SYLVESTER MASANGO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 6 August 2015

Criminal Appeal

C. Daitai, for the appellant
Ms *F Kachidza*, for the respondent

HUNGWE J: The appellant was convicted of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23]*. He was sentenced to 12 months imprisonment of which 4 months were suspended for 5 years on appropriate conditions. Dissatisfied with both, he noted an appeal to this court. In his notice of appeal, the appellant raises one ground of appeal against conviction and another against sentence.

As against conviction, the appellant complains that the trial court erred in finding that in spite of the inconsistencies in the evidence given by the complainant and the only other witness that evidence was safe to rely upon in convicting the appellant.

As against sentence, the appellant contends that the court *a quo* misdirected itself in imposing a sentence which was so harsh, and as such so unreasonable, as to induce a sense of shock.

The facts upon which the conviction was anchored were as follows. The appellant was campaigning for the ruling party when he addressed a gathering at a youth centre. Amongst the attendees was the complainant and the other state witness. The complainant told the court that the appellant ordered certain boys to roll on the ground as a form of punishment for making noise during the proceedings. Complainant was holding a stick. The appellant ordered him to throw it away and join those who were rolling on the ground. Complainant chose to leave the meeting instead. The appellant chased him and assaulted him. The second state witness, Tinashe Muponda, confirmed that complainant was ordered to throw away the stick he was holding but chose instead to run away from the political meeting where those

who had made noise were complying with an order to roll on the ground. This witness had been assaulted. From the record there is sufficient evidence supporting the conviction despite the fair amount of criticism one can direct against the quality of the evidence. I find no explanation for a youth to falsify day a complaint of this nature against a fairly feared political leader in the locality at the time. The appellant failed to provide something in the nature of a sound reason why complainant would do such a thing. For good measure, the learned trial magistrate gave a well-reasoned judgment in convicting the appellant. No criticism can be made against his assessment of credibility. He was clearly acutely aware of the contending and possibly feuding factions which were wooing voters in the area. He articulated the cautious approach which he had to take in the assessment of the credibility of the witnesses appearing before him. He cited relevant case authority which guided him in the task. Indeed, he was aware of the dangers associated with evidence of children. He sought and obtained confirmatory evidence of their testimony independent of their say so. He found this in the failure by the appellant to give a plausible explanation for his actions. The probabilities in his assessment favoured the child witnesses.

In light of the above I am satisfied that there is no merit in the appeal against conviction.

However, there is a lot to be said in favour of the appeal against sentence. Clearly, the learned magistrate was swayed with the need to punish and stem out politically motivated violence. Whether this single incident constitutes political violence is a moot point. The point I make here is that the court's approach to assessing sentence was unduly influenced by the considerations of the political colour reflected in the evidence. There was need, in our view, for the court to balance the gravity of the assault, the appellant's personal circumstances against the interests of society. The appellant was a first offender. The assault itself was not so severe but heavy-handed on its own. It quite clearly deserved censure as it was unprovoked in any way. The appellant was throwing his political weight around like a bull in a china shop. However, even taking that into account we are of the view that a custodial sentence was not warranted in all the circumstances of this case. A heavy fine coupled with a suspended sentence would have adequately met the justice of this case. I have warmly considered the relevant expression of disgust that the learned trial magistrate noted in his reasons for sentence and associate myself with those sentiments. However, that does not detract from the need to keep first offenders out of prison if that can be done. In my view, this can be done here without bringing the justice system into disrepute.

Consequently, it is ordered that the sentence imposed in the court *a quo* be and is hereby set aside and in its place the following is substituted:

> "US$150/6 weeks imprisonment. In addition 3 months imprisonment which is suspended for 5 years on condition the accused is not during that period, convicted of any offence involving an assault on the person of another for which he is sentenced to imprisonment without the option of a fine,"

BERE J agrees…….

Magwaliba & Kwirira, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners