

TIMOTHY TSHUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA AND TAGU JJ
HARARE, 19 November 2014 and 15 January 2015

Criminal Appeal

Mrs *H. S. Tsara*, for the appellant
E. Makoto, for the respondent

TAGU J: This is an appeal against the decision of the magistrate who, after convicting the appellant on a count of the crime of assault, sentenced the appellant to 12 months imprisonment, 4 months of which were suspended on the usual condition of future good conduct leaving the appellant to serve an effective prison term of 8 months.

The appellant was not satisfied with both the conviction and sentence. He accordingly noted an appeal with this Honourable court. The grounds of appeal, which he supported in his heads of argument are that-

1. The court *a quo* erred by accepting the evidence of the complainant in relation to the cursory identification of the appellant, and the fact that he was wearing white gumboots.
2. The court *a quo* further, erred by accepting the evidence of Maxwell Kapara, complainant's husband as there were chances of collusion.
3. The court failed to compel the state to call complainant's sons to testify.
4. The court *a quo* further erred by accepting the evidence of the arresting detail, Constable Isaac Hore relating to the circumstances surrounding the recovery of the knife.
5. In respect of the sentence, the appellant averred that the sentence is rigorous and it induces a sense of shock. He prayed for an order for community service.

The respondent opposed the appeal against conviction. As regards the sentence the respondent was of the view that community service was appropriate given the fact that members of the public who arrested the appellant assaulted him.

The appellant pleaded the defence of mistaken identity. The fact that the complainant was stabbed with a knife was proved beyond a reasonable doubt. The medical report on page 104 confirmed that. The issue is whether the appellant was the one who stabbed the complainant or not.

The facts revealed by the record were that the offence occurred at about 7.00pm. The appellant at that time was in the company of two other work persons. The appellant was wearing a pair of white gumboots. He proposed love to the complainant who turned the proposal down, shouting at the appellant in an angry manner. The appellant then stabbed the complainant on the hands with a small silver knife. Appellant ran away from the scene. He was pursued by a mob of people who apprehended, and assaulted, him.

The appellant in his defence said at about 6.00 pm he left his tuckshop and boarded a commuter bus to go home. He disembarked at corner-store and whilst on his way home two young men approached and robbed him. They stabbed him with a knife on the arm and head. They dealt a blow on his other arm with a metal object as well as on his head and he fell down as he was partially unconscious. His attackers looked for a motor vehicle to ferry him to the police station framing him as a thief. He was ferried to hospital from where he was discharged on 16th December 2013. When he went to report the robbery which had occurred to him, the police told him that they were looking for him in connection with the present case. Having considered the written and oral submissions as well as the evidence in the record, I am of the view that the conviction *in casu*, cannot be faulted. The complainant said that she identified appellant because of the white gumboots. She indicated that appellant was her assailant because after people ran after the appellant who was now running away, as she was screaming for help, they apprehended him and a knife fell down from his pocket. She however, said she did not identify his face as it was 7.00 pm. She maintained that she identified the appellant with his white gumboots, and the tuckshop battery powered light which was at the verandah. She, however, said the lights were bright to such an extent that one could only see the front of the tuckshop. She said she identified him further by his height as well as his big nose, though there was human traffic at the spot, of people who were disembarking from buses.

Maxwell Kupara, the complainant's husband did not collude with his wife. He was a credible witness. He admitted that he did not see his wife being assaulted. He only later saw the appellant after the latter was apprehended by a mob of people. That is the moment he noted that the appellant was putting on white gumboots. He then saw the knife that was recovered from the appellant. His evidence was to the effect that his two sons were at home at the time the complainant was stabbed, hence the sons did not rob the appellant.

The arresting detail Constable Isaac Hove corroborated the fact that when he searched the appellant at the time he was brought to Epworth Police Station at about 900 pm on the 17th of December 2013, he recovered a silver knife in his pockets. He noted that the appellant was wearing a pair of green trousers, t-shirt and white gumboots.

It is, therefore, pertinent to note that the appellant passed by the complainant's tuckshop at the material time. He was putting on white gumboots. The complainant was then stabbed by a man putting on white gumboots. The man was apprehended immediately after a chase and a knife was recovered. All this cannot be explained on the basis of coincidence. Further, it could not have been a coincidence that the appellant was being robbed by the complainant's sons. The court *a quo* cannot be faulted for dismissing appellant's averment. It does not make sense that robbers would rob a person, injure him and then ferry him to the police. The correct position as found by the court *a quo* is that the appellant was chased by members of the public who apprehended him after he stabbed the complainant and took him to the police. The court did not misdirect itself when it convicted the appellant.

Although the respondent conceded that the court *a quo* may have over-emphasized the aggravatory features of the case and ought to have considered that appellant was seriously assaulted by members of the public who meted out instant justice, the appellant deserved it. It was aggravatory that the appellant attacked an old married woman with a knife merely because his love proposal was turned down. Although an effective sentence of 8 months imprisonment falls within the range for community service, failure to impose it due to the seriousness of the offence is not a misdirection warranting this court to interfere with it. The trial court judiciously exercised its discretion. The sentence is not so harsh as to induce a sense of shock.

In the result, the appeal against conviction and sentence is hereby dismissed in its entirety.

MANGOTA J agrees

Tsara and Associates, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners