THE STATE

Versus

TAWANDA MHARADZE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 18 MARCH 2021

Criminal Review

KABASA J: The accused was initially charged with attempted murder as defined in section 47 as read with section 189 of the Criminal Law Code. He was jointly charged with his girlfriend who was found not guilty at the end of the trial.

Both accused had pleaded not guilty with the then accused 1 proffering a defence of self defence whilst the accused (Tawanda Mharadze) admitted assaulting his wife but denied an intention to kill her.

The state led evidence from the complainant only as efforts to get other witnesses to come and testify proved futile.

The state's case was therefore hinged on the evidence of a single witness. The learned Magistrate did not have kind words for this witness who she found to be unreliable.

It is trite that a conviction can be based on the evidence of a single witness for as long as such witness is competent and credible and the evidence is satisfactory in all material respects. (*State v Zimbowora* SC 7-92, *State v Mokoena* 1956 (3) SA 81 (A).)

The learned Magistrate was not satisfied that this witness was credible and could be relied on. A reading of the record suggests that the witness, who is the accused's wife, was bent on protecting her husband. The state counsel had problems in getting the witness to tell a coherent story.

The nature of the relationship between the complainant, her husband and Faith Nyoni who was acquitted at the end of the trial explains the dilemma the complainant found herself in.

The allegations are that the complainant's husband was having an extra-marital relationship with Faith Nyoni. On the day in question, the 28th August 2020 the complainant confronted the two lovebirds after she saw them buying groceries together. An altercation ensued and the complainant's husband unsuccessfully tried to stop it. As a result of that altrecation the complainant sustained injuries which were described by the doctor who examined her as:-

> "expressive aphasia (inability to communicate)
> trauma of the right leg.
> altered level of consciousness"

The complainant's husband and his girlfriend were subsequently arrested and charged with attempted murder.

However the unreliability of the complainant's testimony resulted in the acquittal of the girlfriend, Faith Nyoni. Faith's defence was found to be reasonably probable and she was therefore entitled to an acquittal.

The learned Magistrate's concluding remarks are worth repeating:-

> "*In casu*, the defence given by the first accused is a probable one which was not disputed beyond the standards expected in a criminal trial and as measured in the Difford case (1937 AD 370). It is in these circumstances that the court finds that there is no case against the first accused."

Turning to the complainant's husband, the learned Magistrate found that he admitted assaulting the complainant. The accused's explanation was that he slapped both the complainant and his girlfriend. The manner of the assault could however not have caused the injuries observed on the complainant.

These injuries could have been caused by the accused's girlfriend whose defence of self defence was accepted resulting in her acquittal.

The complainant's evidence did not show how or whether she was assaulted by her husband. The accused's admission was the most that the court *a quo* relied on in finding that he had assaulted the complainant.

The girlfriend's evidence was to the effect that the complainant fell and hit her head on a stone. These injuries were therefore not caused by the husband. Under cross-examination the girlfriend stated that the complainant's husband kicked her several times but it was not clear where and how the complainant was kicked.

The learned Magistrate had this to say as regards the complainant's husband's conduct:-

> "His circumstances were different. He admits to assaulting the complainant though in a less manner than as alleged. Even if we are to accept that and attribute the injuries to the first accused, what is disturbing is that he continued to assault a severely injured complainant with the realization of the existence of those injuries. In any event the first accused narrated that the 2nd accused did not only slap complainant with an open hand but he kicked her as she was down. He did not dispute this evidence. His misfortune would be compounded by the fact that he admitted to acting in anger and emotion and ended up assaulting both. It's clear he failed to control his anger and this coupled with the evidence of 1st accused would justify a finding that he heavily assaulted the complainant."

I must say such a conclusion is not supported by the evidence. How the learned Magistrate came to the conclusion that the accused "heavily assaulted" the complainant is rather baffling. The slap admitted to by the accused and even the kicks mentioned by the girlfriend can hardly be described as a heavy assault. More so when the learned Magistrate goes on to say:-

> "His conduct, however, may fall short of attempted murder as the critical injuries were not ascribed to him. Nevertheless, that he assaulted her is apparent and the court would find it safer to find that he only assaulted her which is different from an attempt to murder her."

The accused was then convicted of assault as defined in section 89 of the Criminal Law Code.

How then can it be said he heavily assaulted the complainant? There was no such evidence and if the injuries observed on the complainant cannot be ascribed to him, it follows that he did not heavily assault her.

The finding is not supported by the evidence and the learned Magistrate appears to have allowed this unsupported finding to influence the penalty he imposed on the accused.

The accused was sentenced to 4 years imprisonment of which 1 year was suspended for 5 years on the usual conditions of good behavior, leaving him with an effective 3 years imprisonment to serve.

The accused is a 28 year old first offender, married to the complainant and has 2 children aged 6 and 3 years. He is self employed as a fish monger realising R1 000 per month.

Section 89's penalty provision provides that:-

> "… A fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both."

Where the penalty provision provides for a fine, a judicial officer should look to the fine first when considering sentence unless the offence is particularly serious such as to make a fine inappropriate.

Whilst the accused's conduct in slapping his wife and kicking her cannot be condoned, the issue is whether the penalty imposed fits both the offender and the offence.

I must say the learned Magistrate's sentence is what would have been expected on a conviction of attempted murder.

In assessing sentence the learned Magistrate correctly observed that courts are urged to lean towards leniency when sentencing first offenders and that imprisonment ought to be resorted to as a last resort after all other forms of punishment are found to be unsuitable. (*State v Peter Mutambara and Another* HH 55-88, *State v Bishop Ncube* HB 153-86, *State v Marongwe* HH 67-83, *State v Shariwa* HB 37-03). After making these observations the learned Magistrate went on to say:-

> "The assault itself was committed in aggravating circumstances. The medical affidavit is the defining standard of the gravity of the offence. The court believes the

> accused's moral blame is also high as he could not swallow the shame of being caught cheating. Instead of being apologetic he assaulted his wife. For that the court does not believe a non-custodial sentence is suitable."

It appears the learned Magistrate allowed his moral indignation to cloud his reasoning in the assessment of an appropriate sentence. Magistrates must always approach sentence rationally. *In casu* the medical affidavit could not be used as a basis or the defining standard as such injuries could not be ascribed to the accused.

The Magistrate fell into error and ultimately imposed a penalty that is disturbingly inappropriate. In *S v Harington* 1988 (2) ZLR 344, DUMBUTSHENA CJ had this to say:

> "The appellant has to pay for her crime. But she must be sentenced rationally and fairly. This is one of the principles of criminal justice which requires that the punishment imposed by the court for crimes committed must themselves be just and fair…."

It is accepted that sentencing is within the discretion of the trial court but such discretion must be exercised judiciously.

I find that the exercise of discretion *in casu* is tainted by misdirection. That being so because factors which ought not to have been taken into account influenced the sentence imposed *in casu*. The sentence is so severe it induces a sense of shock. I can do no more than quote MALABA J (as he then was) in *S v Tsibo Ndlovu* HB-46-96 where the learned judge said:

> "It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient. In arriving at a just and fair sentence the court should never assume a vengeful attitude"

Section 29 (3) of the High Court Act, Chapter 7:06 provides that:

> "No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred"

A substantial miscarriage of justice has occurred *in casu* and there is need to correct that.

The accused was sentenced on 23rd December 2020 and has therefore served about 2 ½ months.

In view of the fact that the injuries sustained by the complainant could very well have been caused by Faith and there is nothing in the medical report reflective of injuries caused by the slap and the kick attributed to the accused, a fine will meet the justice of the case.

The conviction is confirmed but the sentence is set aside and substituted by the following:-

> "Accused is fined RTGS $20 000 in default of payment 2 ½ months imprisonment. In addition 6 months imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine."

The accused has already served the alternative term of imprisonment and he is therefore entitled to his release.

A warrant of liberation has therefore been issued for his immediate release from prison.

Kabasa J ……..

Dube-Banda J ……..... I agree