HB 129/18
HCA 71/16

RAYMOND GOMBEDZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MATHONSI JJ
BULAWAYO 4 & 7 JUNE 2018

Criminal Appeal

K. Ngwenya for the appellant
W. Mabhaudi for the respondent

MAKONESE J: The appellant appeared before a magistrate sitting at Bulawayo in the 18th March 2016 facing one count of assault as defined in section 89 of the Criminal law Codification ad Reform Act (Chapter 9:23). He was jointly charged with three other persons. They all pleaded not guilty to the charge. The allegation against the four accused persons who are members of the Movement for Democratic Change (MDC-T) party, led by the late Morgan Tsvangirai is that they assaulted a party member at Njube hall, Bulawayo. After a lengthy trial the other three accused persons were found not guilty and acquitted. The appellant was found guilty as charged and was sentenced to 6 months imprisonment, wholly suspended on the usual condition of future good conduct. In addition, he was fined US$400 or in default of payment 1 months imprisonment. This appeal is indicative of the appellant's dissatisfaction with both the conviction and sentence. The state in its heads of argument concedes that his conviction is safe and must be set aside.

Background

On the 24th of January 2016 the MDC-T party held a structural audit meeting a Njube Hall in Bulawayo. The meeting was to be addressed by the party leader, the late Morgan Tsvangirai. Amongst the several persons who attended the meeting was the leadership of the party, the provincial leadership and ordinary party members. Susan Mbewe, the complainant was at the meeting. She positioned herself and at a strategic position. When the Provincial Chairman, one

Gift Banda was being introduced by the complainant and other party members started chanting slogans and disrupting the meeting by declaring, "No to Gift Banda". This slogan annoyed and embarrassed the entire leadership of the party that was seated at the "top table". An instruction was immediately issued to the appellant and other members of the security team to remove from the hall the persons who were disrupting the meeting. It was apparent to the members gathered at this meeting that there were two factions, one belonging to Gift Banda and another to one Matson Hlalo.

The complainant was removed from the hall. She alleged that as she was ejected from the hall, the appellant and his co-accused assaulted her by dragging her and pulling her braids, and T-shirts, before she was punched with clenched fists and booted feet several times all over the body. The complainant did not sustain visible injuries and did not seek medical attention arising from this assault. The learned magistrate in the court a quo concluded that there was insufficient evidence to prove the guilt of three of the accused persons. The appellant was convicted after the magistrate reasons that it had been proved beyond reasonable doubt that appellant was guilty of the offence. This then is the factual background to this matter.

The appellant raised three main grounds of appeal, namely:-

1. The trial court erred and misdirected itself in convicting the appellant of assault when the evidence led by the state did not prove the guilty of the accused beyond a reasonable doubt more specifically in that there was no evidence placed before the court either direct or circumstantially to suggest that the appellant assaulted the complainant as alleged by the state.
2. The trial court erred and misdirected itself by convicting appellant of assault in that it failed to appreciate that in view of the factional fights within the MDC political party over the Bulawayo Provincial Chairmanship position, the complainant had fabricated allegations of assault against the appellant whom she perceived as an enemy to her faction.

3. The trial court erred and instructed itself in concluding that the state had proved its case beyond reasonable doubt and convicting appellant yet appellant had proffered a reasonable explanation and defence that the complainant was escorted and left outside the hall without any force being applied on her.

As regards sentence the appellant argued that the court a quo failed to properly exercise its sentencing discretion by imposing 6 months imprisonment, wholly suspended and a fine of US$400. The sentence was excessive and induced a sense of shock, so the appellant contended.

In her evidence in chief, the complainant testified that the appellant had pulled her out of the hall by "pulling her by braids". However under cross-examination the complainant conceded that in the statement she made to the police, when the events were fresh in her mind, she had averred that it was the second accused person, (and not the appellant) who had pulled her by her braids. The complainant went on to make a surprising revelation that it was a misunderstanding that appellant had pulled her. There was clear inconsistency in the evidence of the appellant regarding the role played by the appellant when she was being ejected from the hall. The second state witness, Elizabeth Ncube testified that it was accused two who had dragged the complainant by her dread locks. This confusion only added to the inconsistency in the state case. The finding by the learned trial magistrate that the appellant "dragged and pushed the complainant outside the hall", is therefore, clearly not supported by the evidence on the record. This finding ignores the evidence of Elizabeth Ncube who stated that accused two had dragged the complainant outside the hall. It therefore follows that in view of the apparent and evident contradictions and inconsistencies in the identity of the person who dragged the complainant by her dread locks, the court's finding that the appellant had dragged the complainant outside the hall is a misdirection, as there is no basis for such a finding.

A reading of the learned magistrates' judgment reveals that the court a quo did not find the complainant and other state witnesses credible as indicated on pages 10-10 of the record of proceedings where he states as follows:

"An analysis of the evidence led in this case must follow. The two state witnesses, being the complainant and Elizabeth Ncube cannot be said to have been the most honest or credible witnesses ever brought before this court. There were large pockets of inconsistencies surrounding both their testimonies. Their versions differed on who approached the complainant first between 1st, 2nd and 3rd accused. Both witnesses have divergent conclusions as to when 4th accused joined in the assault and in fact how exactly the complainant was assaulted. For instance, the 2nd state witness Ncube stated that the complainant fell and was then pounced upon by 4 accused persons. The complainant herself never mentioned this.

Both the state witnesses directly confessed that they were members of the Hlalo faction and did not recognize Gift Banda as the Provincial Chairman. The second witness in particular did not hide her disdain of Gift Banda and was aggressive and briefly emotional when questions relating to Gift Banda were part of her cross-examination. To therefore say the two witnesses had a motive to place false charges against the accused persons would be a gross understatement. They clearly had a vendetta and agenda to push."

Regarding the evidence of the defence witnesses, the learned magistrate had this to say:

"The evidence of four witnesses above mentioned was credible and the court therefore accepts the aspect that accused 1, 2 and 4 were on the podium as a fact."

It is my view that the danger of falsely incriminating the accused persons who were acquitted y the trial court was also applicable and relevant to the appellant. The state witnesses who gave evidence admitted that there were against the chairmanship of Gift Banda. There is a strong possibility that the charges were brought up against the appellant and is co-accused because they belonged to an opposing faction. One Donaldson Mabutho who was the first accused in the trial stated in his opening remarks that the allegations were emanating from serious factional fighting in his party.

The trial court grossly misdirected itself in material respects when it sought to place the burden on the appellant of proving his innocence. At page 14 of the learned magistrate's judgment he held as follows:

"In my view the 3rd accused (appellant) has not managed to rebut the evidence that certainly only points to one definite conclusion."

The appellant had no onus to rebut the allegations against him. It was not open to the trial magistrate to place any must on an accused person in a criminal trial. Under our law the burden of proof lies on the state to prove its case beyond reasonable doubt. See *S* v *Makanyanga* 1996 (2) ZLR 231; *R* v *Difford* 1937 AD 372 at 373.

The alleged offence took place in a packed public hall. There was no credible evidence to prove the guilt of the appellant beyond reasonable doubt. Once the court *a quo* came to a conclusion that the witnesses called by the state were noteworthy of belief the court should have entertained doubt. The appellant ought in those circumstances to have been given the benefit of the doubt.

In the circumstances, the appellant's conviction was unsafe I accordingly make the following order:

"1. The appeal be and is hereby upheld.

2. The conviction and sentence of the court a quo be and is hereby set aside."

Mathonsi J ……. I agree

T. J. Mabhikwa & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners