

GEORGE SAMAMBWA
and
VUSUMUZI NZIMA
and
CHAMUNORWA MUGWAGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND MOYO JJ
BULAWAYO 18 JULY 2016 AND 28 JULY 2016

Criminal Appeal

S Chamunorwa for the appellants
T Hove for the respondent

MATHONSI J: The three appellants were convicted of assault in contravention of s89 of the Criminal Law Code [Chapter 9:23]. They were each sentenced to an effective 18 months imprisonment after 6 months of the 24 months imprisonment was suspended for 5 years on condition of future good behavior.

They have appealed against both conviction and sentence on the basis, *inter alia* that the court *a quo* relied on the evidence of a mental patient which evidence was not supported by any other reliable evidence. The mother of the complainant who is the only other witness to testify did not witness the alleged assault.

The appellants gave an explanation about what transpired on 27 November 2013 at Ingutsheni Mental Hospital which led to the complainant losing three front teeth. They said the complainant, who had only been admitted for a week due to mental illness, had become violent at lunch time and attacked the first appellant with clenched fists while at the same time yelling insults. They teamed up in an effort to subdue the complainant and take him to the treatment room where a nurse was waiting to inject him with a tranquiliser. It was during that struggle that the complainant fell head first and sustained injuries.

The court *a quo* only said the explanation was a joke when rejecting it without more. In our law, even if the explanation given by an accused person is improbable the court is not at liberty to reject it unless it is satisfied not only that it is improbable but that beyond a reasonable doubt it is false; *S v Kuiper* 2009 (1) ZLR 113 (S) 118 C – E.

In our view it cannot be said that the explanation given by the appellants was beyond a reasonable doubt false. The only other explanation available to the court was that of a mental patient. In conceding the appeal, Mr *Hove* for the state has made reference to the provisions of s246 of the Criminal Procedure and Evidence Act [Chapter 9:07] which disqualifies a person afflicted by mental disorder from giving evidence in court while so afflicted.

While it has not been shown that when testifying in court on 28 March 2014, the complainant was still afflicted by mental illness, it has not been shown either that he was not afflicted. More importantly it is common cause that when the events of 27 November 2013 unfolded, he was in fact suffering from mental illness. Therefore his testimony about those events could not be relied upon by a court of law to reject the explanation given by the appellants and his co-accused.

In the result, it is ordered that

- 1) The appeal is upheld.
- 2) The conviction and sentence of the court *a quo* are hereby set aside and substituted with the verdict that the appellants are hereby found not guilty and acquitted.

Moyo J agrees.....

Calderwood, Bryce Hendrie and Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners