Judgment No. S.C. 72/98
Crim. Appeal No. 832/97

PETER JOHANNES CLOETE v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & MUCHECHETERE JA
HARARE, MAY 11 & 18, 1998

E W W Morris, for the appellant

M Zimba, for the respondent

GUBBAY CJ: The appellant was convicted in the magistrate's court at Gwanda of assault with intent to do grievous bodily harm. As he had a previous conviction for the same offence, he was sentenced to undergo eight months' imprisonment with labour, of which period four months were suspended for five years on appropriate conditions. He has appealed against both conviction and sentence.

This was yet another case effectively of one witness for the State being pitted against one for the defence; for although the doctor who examined the complainant testified on behalf of the State, and the appellant called the investigating officer, neither was able to throw any light on the material disputes of fact which emerged from the accounts of the complainant and the appellant. No explanation was forthcoming from the prosecutor as to why the State was prepared to rest its case upon a minimum of evidence when there were several eyewitnesses present at the scene. The risk inherent in such action has been highlighted repeatedly by this Court, yet warnings continue, so it would seem, to fall on deaf ears.

The confrontation between the parties occurred on 27 November 1995, at the appellant's farm, Lamba Ranch, in the Kezi District. It was there that the complainant, Joshpat Moyo, was employed to herd goats and feed pigs.

Having fed the pigs during the early morning of that day, the complainant returned to the kitchen of his quarters to drink tea. While there the appellant arrived. He asked the complainant why he had not answered his call. Upon receiving the response that the call had not been heard, the appellant, a big and powerfully built man, lost his temper. He struck to the ground the cup the complainant was holding. He cornered the complainant near the sink and delivered a slap to the left side of the face. He took a smouldering piece of wood from the open stove and attempted to burn the complainant with it. The complainant broke free and ran from the kitchen into the garden. He was pursued by the appellant. During the chase the appellant picked up a stone and threatened to throw it at the complainant if he did not stop. The complainant complied. The appellant then took hold of the complainant by the neck and tripped him to the ground. While lying on the ground, the complainant was kicked about the body and received a kick in the area of his left ear. He lost consciousness momentarily. When he recovered, he became aware that his left ear was bleeding. By then the appellant had departed.

The complainant went immediately to the nearest police station and reported the incident. He was detained at Antelope Hospital and the next day was examined by Dr Jabulani Ndlovu.

Doctor Ndlovu observed that the complainant had a swollen left cheek, a swollen lower left eyelid, and that there were blood clots in his left ear. He referred the complainant to an ear, nose and throat specialist to determine whether any injury to the eardrum had been sustained. Doctor Ndlovu was of the opinion that moderate force had been used to inflict the injuries. However, on the complainant's own admission, the injury to the lower left eyelid had not been caused by the appellant. It pre-existed the assault. And the swollen left cheek could have been caused by the same kick that resulted in the bleeding of the left ear.

The appellant denied committing any form of assault upon the complainant. He maintained that whilst the complainant was running away from him he tripped and fell on rocky ground, thereby sustaining the injury to the left ear. Under cross-examination, however, the appellant made some significant admissions. These were that in the kitchen he struck the cup out of the complainant's hand and picked up a smouldering piece of wood from the open stove; that he chased after the complainant, threatened to throw a stone at him, and heard him "moaning and groaning" when lying on the ground. He also said that he did not bother to ascertain how seriously the complainant was injured but merely walked away, leaving him on the ground.

The evidence of the defence witness, police officer Ngwenya, afforded the appellant's case no assistance. It established that the account of the assault given to him by the complainant shortly after the incident was entirely consistent with the complainant's sworn testimony.

The trial magistrate rejected the appellant's protestation of innocence. It is my view that he was entirely justified in so doing. The admissions made, which corroborated the complainant's evidence, point to the falsity of that of the appellant. In a situation in which the appellant was obviously in a furious temper with the complainant, it is unbelievable that he would have armed himself with the smouldering piece of wood just to frighten the complainant and cause him to leave the kitchen; that he would run after the complainant in order to talk to and admonish him; and that the complainant tripped himself. Why, one asks, if the complainant injured himself, did the appellant not render him assistance instead of callously leaving him lying on the ground in pain?

Were it not for the justified finding that the appellant kicked the complainant to the head, I would have been inclined to alter the conviction to common assault. The slap to the face, the attempt to burn the complainant, the threat made with the stone, the chase, and the kicks to the body (which could not have been serious as they were not even mentioned to Dr Ndlovu) would not have sufficed to prove, beyond a reasonable doubt, either an actual or a constructive intention to do grievous bodily harm.

The kick to the head, even though delivered with moderate force, was to a most vulnerable part of the complainant's body. The appellant must have known that there was a risk of grievous bodily harm to the complainant resulting therefrom or, at the very least, was reckless whether or not that result ensued. See *S v Moyana and Anor* 1980 ZLR 460 (AD) at 463F.

I am satisfied therefore that the conviction was correctly entered.

Turning to the question of sentence, I find myself in full agreement with the remarks of the magistrate. The appellant assaulted the complainant, a lowly employee, for a most insubstantial reason. In a furious temper, he was not prepared to accept the explanation that his call had not been heard. The scene, from start to finish, was observed by other employees. It was humiliating and degrading for the complainant to be treated in such a manner. One cannot avoid the impression that the appellant would not have acted towards the complainant as he did were he of the same race. This type of conduct by white employers against their black employees cannot be tolerated. The message must go out clearly that every person, no matter the colour of his skin, or however humble his station, must be accorded a measure of decency and respect.

In assessing punishment the magistrate also rightly had regard to the appellant's previous conviction, for which he had been sentenced on 16 May 1992 to a fine of $700 or, in default of payment, two months' imprisonment with labour. Obviously the sentence did little to impress upon the appellant the need to curb his vicious temper.

Mr *Morris*, who appeared for the appellant, did not contend that in arriving at his assessment of punishment the magistrate had in any way misdirected himself. He merely pointed to the delay of almost twelve months in the preparation of the record, despite requests to the clerk of court that it was the appellant's wish that

the matter be heard expeditiously by this Court. Consequently, so it was submitted, it would be unjust to send the appellant to prison after being on bail for so long a period.

It is, of course, regretted that the record was not available sooner. But one does not know what the other commitments of the transcribers at Gwanda happened to be. Priority may well have been given to those persons in custody whose cases were pending appeal. However that may be, I cannot accept that any stress that the appellant may have suffered in the delay of having his appeal heard, warrants this Court interfering with a punishment that he richly deserved by reducing it so as to save him from incarceration.

It follows that I would dismiss the appeal in its entirety.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners