complainant why she did not comply when he telephoned her and told her to report for duty. Her reply was that it was because she had been told that she would be off duty on that particular day by an inspector – (a senior to the appellant). When he put it to her that she was struck with a rifle she retorted that the rifle was in her right hand. It would, therefore would have hit her on the right ear. Moreover, the appellant first struck her on the left ear before he grabbed hold of the rifle. Finally under cross-examination the appellant wanted to know if there was any need for him to assault the complainant where upon she said she was surprised by his statement that he had intended to "sort her out".

The state called Inspector Charles Bendembe who corroborated the complainant on material respects. His evidence was not challenged by appellant at all. As already alluded to

*supra* Bendembe did not see anything improper in the manner she called out the time for lowering the national flag. He said the chair fell over by mistake and went on to confirm that she had the rifle in her right hand at the time of the alleged assault.

The inspector went on to tell the court that if the complainant was assaulted that must have been accidental. He was clearly mistaken on that point. The complainant received an injury to her left ear. But, the appellant's case is that the injury could have been accidental caused by the rifle which was on the right side in her right hand. It would have made a bit of sense had the injury been to the right ear. The court *a quo* can therefore not be faulted for reflecting that story.

Inspector Bendembe said the appellant alleged that the complainant had threatened to shoot him when in fact she had the rifle in her right hand facing upwards. It was his evidence that at no point did the rifle point at appellant. The appellant was therefore in no danger whatsoever.

The inspector said there was a distinct smell of alcohol on the appellant's breath which he described as "the stench" that was coming from him. When he reprimanded him for that he argued that he was sober.

I pause to observe that a combination of alcohol and the belief by appellant that complainant was resisting orders culminated in him doing what he did.

Inspector Bendembe was a fair witness. His evidence was not challenged at all. The appellant declined to ask him any questions.

In his evidence the appellant adhered to his defence outline which is as follows.

He stated that the complainant was subject to his discipline. He said at the time he called her to come to work she showed some negatives. Meaning that she acted in a manner that was not consistent with his instruction. As a sergeant major in the police force he had to enforce discipline. He complained that when he phoned her to come to work she rushed to a senior officer who was not even on duty instead of complying with his instructions. He had to go to a senior officer on duty who insisted that she should be called for duty. He alleged that she cut him off several times on her mobile phone until he had to use a landline.

When she came for duty he ordered her to take a rifle from the charge office and proceed to the gate where she was going to work for the day. When making her way to the gate she allegedly uttered the following words "my boyfriend loves to see me when I am at the

gate." He interpreted those words to mean that she did not like those duties. He then ordered her to call out the time for lowering the flags.

After she had done so he told her that she had not done it properly. He said she was supposed to call out the time louder with a high pitched voice and standing at a fixed position. He then called her to go where he was at the front of the charge office.

But before she went to him she allegedly took a chair from one side of the gate and threw it to the opposite side. Thereafter she proceeded to where he was and stood a metre and half away from him. He subjected her to a barrage of questions about why she had thrown the chair which was state property. It was one of his responsibilities to safe guard state property.

As he questioned her for her alleged bad attitude towards work she removed the magazine from the rifle and cocked it. She then returned the magazine onto the FN rifle.

Thereafter the rifle tilted towards him. She placed her hand on the rifle which prompted him to grab hold of the weapon forcefully as he suspected that she was about to shoot him. He then handed the weapon to Constable Kotyoka in the charge office who then went to man the gate. He then deployed the complainant to other duties in the charge office. He concluded by denying ever assaulting the complainant in any way.

The appellant was not being truthful when he suggested that he had assigned the complainant to other duties in the charge office because after the assault she made a formal report in the charge office.

I now turn to consider what appellant raised in his grounds of appeal. His suggestion that the state did not prove that he had the requisite *mens rea* is without foundation in the light of the fact that he stated, prior to the assault, that he intended to "sort out" the complainant. He thereafter then delivered a severe blow causing serious injury to her left ear. The fact that no one witnessed the blow being delivered does not mean that the blow was not delivered. It admits of no doubt that a severe blow was aimed at the complainant's left ear damaging the ear drum causing loss of hearing to that ear.

Equally without merit is the suggestion that the assault could have been accidental. If that had been the case the injury would have been to the right ear as the rifle was in her right hand. The appellant only grabbed hold of the rifle after her had struck complainant on the left ear. The injury was therefore not caused by any part of the rifle. It was caused by some object

which appellant was not prepared to reveal. In the light of the foregoing the trial court's findings on conviction cannot be faulted and are in fact unassailable.

As regards the sentence imposed the trial court gave its reasons in a commendable fashion. It was alive to the general rule that where appropriate first offenders must be kept out of prison. It was further alive to the fact that there was no rule of law which says first offenders must never be sent to prison where circumstances demand. The court considered the option of a fine and found it to be inappropriate in the circumstances of this case.

It also discussed the option of community service at some length citing decided cases on the matter and concluded that community service was unsuitable in this particular case.

The suggestion by the appellant that, the complainant was wrong in the first place by arguing and struggling with him who was a sergeant major in charge of discipline is devoid of any merit. It is not true that complainant argued and struggled with him. She, apart from saying "Sir" did not answer back. She never struggled with him.

This court and the Supreme Court have repeatedly stated that assaults by policemen, soldiers and prison officers and others in authority during the execution of their duties were grave offences. The trial court was alive to this and cited the following cases for its guidance. In the case of *S* v *Mashatini* HH-51-90 the complainant suffered a swelling on the face after having been assaulted by a police officer. This court held that a sentence of 10 months imprisonment with a part of it suspended was in accordance with real and substantial justice.

In *S* v *Ngoni* SC-118-90 a prison officer slapped the complainant in the face and kicked her in the stomach. The Supreme Court confirmed a sentence of 9 months imprisonment with 4 months imprisonment suspended. In *S* v *Sibanda and Others* HB-112-93 security guards assaulted a woman on her buttocks. This court confirmed a sentence of 12 months imprisonment with 6 months imprisonment suspended on the customary conditions of future good behavior.

In *S* v *Mafios and anor* HC-20-93 a soldier punched a woman without provocation. A sentence of 12 months imprisonment with 6 months imprisonment suspended was deemed to be in accordance with real and substantial justice.

In *S* v *Mudimu* S-127-94 a police officer with 20 years of unblemished service and a record of community service, struck two blameless people without provocation when he was exhausted from long hours of duty and struggling to find another address. He hit one of the men on the head with a baton, impairing his hearing (possibly permanently) and punched and

slapped the other man. GUBBAY CJ stated that because the assaults were committed by a law enforcement officer while on duty, deterrence was paramount and, despite all personal circumstances, imprisonment was appropriate.

In *S* v *Chipare* 1992(2) ZLR 276 a police officer, on duty, assaulted a civilian. A sentence of 18 months imprisonment was upheld by the Supreme Court which went on to state that imprisonment was appropriate in cases where police officers commit assaults while executing their duties. The Supreme Court labeled such offences as grave offences.

The learned trial magistrate having surveyed the above decided cases concluded that imprisonment was appropriate *in casu.* He found that the appellant showed no remorse at all after damaging the complainant's left eardrum causing loss of hearing.

This court's view is that a sentence of 15 months imprisonment with 3 months suspended on the customary conditions of future good behavior is not out of step with sentences usually imposed in cases of this nature. The sentence is accordingly upheld.

In the result the appeal is dismissed in its entirety.

Cheda J …… I agree

*Cheda and Partners,* appellant's legal practitioners
*Attorney-General's Office,* respondent's legal practitioners