HB 194/17
HCA 229/15

MELODY ANNA MARUFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & MAKONESE JJ
BULAWAYO 19 JUNE 2017

Criminal Appeal

M. Ncube for the appellant
T. Mudima for the respondent

KAMOCHA J: After hearing counsel for both parties this court held that the conviction of the appellant was proper and was consequently confirmed. The appeal against conviction was dismissed.

In respect of the appeal against sentence the court held that there were merits in the appeal and upheld it. The respondent's counsel did not support the sentence imposed by the court *a quo*. The concession was proper, in this court's view.

Accordingly the sentence was set side and substituted with the following which in the circumstances the court felt would meet the justice of the case.

Fined: $300 or in default of payment 3 months imprisonment.

The court indicated that reasons would follow. These are they.

Appellant was charged with the crime of contravening 27 (c) of the Criminal Law (Codification and Reform) Act [Chapter 10:05] (*sic*) Negligently or Recklessly Discharge a firearm or cause or permit a firearm to be discharged.

In that on the 10th of October 2013 and at ZRP Hillside Charge Office Bulawayo Melody Anna Marufu unlawfully and negligently or recklessly discharged a firearm that is to say Melody

Anna Marufu squeezed the trigger of a cocked Norinco 9mm pistol and shot Thabiso Moyo contrary to the said Act.

She tendered a plea of not guilty but was convicted at the end of the trial despite her protestation. She was then sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition that she did not commit any other offence involving an element of negligence for which upon conviction she would be sentenced to imprisonment without the option of a fine.

Aggrieved with the decision of the court she appealed against both conviction and sentence on the following grounds.

"**Ad conviction**

(1) The court *a quo* erred and misdirected itself at law by trying, convicting and sentencing the appellant on a wrong and incompetent charge under Criminal Law and Reform Act [Chapter 9:23].
(2) The court *a quo* erred and misdirected itself in law by refusing the appellant's request for postponement due to non availability of his (*sic*) erstwhile legal practitioner who was allegedly engaged elsewhere in a higher court, and thereby infringing on the appellant's constitutional right to be represented by a legal practitioner of her choice.
(3) The court *a quo* further erred and misdirected itself in law by failing to ensure assistance of an unrepresented accused to call her own defence witnesses and thus infringed her constitutional right to a fair trial.
(4) The court *a quo* erred and misdirected itself in accepting opinion evidence on non-expert-ordinary police officers on firearms and relying heavily on such opinion to convict the appellant.
(5) The court erred in law and fact by dismissing the averment by the appellant that she did not carry out safety precautions because she was not trained in the use of this particular firearm which at law amounted to a complete defence.
(6) The court further erred in fact by disregarding the need to establish what safety precautions had to be taken and ignoring the fact that the appellant was handed a loaded firearm by her superior who should have first carried out safety precautions himself before handing over the firearm.
(7) The court *a quo* thus erred in finding as it did that the state had managed to prove its case beyond a reasonable doubt when it had in fact failed to do so.
(8) Alternatively, in the event that this honourable court finds that the appellant's conviction was unassailable he (*sic*) appeals on the following grounds against sentence:-

Ad sentence

(9) The court *a quo* erred and misdirected itself in the exercise of its sentencing discretion by imposing an excessive sentence which is so severe as to induce a sense of shock in the circumstances.
(10) The court *a quo* erred by paying lip-service to such factors as the factors as the fact that the appellant is a first offender, with 4 minor children and heavy family responsibilities, the loss of employment as a consequence of imprisonment and had been injured in a traffic accident.
(11) The court *a quo* erred in placing undue weight on the seriousness of the injuries sustained by the complainant.
(12) The court *a quo* erred in totally ignoring and disregarding the apparent selective prosecution and negligence of the appellant's superior who handed over the loaded firearm without taking safety precautions.
(13) The court *a quo* erred and misdirected itself in regarding imprisonment to be the only and last option instead of considering other non-retributive options like community service or payment of a fine.

WHEREFORE, it's the appellant's prayer that his (*sic*) conviction be quashed and his (*sic)* sentence set aside or alternatively, that in the event that this court finds the conviction unassailable his (*sic*) sentence be substituted with a now (*sic)* custodial one."

The indictment in this case cannot be said to be insufficient and incompetent because it cites section 27 (c) of the Criminal Law (Codification & Reform) Act [Chapter 10:05] instead of the Firearms Act (Chapter 10:09). The description in the charge relates to section 27 (c) of the Firearms Act. The indictment clearly states that she negligently or recklessly discharged a firearm or cause or permit a firearm to be discharged on 10 October 2013 at ZRP Hillside Charge Office thereby shooting Thabiso Moyo. The mistake to cite the Criminal law (Codification and Reform) Act instead of the Firearms Act is not an omission or imperfection which can render the indictment invalid. See section 172 (a) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The record of proceedings shows the appellant and her legal practitioners sought postponements which were granted by the court. The legal practitioners were in the habit of coming to court late leading the trial magistrate to suspect that the legal practitioner Mr *C. Dube* was trying to buy time. There were times when the appellant appeared in court without her legal practitioner with no acceptable explanation. The complaint that appellant was denied a fair trial

because she was not assisted by the court to call her defence witness is also untenable. The record reveals that on 17 November 2015 and 11:15 hours the appellant's legal practitioner requested for the matter to be postponed to 25 November 2015 in order for him to secure the attendance of two witnesses. The request was granted. On 25 November 2015 Mr *Sengweni B* who was standing in for Mr *C. Dube* had this to say:"I have instructions from Mr Dube to close the defence case as we have failed to secure the attendance of our witnesses, we will file written submissions."

The appellant adhered to her defence outline as evidence in chief. Her story was that the firearm in question was recovered by Assistant Inspector Chagunda who brought it to the station without doing safety precautions to unlock it. She alleged that the firearm was handed over to her by Sergeant Mutika who also should have done safety precautions. When she sought to do the papers to secure the firearm she called Sergeant Mutika to come and do the safety precautions for her. She stated that she only received it and put it on the charge office counter, whilst calling Sergeant Mutika to do the safety precautions and it discharged on its own. She denied that she squeezed the trigger or anything contributing to that. She also denied being negligent in any way – contending that the responsibility to do safety precautions lay with the person who received the weapon at the station. She further contended that according to the Police Standing Orders 1012 Article 54.3, it was the responsibility of the person handing over the weapon, sergeant Mutika to prove that the weapon was not loaded and that was not done.

In conclusion, her legal practitioner said something difficult to understand as follows:- "She will deny any accidental discharge of the weapon and she prays that she be found warned and acquitted."

The main issue in this matter was whether or not the appellant was in any way negligent. The trial court found that she was not only negligent but her negligence was gross. The evidence against her was led from nine witnesses. Their evidence revealed that the appellant went into the charge office, in which there were six or seven police officers, while she was carrying two firearms. She placed them on the counter as she wanted to do a handover takeover. She had

started to write information in the occurrence book when Sergeant Mutika walked in and noticed that the hammer of one of the weapons was up meaning that the firearm was corked. The sergeant brought that to the attention of the appellant and told her to go out and do safety precautions. The appellant said she would do that after she had finished entering information in the occurrence book. She had not done the safety precautions outside before she entered the charge office full of people. When she was through with recording information in the occurrence book, she took the firearm and it fired a bullet which injured the complainant. The officers who were in the charge office including the appellant ran out. She had dropped the weapon to the ground. The evidence established that all police officers were trained to take safety precautions whenever they received a firearm from someone or whenever they find a firearm. The appellant was remiss when she took the firearm in her possession without doing the precautions outside. The trial court held that she was negligent by failing to do what she was expected to do. The court further held that her negligence was beyond ordinary negligence when regard is had to the fact that Sergeant Mutika warned her that the hammer of the firearm was up meaning that it was loaded and that she should go out and do the safety precautions but she decided to continue entering information in the occurrence book. She was there for 30 minutes or so. The court assessed her negligence as gross. Her legal representative did concede at the end that she was negligent but complained that Sergeant Chagunda who instructed her to collect the weapons should have been jointly charged with her. The court a quo still came to the conclusion that she was being prosecuted for her negligence which resulted in serious injuries to the complainant.

This court, in the result, held that the conviction was proper and dismissed the appeal against it.

Ad sentence

The trial court fell into error by holding that imprisonment was the only appropriate sentence in the circumstances. The sentence it imposed was less than 24 months imprisonment. The sentence of 18 months could have been suspended on condition of future good behaviour

and community service. Even a heavy fine would have been an appropriate punishment in the circumstance.

The respondent's counsel did not support the sentence imposed by the trial court. The concession was properly made in my view. In the result the appeal against sentence was upheld. The sentence was set aside and replaced with one of:

"$300 or in default of payment 3 months imprisonment."

Makonese J ……..I agree

Messrs Ndove, Museta & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners