FARAI GATSI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & BERE J
HARARE, 26 February 2015 and 8 June 2016

Criminal Appeal

T M Kashangura, for the appellant
I Muchini, for the respondent

BERE J: The appellant was convicted by the Regional Magistrate Court sitting at Bindura on 11 February 2014 for the offence of attempted murder as defined in terms of s 189 (a) (b) as read with s 47 (1) (a) (b) of the Code, [*Chapter 9:23*]. The appellant was sentenced to 7 years imprisonment of which 3 ½ years imprisonment were suspended on the usual conditions leaving an effective term of imprisonment of 42 months.

Aggrieved by both his conviction and sentence, the appellant has noted this appeal. The appeal is against both conviction and sentence.

Preliminary Point

Before addressing the substantive issues raised in this case, the respondent's counsel has taken issue with the notice of appeal which he alleges is defective.

It is the undisputed legal position that the Supreme Court (Magistrates Courts) Criminal Appeals Rules, 1979 require an appellant to set out clearly and specifically his grounds of appeal.

In a proper case, where the court feels that there is no full compliance of the Appeal Rules, the appeal can be dismissed on this technicality.

In *S* v *Ncube*[1] the court did not hesitate to pronounce the filed appeal a nullity because of non-compliance with the court rules.

[1] 1990 (2) ZLR 303 (S) at 304 E

The late Dumbutshena CJ in the case of *S* v *McNab* was quite forthright in expressing his total displeasure in dealing with non-observance of the above cited Appeal Rules when he noted:

> "In cases in which defective notice of appeals are filed, it is in most cases applicant's legal practitioners who are to blame. In such cases the court has to consider whether to punish the appellants for the negligence of their legal practitioner. In my view clients should in such cases suffer for the negligence of their legal practitioner."[2]

We have considered the concerns by the state counsel in attacking the notice and grounds of appeal filed by the appellant. The notice and grounds could have been better presented. However, despite this we are satisfied that there has been substantial compliance with the Appeal Rules to the extent that we are in a position to proceed to hear the appeal on merits.

The main attack on the conviction is that the court *a quo* was erroneous in its assessment of the evidence that was adduced before it. It was argued that the appellant was convicted against the weight of evidence which required nothing less than the appellant's acquittal.

As against sentence the attack on the court *a quo* is that there was no proper assessment of the mitigation factors *vis a viz* the aggravating factors in this case.

As the appeal court we have had the privilege of going through the judgment of the lower court as well as the reasons that informed it of the sentence itself.

It occurs to us that in a properly reasoned judgment, the court *a quo* made a proper assessment of the evidence that was presented to it. The court *a quo* was particularly impressed by the evidence of Lucky Tamera who the court accepted as an independent witness who substantially confirmed the story told by the complainant in all material respects. It is extremely difficult in my view to decipher any possible loopholes in the court *a qou*'s judgment as urged upon us by the appellant's counsel. I do not see how the court *a quo* could have come to the decision or outcome desired by the appellant in this case.

It was common cause in this case that for a distance of almost 400 metres the appellant was driving his motor vehicle at an unacceptable speed whilst the complainant perilously held on to the front bumper of his motor vehicle. The appellant drove his vehicle at such speed which enabled him to overtake another vehicle whilst the complainant was holding on to the vehicle.

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[2] S v Mcnab 1986 ZLR 280 (S) at 283H – 284 A

The learned Magistrate correctly read the conduct of the appellant to satisfy the requirement of attempted murder and properly pronounced him guilty of such an offence.

As regards to sentence it seems most unfortunate to us that the appellant did not seem to have noted the reasons for sentence as articulated by the trial Magistrate on pp 12 -14 of the record of proceedings.

It is imperative for legal practitioners to have serious consideration of a Magistrate's reasons informing him of what he deems to be an appropriate sentence before an attempt is made to attack that sentence.

It has been stated for time without number that it is not the function for the appellate court to ameliorate the sentence of the trial court. See *S* v *Mundowa* where the learned judge instructively remarked as follows:

> "An appeal court does not have a general discretion to ameliorate the sentence of trial courts. It cannot interfere unless the discretion was not judiciously exercised, that is unless the sentence is vitiated by an irregularity or misdirection or is so severe that no reasonable court would have imposed it."[3]

It is precisely for these reasons that we feel that this appeal has no merits and it is accordingly dismissed in its entirety.

Pundu & Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[3] 1998 (2) ZLR 368