MAKOMBORERO HARUZIVISHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 19 & 22 September 2022

**Criminal Appeal**

*K Ncube* with *O Shava*, for the appellants
*F I Nyahunzvi*, for the respondent

**CHIKOWERO J:**

1. This is an appeal against both conviction and sentence.
2. The magistrates court convicted the appellant of the offence of inciting public violence as defined in s 187(1)(a) as read with s 36 of the Criminal Law Code. It sentenced him to 24 months imprisonment of which 10 months imprisonment was suspended for 5 years on the usual conditions of good behaviour
3. The second count on which the court convicted the appellant was on the charge of resisting a peace officer as defined in s 176 of the same code. For this, the appellant was sentenced to 12 months imprisonment half of which was suspended for 5 years on condition of good behaviour
4. The sentence on count 2 was ordered to run concurrently with that in count 1
5. The trial court found that on 5 February 2020 and at the corner of First Street and Nelson Mandela Street in Harare, the appellant had, by whistling and throwing stones at police offices, incited members of the public to commit public violence.
6. It also found that the appellant had on the same date, place and time resisted arrest. In other words, that the appellant had resisted to be arrested by a police officer called Rayson Davison. This was pursuant to the incitement to commit public violence aforesaid.

7. The court *a quo* concluded that Rayson Davison and Innocent Name, both of whom were police officers, were credible witnesses who had also corroborated each other. It convicted on that basis.
8. We entertain not the slightest doubt that the learned magistrate fundamentally misdirected herself in so concluding.
9. We think that the judgment rendered *a quo* is not thorough.
10. The rectified record of proceedings also demonstrates that the trial court convicted on the basis of a defective record of proceedings. The latter record was also placed before us as was this court's order directing that the record be rectified by inclusion of what turned out, on appeal, to be vital portions of the evidence led at the trial but had initially been recorded in too summary a form as not to reflect the actual testimony given.
11. The two police officers were the only witness for the prosecution.
12. Each fundamentally contradicted himself. In addition, the one contradicted the other. We agree with Messrs Ncube and Shava, for the appellant, that these discrepancies are of such a magnitude and value that they go to the root of the matter to such an extent that they give a different complexion to the matter altogether. See State v Lawrence & Anor 1989 (1) ZLR 29(S)
13. In evidence in chief, Davison said he and Name were among the many police officers who landed at the crime scene. Three lorries brought them there. Davison arrested a phone charger vendor. The appellant persistently demanded that the vendor be released. Realizing that this was futile, the appellant then whistled whereupon members of the public responded by throwing stones at the police, hence the charge of inciting public violence.
14. Still testifying in chief, Davison said he did not participate in the arrest of the appellant. Instead, he found Name, Sergent Zimbe and one Makaya having already arrested the appellant who, however, was resisting the trio's efforts to take him to the police vehicle.
15. Under cross-examination, Davison confirmed, twice, that he did not see the appellant throwing stones at a police vehicle or at police officers. This was in respect of the charge of incitement to commit public violence. He also confirmed that he did not participate in the arrest of the appellant as the latter had already been apprehended by Name and company. This relates to count two and would mean that the said charge was fabricated

because the appellant could not resist arrest by Davison if that particular police officer never arrested him in the first place.

16. Still under cross-examination, Davison claimed that a totally different version relating to both counts was true. This version was contained in the statement that he gave at the police station. It was this which had been omitted in the defective record. The witness was asked to read the relevant portion into the record. The exchange is in these terms:

> "Q. Read again the second sentence?
>
> A. In the process of that, the accused then started whistling and throwing stones towards a police vehicle. We then charged towards him and arrested him immediately and he also tried to be violent by resisting an arrest saying "muri kutisungirei motikuvadzisa."

17. When pressed to reconcile this version with what he had said in examination in chief and earlier under cross-examination the witness surprisingly claimed that both versions were true.
18. The only common denominators are that the appellant whistled and was arrested. Everything else is fundamentally different. Our view is that the whistling, throwing of stones and resisting arrest either fall or stand together.
19. Amidst this clearly unsatisfactory testimony, the witness maintained, still under cross-examination, that he did not see the appellant throwing stones at the police officers and the police vehicle.
20. On one version given in court, Davison did not see the appellant throwing stones at the police officers and the police vehicles. On that version he found Name and company having already apprehended the appellant with the latter resisting the trio's bid to take him to the police vehicle. This version speaks to both counts and necessarily means, in respect of the latter, that the appellant did not commit the offence which was alleged in that charge. Put differently, the appellant could not be convicted of resisting arrest by Davison when it is not Davison who was effecting that arrest.
21. The other version, given at the police station and which the witness claimed, albeit under cross-examination, to also be true is that containing the statement which we have quoted

in this judgment. That version means that Davison saw the appellant as the latter was whistling and throwing stones at the police vehicle. It also means what it further says. It is this:

> "..we then charged towards him and arrested him immediately and he also tried to be violent by resisting an arrest…."

22. Needless to say, the two versions are mutually exclusive. They cannot both be true. A witness who gives such kind of evidence cannot by any stretch of the imagination be said to be credible. This appeal must be one of those exceptional matters where the record itself justifies interference with factual findings of fact made by a trial court where such findings are anchored on credibility. There was something grossly irregular in the proceedings. The trial court relied on a defective record of proceedings to render judgment. It missed the opportunity to detect the fundamental contradictions in the evidence of Davison as well as the incredible nature of that testimony. It rested its judgment on an incorrect appreciation of the evidence and hence based its judgment on patently wrong facts. *State* v *Soko* SC 118/92: *Chimbwanda* v *Chimbwanda* S 28-02.
23. The foregoing resolves the appeal against conviction on both counts. The need to advert to Name's *evidence vis-a- vis* the trial court's findings of fact no longer arises.
24. Since we have allowed the appeal against the convictions, the sentence imposed on the appellant falls away.
25. In the result, the following order shall issue:

    1. The appeal against the convictions be and is allowed
    2. The convictions are quashed and the sentences set aside. The following is substituted:
       "Count 1: the accused is found not guilty and is acquitted.
       Count 2: the accused is found not guilty and is acquitted"

CHIKOWERO J:…….

ZHOU J:……

*Kossam Ncube and Partners*, appellant's legal practitioners
*The National Prosecuting Authority*, respondent's legal practitioners.