

ARCHFORD CHARI
and
LEONARD REBANNEWAKO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 19 June 2019, 11 July 2019

Criminal Appeal

L Chigadza, for the appellants
J Chingwinyiso, for the respondent

MUZENDA J: The two appellants were charged with allegations of obstructing or endangering the free movement of persons or traffic in contravention of s 38 (c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by placing and burning tyres and grass along the Harare-Mutare Road in Rusape. They were convicted after a full trial and sentenced to 3 years imprisonment each of which 1 year imprisonment was suspended for 5 years on the usual conditions of good behaviour.

The appellants noted an appeal against both conviction and sentence on the following grounds:-

AS AGAINST CONVICTION

1. The Learned Magistrate erred in convicting appellants despite the fact that the State failed to prove its case beyond reasonable doubt due to the following:
 - (a) (i) the appellants clearly stated in their defence outline that they were not part of the crowd and were going to Ridgemont Park Suburb for some family assignment and that fact was not refuted by the State.
 - (ii) that the reason they ran away was because they feared for their lives in view of the events of August 2018. Again this assertion was not refuted.
 - (iii) that they never participated in the blocking of the road as alleged or at all.

(b) The Learned Magistrate misdirected himself in failing to analyse the credibility of the three State witnesses in view of the following:

- (i) that the self-recorded statements together with statements were similar word for word save for personal information therefore connivance was apparent.
- (ii) that they all departed from their statements materially.
- (iii) that they never gave any details implicating appellant in their statements and that the attempt to do so while giving evidence clearly indicated that something happened between the receiving of statements and the time of testifying in court.
- (iv) that despite the clear challenge that they never arrested appellants and that they were not present when the appellants were arrested by soldiers, they all failed to identify, let alone, record statements of the alleged six soldiers, or at least mention their brigade. It is therefore clear that the witnesses were not present at the time appellants were arrested and assaulted, therefore could not have possibly witnessed the alleged participation by appellants.
- (v) The Learned Magistrate misdirected himself on points of law and fact by failing to recognise the contradictions by the three State witnesses on the reasons why they did not self record the alleged participation of appellants which Sergeant Ngangu saying they were busy and Constable Chingonze saying they felt it was not necessary. Further the Learned Magistrate failed to consider the improbable testimony of Sergeant Ngangu that it took them up to ten minutes to drive for a distance of 50 metres.

2. AS AGAINST SENTENCE

The sentence imposed by the Learned Magistrate is so severe as to induce a sense of shock in view of the following:

- (i) that appellants are young first offenders.
- (ii) that no one was injured as a result of the alleged action.

- (iii) that there are other available sentence of a fine or community service which the Learned Magistrate misdirected himself by failing to consider.

The State alleged in the State outline that on 15 January 2019 at around 1030 hours, the appellants and outstanding four accomplices connived and proceeded to the 174km peg along the Harare-Mutare road where they placed some burning tyres on the road. They were seen committing the offence by the Rusape reaction team which comprises of the members of the Zimbabwe Republic Police and the Zimbabwe National Army. On noticing the reaction team approaching, the appellants ran away into different directions. The reaction team chased after the appellants and managed to arrest them. A partly burnt tyre was recovered by the police at the scene.

Although the grounds of appeal against conviction are clustered and heavily laden the outstanding issues for appeal are:

- (i) whether the State failed to prove its case against the appellants.
(ii) whether the court *a quo* failed to analyse the credibility of State witnesses.

Finally on the issue of sentence whether the sentence imposed by the court *a quo* was so severe as to induce a sense of shock.

As against conviction the appellants submitted that there is no onus on them to prove their innocence. They pointed out in their defence that they were not part of the crowd and they were on their way to Ridgemont Park for some family assignment. They ran away because they feared for their lives in view of the events of August 2018. The failure by the Trial Magistrate to accept this to the appellants was a misdirection. The State failed to prove its case beyond reasonable doubt.

The appellants went on to add to their submissions that the court *a quo* failed to analyse the credibility of the State witnesses. According to the appellants, the witnesses for the State departed from their statements materially. The appellants attacked the uniform format of the police's witnesses recorded statements and alleged connivance. The appellants further submitted that the witnesses' testimony lacked credibility since the police were not present at the time the appellants were apprehended by members of the armed forces, the soldiers. The witnesses failed to accurately identify the appellants from a distance maybe, the actual perpetrators fled from the scene unnoticed, argues the appellants.

On the other hand the State submitted the following on the aspect of conviction. The court *a quo* did not err nor misdirect itself in assessing the evidence adduced before it for it to

come up with the verdict of guilty against the appellants. The State went on to submit further that the trial court correctly analysed the evidence and found the witnesses to be credible hence the verdict of the trial court was reasonable and justified by the evidence. The trial court accepted and relied on the evidence of the three police details who testified.

The appellants' notable substantive point observable from the appeal is centralised on the evidence of the police details. According to the record of proceedings, police received information about the conduct of the appellants and their partners. They reacted by coming to the scene but in the company of the members of the army. Upon arrival at the scene, those responsible for barricading the road fled. Constable Tichaona Merica pursued and managed to apprehend Leonard Rebanewako, second appellant, whom he positively identified through the dreadlocks. Luke Ngunu chased after 1st appellant and arrested him.

Both officers testified seeing each of the appellants actively involved in activities that perpetuated something to do with the barricading of the road. First appellant was placing a tyre on the road, second appellant was holding some dry grass which he threw in the burning tyre, he was also seen placing a log on burning tyres. Tichaona Merica was seated in front of the reaction team vehicle when he saw the events happening. When the second appellant was arrested he admitted (see p 19 of the record of proceedings) Sergeant Ngunu was also seated in the front when he saw first appellant throwing a tyre on the fire which was burning. Constable Yvonne Chingonzo told the trial court *a quo* that first appellant upon arrest admitted to barricading the road and asked for forgiveness for what he had done.

This evidence found on pp 36 and 59 is actually corroborated by the second appellant and the effect is that Constable Chingonzo is placed at the scene of the arrest contrary to the averments by the appellants that they were arrested by the soldiers and handed over to the police at a later stage. As a general observation of the record of proceedings most of his evidence was barely challenged by the defence. The defence spent most of its time pointing out the similarities of the witness's written statements, and ignored the evidence which directly placed the appellants at the scene of the barricading.

The following issues are not in dispute:

- (a) The Harare – Mutare Road was barricaded at Rusape on 15 January 2019 at the 174km peg. Tyres and logs were placed on the road and some of the tyres were burning.
- (b) The police and the army reaction team arrived at the scene and the perpetrators fled.

(c) The two appellants were at the scene of the barricade and they were chased after and arrested.

The pertinent question is whether the two appellants were part of the perpetrators?

The version of the appellants deduced from the defence is that they were merely passers-by at the crime scene. They were arrested while running away. On p 53 of the record of proceedings, first appellant stated that whilst they were using the Mutare Road they passed where people were violent. After passing they heard people shouting “soldiers” and they started running. The second appellant relating the same event on p 58 stated that when they were in Mutare Highway and had passed the mob they started running away since they had passed the scene, they were trying to separate themselves from the scene. One can see the difficulties the two appellant find themselves in trying to explain their presence at the scene and why they were arrested.

However, as the state counsel properly put it in the heads of argument, the appellants were at or near the scene of the crime, they ran away when the police and army arrived. They were caught in the process of running away. The army and the police caught them by surprise and the probabilities deduced from the circumstances of this case is that the appellants were arrested because they were the last to be on the scene participating in the barricading. The police details witnessed the two partaking in the barricading and chased after the two. The court weighed both versions presented by the state and the appellants and believed the state.

The court *a quo* remains the domain on the issue of credibility and the factual findings of the lower court cannot easily be interfered with by a superior court unless the lower court’s findings are so outrageous or irrational that no tribunal would act upon it.¹ The trial magistrate reached a verdict after a competent analysis of evidence adduced and there is no basis by this court to quash that conviction, there is no irregularity shown by the appellants.² The conclusion by the court *a quo* is far from being erroneous and there are no compelling reasons advanced to this court to justify interference.³

The defence went at sea attacking the contradictions between the written statements by the police details and their evidence in court. It is not in dispute that the witnesses wrote almost

¹S v Mpetha and Others 1983 (4) SA 262, S v Mlambo 1994 (2) ZLR 410 (S). Lovemore Dewa v S HH 2-6/14 S v Mashonganyika HH 131/18

² S v Gore 1991 (1) ZLR 117 (H) at 180 F-181 E

³ S v Madeyi 2013 (1) ZLR 14 (H) at 28 E-F

identical version of what happened on 15 January 2018. That is not strange since it happened that all three witnesses observed the chain of same event. I do not agree with the defence that these statements are a result of connivance among the police witnesses. A witnesses' statement is not perse evidence but a precis of what the witnesses perceive happened. In most cases such a statement is prepared by a police detail. However when juxtaposed with oral evidence in court under oath, the oral evidence in court has more probative value for the assessment of the witness' conduct in court, demeanour and credibility. The written statement forms part of the tools used by a court in evaluating the credibility of the witness, but a statement cannot be classified as evidence so to speak in my view. It is not confirmed by the fact that he said the same thing to somebody else on a previous occasion.⁴ The defence did not manage to prove that the witness' statements or evidence's discrepancies were material. The discrepancies in witness's statements must be of such a magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether.⁵ Discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value in the determination of the truth or otherwise of the matter before the court. The criticism advanced by the defence on the discrepancies does not justify this court to interfere with the conviction. Identification of the appellants by the police was direct and the police pursued the very people whom they have seen participating in the barricading and burning of tyres. Those people are the two appellants. I am convinced that the conviction is beyond reproach and hence the appeal against conviction is dismissed. The soldiers were part of the reaction team constituting both army and police and the latter has the right to arrest offenders and the police details did their constitutional mandate to arrest the appellants.

As against sentence, it is now trite law that an appeal court will not lightly interfere with the sentence imposed by the trial court, unless there is a misdirection by the sentencing court.⁶ I have examined the reasons for sentence relied upon by the court *a quo* which are fairly comprehensive and I discern no misdirection at all. The court *a quo* looked at both

⁴ S v Moyo 1989 (3) ZLR 250 (S) at 252 D-E

⁵ S v Nduna and Another 2003 (1) ZLR 440 (H)

⁶ Tichaona Muhomba v S SC 57/13

S v Sidat 1997 (1) ZLR 487 (S)

Anthony Jacob Gono v S HH 136/00

S v Benliner 1967 (2) SA 193 (AD) at 200D

mitigatory and aggravating features and came to the sentence it passed. It is not outrageous and there is no basis for this court to interfere with it. The appeal against sentence has no merit.

Accordingly the appeals against conviction and sentence are dismissed.

MWAYERA J agrees_____

Chigadza & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners