HB 164-17
HCA 142-17
XREF DISCIPLINARY 02-16

HAMASHOLD NYAMUNDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND MAKONESE JJ
BULAWAYO 12 JUNE 2017 AND 15 JUNE 2017

Criminal Appeal

N Hlabano for the appellant
Respondent in default

MATHONSI J: It would have been comical had it not been tragic and with far-reaching consequences on both limb and a career in police service which had endured for 20 years without blemish only for one moment of madness to spoil it all. The applicant is a fairly senior member of the police service holding the rank of inspector. He had been attending a Junior Officers Command Course at Zimbabwe Republic Police Buchwa National Training Centre which had commenced on 27 April 2013 and was due to end on 24 May 2013 when on the night of 17 May 2013 he broke curfew and went hunting for a girl. When attending such courses members of the police service are bound by rules which restrict them to the training camp. Residential areas and beer outlets are out of bounds for trainees.

On the night in question the appellant had a rendezvous with a girlfriend called Chipo who had given him directions to her house at the residential quarters at ZRP Buchwa camp. In giving him directions to her house she assured him she would, at the appointed time, leave her front door a jar to enable him to gain entry and have a nice time with her. At about 2300 hours that night the appellant stole surreptiously out of training camp and found his way to Chipo's lodgings. When he arrived in the vicinity of Chipo's place, he observed a door that had been left open at house number A15 and thought that his moment of truth had arrived.

The appellant strolled into the yard of house number A 15 and pushed open the verandah door which opened with a creaking noise alerting the occupants of the presence of someone opening it. Except that this was not Chipo's house and it was not Chipo who was alerted by the

noise. In fact the good inspector had gone to a wrong house, a house occupied by Assistant Inspector Ndlovu and his loving wife Sharon Ncube. It is Sharon Ncube who responded to the noise at the door and when she did she was surprised to see her verandah door half open and a man standing by the verandah in the middle of the night.

Obviously startled, she shouted "thief! thief!", while at the same time summoning a neighbour, Sergeant Bvungwe, to come to her rescue. Faced with such a tricky situation and fearing for his life, the appellant took to his heels. Not being a sprint expert of the mould of Usan Bolt but merely a trained police inspector, about 30 metres away he tripped and fell with a thud as Sharon Ncube was bearing down on him while still shouting for help. Arriving rather late, Sergeant Bvungwe thought he had caught a thief when he grabbed him by the neck and pressed him down.

Bvungwe should not have bothered. The man was down and out. He had broken a leg and an arm while taking flight and could not move. When Sergeant Bvungwe checked closer, he discovered it was Inspector Nyamunda who was well-known in that area having served at that station before. Now the appellant has been restricted to office work and other light duties as he is disabled to a certain extent. For his misadventure the appellant was subjected to disciplinary proceedings charged with contravening paragraph 35 of the Schedule as read with s34 of the Police Act [Chapter 11:10] that is acting in an unbecoming or disorderly manner, or in a manner prejudicial to the good order or discipline or reasonably likely to bring discredit to the Police Force.

The appellant appeared before a magistrate at Gweru and pleaded not guilty but was convicted following a full trial. He was sentenced to a fine of $80-00 or in default of payment 30 days imprisonment. He has appealed against both conviction and sentence. In respect of conviction it is his view that in convicting him the court *a quo* turned a blind eye to the reason why he ran away. He acted reasonably in the circumstances as he was at risk of being attacked after he had been called a thief. Regarding sentence the appellant's view is that it is too harsh and induces a sense of shock. He should have been cautioned and discharged or given a wholly suspended sentence.

The Civil Division of the Attorney General's office opposed the appeal and filed heads of argument. However at the hearing of the appeal there was no appearance from that office. We initially stood the matter down after Mr *Hlabano* for the appellant had made that request because someone had sent word to him that counsel from the Attorney General's office was appearing in another court. Later when still no one appeared for the respondent we decided to consider the appeal in their absence. In preparing this judgment we have however taken into account the heads of argument filed on behalf of the respondent.

In those heads of argument a point was taken *in limine* that the appellant has cited the wrong respondent. Reliance was placed on the cases of *S* v *Machinga* HCA 234-15 and *Matsika* v *Commissioner General of Police* HB 67-17. Unfortunately that point *in limine* was not developed beyond saying that in view of the fact that proceedings in terms of the Police Act are disciplinary in nature where the court is enforcing disciplinary law the state should not have been cited. While that point is correct, counsel did not suggest who should have been cited but still asked that the appeal be dismissed on that point alone. I am unable to do that. The case of *S* v *Machinga* is not a judgment but an order removing the appeal from the roll. I did not benefit from it.

Looking at the record it is apparent that in the charge sheet and indeed the outline of the case for the prosecution, which documents were prepared by the respondent and served upon the appellant, the parties were cited as "the state versus Inspector Nyamunda H". Therefore it is the respondent which made that citation. All the appellant did in the appeal was to repeat that citation. The respondent can therefore not be allowed to benefit from what is in fact its own creation.

On the merits the respondent supported the conviction on the basis that the appellant's conduct of running away when he was branded a thief was unbecoming and likely to bring discredit to the Police Force. A Police officer of the rank of inspector is not expected to run away because someone has shouted "thief" in a police establishment. It was further submitted that:

> "In the present case, the appellant's unbecoming conduct starts from the time he was discovered standing in the verandah by Assistant Inspector Ncube's wife. As a police officer with the rank of an inspector, he should just have identified himself and explained

> his mistake to Sharon Ncube. There was no need for him to panic. He was not a stranger to the area as he had once worked in that police camp."

What comes out clearly from the foregoing submissions is that the respondent does not find anything wrong with the appellant breaching curfew as a trainee subject to restrictions which kept him within the confines of the training camp. In their evidence during the trial both Superintendent Peter Mkandla, who was in charge of training and Chief Inspector Wycliff Mulondiwa adverted to rules governing trainees and suggested that trainees are not allowed to wander away from training quarters. This perhaps could explain why the appellant ran away on being found at house number A15. Having abandoned that line of the prosecution, the only issue for determination therefore is whether the respondent's case was proved merely on the basis of the appellant's ill-fated dash into the night.

In convicting the appellant the trajectory taken by the trial magistrate was as follows:

> "I did not find anything amiss in the manner accused gave his evidence. No evidence was presented to the court to show that accused's visit was for some other purpose other than what he said. I have no doubt therefore that accused went to the wrong house on the night in question. This is not the house he intended to visit. The question therefore is that conduct unbecoming or disorderly which is prejudicial to good order or discipline or is reasonably likely to bring discredit to the police force? The state has dwelt much on the issue that accused contravened the training rules and regulations which were governing the training at the camp. Unfortunately the state outline and charge sheet did not allude to that. That is not what accused pleaded to. ----. I will therefore (---) not dwell much on the issues which the state presented in the trial and are not connected to the facts alleged in the state outline. That would be prejudicial to the accused as separate offences relating to discipline would come out. Be that as it may, I do not hesitate to conclude therefore that accused acted in an unbecoming manner when he was confronted by Sharon Ncube. A police officer with the rank of an inspector should just have explained his mistake to Sharon Ncube. There was no need for him to panic. He was not a stranger to the area as he had once worked in the police camp." (The underlining is mine)

I sharply disagree with that line of reasoning. In the first place the entire state case was premised on the appellant breaching curfew. The charge sheet specifically referred to "the accused (going) to house number A15 ZRP Buchwa camp." The outline of the state case specifically mentioned that;

> "For the smooth running of the course, trainees' standing orders were issued on the 28 of April 2013 and all trainees acknowledged them by signing."

It was therefore proper for the state to lead evidence to prove the allegations of breaching the standing orders governing the training camp in order to prove its case. I would have thought that the respondent would take issue with that finding and lodge a cross-appeal. Unfortunately no such cross appeal was made. Instead the respondent elected to abandon its case and defend what was clearly a wrong finding relating to the appellant being found at that house and running away.

In the second instance, the moment the court *a quo* decided to abandon what was in fact the state case and pre-occupy itself with extraneous issues it completely strayed and badly misdirected itself. Having decided not to dwell on the evidence led on behalf of the state, it was left with nothing upon which to convict the appellant. When the court then swung round and concluded that it would not hesitate to find the appellant guilty of unbecoming conduct it was making a conviction which was not supportable. The appellant's unbecoming conduct stems from breaching the training camp rules and going on a tryst at Chipo's residence against standing orders. If the respondent had counter-appealed on that aspect, we would have upheld such counter appeal. As I have said, such was not made.

SQUIRES J attempted to define unbecoming conduction *S* v *Pearce* 1982 (2) ZLR 303 (H) 307 C –E when he pronounced:

> "Now, in the first place, whether conduct is 'unbecoming' or 'reasonably likely to bring discredit to the Force' seems to me to be very much a matter of degree. And, secondly, it must surely be conduct that is objectively known to, or discernible by, someone else who is affected or offended by it, that is to say, someone to whom it is unbecoming or in whose eyes the Force is thereby brought into discredit."

It occurs to me that when someone has been lost and goes to a wrong verandah, they cannot be said to be behaving in an unbecoming manner. They are simply lost. When the owner of the house, without bothering to enquire from the intruder what brings him to her door step but rushes to raise alarm calling that person a thief, surely any reasonable person would lose composure and run. It is a well known fact that members of the public respond to that kind of

call by attacking anyone pointed out as a thief even without asking what it is they would have stolen and at times they even hurt or kill a person under those circumstances.

That assessment of the reaction of the public is borne even by the manner in which Sergeant Bvungwe armed himself when the call was made. The appellant could have been shot. I have said that the conduct complained of must be assessed objectively by the standard of a reasonable man in the same circumstances not that of an armchair critic. To my mind the conduct of the appellant was reasonably justifiable in the circumstances. In any event, it occurs to me that Sharon Ncube certainly did not lose her high regard of the Police Force merely because she erroneously called for a thief to be attacked or apprehended and a police inspector ran to his fall and was soon identified as no such thief.

I therefore conclude that as long as the appellant was not convicted for breaching curfew and offending training camp rules he could not be found guilty for taking to his heels at No A15. There was simply no offence committed as a result of such conduct. The good image of the Police Force remained intact only that the appellant came out as the biggest loser after breaking limbs in the process. It is one of those matters which should have ended there, poetic justice having taken over.

In the result, it is ordered that;

1. The appeal against both conviction and sentence is hereby upheld.

2. The conviction and sentence of the court *a quo* are set aside. In their place is substituted the verdict that the appellant is found not guilty and acquitted.

Makonese J agrees……..

Sachikonye-Ushe and Hlabano, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners