(Reportable)

MUCHIHWANDE FORBES SITHOLE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 12 June 2017 & 21 May 2018

Criminal Appeal

L Madhuku, for the appellant
I Muchini, for the respondent

CHATUKUTA J: This is an appeal against both conviction and sentence. The appellant was convicted after contest of 2 counts of contravening s 89 (1), one count of contravening s 93 (1) and one count of contravening s 189 (1) and s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Counts 1 and 2 were taken as one for sentence and appellant was sentenced to $200 in default of payment to 4 months imprisonment. He was sentenced to 2 years imprisonment for count 3 of which 6 months were suspended on condition of future good behaviour. In respect of count 4, he was sentenced to 6 years imprisonment of which 2 years were suspended on condition of future good behaviour.

Aggrieved by the conviction and sentence, appellant filed the present appeal. The following are the grounds of appeal against conviction, in the main that:

(a) the court *a quo* erred by disregarding the appellant's defence of *alibi* and relying on uncorroborated evidence of a single witness;
(b) the court *a quo* disregard appellant's version of events which were reasonable and possibly true; and
(c) the court *a quo* erred in applying the common purpose principle where the appellant's alleged accomplice was still at large and had not been charged or convicted.

Regarding sentence, the appellant contended that the court *a quo* erred by splitting counts 3 and 4 where they were one act. Further, the court disregarded mitigating factors and in the end resulted in imposing a severe sentence which was gross and outrageously harsh.

The following facts were found to have been proved:

The appellant was employed by the National Prosecuting Authority as a prosecutor and based at Beitbridge Magistrate Court. On 8 September 2015 there was a break-in at his house and various items of clothing, grocery and linen were stolen. Appellant reported the break-in to the police. On 15 September 2015, he received information that the complainants in the first two counts (Clemence Moyo and Knowledge Mike) were at the flea-market near Dulibadzimu Bus Terminus selling property similar to that stolen at his house. He proceeded to the flea market and upon arrival he saw the two complainants and identified football boots in their possession as his stolen property. He effected a citizen arrest with the assistance of two unidentified men and in the process assaulted the complainants at the flea-market. He ordered the complainants into his car and drove to the latter's residence. On the way, the appellant continued to assault the trio giving rise to the first two counts. The complainants implicated one John Mavaya as the one who had given them the boots. They led the appellant to Dulibadzimu Bus Terminus where one John Mavaya was apprehended. The three were subsequently handed over to the police. The three were taken to court on 17 September 2015 facing allegations of unlawful entry. John Mavaya pleaded guilty to and was convicted of unlawful entry into the appellant's house. He disclosed to the appellant that part of the stolen property was in the custody of Gabriel Choruwa, the complainant in the 3rd and 4th counts. Gabriel Choruwa resided with the first two complainants at the same house at 1568 Dulibadzimu.

On 22 September 2015, the third complainant proceeded to the appellant's office having been invited telephonically to the office by appellant. Upon arrival, the appellant referred him to an unidentified man who was sitting in the courtyard. The man started interrogating the complainant as to who had broken into the appellant's house. The man was joined by two other men. The three took the complainant into the appellant's vehicle and drove into a bushy area along the Beitbridge – Bulawayo road where they severely assaulted the complainant. The complainant was taken to the appellant's home where he was subsequently handed over to the appellant who took him to Beitbridge police station in the company of Detective Tauya, a

female police officer based at Beitbridge police station and the appellant's neighbour. The complainant sustained impaired renal function as a result of the assault.

The appellant denied the allegation. His defence was that following the break-in at his home, he distributed notices in public places with information of the stolen property, his contact details and those of the police. The first two complainants were apprehended by persons unknown to him. He only became aware of the arrest of the two complainants following a telephone call from the police inviting him to come and identify his stolen property which had been recovered from the complainants. He did not go to the flea-market or to apprehend John Mavaya. The two complainants led to the arrest of the 3rd complainant who later pleaded guilty to the charges of unlawful entry into his house. Regarding the arrest of the 3rd complainant, it was his defence that the complainant was apprehended by some men who advised him that they had left the complainant at his house which was adjacent to his offices. He contacted Detective Tauya to come to his house. When he arrived at his house, the men handed over the complainant who had problems walking and had blood on his clothes. The complainant upon inquiry as to his injuries, told the detective that he had been assaulted by some persons known to him but not present among those who were at appellant's house. The appellant drove Detective Tauya Ruramisai and the 3rd complainant to the police station, leaving the men behind.

The issue for determination is whether the trial magistrate erred in accepting the complainants' evidence and disregarding the appellant's evidence. The trial magistrate's decision was based on his findings that the state witnesses were credible while the appellant was not. The court pitted the evidence of the appellant against that of the complainant.

The trial magistrate observed at p14 of the record of proceedings that:

> "The ordeal according to both witnesses took a considerable amount of time in broad day light. Discrepancies are not necessarily an indication of falsehood on the part of a witness. This court will also not ignore the fact that Clemency Moyo is visually impaired while Knowledge has sight. Due to their different senses of perception it cannot be supposed that their evidence must be in line throughout. It will also be noted that Knowledge Mike was in an awkward position in the vehicle."

He further observed at p15 that:

> "The circumstances surrounding the assault charges and the evidence placed before the court does not suggest to this court that there is a risk of false incrimination or false allegations against the accused. I make the observation on the following basis:-
> Clemence Moyo and Knowledge Mike are ordinary, simple and unsophisticated folks who hold no authority to have entertained any desire to take accused head on during their ordeal, hence their total submission."

It is trite that the determination of the credibility of witnesses remains the domain of the trial court. An appeal court will interfere with the findings of a trial court on the credibility of witnesses only where the findings are not supported by the evidence adduced during the trial. (See *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62E-H to 63 D and *S v Hollington & Anor* 2002 (2) 163.) At the same time, in order for an accused's defence to be rejected, the state must show beyond a reasonable doubt that the defence is not reasonably probable. As stated in *S* v *Makanyanya* 1996 (2) ZLR 231 (H) at 235 E-G: GILLESPIE J observed:

> "Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, still, the fact that such credence is given in testimony for the State does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

Contrary to the observations by the trial magistrate on the credibility of the state witnesses, the evidence given by the witnesses was manifestly unreasonable and a cause for doubting their credibility. Clemence Moyo and Knowledge could not be said to be "simple and unsophisticated folks" who had no cause to falsely incriminate the appellant. The same cannot be said of Gabriel Choruwa the third complainant either. All the three complainants were linked to the unlawful entry into the appellant's house. The first two complainants had been found in possession of property stolen from the appellant's house. The witnesses led to the arrest of John Mavaya who led to the arrest of the 3rd complainant. John Mavaya was ultimately convicted on his own guilty plea for unlawfully entering the appellant's house and stealing the appellant's, property. Their motive to lie is quite apparent and should have put the court on its guard on their credibility.

The appellant testified that he received a call from the police advising him of the arrest of the first two complainants. Any diligent investigating officer and prosecutor would have known that it was prudent to have a call history of the appellant's phone to trace the calls to and from the appellant's phone. The complainants alleged that they were apprehended and assaulted by the appellant in a public place yet the State did not call any independent witness who witnessed the assault. No evidence was adduced why the police did not identify any independent witnesses yet this is a case that cried out for independent witnesses because of the

appellant's station and the apparent links of the complainants to the unlawful entry into the appellant's house. The court ought to have questioned in its reasons for judgment the absence of any independent witnesses.

The dangers of proceeding as the court did without the benefit of evidence from independent witnesses were considered in *S* v *Temba* SC-81-91 where MCNALLY JA observed at p 2 that:

> "I have drawn attention before to the tendency of prosecutors and investigating officers to adopt what I have called the "boxing match approach" to criminal prosecutions. By this I mean the tendency, especially in assault case, to throw the two protagonists into the ring with magistrate as referee. At the end of the bout the magistrate awards points of demeanour and probability, and name the winner, who is usually the complainant.
> …….
> This is a very dangerous approach, more especially in assault cases. The reason is obvious. A physical struggle between two people always has a cause. Each party will almost invariably give a different cause for the struggle. **It is impossible to decide without the evidence from by-standers, which version is true. But it is even more complicated than that. Usually neither version is entirely true.** Each party will tend to minimize his own role, and exaggerate that of his opponent. So it is not who is telling the truth, but how much of the truth is being told by each of them." (own emphasis)

Whilst in *S* v *Temba* the court was dealing with a case where it was common cause that there was an altercation between the accused and the complainant, in the present case the appellant denied having been present at all hence the need to have been even more cautious in accepting the evidence of the complainants.

The credibility of the witnesses is even more questionable on further analysis of the evidence. The first complainant is visually impaired. However, he testified that he was able to identify that it is the appellant who assaulted him when he was initially apprehended. He attempted to explain that he was able to identify the appellant by his stature. However, he was not known to the appellant and his explanation that he was able to distinguish the appellant from the other men was not satisfactory. He lied to the persons who accosted him that he had purchased the boots from South Africa. He admitted lying and testified that he was given the football boots by John Mavaya to play football. He again could not explain why he did not tell the truth when he was apprehended. He was found in possession of not only one pair of boots but three pairs of different sizes. At the time he was apprehended he was selling the boots at a flea market and was not playing or going to play football. The explanation by the complainant was clearly incredible under the circumstances. That is not to say that visually impaired persons do not play football. The least that the investigating officer should have done was to investigate

if indeed the complainant played football and why if he had been given the boots to play football he was selling them.

The second complainant did not fare well either. The complainant could not describe the three men who confronted them at the flea-market. Despite being visually impaired, the first complainant was able to give a better description than the second complainant who had his full sight. The second complainant initially testified that it was the first complainant who knew where the boots had come from. However, he later testified that on 9 September 2015 he in fact had assisted John Mavaya to pack football boots at their house for delivery to Mutare and he is the one who addressed the package. This was just five days before they were apprehended at the flea market on 14 September 2015 yet he had sought to mislead the court that he had no knowledge of the origin of the boots. He was aware of the dispatch of the boots to Mutare and was assisting the first complainant to sell the other boots.

The first complainant testified that one of the men who approached them at the flea-market and who phoned the appellant called the person at the end of the line by name, that is the appellant's name, Sithole. The second complainant testified that the person at the other end was only referred to as "Boss" and not by the name "Sithole". The first complainant testified that when they were bundled into the appellant's vehicle, it is the second complainant who gave directions where to find John Mavaya. The second complainant testified that it was the visually impaired first complainant who gave the directions. The first complainant testified that he was seated in the back of the appellant's vehicle together with the second complainant when they left the flea-market. The second complainant said that the first complainant was seated at the front. The second complainant testified that the appellant came with one Mberesi. It appears Mberesi was known to both complainants. The first complainant made no mention of one Mberesi as having come with the appellant.

Turning to the third and fourth counts, it is not in issue that the third complainant was kidnapped and was severely assaulted by unknown assailants. What is in issue is the complainant's role in the assault. The state evidence does not establish that the appellant was present when the third complainant was kidnapped and later assaulted. The trial magistrate relied on circumstantial evidence. It was the complainant's evidence that he was assaulted by two men at the behest of the appellant. It was contended that the actions of the appellant before and after the kidnapping and attempted murder of the complainant reflected that the appellant acted in common purpose with the actual perpetrators. The basis upon which the appellant was

convicted was therefore that the appellant had acted in common purpose with unknown accomplices. On the other hand the appellant disputed any involvement in either the kidnapping or the assault. He contended that there were contradictions in the evidence of the State witnesses which rendered their evidence not credible. He further contended that since the two men have not been accounted for, the appellant cannot be held liable. In support of this proposition, he relied on s 197 of the Criminal Code before its amendment under the General Laws Amendment Act, 2016 (Act NO. 3 of 2016).

I will proceed to deal with the last issue first.

Section 197 of the Code reads as follows:

> "(1) Subject to this part, as accomplice shall be guilty of the same crime as that committed by the actual perpetrator whom the accomplice incited, conspired with or authorised or to whom the accomplice rendered assistance.
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> (2) An accomplice may be found guilty of the crime committed by the actual perpetrator whom the accomplice hated, conspired with or authorised or to whom the accomplice rendered assistance, even if-
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> a) the accomplice lacks the ability or capacity to commit the crime himself or herself, or
> b) The accomplice is only aware of the fact that the conduct of the actual perpetrator is unlawful but unaware of the nature of the crime being committed or to be committed by the perpetrator, or the manner in which it is committed; or
> c) The actual perpetrator is unaware of any assistance rendered by the accomplice."

The *locus classicus* in respect of the doctrine of common purpose is the case of *S* v *Mubaiwa & Anor* 1992 (2) ZLR 362 (S) in which it was stated in the Headnote at 363 E-F;

> "For the doctrine of common purpose to apply in case of murder or attempted murder it would have to be proved that the accused did something to associate himself with the actions of the person who actually did the killing or attempted to do so, knowing that the other person intended to kill or foreseeing the possibility that he intended to kill."
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> (See *S* v *Chauke & Anor*. 2000 (2) ZLR 494 (S) at 497 A-B.)

In *S* v *Banda & Ors* 1990 (3) SA 466 Friedman J observed at 497 that:

> "Simplistically construed, the doctrine provides that, if two or more persons decide to embark on a joint unlawful activity, the acts of one are imputed to the other(s) which fall within their common purpose. See Du Toit and Others *Commentary on the Criminal Procedure Act* para 22-10; *R* v *Duma and Anor* 1945 AD 410 at 415; *R* v *Shezi and Others* 1948 (2) SA 119 at 128."

MOSENEKE J sets out in *S* v *Thebus* 2003 (6) SA 505 (CC) the two categories of the liability requirements of a joint criminal enterprise under the common law principles. He remarks:

> "[18] The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. *Burchell and Milton* (at 393) define the doctrine of common purpose in the following terms:
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> > "Where two or more people agree to commit a crime or actively associate in joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime."
> >
> > Snyman (Criminal Law 4th Ed at 261) points out that "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others." These requirements are often couched in terms which relate to consequence crimes such as murder.
> >
> > [19] The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind. In the present matter, the evidence does not prove any such prior pact"

The State must therefore prove the existence of an agreement between the perpetrator and accomplice that the accomplice rendered some form of assistance with the intention to assist in the commission of some unlawful conduct. In the absence of such an agreement, the accomplice must have actively associated with the perpetrator. There must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator it be by agreement or active association. Ordinarily, it is easy to prove the assistance and intention where the actual perpetrator is also brought before the court. However, it is my view that s 197 has never been a bar to the prosecution of an accomplice in the absence of the co-perpetrator. In the absence of the actual perpetrator of the offence, the intention and assistance can be deciphered from circumstantial evidence.

Section 197 was amended under Act NO. 3 of 2016 with the deletion of subsection (2) and substitution thereof with:

> " (2) For the avoidance of doubt, it is declared that an accomplice to the commission of a crime is liable to be charged and convicted as such even where:-
> a) the actual perpetrator is produced as a witnesses on behalf of the prosecution; or for any reason, it has not been possible to bring the actual perpetrator to trial."

The new amendment is in my view a mere rehash of the law on the common purpose principle. All it does is to specifically state the law that it is not necessary to bring the actual perpetrator to trial in order to convict an accomplice. The argument by the appellant that he ought not to have been convicted in the absence of the actual perpetrators lacks merit.

Turning to the question whether or not the state evidence established that the appellant was indeed an accomplice, the trial magistrate concluded that the state had made out a proper case warranting the conviction of the appellant based on the doctrine of common purpose. His conclusion was based on his findings that the evidence of the state witnesses was credible. The trial magistrate however did not give due regard to the contradictions in the evidence of the witnesses and the reasonableness of the appellant's explanation that he did not play any role in the commission of the offences.

SANDURA JA (as he then was) in *Edward Chindunga v The State* SC 21/02 held that:-

> "Finally, I wish to deal with the law very briefly. In my view, the appellant gave a reasonable explanation of what he did during the night in question. That explanation cannot be rejected out of hand.
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> As I said in *S v Kuiper* 2000(1) ZLR 113(S) at 118B-D:-
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> "The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373, the learned judge said:-
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> > '... no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ..."

Similarly, in *R v M* 1946 AD 1023, DAVIS AJA said the following at 1027:

> "And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true ..."

(See *S* v *Makanyanga* 1996 (2) ZLR 231 and *S* v *Katsiru* 2007 (1) ZLR 367 (H)).

The complainant testified that some groceries had been taken from his home on allegations that they were part of the goods stolen from the appellant's house. The appellant called him on the phone and invited him to his office on 21 September 2015 to come and collect his goods. He went to the office in the company of one Innocent Moyo and was told to return the following day. He returned the following day whereupon he was later kidnapped and assaulted. The appellant testified that on 21 September 2015 he went to Messina and returned

around 9 pm and he therefore would not have met the complainant. He produced as proof thereof a copy of the pages of his passport with the relevant date stamps for entry into and exit from South Africa. On 22 September he was at work when he was advised by some young man that his property had been recovered and the suspect was outside.

In the first place and as alluded to earlier, the complainant, Gabriel Choruwa, had been implicated by John Mavaya as having been involved in the unlawful entry into the appellant's house. He therefore, as the first two complainants may have had a reason to falsely implicate the appellant. The trial magistrate weighed heavily on the complainant's account that he had the appellant's telephone number and gave some description of the appellant's vehicle and the registration number of the vehicle. He in the process discounted the appellant's evidence that the appellant was well known in Beitbridge and that he had inscribed his telephone number on notices placed in public places around Beitbridge. The complainant was a resident of Beitbridge. He would therefore have been able to recite the telephone number from the notices and described the appellant's vehicle after it had been used to ferry the complainant to the police station. In fact the complainant had difficulties in describing the appellant's vehicle saying it was a twin cab which it is not. His evidence was that he recalled the registration number of the appellant's vehicle as he had saved the number in his phone. This was contradicted by Jabulani Chigudu who testified that the appellant recalled the number from head. The complainant testified that he saved the number on his cell phone because he suspected that he would require the number in future. However, when he was taken away by the two men from the appellant's office he left willingly believing that he was going to get his goods. According to his evidence there was no cause for him to suspect that anything untoward was going to happen to him.

The complainant testified that he told Tauya Ruramisai that he had been assaulted by some youths. His evidence in that respect was corroborated by Ruramisai which in turn corroborated the appellant's evidence. Despite there being two men present with the complainant when Ruramisai went to appellant's home, the complainant did not identify the two men, how they came to be there with him and if they were his assailants. Even during trial the complainant remained silent about these two men. The complainant may not have been able to disclose the assailants whilst still at the appellant's home but surely could have been able to do so at the police station. It is not even clear from the record when he made his complaint of kidnapping and attempted murder.

The complainant testified that when he was brought to the appellant's home, the appellant arrived and placed him in the corridor of his house. He assumed the appellant did not want members of the public to see him as he was severely injured. However Ruramisai testified that she found him lying outside the house and not in the corridor. The other contradiction between the complainant and Ruramisai's evidence relates to where the two were seated in the appellant's vehicle when they went to the police station. The complainant testified that he sat in the front passenger seat, between the appellant and Ruramisai. Ruramisai however testified that she was with the complainant in the back seat of the vehicle.

The evidence of Tauya Ruramisai appears not to be credible. Her evidence was that when she arrived at the appellant's house, there were two men who were present. The complainant explained to her that he had been assaulted by some youths despite his testimony in court that he had been assaulted by two men at the instance of the appellant. She however did not consider it necessary to inquire how the complainant had arrived at the appellant's house. She did not record the names of the men who were present with the complainant at the appellant's house. She however testified that she accepted the version by the appellant that he knew who had assaulted the complainant and would furnish her with their names. The appellant denied this evidence. In fact, Ruramisai testified that she saw one of the two men hanging around at appellant's residence two or three days after arrest of complainant. She still did not inquire after the men or advise the investigating officer. Any experienced and diligent police officer would have expressed an interest in the men and at least recorded their names if not asked them some questions as possible witnesses given the apparent injuries on the complainant. She was a Detective Constable attached to the Criminal Investigations Department and had served ten years in the force. That is a considerable period in the police force.

What is more confounding is the evidence of the investigating officer, Jabulani Chigudu. He had served in the police force for 20 years. Despite being the investigating officer, he did not visit the scene of the assault. He did not verify if the appellant was in the office the entire day on 21 September 2015. He did not call for the call history of the appellant's telephone to confirm the numerous telephone calls the complainant said were made by the appellant which the appellant denied. He appears not to have even made a follow up with the police officers whom the appellant alleged phoned to inform him of the recovery of his stolen property and the arrest of the complainants. This is a cause of concern where the appellant alleged that

calls originated from the police itself. It would have been simple for Chigudu to establish who was on duty at the time the calls are alleged to have made or who would have made the calls.

He further did not indicate that he interviewed Innocent Moyo to confirm if the complainant visited the appellant on 21 September 2015. Chigudu did not indicate in his evidence when the complainant implicated the appellant in the kidnapping and attempted murder charges. His evidence was that he initially followed up with the appellant for the names of the complainant's assailants whom the appellant had promised to avail. The appellant was therefore not a suspect at that stage. This gives credence to the appellant's evidence that there may have been a hand behind his prosecution.

This is bolstered by the fact that despite being the investigating officer, Chigudu's statement was only recorded between 2 and 4 April 2016. This was after trial had commenced on 31 March 2016 and 5 witnesses had testified. The appellant was served with the statement on 2 April 2016 (a Saturday) with the trial resuming on the following Monday on 4 April 2016. On 2 April 2016, the appellant's counsel objected to the procedure adopted that a statement was recorded and served at this late hour and more particularly that the recording of the statement was intended to assist the State to sanitise its case. He requested a postponement of the matter. Despite the protestations, the court ordered continuation of the matter on the Monday. Whilst the discretion whether or not to allow a postponement lies with the trial magistrate, the discretion must be exercised judiciously. Criminal proceedings must be conducted properly and fairly. Under the circumstances, the request by the appellant was not unreasonable. The appellant was compelled to proceed without having been given adequate time to consider Chigudu's statement and the import of the evidence therein contained. The trial magistrate in essence was affording the State a chance to spruce up its case. Such conduct was not in the furtherance of justice and was tantamount to a violation of the appellant's right to a fair hearing.

In what appears to have been deceitful conduct, it is common cause that Chigudu's statement was recorded as having been recorded on 22 January 2016 before commencement of trial yet it had been recorded on 2 April 2016.

The investigations appear to have been lackadaisical.

However comment is called for on one further aspect of this case. Even on the basis of the facts it found proved, the court *a quo* was clearly in error in finding that the assault on Gabriel was with the intention to murder him solely on the say so of the complainant in the

absence of the nature of the weapons used and non-attendance by police at the scene to ascertain whether or not weapons could be recovered and more particularly the contradictions in the medical reports. According to the medical reports produced by as exhibits, Gabriel was first examined on 24 September 2015, two days after his arrest. It can be assumed he was in custody during these two days. The doctor who examined him observed that Gabriel had suffered soft tissue injuries. He concluded that whilst the injuries were serious, there was no likelihood of permanent injuries. He was again examined on 4 October 2015 and on 23 December 2015 (ten days and over three month respectively) after the first examination. The doctors concluded that there was no possibility of permanent injuries. The State did not lead any evidence as to whether or not Gabriel received treatment upon arrest. If he did not receive treatment, it ought to have been a cause for concern for the trial magistrate that the complainant had not received treatment immediately in light of the evidence adduced on the perceived extent of the complainant's injuries when he was taken to the police by Ruramisai and the appellant. This evidence coupled with the fact that the police did not attend the scene of the assault in an attempt to recover the weapon used to assault the complainant put into issue the intention of the assailants and consequently the charge that ought to have been preferred against the appellant.

All in all, the trial magistrate ought to have been circumspect of the evidence of the three complainants as they were tainted by being found in possession of property stolen from the appellant's house or connected to the unlawful entry into the appellant's home. This connection to the unlawful entry would have put the trial magistrate on his guard and treat the witnesses with more diligence than would have been the case of an untainted witness. In fact the trial magistrate ought to have treated the evidence of the witnesses as it does the evidence of accomplice witnesses. The likelihood or danger of the complainants falsely incriminating the appellant to save themselves from prosecution was very high. The trial magistrate ought to also have queried and analysed in his judgment the quality of investigations conducted by the police.

The State cannot be spared from criticism for the manner it handled the trial. It is the responsibility of the prosecutor to ensure that the matter being presented has been properly investigated and all leads have been followed. In the event that there are issues to be investigated further, it is his/her responsibility to direct the police to attend to the issues.

The probability of the appellant having played an active role in the investigation of his own matter is evidenced by his posting notices all over Beitbridge. However, his evidence was not in the main controverted. The inconsistences in the evidence of the state witnesses were not minor or inconsequential both individually and in their totality. This dented the credibility of the witness rendering the appellant's defence that he did not assault the first two complainants and acted in common purpose with the third complainant's assailants reasonably probable. The court *a quo* ought to have therefore given the appellant the benefit of doubt and acquitted him.

Initially the State opposed the appeal. However, faced with the above inconsistences ultimately conceded, and rightly so, that the appeal was merited

In the result, it is ordered that:

1. The appeal be and is hereby upheld.
2. The conviction of the appellant be and is hereby quashed.

Zinyengere Rupapa, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners