JORUM SITHOLE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND MAKONESE JJ
BULAWAYO 23 JULY 2012 AND 26 JULY 2012-

Mr N. Ndlovu for the appellant
Ms A. Munyeriwa for the respondent

Criminal Appeal

MAKONESE J: The Appellant was arraigned before the magistrate court at Plumtree for contravention of section 89 of the Criminal Law (Codification and Reform Act) [Chapter 9:23], it being alleged that on the 13th May 2011 at Zimbabwe Republic Police, Plumtree he assaulted a mentally ill man who had run amok at the police station. He was jointly charged with John Chimweda. Charges against his co-accused were withdrawn after plea despite the fact that the complainant had alleged that accused one held him down while the appellant assaulted him with a button stick. Appellant was convicted and sentenced to 9 months imprisonment of which 3 years were suspended for 5 years on the usual conditions. He now appeals against conviction and sentence.

At the hearing of this appeal we allowed the appeal and set aside the conviction and sentence. We undertook to give our reasons. These are they.

Ms *Munyeriwa*, appearing for the State conceded that the conviction was not safe given the complainant's state of mind at the material time and the quality and nature of his evidence. She conceded further that the sentence was excessive and induced a sense of shock given the circumstances of the case. I am of the view that the concession by the State was properly made.

The background to this case is that the Appellant and his co-accused were charged for assaulting the complainant. It is not in dispute that the appellant and his co-accused, who were both members of the Zimbabwe Republic Police stationed at Plumtree were called out to deal with the complainant who was vandalising property at the Police Station. The complainant had been in police custody for malicious damage to property. Upon his release he demanded some food and upon being given the food he protested that the food was inadequate. The complainant became violent. When Appellant confronted the complainant he threatened to destroy property. Appellant tried to negotiate with the complainant to leave the police station but he smashed the charge office window with his fist, opened it and jumped outside, where he fell on the corridor. Complainant got up and ran to another office where he started hitting the walls and breaking windows. Appellant tried to persuade him to leave the police station, but, instead complainant rushed to the holding cells and got into one of the coffins. He got out of the coffin and started pulling the coffin and ran back towards the offices. When he got there he started crawling on top of flower beds before running to hide underneath a parked motor vehicle. Appellant called for help from other police officers who then brought two button sticks. Appellant threatened the complainant with the button sticks. Complainant was kicking and splitting out saliva. The drama ended when complainant ran out of the police station using the main gate.

Following this unusual event, and after a period of two weeks, the complainant filed charges of assault against the appellant and his co-accused. The learned magistrate in the court *a quo* considered the evidence and came to the conclusion that there was insufficient evidence against the first accused and discharged him at the close of the state case in terms of section 198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. In his oral submissions at the end of the State case the prosecutor had this to say:

> "The State would like to make an application for withdrawal of charges against accused one for lack of evidence. The State cannot sustain a conviction against accused one, because the testimony given by the complainant shows that the only part the accused (one) played was to remove the complainant from underneath the vehicle, this does not constitute a crime. At no particular point, did accused one assault the complainant from the complainant's testimony and neither was he threatened by accused one...."

It is now trite law that for an accused person to be convicted in our courts the State must prove its case beyond reasonable doubt. If the State fails to prove its case beyond reasonable doubt, then the accused should be given the benefit of the doubt and be acquitted. The State case was fraught with inconsistencies thereby reducing its probative value.

It is clear from a reading of the record that when the State applied to have proceedings against the first accused withdrawn after plea, it was on the basis that the first accused's only role was to pull the complainant from underneath the motor vehicle. It follows, then that the charges against the Appellant must have been withdrawn at the close of the State case since the only evidence linking the appellant to the offence was the same evidence relied upon to exonerate the first accused person. It defies logic to acquit first accused on the basis that the evidence is not sufficient and then proceed to convict the appellant on the very same evidence. The learned magistrate clearly fell into error in that regard.

It is important to analyse the evidence of the complainant in brief:-

(a) **The complainant's evidence**

(i) By his own admission the complaint suffered from a mental disorder and at the critical time of the alleged offence he was not well. He told the court that on the particular day he had been detained at the police station. Upon his release he was given food and asked to leave. He did not leave but kept on moving around the Police Station. He broke windows and other property while he was at it. It was his evidence that other police officers asked him to leave but he did not hear them. One would wonder how he remembered something he never heard.

(ii) In his evidence in chief the complainant stated as follows:

Q: Accused 2 denies that he assaulted you?

A: He did, accused 1 only assisted in holding me.

Q: How did accused 1 assist accused 2?

A: He only pulled me from underneath the vehicle.

Q: Besides pulling you from underneath the vehicle where did accused 1 hold you?

A: He did not.

Q: Accused 2 stated that he requested other officers to bring the button sticks to scare you away.

A: That is not correct

Q: What will be your comment if accused 1 alleges that he never touched you?

A: He left me lying on the ground after assaulting me.

Q: What would be your comment if it were said that you reported to the police after two weeks?

A: I was hospitalized in hospital (Plumtree/Central). I went back there after in a month

Q: Accused 2 denies that he assaulted you?

A: The police did not want to open a docket, I went to the Dispol and the C.I.O, that is why they accepted me.

Q: Did accused 1 threaten you?

A: No.

Q: Did they act lawfully?

A: No.

In his cross-examination by Accused 1

Q: Why did you break the window next to the cells?

A: I pushed it by force it banged, thereby breaking it.

Q: Do you recall getting inside the coffin?

A: No, I only pulled it.

Q: You got inside and slept inside.

A: No.

Q: Where you injured when you broke the window?

A: No.

Q: Do you recall telling people that you are a guerrilla and freedom fighter?

A: I never said that.

Q: You crawled from the coffins to the vehicle?

A: You were not there; accused 2 is the one who was there.

In re-examination by the State

Q: When you were at the police station, you saw other police officers before you saw accused 2?

A: Yes.

Q: You only pointed at the accused as the assailant?

A: Yes.

Q: Where you mistaken as to the identity of the accused?

A: No.

Q: Is it your positive evidence that it is the accused 2, who assaulted you at the gate?

A: Yes.

Q: What did he use?

A: Long black weapon, button stick.

At first complainant averred that the first accused had held him down as accused two assaulted him, but he back tracked and said accused one did not hold him. Again, during cross-examination by accused one, he said accused one was not there, only accused two was there. In re-examination he was now saying accused two assaulted him at the gate yet on page 15 in his evidence in chief he told the court the impression that he was assaulted in the Police Station near the building that was housing the dead bodies. In the light of these glaring contradictions and inconsistencies it is not surprising that the Prosecutor withdrew charges after plea against accuse one.

(b) **Complainant's Mental Condition**

Section 246 of the Criminal Procedure and Evidence Act (supra) provides as follows:

> *"No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise whereby*

he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability."

It should have been apparent to the learned magistrate early in the proceedings that the complainant was mentally disturbed at the relevant time. In his sworn statement the complainant stated as follows:

"--- I had been detained at the holding cells. I was released, however at the time I was not well. Upon release I was given food and asked to leave. I did not leave..."

The complainant was further probed by the Prosecutor.

Q: What do you mean that you were unwell?

A: I sometimes suffer from a mental disorder. After a while, accused 2 came and instructed me to leave, that is when I ran towards the holding cells, I got into a place that had coffins I pulled them out of that building. ..."

The learned magistrate in response to the Notice of Appeal states as follows:

"*The trial magistrate acknowledges that the complainant admittedly was under treatment for a mental disorder hence in terms of section 246 of the Criminal Procedure and Evidence Act [Chapter 9:07}, was not an incompetent witness. The capacity of the witness, which was not adequately investigated by the State was carried over to the court and was fatally undetected."*

I must observe here that the learned magistrate seems to suggest that it is the State which failed to investigate the competency of the witness. The learned magistrate cannot be correct. It is the court's duty to ensure that a witness has sufficient mental capacity to give evidence. The court should, *mero metu* order the examination of any witness who appears to have any form of mental disorder. Section 245 of the Criminal Procedure and Evidence Act (supra) is clear. It provides as follows:

"It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence."

In this case taking into account, the complainant's evidence from the time he was at the police station, it is clear that his conduct was that of a person afflicted with mental disability.

He was violent. There was need to subdue the complainant. The appellant was obliged to use minimum force to control the complainant. There is however no clear and direct evidence that the state did prove beyond reasonable doubt that the appellant had indeed assaulted the complainant with a button stick as alleged in the charge.

(c) <u>The Medical Report</u>

The medical report was of little force and weight and did not strengthen the State case. Its contents were to the effect that the complainant was examined on the 3rd of August 2011 at Plumtree District Hospital and was found to have a fractured middle finger. It cannot be clearly ascertained whether this injury had anything to do with the "assault" by the appellant or any other members of the police. The offence allegedly occurred on 13th May 2011. The medical examination was done three months later. It is quite possible that the complainant injured himself when he was throwing bricks and breaking windows or climbing in and out of the coffins, and pulling them out of the police station. He could have fractured his finger when he was clinging underneath the motor vehicle or he could have injured himself sometime after the incident bearing in mind that the medical report was prepared three months after the event.

In the circumstances, there can been no doubt that the oral testimony led from the complainant taken together with the conduct of the complainant on the critical day raises considerable doubt on how the complainant suffered his injuries. The conviction against the appellant under such circumstances is not safe.

(d) **<u>Sentence</u>**

Given the circumstances of the case as already outlined above the sentence was unduly excessive and even if this court were to uphold the conviction, there would have been a need to interfere with the sentence. The learned magistrate mislead himself was relying on the case of *S v Reza and Another* HH 02/04, wherein it was held that custodial sentences were warranted when police officers assault suspects in their custody. In *casu,* the complainant was

not a suspect. He was on the contrary a violent person who had somewhat lost his "marbles" so to speak. He needed to be contained and subdued.

In the result, I made the following order;

(1) The appeal against conviction and sentence is allowed.

(2) The conviction and sentence are set aside.

Ndou J agrees.....

Messrs Cheda and partners, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners