

BLOODWELL NYAWO**Versus****THE STATE**IN THE HIGH COURT OF ZIMBABWE
MAKONESE & KABASA JJ
BULAWAYO 26 & 29 OCTOBER 2020**Criminal Appeal***K. Madzikura* for the appellant*B. Gundani* for the respondent

MAKONESE J: The appellant appeared before a magistrate sitting at Bulawayo on the 18th of November 2018 facing two counts of contravening section 89 (1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23), that is assault. Appellant pleaded not guilty to both counts but following a full trial he was convicted and sentenced to 48 months imprisonment of which 12 months was suspended for 5 years on the usual conditions of good behaviour.

Dissatisfied with the outcome of the proceedings in the court *a quo*, appellant lodged an appeal against both conviction and sentence.

In his grounds of appeal, appellant argued that:

1. The court *a quo* failed to warn itself against the dangers of accomplice evidence as the witness did not identify themselves.
2. The court *a quo* misdirected itself by convicting him without evidence linking the appellant to the offence.
3. The court *a quo* failed to take into account that the two witnesses did not identify themselves as workers of ZETDC by providing identity documents
4. The court *a quo* failed to take into account that their clothes were not identifiable with ZETDC.

5. The court *a quo* did not fully take into account that the complainants should procedurally be accompanied by police officials.
6. In the absence of other evidence the court drew unwarranted inference.
7. The court *a quo* failed to take into account that the appellant's evidence was never disputed.
8. The trial court descended into the arena and appeared to pre-judge the case.

As regards sentence the appellant contended that the sentence was manifestly excessive and induced a sense of shock. It was argued that the trial magistrate did not take into consideration the possibility of community service.

Factual background

The facts of this matter are these. On 31st July 2018 at around 0345 complainant and his workmates received a call from their control room indicating that the Woodville electricity line in Bulawayo had tripped off. The complainants are employees of ZETDC (Zimbabwe Electricity Transmission of Distribution Company). The complainant, Edgar Tshuma proceeded to Woodville in the company of Zibusiso Dube and Victor Nkala. Upon reaching the Woodville area, the complainants observed that electric cables had been cut. Complainants checked the area and phoned the Dog Section. They parked their motor vehicle along a main road. At that stage appellant arrived in the company of one Luke Ncube. Ncube fired two warning shots into the air before assaulting the complainants with logs. One of the complainants got into the motor vehicle. The appellant accused the complainants of being cable thieves. In spite of the complainants indicating that they were ZETDC employees, the appellant and his associates would have none of it. Complainants surrendered but were subjected to further assaults. Complainants sustained serious injuries. The police and other ZEDTC employees were summoned to the scene. Complainants were ferried to hospital by an ambulance.

Appellant raised the defence of self defence and alleged that the complainants had failed to properly identify themselves. The trial magistrate rejected the appellant's defence and convicted the appellant.

The appeal against conviction

It is a settled principle of our criminal law that an accused facing a charge must be acquitted and found not guilty where the state fails to prove its case beyond reasonable doubt. There is clear evidence on the record in this matter that the appellant assaulted the complainants. Oral evidence was led from the complainants. Medical evidence was placed before the court *a quo* reflecting that complainants sustained serious injuries as a result of the assault. The appellant sought to rely on the defence of self defence. Evidence led from the complainants proved that the appellant was never at any time under attack or threat of imminent danger from the complainants. At page 65 of the record the appellant conceded that he had exceeded the bounds of self defence. Ncube's evidence shows that the complainants were assaulted after they had been made to lie down in front of their vehicle. The complainants' gun was never taken out of the vehicle and was never used to threaten the appellant. Edgar Tshuma was assaulted for interrupting appellant's conversation with Zibusiso Dube in a manner that was considered arrogant. The 2nd complainant was assaulted for not calling her supervisors as instructed by the appellant and for not giving the appellant a suitable explanation. The evidence of Ncube clearly shows that the appellant's defence was a mere fabrication. It was clear that there were verbal exchanges between the appellants and the complainants. The complainants never physically engaged the appellant. The assault on the complainants was totally unjustified.

It was alleged that the magistrate in the court *a quo* descended into the arena and pre-judged the matter. The questions posed by the trial magistrate were relevant and meant to clarify issues that would assist the court in reaching a determination. In my view, a trial magistrate is perfectly entitled to put questions to witnesses that resolve any lingering questions. No questions were put to the witnesses in a manner that would pre-judge the matter.

In *Kasekev s The State* 1996 (1) ZLR 51 (S), the Supreme Court citing *S v Hove* S-183-89, quoted the words of GUBBAY JA (as he then was) at p 5 where he stated thus;

“Judicial officers are frequently cautioned not to descend into the arena, but this does not mean that they must simply adopt the position of an umpire in a game, to see that neither side commits a foul. They are there to direct and control the trial according to recognized rules and procedures that ensure that justice is not only done but seen to be done. They have the right, if not the duty to examine witnesses or the accused in order to clarify some point in the interests of justice, they must refrain from doing so in a way, or to such an extent, as may, on one hand, disconcert the witness or unjustly affect the quality of his replies and, on the other, preclude an objective appreciation and adjudication of the issue they are called upon to determine. If the manner of questioning is such as to sustain the inference of a lack of impeccable impartiality and open-mindedness, then the fundamental prerequisite of a fair trial has not been attained”

On the facts of this case, the questions posed by the trial magistrate did not disconcert the witnesses or unjustly affect the quality of their responses. This ground of appeal was merely an afterthought and no criticism can properly be placed against the trial magistrate.

It is the view of this court that the appeal against conviction has no merit and ought to be dismissed. In the end, during oral submissions the counsel for the appellant, *Mr Madzikura*, conceded that the appeal had no merit.

As regards sentence, the injuries suffered by the complainants are serious. *Mr Gundani*, appearing for the state, indicated that the sentence was appropriate. Edgar Tshuma suffered a depressed skull fracture of the left parietal area and underlying intracranial haemotoma. The complainant received surgery to treat the fracture and the bleeding. The medical report revealed that the complainant would likely suffer from recurrent headaches. The second complainant Zibusiso Dube suffered a tender left knee with mild swelling. There was no misdirection on the part of the trial magistrate in her approach to sentence. A sentence of community service would have trivialized the offence, regard being had to the nature of the attack and the resultant injuries.

In the circumstances, and accordingly the appeal is hereby dismissed in its entirety.

Kabasa J I agree

Messrs T. Hara & Partners, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners