

THE STATE
versus
EDDIE MAGONA

HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 27 APRIL 2017

Review Judgment

BERE J: In this case the accused was charged with the offence of contravening section 126 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. At the conclusion of the trial the accused was acquitted of the offence charged and instead found guilty of the offence of contravening section 89 (1) (a) of the same Code.

I am deeply concerned with the manner in which the accused was convicted in this matter. In my view this was a frighteningly bad conviction characterized by the court *a quo*'s lackadaisical approach in the assessment of the two competing pieces of evidence that was presented to it.

It is clear that the trial Magistrates was presented with two diametrically opposed versions by the complainant and the accused. At the end of the trial the Magistrate, for no cogent reason decided to intuitively find the accused guilty without even attempting to properly analyse the evidence that was presented to justify the finding of guilt.

The brief facts of the State case are that the accused and the complainant were residing at the same village and were neighbours. It was alleged that on 29 August 2016 at around 2200 hours the accused ambushed the complainant who was on his way from some business centre, stoned and rendered him unconscious before he stole US\$50-00 from him.

To these allegations the accused offered a spirited defence which was centred on his averments that the two had had a misunderstanding after partaking beer. The accused alleged that during the drinking the complainant had borrowed some money from him and when he asked for his change the complainant became aggressive and started attacking him. The accused

went on to say that the two started fighting with the complainant hitting him with the “backside” of an axe which made the accused fall down. The accused concluded his defence outline by saying that the two were eventually stopped from fighting by people who included one Mandla and Thulani.

It is quite unfathomable that despite the presence of these other potential witnesses this case was decided on the strength of the conflicting evidence of the accused and the complainant only. This approach borders of laziness on the part of the State in gathering evidence in a criminal prosecution. The situation in this case is compounded by the nature of the judgment which was produced by the court *a quo* which was devoid of any analytical approach. For the avoidance of doubt I propose to reproduce the court *a quo*'s judgment and it was given as follows:

- “1. The accused person appeared before this court charged with robbery. He denied the charge and insisted that he was rather attacked by complainant and defended himself by kicking him away.
2. Evidence was led by the State which included a medical report showing the extent of complainant's injuries. The medical report shows in a serious manner inconsistent with the defence of the accused.
3. This leads the court to dismiss his defence of being attacked by the complainant. The charge was robbery but nothing much was said of accused taking money from complainant.
4. As a result the court would find him, accused guilty of contravening section 89/ Criminal Law Code – Assault” rather than Robbery.”

As is evident from the court *a quo*'s judgment, there was clearly no attempt made to properly analyse the evidence to justify why the balance had to tilt in favour of the State. There is virtually nothing in the learned Magistrate's notes or judgment to show why the court decided to disregard the evidence by the accused.

It is a pity that I must re-state the long established principle in criminal prosecution laid down as far back as 1937 in the *locus classicus* of *R vs Difford*¹ in the following:

“---it is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the court could draw if no explanation were given. --. It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation even if that explanation be improbable,

¹ . 1937 Ad 370 at 373

the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of this explanation being true, then he is entitled to his acquittal--.”

The point made is that the threshold in criminal prosecution is proof beyond a reasonable doubt and this could not have been achieved in this case by pitting the accused against the complainant in a “boxing match approach” scenario as observed by McNALLY JA in the much celebrated case of *S v Temba*². See also *S v Chingurume*³, a decision which I had occasion to revisit these basic principles in criminal prosecution proceedings.

In the case before me, we know for a fact that the fight between the accused and the complainant was witnessed by among other people Mandla and Thulani but for some strange reason these potential witnesses were never called to testify. That omission can only affect the State case and not the accused’s defence.

Equally undeniable in these proceedings is the specific finding by the trial court of the non-occurrence of robbery contrary to the complainant’s claim. It simply means that the court *a quo* was not satisfied by the complainant’s explanation that he was robbed by the accused, a finding which was consistent with the accused’s position throughout the proceedings.

It is a gross exaggeration in the case under review that the trial court, by merely looking at the medical report could have concluded that the accused was lying. That is not how a decision can possibly be arrived at in criminal proceedings.

In conclusion, and in all the probabilities of this case this was a bad conviction and consequently it must be set aside.

The accused is found not guilty and acquitted, and accordingly I order his immediate release.

Makonese J agrees.....

². S – 81-91 at pp 1-2.

³. 2014 121 ZLR 260 (H)