

MAXWELL MARANGWANDA
versus
THE STATE

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

Criminal Appeal

Mrs *N Nyamwanza*, for the appellant
Ms *T.L. Katsiru*, for the respondent

MUZENDA J: The appellant, Maxwell Marangwanda aged 56 years, was charged and convicted of assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] where it is alleged that on 29 August 2018 at Nyachityu Business Centre, Marange, Mutare, the appellant hit Patson Chakawanda twice on his arms with an iron bar. On 27 February 2019 the appellant was sentenced to 12 months imprisonment of which 3 months imprisonment was suspended for 2 years on condition accused does not during that period commit any offence involving violence for which he is sentenced to imprisonment without the option of a fine, leaving an effective prison term of 9 months.

On 5 March 2019 appellant noted an appeal against both conviction and sentence and outlined the following as grounds of appeal:

1. AD CONVICTION

- (a) The learned trial Magistrate erred at law and facts in convicting the appellant when the evidence led by the State was totally inadequate for the purposes of securing a conviction. The conviction was based on a single witness, the complainant who was not credible. This is because the other State witnesses did not corroborate the evidence of the complainant.
- (b) The learned trial Magistrate misdirected herself by accepting the evidence of the complainant which was not corroborated by the evidence of the other two witnesses.
- (c) The learned Magistrate erred and misdirected herself by putting onus on the appellant when all that was required of appellant was to offer an explanation which is possibly true.
- (d) The learned Magistrate erred and misdirected herself in law and fact in misinterpreting the medical affidavit and reaching a conclusion that the injuries were as a result of an assault when they could have been caused by complainant falling as he was drunk.
- (e) The learned Magistrate erred and misdirected herself in failing to properly appraise the credibility and testimony of appellant and giving reasons why such evidence was rejected.

- (f) The learned Magistrate erred and misdirected herself in making a finding of facts that the State had discharged its onus of proving the essential elements of the crime beyond reasonable doubt as is required by the law.

2. AD SENTENCE

- (i) The learned Magistrate erred in imposing a sentence that is disturbingly disproportionate to the gravity of the crime that is to say the sentence is manifestly excessive and so harsh as to cause a sense of shock.
- (ii) The learned Magistrate misdirected herself by overemphasising the appellant's crime and under estimating the person, character and circumstances of the crime resulting in the miscarriage of justice.
- (iii) The learned Magistrate misdirected herself by failing to consider non-custodial forms of punishment like a wholly suspended sentence, a fine, community service and or a combination of the above. More so the penal provision provides for a fine.
- (iv) The learned Magistrate misdirected herself by failing to take into account the mitigation by appellant and to indicate what portion of the sentence was modestly reduced as a result of these mitigatory circumstances.

EVIDENCE LED ON BEHALF OF THE STATE

The complainant Patson Chakawanda told the trial court that he had known the appellant since 1995. He knew the reason why appellant was in court, the appellant had assaulted him on 29 August 2018. On that date complainant was coming from Mutare when he decided to go to appellant's shop to buy opaque beer commonly called supa. Upon arrival he shook appellant's gate, there was no response, the witness waited assuming that appellant had heard the shaking. The appellant came from behind, did not ask what complainant wanted but then struck complainant on the arm. The complainant ventured to ask the appellant why he was assaulting him appellant did not respond but went on to hit the other arm. Complainant screamed and because of the assault fainted.

In that condition the complainant regained consciousness whilst he was then by a fowl run. He was in pain. Upon gaining consciousness he recalled appellant summoning Lovemore Nyadongo to come to the scene and check whether he could identify the complainant. Nyadongo brought a torch and positively identifies complainant as his uncle. The appellant told Lovemore Nyadongo that complainant intended to steal chickens but Nyadongo disbelieved appellant's allegation indicating that complainant could not possibly steal since as a pensioner he had his own money.

Appellant went on to call another person his neighbour, who obliged to appellant's call. Appellant went on to tell the neighbour that he (appellant) found complainant surrounded by dogs and that complainant tried to jump a wire that was about 3 metres. The neighbour called by the appellant pointed out that complainant was in pain and needed hospital attention but

complainant did not accede to the issue of hospital. The appellant went on to call yet another neighbour who heeded to appellant's call upon that third neighbour's arrival, appellant explained to the neighbour that he had found complainant in his fowl run. Complainant was then taken to Bocha clinic.

Under cross-examination he told the court that he arrived at appellant's place at around 8-9pm. Complainant told the court that he was not intoxicated he had taken only one supa. He further testified that he could not have been found by appellant at the fowl run for that would have meant that he would have jumped the perimeter fence coupled with his age (74 years) he would have scaled the fence. He did not see what hit his arm but he believed it was a metal bar. As far as he recalled he fell unconscious at the gate and appellant lifted him up to the fowl run. He did not pace up and down in appellant's premises, he only did so when he regained consciousness and did so out of pain.

One clear observation can be deduced from complainant's evidence. He was hit from behind by a hard object and screamed. Appellant did not leave the scene thereafter. He then summoned three of his neighbours to the scene and Lovemore Nyadongo positively identified the complainant. When the second neighbour arrived at the scene he observed that complainant was in pain and needed medical attention. There is no break on the chain of events and accused did not at all the stages explain how the complainant had sustained the pain observed by one of the neighbours. He deliberately concealed the information.

The second witness called by the State was Lovemore Nyadongo. He knows both appellant and complainant. On 29 August 2018 he was woken up by his wife after hearing someone screaming. He took a torch and went where the cry was coming from. He heard appellant calling out whether it was him and he confirmed. He was told by the appellant that appellant had caught someone at the fowl run and had entered his yard.

The witness jumped the wire to gain entrance and the wire he jumped is one and half metres high. Upon arrival by the witness he saw appellant, his worker and wife, he was asked whether he knew complainant, he knew him, of importance, when Lovemore Nyadongo arrived at the scene he saw that complainant was severely injured on his hands.¹ Lovemore Nyadongo asked appellant how the complainant sustained a fracture on his hands, he was told by the appellant "I saw this guy jumping wire and had found him surrounded by dogs and upon trying to jump again he then fell."² Nyadongo did not perceive any dogs barking but heard cry

¹ at page 38 of the record of proceedings

² Page 39

screams. Appellant indicated to the witness that he wished to call his neighbour Mr Mutongo to come and see the complainant. Later appellant left the witness. Meanwhile the witness saw complainant crying, walked towards the witness' homestead, he fell in a pit. The witness lifted him from the pit, complainant could not help himself, he was in a confused state. Under cross-examination by the defence he reiterated that when he was called to the scene complainant had sustained a broken arm.

After the examination of the complainant by a medical doctor he then learnt that both hands had been fractured. To the witness the complainant was average drunk. He only saw footprints at a later stage belonging to complainant and they were both inside and outside appellant's residence.

Felix Majaya, a police detail was called by the state. The piece of evidence crucial to this appeal from this witness is what he was told by the appellant. The appellant told the police that complainant had been robbed and he went on to get into appellant's fence.³ The appellant later told the police that complainant wanted to steal chickens. The witness told the court *a quo* that the appellant gave different versions.

The appellant testified. He is 58 years old. He saw complainant at 9pm behind his fowl run, he was the first person to see complainant. When he saw complainant he woke up his employee, Clever Nyahotsi. Whilst he was with Clever, complainant jumped into the paddock, Clever went towards complainant and had dogs. The appellant went where Clever and complainant were and asked complainant to sit down. He saw Lovemore Nyadongo coming and went where complainant was seated. Lovemore confirmed to appellant that complainant was his uncle. He decided to call another neighbour and when he returned he found Clever and complainant seated inside the yard. When appellant came to the place where complainant was seated he heard for the first time from Godfrey that his hands had been injured. It was Godfrey who proposed to the appellant that they should go to the hospital because complainant was crying. The footprints did not lead to the main gate he said but behind his house. He did not hear any scream from complainant. He does not know why complainant would allege that he assaulted him. He had woken up to protect his chickens and thought that complainant was a thief.

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This is the evidence which was presented before the court *a quo*. This is the evidence which the appellant impugns saying it was not adequate to prove the state case beyond a reasonable doubt.

It is not in dispute that the court *a quo* was faced with a single witness, the complainant. In terms of s 269 of the Criminal Procedure and Evidence Act, it is competent to convict an accused on the evidence of a single witness.⁴ What is important in such a scenario is for the trial court to be alive to the fact that where there is only one single witness to the crime special evidential rules apply. What the trial court should try to do is to guard against the obvious risk of convicting the accused on the basis of uncorroborated evidence of a single witness. The single witness should therefore be credible in all respects. What matters at the end of the day is the quality rather than the quantity of evidence led.⁵

In casu the court *a quo* did not critically analyse this aspect of a single witness. That was a misdirection, though it was not fatal to the proceedings. It accepted the state's evidence and rejected the defence's version. The appellant's conduct on the date in question portrays a guilty mind. He gave various versions to what had caused the fractures on the complainant's arms. To the police he mentioned that the complainant had been robbed on one occasion he told the court *a quo* that the complainant jumped over high fences and that could have led to his fracture. Yet on the other hand he wanted to convince the court that complainant had fallen into a pit. The complainant gave a coherent unimpeached chronicle of what happened, he wanted a supa and went to appellant's property. Appellant might have retired and when he heard the shaking of the gate he woke up and found the complainant at his premises, he hit him thinking that he was a thief and intruder. When Lovemore Nyadongo arrived and dispelled the fear of complainant being a thief the appellant decided to create a way of trying to find some other causes of injury other than his assault. Lovemore Nyadongo found complainant injured already well before complainant fell into the pit, which event occurred after the arrival of Nyadongo. Throughout the night the appellant stated he saw the complainant first and tracked his movement whilst in appellant's yard. However, he could not tell the court exactly at what point complainant sustained the injuries. Although the learned trial magistrate failed to pinpoint the cautious approach in single witnesses cases, he nevertheless properly in my view did an

⁴ See also *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H)

⁵ *S v Zvimbovora* 1992 (1) ZLR 41 (S)

S v Mutandi 1996 (1) ZLR 367 (H)

R v Mokoena 1956 (3) SA 81 (A)

S v Magodo 2017 (1) ZLR 294

appropriate evaluation of the state witnesses and arrived at an appropriate decision. I am convinced the state managed to prove its case beyond reasonable doubt and the conviction of the appellant by the court *a quo* is unassailable. The appeal against conviction has no merit.

On the aspect of sentence the appellant submitted that the sentence is disproportionate to the gravity of the offence. It is true that the court *a quo* passionately sensationalised its feeling about the helplessness of the complainant in court. The fundamental purpose in sentencing first offenders should be rehabilitation and reform. Imprisonment should be the last resort.⁶ A sentencing court should first explore non-custodial forms of sentence before imposing imprisonment which is a rigorous punishment that should be resorted to only in the absence of any other suitable forms of sentence.⁷ However, a fine will trivialise the otherwise serious offence committed by the appellant. Accordingly the appeal against custodial sentence will succeed. The sentence of the court *a quo* is set aside and substituted by the following:

12 months imprisonment of which 3 months imprisonment is suspended for 2 years on condition accused does not during that period commit any offence involving violence. The remaining 9 months imprisonment is wholly suspended on condition accused performs 315 hours community service at Marange High School.

The record is remitted to the trial magistrate to liaise with the defence counsel on the date of commencement of community service and other related issues.

MWAYERA J agrees_____

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

⁶ See *S v Gumbo* 1995 (1) ZLR 163

⁷ *S v Bonda* HH 67/2010

S v Magaya HB 12/03