

THE STATE  
**versus**  
MIKE MOYO

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 9 JULY 2015

### **Criminal Review**

**MOYO J:** The accused person was charged and convicted of assault as defined in section 89 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

He was sentenced to 6 years imprisonment of which 3 years imprisonment was suspended on the usual conditions.

The facts of the matter are that the complainant and accused person were neighbours (tenants in the same plot) and that on 11 March 2014 the accused person proceeded to the complainant's place of residence whereupon he found the door closed and then he forced it open. Accused then threatened to chop complainant's head with an axe and this then led to a misunderstanding. Accused then assaulted complainant with an axe on the cheek, head and hand.

Complainant's version of events is that accused's friend one Mino Moyo came and knocked on his door. Complainant opened and asked him to enter. Mino Moyo said he would not enter but requested that complainant comes out of the house. While they talked, accused came and tried to strike complainant with an axe, complainant blocked it, but nonetheless the axe landed on his (complainant's) forehead. Complainant tried to close the door but they pushed it. They were striking the door trying to force their way in.

They were ordering the complainant to sit down so that they could chop him to pieces. As the door collapsed, complainant tried to force his way out but the accused struck him again under the eye running down to the nostril with an axe. They chased him and struck him with an iron rod. It would seem from complainant's version of events he was just attacked by the

accused and this Mino Moyo for no apparent reason and he suspected that since he would sometimes bring them to order at the beer drink when they would use foul language, perhaps that was the reason for the attack.

The accused person's defence outline was to the effect that he arrived from town to find the complainant having an altercation with Chrispen Moyo and that all he did was to restrain them. They were drunk and accused knew that they had a prior misunderstanding at the shops. Accused then took away the axe they were using in the fight and handed it over to the landlord, one Khaya. He took the axe from Chrispen but the axe belonged to Bruce. Accused said if complainant said that he (accused) also assaulted him (complainant), he would be lying as he did not have any reason to fight the complainant.

The state case was closed after only the complainant had given evidence and yet during cross-examination it came out clearly that one Khaya, the landlord was also present. Even if he may not have witnessed the fight he would confirm whether accused handed over the axe to him as alleged by the accused.

There is also mention of the complainant's wife during the altercation but surprisingly complainant's wife was never called. Under cross-examination, the accused person brought up a very critical point to the effect that Chrispen Moyo the person who according to him assaulted the complainant, had in fact defaulted bail, meaning that this Chrispen Moyo was at large.

There are problems regarding the state case in this matter, only the complainant was called, other potential witnesses, were not, Chrispen Moyo, who allegedly assaulted the complainant together with the accused, is at large. The accused's version of events sounds plausible. The trial magistrate decided to reject the accused's version and accept the complainant's with no basis whatsoever. He says in paragraph 3 of the judgment:

“The evidence of the accused is merely a story told in the hope of exonerating accused (*sic*). It is not a convincing story. He does not give a reason why the complainant would want to falsely implicate him and exonerate or lessen Chrispen Moyo's role.”

The evaluation of the state case as against the defence case in the manner quoted herein by the trial magistrate is illogical for, why does he say that accused's version is a mere story? How does accused's version become a mere story and not evidence? The accused is giving his

version of events, how does his version become a mere story? No weaknesses have been pointed at by the trial magistrate on the defence proffered by the accused, except that perhaps he just does not want to accept it. He even goes further to say the accused failed to explain why complainant would implicate him and exonerate Chrispen Moyo. How can accused explain this? He is obviously baffled by complainant's conduct. Is it the duty of the accused person to prove his innocence?

Again, the trial magistrate is aware that Chrispen Moyo is at large, so it would be easier for the complainant to deal with a person who is available but he nonetheless finds that there would be no reason for the complainant to implicate accused and exonerate the person whose whereabouts are unknown.

The trial magistrate should have asked himself the critical question: Is accused person's version reasonably possibly true? If the trial magistrate could not find any factual basis upon which to dismiss the accused's version as not being reasonably possibly true, then an acquittal would immediately follow. It was the duty of the state to prove its case beyond any reasonable doubt and not for the accused to prove his innocence by coming up with explanations as to why he is an accused. The required standard of proof beyond reasonable doubt was profoundly dealt with in the case of *S v Makanyanga* 1996 (2) ZLR 231 when the court observed that:

“A conviction can not possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the testimony does not mean that conviction must necessarily ensue. Similarly the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.”

It is my considered view that the accused person's version cannot be thrown out on the basis that it is impossible, untrue or improbable in fact, the accused person's version is reasonably possibly true, in the circumstances. The accused person's version in my view is even better than the state case. The state never proved the accused's defence to be palpably false in this matter.

For that reason, and others that I have alluded to herein in my assessment of the facts, one can not find that the state indeed proved its case beyond a reasonable doubt in this matter. The conviction is thus not safe.

The conviction and sentence are accordingly set aside.

Makonese J agrees.....