

MUNASHE ROBI BUKUTA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 10 June 2020 & 3 July, 2020

Criminal Appeal

Mr O. Mafa, for the State
Ms M. Mutumhe, for the accused

MAWADZE J: On 10 June 2020 we dismissed the appellant's appeal in respect of sentence after hearing arguments from counsel. We gave our detailed reasons *ex tempore*.

On 15 June 2020 I received a letter from appellants counsel dated 12 June, 2020 in which a request for written reasons for dismissing the appeal was made. I now provide the reasons hereunder;

The appellant was convicted after trial by the Regional Magistrate sitting at Masvingo for attempted murder as defined in s 189 as read with s 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The appellant on 31 July, 2019 was sentenced to 18 months imprisonment of which 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour thus leaving an effective prison term of 12 months.

Aggrieved by both the conviction and the sentence the appellant who was represented during the trial filed a Notice of Appeal on 7 August 2019.

At the commencement of the hearing of the appeal on 10 June, 2020 *Mr Mafa* for the appellant withdrew the appeal in respect of the conviction after realising the futility of challenging the conviction of the appellant. The appellant therefore only pursued the appeal in respect of sentence. As a result it is not necessary to now regurgitate the grounds of appeal against the conviction but I shall only restrict myself to the grounds of appeal against sentence.

The charge against the appellant is that on 16 September, 2018 at Stop Over Night Club, Masvingo the appellant attempted to cause the death of Francis Chinyeruse by stabbing with a flick knife once on the left side of the back.

The facts which are now common cause are as follows;

The then 23 year old appellant is a member of the Zimbabwe National Army based at 4.3 Infantry Battalion, Masvingo. He resides at No. 25250, Mbizi Street, Rujeko "C" in Masvingo.

The then 21 year old complainant resides at No. 7243, Mhungu Close, Rujeko "B" in Masvingo. The appellant and the complainant were not known to each other.

On 16 September, 2018 at about 0200 hrs both the appellant and the complainant were amongst merry makers at Stop Over Night Club in Masvingo. The appellant was seated in his motor vehicle outside the night club. The complainant decided to go home.

The complainant then approached the appellant requesting to hire appellant's motor vehicle to the complainant's residence. For some strange reason the appellant took offence. Apparently the complainant had hitherto denied appellant entrance into the night club with beer bought outside the night club. Thus the appellant reminded the complainant of this earlier on incident. The appellant then got out of his motor vehicle. He had a flick knife which the complainant had not seen which weighs 0.159 kg and is 21 cm long. The appellant proceeded to stab the complainant on the left side of the back with the flick knife. Appellant was then disarmed by one Tinashe Zihove who witnessed all what the appellant did.

Thereafter, the appellant, in a bid to confuse matters rushed to Rujeko police station and filed a false report that he had been attacked by the complainant.

Meanwhile the complainant was ferried to Masvingo Central Police Station where he made a report resulting in the appellant's arrest.

The appellant was treated and examined by a doctor at Masvingo General Hospital. As per the medical report dated 18 September 2018 the doctor observed the following;

“a stab wound left loin of abdomen 5 cm deep and 2 cm wide”

The doctor stated that the stab wound was inflicted by a sharp instrument. The injury is described as serious and inflicted with severe force. The doctor said as a result the complainant would require constant medical care.

These are the facts which inform the appellant’s conviction and sentence.

The grounds of appeal in respect of sentence are couched as follows;

“AGAINST SENTENCE

3. *The court misdirected itself by failing to consider the suitability of community service despite the court having settled for an imprisonment term which was less than 24 months.*
4. *The sentence imposed by the court a quo induces a sense of shock particularly on an unemployed first offender”(sic)*

The appellant prayed that the sentence by the court *a quo* be set aside and that the same be substituted with the following;

“\$400 or in default of payment 6 months imprisonment”

To be fair to the appellant it is clear that the appellant as per the said grounds of appeal is simply clutching on to straws. The grounds of appeal are rather confusing. One really wonders whether the appellant bothered to read the learned Regional Magistrate’s reasons for sentence! Worse still the appellant clamours for community service in the grounds of appeal but in his prayer he now advocated for a fine!! This is really testing the waters as it were.

In the heads of argument appellant submitted that as a first offender he was entitled to a non-custodial sentence. Reliance was placed on the case of *S v Mpofu (2) 1985 (1) ZLR 285 (H)* and the views I expressed in *S v Usavi HH 182/10*. Clearly the appellant misses the reasoning in those cases. There is no strict rule that first offenders cannot be imprisoned in deserving cases.

The appellant’s argument is that since the overall sentence of 18 months imprisonment was imposed [with 12 months being the effective term of imprisonment] the court *a quo* was obliged not only to consider the option of community service. The appellant alleges that, for this proposition, he finds comfort in the case of *S v Antonio & Ors. 1998 (2) ZLR 67 (H)*. Again that proposition is misleading.

It is the appellant's contention that it was improper for the court *a quo* to characterise the sentence of 18 months imprisonment as "*a short and sharp sentence*". Again its no use for appellant to dwell on semantics. What matters at the end of the day is the substance, that is, whether the sentence imposed amounts to an improper exercise of discretion warranting interference by this court.

Apparently no effort is made by the appellant in the heads of argument to propose what the appellants deems as an appropriate sentence in the circumstances. Worse still no case law is cited at all in order to persuade this court in that regard.

The respondent on the other hand pointed out that appellant committed a serious offence and that the court *a quo* properly assessed the appropriate sentence. According to the respondent the court *a quo* took on board the mitigating factors as part of the sentence was conditionally suspended. Further the respondent submitted that the court *a quo* rightly took as an aggravating factor that the appellant used a knife to stab the complainant on the abdomen causing a deep cut of 5 cm and 2 cm in width. Thus severe force was used inflicted injuries deemed to be serious to the extent that the complainant would require regular medical review.

I have no doubt in my mind that *Mr Mafa* for the appellant misunderstood the very well-meaning sentiments I expressed in the case of *S v Zava* HMA 15/17 and the cases I cited therein. Similarly he seemed to misinterpret the views expressed by MATHONSI J (*as he then was*) in the case of *S v Sibanda* HB 89/16 which he takes out of context.

I find no misdirection in the manner the court *a quo* approached the question of sentence in this matter. The mitigatory factors were fully considered (*see page 18 of the record*). The court *a quo* dealt with the appellant's personal circumstances. It did consider that the appellant was voluntarily intoxicated. Thereafter these mitigating factors were weighed against the aggravating factors which include *inter alia* that the appellant committed a serious offence, the weapon used and that the single blow was directed at the vulnerable part of the complainant's body. As a result serious injury was inflicted as a knife was thrust 5 cm deep into the complainant's abdomen which could have been fatal if he was not hospitalised.

It should be borne in mind that the appellant is a member of the disciplined force. His behaviour is expected to be above board and exemplary. He is not expected to attack civilians with

dangerous weapons for such minor infractions and should not move around night clubs with knives.

I find no fault in how the court *a quo* reasoned that to impose a fine or community service in this matter would indeed send wrong and harmful signals to the public especially where a dangerous weapon was used to inflict serious and life threatening injury.

It is wrong for the appellant to believe that first offenders cannot be sent to prison for effective prison terms of 24 months or less [*which is the threshold for which community service should be considered*]. There are appropriate cases where an accused person would justifiably be sent to prison for an effective term of imprisonment of 24 months or below. It is also incorrect that the court *a quo* did not explain why community service was inappropriate in this case.

The appellant stand convicted of a serious offence which invariably attracts a custodial term. *In casu* there are no mitigating factors suggesting that a different approach should be adopted.

The appellant's moral blameworthiness is very high. He was not provoked in any manner. All what complainant did was to ask to hire appellant's motor vehicle. Surely can that be a reason for one to then pull out a knife and thrust it 5 cm deep in one's body unless one is simply a sadist? If alcohol purchased outside the nite club was not allowed into the nite club why would the appellant take offence of that?

As already said the nature of the injury inflicted cannot be over emphasised. A dangerous weapon, a knife was used. Severe force was applied and the complainant had to be hospitalised.

The appellant is not remorseful at all. He did not offer the complainant any help. Instead he had the temerity to rush to the police station to file a false report claiming to be the victim instead. This was meant to simply muddle the waters. Throughout the trial he was not contrite at all. Society expects much better from members of the disciplined force.

In conclusion therefore I find no misdirection at all on the part of the court *a quo* in the manner it exercised its discretion in assessing sentence. If it indeed erred it could only have done so on the side of leniency.

The appeal against sentence clearly lacks merit and should be dismissed.

These are the reasons why we ordered that the appeal against be dismissed.

Mutendi, Mudisi & Shumba, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners