FUNGAI MLAMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE 29 May 2018 & 20 September 2018

Criminal Appeal

O Shava, for the appellant
K Kunaka, for the respondent

WAMAMBO J: At the hearing of this appeal we dismissed the appeal. These are the reason for that decision. Appellant was convicted of attempted murder and sentenced to three years imprisonment of which one year imprisonment was suspended for four years on condition of good behaviour.

He now appeals against both conviction and sentence.

The grounds on conviction basically attack the charge preferred as formulated by the State. The defence asserts that a fatally defective charge was preferred against the appellant, which charge was not amended or cured by the evidence.

The grounds of appeal on sentence attack the sentence for being too harsh and the court *a quo* for applying wrong sentencing principles. Further, that the sentence of community service was the only sentence that was supposed to be passed in the circumstances of the case.

The facts of the matter are that the appellant and complainant are neighbours, residing at Hopley. Complainant overhead appellant and the chairman and another called Wasu saying that complainant's house should be demolished to pave way for a road.

The possible demolition of his house did not go down with the complainant who later asked appellant about it at Wasu's shebeen. Appellant on his part retorted that he did not want to hear about that matter and appeared annoyed, if not outright angry.

Appellant left Wasu's shebeen earlier leaving complainant behind. When complainant eventually went home he met appellant close to his house and appellant pushed him causing him to stagger. As he staggered appellant took out a knife from his pocket and stabbed complainant. According to complainant as appellant was pulling out the knife from his intentions he said "I am going to kill you" thrice. The complainant sustained serious injuries as reflected on the medical report exh 1.

Among other observations the medical report reflects that complainant suffered a penetrating abdominal wound and that he was operated on. Injuries sustained were serious and the possibility of permanent injury is likely.

The injuries sustained by complainant have negatively affected his livelihood.

The record shows that the offence preferred is couched as follows:

Offence: Attempted murder as defined in s 89 (1) of the Criminal Law Codification as read with s 47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

It becomes clear in the context that s 89 (1) (a) of [*Chapter 9:33*] is a typographical error and was supposed to be s 189 of the said Act which relates to an attempt. Otherwise it would not make sense for the State to prefer a charge titled attempted murder but it being a charge effectively of a strange, non-existent charge of assault as read with murder.

The State outline is clear in para 5 that appellant is alleged to have stabbed complainant on the stomach with a knife.

While there were some errors in couching the charge we are of the view in the circumstances that appellant clearly understood that he was being charged of attempted murder. He was thus not prejudiced by the errors; see *S* v *Phanuel Chekere* HH 114/2006, *David Karombe* v *The State* HH 264/15 and *William L Parson & Anor* v *Magistrate Chibanda N.O and the Attorney General* HH 273/13.

The evidence adduced also clearly established attempted murder. The defence of self defence was correctly rejected by the court *a quo* as the actions of appellant fits properly in the mould of the offence.

The appellant feebly attempted to paint a picture whereby complainant attacked him and he stabbed him in self-defence.

The complainant's wife, a credible eye witness dismissed the appellant's allegation. She also gave evidence that appellant had earlier send his child to ask after complainant suggestive of the fact that appellant had planned the attack. This coupled with the fact that appellant gave evidence that he happened to be preparing cabbages with a knife when he accosted complainant.

The court *a quo* in a detailed and analytic judgment made favourable credibility findings on complainant and his wife's evidence. The appellant's evidence was found to be unreliable. Credibility findings are not easily dislodged at appeal stage. See *R* v *Dlumayo and another* 1948 (2) SA 677 (A) at 706.

The proper approach in considering evidence has been spelt out in various judgments. Reference is made to one of those *Collins Dzinoreva* v *The State* HH 780/15 wherein HUNGWE J at page 6 said:-

> "Furthermore, the test requires a consideration of the cumulative effort of all the evidence and not a piecemeal approach. In S v Trainor 2003 (1) SALR 35 (SCA) at 41b, NAVSA JA applied this principle as follows:-
> "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any."

The decision in *S* v *Van de Meyden* 1999 (1) SACR 447 (W) at 449H – 450B endorsed in *S* v *van Aswegen* 2001 (1) SACR 97 (SCA) 101 C – E is also instructive in these disputes. NUGENT J said the following:

> "A court does not base its conclusion, whether it be, to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence…The proper test is that an accused is bound to be convicted if the evidence establishes he is guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of evidence which the court has before it. What must be borne in mind however is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may be ignored."

The office of attempted murder is a serious offence. In this case it was committed on a neighbour, next to his home. An ugly weapon, a knife was used on the stomach a sensitive and

vulnerable part of the body. The complainant can hardly do the duties he used to carry out as a result of the injuries perpetrated by appellant. Indeed the result of the offence was an operation and likelihood of permanent injuries.

The wave of sentences imposed in like cases is within the vicinity of the sentence passed in this case. The appellant has failed to refer us to case law demonstrating that the sentence induces a sense of shock or that the sentence of community service is the only sentence that would fit the full circumstances of this case.

In fact inspite of the grounds of appeal on sentence the appellant only attacks the conviction in his heads of argument.

We are unable to find any justification at law to reduce the sentence.

In the circumstances we make the following order:

1. The appeal against conviction and sentence is hereby dismissed

HUNGWE J agrees ……

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners