HB 31-16
HCA 225-7-10
XREF 1264-7-10

ESLOM GURAJENA
and
ADMIRE TSERAYI
and
MIKE MUPIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA AND MOYO JJ
BULAWAYO 12 OCTOBER 2015 AND 3 MARCH 2016

Criminal Appeal

D. Mujaya for the appellants
T. Makoni for the respondents

MOYO J: The appellants in this matter were convicted of assault as defined in section 89 of the Criminal Law Codification and Reform Act [Chapter 9:23]. They were each sentenced to twelve months imprisonment of which four months imprisonment were suspended for five years on the usual conditions.

Dissatisfied with both conviction and sentence, they then noted an appeal to this court.

The grounds of appeal are that:

1. AS AGAINST CONVICTION

   The State failed to prove its case beyond all reasonable doubt, more particularly in that;

a) The case was not properly investigated and the Investigating Officer actually conceded that the investigations were "partially" sjambolic.
b) The State produced two contradictory statements signed by the complainant which contained materially different information but such contradictions were ignored by the Court.

c) The State produced a Reports Received Book recorded five days after the alleged assault and the Court simply ignored the fact that evidence could have been fabricated to fix the Appellants.

d) The State relied on a Medical Report prepared more than two months after the alleged assault and no evidence was led to show that the complainant had not been assaulted by some persons during the intervening period.

2) The State failed to controvert the defence advanced by the appellants and did not in any manner discredit the evidence led in Court by all the appellants.

3(a) The State failed to show that the three appellants assaulted the complainant as alleged in the charge sheet beyond reasonable doubt and accordingly the appellants should have been acquitted.

b) The State erred in accepting the evidence of the complainant whose evidence was suspect as shown by the different reasons he gave in court. The complainant's deamenour was poor.

4. AS AGAINST SENTENCE

a) The sentence of 12 months imprisonment without the option of a fine is so severe as to induce a sense of shock in that:

i) All the appellants are married persons with the usual family responsibilities.

ii) All the appellants are sole breadwinners for their families.

iii) All the appellants are likely to lose their employment as a result of the convictions and custodial sentence.

b) The learned magistrate failed to take into account other options of a sentence other than custodial sentences such as community service or a fine coupled with suspended prison terms.

c) The learned magistrate failed to take into account the fact that the appellants were first offenders and that custodial sentences were harsh and excessive.

d) The learned magistrate overemphasized the fact that appellants were serving members of the Police force without noting that the assault was of a minor nature and a fine was a suitable under all the circumstances of the case.

In a nutshell, the appeal against conviction is premised on the fact that the state did not prove its case against the appellants beyond a reasonable doubt, due to the manner in which investigations were conducted. The appeal is further premised on that the defence by the applicant was not controverted by the state. As against sentence the appeal is premised on the fact that the sentence is excessive and induces a sense of shock and that the learned magistrate did not consider the applicant's personal circumstances.

At the hearing of the appeal we dismissed it in its entirety and stated that our detailed reasons would follow, here are they:

The appellants failed to show how the elementary errors made by the police, affected the credibility of the complainant. The complainant is not the one who recorded his own statement and he certainly cannot be held liable for the errors therein. The complainant told the court, to the court's satisfaction, what had transpired on the day in question. The appellants have not shown how the complainant's version as given in court should be found wanting. The complainant explained clearly what he in fact told the police. With regard to the statement recording, it is clear that two police officers did that with one Constable Madakwa recording paragraphs 1 – 5 and Constable Rumbidzai Manyuse recording paragraphs 6 – 12. That the investigations were shambolic in our view has no bearing on the credibility of the complainant as assessed by the learned magistrate. Actually, the confusion by the police in their recording of the statements show that there is something seriously wrong with the manner in which they did their work but that does not prove that the complainant lied in anyway. In our view the complainant sufficiently explained himself and gave a clear and vivid account of what transpired on the day in question, which account was corroborated by Chipo Mombo. The statement that the defence seeks to lean on was in fact signed by the complainant with his proper names, meaning that he is being truthful when he says he gave the police his names as Nherera and not Nyirenda.

In the case of *Baros and Another* v *Chimphonda* 1999(1) ZLR SC. The learned former Chief Justice GUBBAY held that:

> "It must appear that some error has been made in exercising the discretion. If the primary court, acts upon a wrong principle, if allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substituting it, provided always it has the materials for so doing"

The sum total of these considerations is that there must be a misdirection on the part of the trial court in assessing the issues of fact and law before it. Such can be the only basis upon which an appeal court can interfere.

We accordingly found no fault with the factual findings of the learned trial magistrate, neither did we find any fault with the manner in which the complainant presented his testimony in court. As such we find no basis upon which this court should interfere with the trial court's findings. The issue of the medical report, we find to be of no consequence, as explained in the court record, while it was prepared latter, it was an extract from the hospital records that were being kept by the doctors after duly examining and treating the complainant at an earlier date. It has not been shown how this compromises the probative value of the report.

It is an acceptable explanation by the witness that the police did not record his statement correctly or that it was not correctly interpreted. There is thus no need for the court to reject the testimony of a witness if it is satisfied that satisfactory explanation has been given. The appellants themselves attack the investigations as having been shambolic meaning even the complainant himself cannot be held down to what was recorded by the police. The court should assess his credibility on the basis of his account as given in court and the shoddy job by the police cannot be visited upon him when he has clearly told the court to its satisfaction what actually transpired.

The appeal against sentence has not been substantiated in any way, as the appellants' counsel has not shown any misdirection at all on the part of the sentencing court. The appellants are simply not happy with the sentence given but not that there is a misdirection. The learned magistrate aptly dealt with the issue of why the rule that first offenders should be kept out of prison where possible was not applicable in this case. We have not found any misdirection in the reasons for sentence.

It is for these reasons that the appeal was dismissed in its entirety.

Makonese and Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners

Kamocha J agrees……