RIVALDO KHUMALO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHAREWA AND KABASA JJ
BULAWAYO 10 JANUARY 2024

Criminal Appeal

R. Ndlovu, for the appellant
S. Moyo, for the respondent

KABASA J: - This is an appeal against conviction and sentence. The appeal was heard on 10 January 2024 and we dismissed it in its entirety in an *ex tempore* judgment.

We have now been asked for written reasons and these are they: - The appellant appeared before the Regional Court charged with contravening section 47 (a) (b) as read with section 189 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. It was alleged that on 15 August 2021 the appellant in the company of four others were at 19453 Cowdray Park Bulawayo and so was the complainant. An altercation ensued and the appellant acting in concert with the other four individuals assaulted the complainant with booted feet, clenched fists and a machete. The others fled but the appellant was apprehended at the scene.

The appellant pleaded not guilty. In his defence he explained that he was not denying the charge but this was a fight between him and the complainant. After hearing evidence from three state witnesses the court *a quo* dismissed the appellant's story and was satisfied the witnesses were credible. There was no fight but the complainant was assaulted with unknown weapons and bricks in an attempt to rob him. The savage attack resulted in the complainant sustaining severe head injuries and he suffered irreversible brain damage. The court was satisfied the appellant and those he acted in concert with intended to kill the complainant. The appellant was convicted of attempted murder and sentenced to 8 years imprisonment of which 2 years were suspended for 5 years on the usual condition of good behavior.

Aggrieved by the conviction and sentence, the appellant noted an appeal to this court. As against conviction the appellant raised 3 grounds of appeal and 2 grounds against sentence.

At the hearing of the appeal and in response to a question by the court, *Mr Ndlovu* for the appellant accepted that the 1st and 2nd grounds of appeal against conviction were essentially the same. Counsel proceeded to abandon the 2nd ground effectively leaving two grounds of appeal.

The conviction was attacked on the following grounds:-

1. The learned Regional Magistrate grossly erred and misdirected himself in accepting the testimony of the complainant when direct evidence was led to the effect that the complainant suffered from mental disorder as a result of brain damage and was a patient of Ingutsheni hospital.

2. The learned Regional Magistrate grossly erred and misdirected himself in finding that the appellant acted in common purpose with other people in assaulting the complainant when no evidence was led to prove such. The learned Regional Magistrate erred in failing to consider and apply the provisions of section 196 of the Criminal Law (Codification and Reform) Act. [Chapter 9:23].

As regards sentence the appellant attacked it on the following grounds:-

1. The learned Regional Magistrate's sentence of an effective six (6) years imprisonment is manifestly excessive, unjust and induces a sense of shock considering the sentencing trends for the same offence and also considering that the appellant's young co-accused was sentenced to an effective 3 years imprisonment.

2. The learned Regional Magistrate grossly erred and misdirected himself in finding as aggravating that the offence was committed in the process of robbing the complainant when there was no sufficient evidence led to prove such.

It is trite that an appellate court can only interfere with the trial court's findings of credibility and facts if such findings are so outrageous in their defiance of logic that no reasonable person properly applying his mind to the question to be decided would arrive at

such a conclusion. (*Barros & Another* v *Chimpondah* 1999 (1) ZLR 58 (S), *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664)

The assessment of witnesses' credibility is par excellence the province of a trial court (*S* v *Zulu* HB 52-03, *S* v *Shoko* S 118-92, *S* v *Mbanda* S 184-90)

In *S* v *Mlambo* 1994 (2) ZLR 410 (S) GUBBAY CJ succinctly put it thus:-

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense."

The trial court was satisfied the complainant was a credible witness. The complainant recalled the events of this day or night rather and was able to identify the appellant and two others. Before he was attacked the assailants asked "Is that not Ben" and proceeded to say if it was Ben then he should just give them money. He fled but was pursued and just before he reached his place of residence he was attacked. He could not recall what happened thereafter as he came to when he was in hospital.

When this witness testified he could recall clearly the events of that night up to the time he was attacked. The injuries he sustained resulted in irreversible brain damage.

Was he however mentally disordered such that he could not testify in court? Section 246 of the Criminal Procedure and Evidence Act, Chapter 9:07 provides that:-

> "No person appearing or proved to be afflicted with idiocy or mental disorder or defect or laboring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability."

In *S* v *Mbizi* S 184-84 the Supreme Court held that mental defectiveness is a question of fact to be determined on the basis of expert medical evidence. There was no such expert medical evidence to support the contention that the complainant was suffering from a mental disorder. On the contrary the record showed that he was aware of what happened to him which led to the condition he now suffers from requiring medical treatment. He was clear on the events that transpired before the attack and had identified his attackers before that attack.

The court *a quo's* findings can therefore not be faulted. The findings were within reason and not in defiance of common sense.

The first ground of appeal therefore lacked merit and was dismissed. In any event evidence from a neighbor and the complainant's wife corroborated the complainant's story as regards the attack and the identity of the attacker. These witnesses may not have witnessed the attack but they went to the scene and the appellant was not able to make good his escape. The complainant lay motionless and people who had gathered believed he was dead. The wife however attended to him as best she could, keeping him warm with a blanket until he started making feeble movements signifying that he was still alive. Stones with blood were at the scene, near where the complainant lay, indicative of the fact these stones were among the weapons used to assault him. This narration explained the complainant's inability to recall how he was attacked as he only came to when he was in hospital.

The appellant did not dispute inflicting these injuries but said they were inflicted as the two were fighting, a story dismissed by the trial court. With the finding of credibility regarding the complainant, the dismissal of the appellant's story is supported by the evidence.

The appellant was charged with four others but two of them were discharged at the close of the state case. The three who were convicted were the three the complainant identified. His identification of the three was accepted by the court as these were complainant's friends. This speaks to the lucidity of the complainant and supports the trial court's findings of credibility. The trial court found that these three acted in common purpose.

The appellant admitted as much under cross-examination.

Section 196 A of the Criminal Law Code [Chapter 9:03] provides that:-

> "(1) If two or more persons are accused of committing a crime in association with each and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator."

In casu the appellant admitted assaulting the complainant albeit proffering the story that the two were fighting. The complainant's evidence disproved that fight and indicated that such attack was preceded by the assailants identifying who he was and deciding that he should just give them money.

To argue that there was no evidence to prove common purpose as counsel sought to, appears to be a failure to appreciate the nature of the evidence and its import.

The appellant was shown to have acted in common purpose with the others. The criticism levelled against the trial court has no merit.

The second ground of appeal was accordingly dismissed.

Turning to the appeal against sentence, *Mr Moyo*, counsel for the respondent submitted that the co-accused who was sentenced to 5 years with 2 years suspended was a teenager. The differentiation in sentence was therefore anchored on the age difference. There was therefore no violation of the right to equality. *Mr Ndlovu* equally acknowledged that this co-accused was youthful. It is that youthfulness which led to the differentiation in sentencing.

Sentence is pre-eminently a matter for the trial court and the trial court's exercise of discretion ought not to be fettered unless the exercise of discretion is afflicted by a misdirection.

In *S* v *Ramushu & Ors* S 25-93 GUBBAY CJ had this to say:-

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate." (See also *S* v *Msindo & Ors* HH 25-02)

After holding that the 18 year old (17 at time the offence was committed) was still young and had prospects of doing better in life the court settled on 8 years with 2 years suspended for the 22 and 25 year olds whilst the juvenile received 5 years imprisonment with 2 years conditionally suspended. Such reasoning cannot be faulted.

The trial court also considered that the appellant and his co-accused had wanted money from the complainant. The words spoken before the attack clearly exhibited the motive behind the attack. The trial court was therefore correct to consider that the circumstances revealed an attempt to rob the complainant. Such an observation is supported by the evidence. There was therefore no misdirection in considering this in aggravation.

The sentence of 8 years with 2 years suspended was within the trial court's discretion and without a finding of misdirection, this court could not interfere with the sentence.

In arriving at that sentence the trial court said:-

> "The attack on the complainant was barbaric and uncalled for given that the complainant had not provoked you in any way. As a result of the attack on the complainant he has suffered irreversible brain damage. His personality and life has slightly changed. He is now a psychiatric patient as a result of the head injuries he suffered during the brutal and savage attack on him."

These observations cannot be faulted and were not plucked from the air. The sentence imposed was appropriate in the circumstances.

It is for the foregoing reasons that the appeal was found to be without merit and was accordingly dismissed in its entirety.

Kabasa J……

Charewa J……. I agree