NYASHA MUNGWASHU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 5 and 19 June 2019 and 25 July 2019

Criminal Appeal

P Nyakureba, for the appellant
M Musarurwa, for the respondent

MWAYERA J: The appellant was arraigned before the court *a quo* on a charge of obstructing or endangering the free movement of persons or traffic as defined in a 38(c) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state's contention being that on 15 January 2019 along Mutare – Burma Valley Road near Saburi Business centre, Chigodora both Lovemore Marima and Nyasha Mungwashu or one or more of them placed some scrap metals, logs and stayed on the road with the intention or realising that there was a real risk or possibility of obstructing the road or endangering free movement of persons or traffic. After a protracted trial the appellant was convicted and sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. The appellant's co-accused was discharged at the close of the state case and found not guilty and acquitted for want of evidence.

Dissatisfied with his conviction and sentence the appellant lodged the present appeal citing the following grounds of appeal.

A. CONVICTION

"1. …… the court *a quo* erred and grossly misdirected itself by convicting the Appellant on a balance of probability approach when in actual fact the state failed to prove its case beyond reasonable doubt.

2. Further the court *a quo* erred and grossly misdirected itself in disregarding in total the undisputed evidence of the defence witnesses proving that the state's single witness on the commission of the offence (Elias Mutiza) was acting maliciously against the accused person.

3. Further the court *a quo* erred and grossly misdirected itself by placing reliance on the single evidence of Elias Mutiza whose credibility it had earlier on held to be very low in the same matter.

B. SENTENCE

4. ….. that the trial court erred and grossly misdirected itself in its failure to treat the appellant' case according to its own circumstances and then impose a sentence based on the so called "taking of judicial notice of the situation prevailing in the country when the offence was committed."

5. Further, the court *a quo* erred and grossly misdirected itself by its failure to apply its mind to the mitigation addresses made for and on belief of the appellant."

The brief facts of the state case are that on the day in question the police received information that the appellant and others were blocking the Mutare - Burma Valley road near Saburi Business Centre using logs and scrap metals. The appellant and group were obstructing the free movement of traffic. The police drove to the scene and upon arrival observed a group numbering approximately 15 who ran away from the scene on seeing the police. The appellant left his bicycle at the scene. Investigations revealed it was appellant who left the bicycle which was then held as exh 1.

Given the grounds of appeal tabled the court is to determine whether or not the state proved its case beyond reasonable doubt and secondly whether or not the court *a quo* properly or improperly exercised its sentencing discretion.

It is settled that in criminal matters the court has to prove its case beyond reasonable doubt. Section 18 (1) of Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is instructive, it reads:

> "Subject to subsection (2) no person shall be held to be guilty of a crime of this Code or any other enactment unless each essential element of the crime is proved beyond reasonable doubt."

The burden of proof lies on the state. See *S v Difford* 1937 AD 370 and also *S v Makanyanga* 1996 (2) ZLR 231.

In this case the state adduced evidence from three witnesses. A police detail Emmanuel Magaragumbo's evidence was to the effect that the appellant was at the scene of crime and that upon sighting the police defender he fled together with others. He was wearing a red t-shirt which he changed upon fleeing. The witness's evidence was confirmed by Norbert Muzondo another police detail who attended the scene. The road was blocked with scrap metal and logs and upon fleeing the appellant left a bicycle which investigations revealed belonged to Tafadzwa Tsengu but that appellant is the one who was using it on the day in question and he

abandoned it at the scene of crime upon being approached by the police. The evidence of the police details linking appellant to the commission of the offence was corroborated by Elias Matiza a civilian who testified to the effect that he saw accused barricading the road using scrap metal. The witness confirmed appellant ran away wearing a red t-shirt and came back after having changed to grey t-shirt. He further confirmed appellant had the bicycle recovered from the scene. The appellant seemed to take issue that conviction was a single witness's evidence which is not the case here. There was corroborative evidence from other witnesses. There was both direct and circumstantial evidence the changing of t-shirt and the bike at the scene of crime. In any event single witness's evidence is admissible. The trial court simply has to be cautious when assessing the credibility or other wise of the witness's testimony. See *S v Thomas Madeyi* HH 34/13 and *S v Mupfumbiri* HH 64/15 and also *S v Mabinya* SC 16/91 where KORSAH JA (as he then was) made these pertinent remarks:

> "A court is there to convict in the absence of corroboration if it finds the uncorroborated evidence sufficiently convincing (cautionary rule) does not say that a conviction cannot be found on the uncorroborated evidence of a single aspect witness."

In this case the court *a quo* strictly speaking did not convict on basis of a single witness. The appellant seems to suggest single civilian witness as if police details are not witnesses. The court *a quo* analysed the evidence presented before it and assessed credibility of witnesses. The court *a quo* found the state witnesses credible and it accepted and relied on that evidence culminating in the conviction of the appellant.

Sight should not be lost of the fact that assessment of credibility and factual findings is a domain of the trial court which should be sparingly interfered with in circumstances where the findings are outrageous and irrational such that the conviction is not supported by the record. Where the finding is anchored on evidence on record and the trial court has made a factual finding based on evidence and credibility then the appeal court which has no opportunity to hear evidence and assess evidence should not over step its powers and substitute the trial court's decision for mere asking of such substitution.

See *S v Madeyi* 2013 (1) ZLR 14 and *S v Mpetha and Others* 1983 (4) SA 262.

Only in circumstances where the finding of the trial court is so irrational and outrageous and not anchored on evidence on record will it be appropriate for the appellant court to interfere with the findings of the trial court. In the present case the eye witness Elias Matiza observed appellant barricading the road together with others. When the police details approached the appellant together with others in the group of about 15 fled. The appellant left his borrowed

bicycle at the scene. He fled, changed his red t-shirt and then came back to the scene leading to his arrest. The conviction by the court *a quo* was based on evidence adduced beyond reasonable doubt and is unassailable.

Turning to the sentence the appellant seemed to take issue with the court's expression that "it took judicial notice of the fact that cases of obstructing or endangering traffic movement were prevalent and in most cases caused wanton destruction of property."

A reading of the reasons for sentence reflects the court *a quo* appreciated the sentencing principles of seeking to match the crime to the offender ensuring that the administration of justice is done while at the same time tempering justice with mercy. The court *a quo* considered mitigatory and aggravatory factors as well as circumstances of the commission of the offence and the personal circumstances of the appellant. Sentencing discretion remains the domain of the sentencing court. Only when the sentencing discretion is improperly exercised should the appellant court interfere with the sentence. It is not a matter of whether the sentence is wrong or right or that if I was the one sentencing I would impose a different sentence but what falls for consideration is whether or not the sentencing discretion was properly exercised. See *S v Mundowa* 1998 (2) ZLR 395, *S v Matanhire and Others* HH 18/03 where it was emphasised that a superior court will not lightly interfere with a sentencing court's discretion unless the discretion was not judiciously exercised such that the sentence is vitiated by irregularity or misdirection. See also *S v Berliner* 1967 (2) SA 193 AD 200 in which the court elaborated what falls for consideration in an appeal against sentence when it held that:

> "As the essential inquiry in an appeal against sentence, however, is not whether the sentence is right or wrong, but whether or not the court imposing it exercised its discretion properly and judiciously. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. It must be of such a nature/degree or serious that it shows directly or indirectly that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually termed one that vitiates the court's decision on sentence. That is the type of misdirection that dictates of justice clearly entitle the appeal court to consider the sentence afresh.

In this case the appellant was convicted of an offence akin to public violence in circumstances where such offences were prevalent. An appropriate sentence was judiciously meted out. Deterrence to ensure that lawlessness is curbed was called for and this is what the sentencing court emphasised when it took judicial notice of the prevailing situation. The unnecessary criticism by appellant's counsel on trial court taking its sentencing discretion from elsewhere and not upholding the rule of law by punishing lawless individuals who went about barricading roads at the expense of road users is very unfortunate. It is a clear display of lack

of appreciation of the notion that all individuals have fundamental right provided for by the Constitution.

Such rights have to be responsibly exercised so as not to infringe on the next person's rights. In the present case the appellant over stepped his rights at the expense of others. The infringement given the seriousness of the offence would not be appropriately censored by imposition of a fine or community service. A fine would have been too linient. Community service based sentence would put to disrepute an otherwise noble sentencing principle which is a preserve for the minor offences. It would be a misdirection to consider community service for a serious offence akin to public violence. I am alive to the fact that where the sentencing provision provides for the option of a fine that should be the starting point. However the alternative is a preserve for the bad cases. The case before the court *a quo* was such a bad case where about 15 people gathered to barricade and obstruct motorists and other road users and inconvenienced them by charging a fee for them to pass. It would have been remiss for the court *a quo* to ignore the prevailing prevalence of the offence in passing sentence. The individual circumstances were taken note of. The sentence of 36 months with 12 months suspended on usual conditions of good behaviour cannot be said to be outrageous as to vitiate proper exercise of sentencing discretion. Mr *Nyakureba* sought to impugn the exercise of sentencing discretion by orally alluding to the judiciary having to be independent. In an unsubstantiated scathing attack on the lack of judicial independence he sensationally attacked the exercise of sentencing discretion in a manner we viewed as highly unethical given the circumstances in which the conviction and sentences was reacted by the court *a quo*. We found nothing political about the manner the matter was handled by the court *a quo* as suggested by Mr *Nyakureba*. The appeal against both conviction and sentence has no merit.

Accordingly the appeal is dismissed in its entirety.

MUZENDA J agrees _____

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