HB 39-18
HCA 95-16
XREF INYATHI 140/16

SITHEMBISO NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 19 FEBRUARY 2018 AND 22 FEBRUARY 2018

Criminal Appeal

M Mpofu for the appellant
T Hove for the respondent

MATHONSI J: The appellant appeared before a magistrate at Inyathi on 15 April 2016 charged with assault as defined in s89 (1) of the Penal Code. He pleaded guilty and was, upon conviction sentenced to 36 months imprisonment of which 6 months imprisonment was suspended on condition of future good behaviour.

The facts are that the 42 year old appellant of village 1 Masimini, Kennilworth Inyathi had been in the company of the 43 year old complainant at Mhlongwe Bar Kennilworth Business Centre drinking beer and were drunk. At about 2200 hours the complainant was leaving the bar intending to go home when the appellant followed him and stabbed him on the hand, the mouth and the left side of the chest with an okapi knife inflicting injuries described by the doctor who examined the complainant as serious. The doctor also found that the degree of force used was "severe."

The appellant has appealed against both conviction and sentence. On conviction the appellant attacks the proceedings on the basis that he is unsophisticated and illiterate but had initially pleaded not guilty. Therefore the court should have requested and confirmed his warned and cautioned statement in order to ascertain whether the change of plea to that of guilty was genuine. There is no evidence that the offence was committed.

Regarding sentence the appellant complains that due weight was not given to his personal circumstances. The court unduly placed too much emphasis on the prevalence of the offence.

I must confess that I have not the slightest idea of what the appellant is talking about in his notice of appeal or in the heads of argument running into thirteen pages. Indeed the heads of argument are extremely unhelpful constituting as they do a compilation of research which has nothing to do with the matter before the court. What comes out very clearly from a reading of the submissions is that counsel has another case, not borne by the appeal record placed before us, which he has elected to argue. He talks of a warned and cautioned statement made by the appellant which is not part of the record. He makes reference to an initial not guilty plea, an initial complaint made by the appellant about unkind treatment he was subjected to by the police and to a defence that the complainant may have been stabbed by other people who are not the appellant which may have been stored in the mind of appellant. The entire submissions are obtusely unhelpful to the court.

What is completely lost to counsel for the appellant is that an appeal is decided from the appeal record. The appeal court is restricted to the four corners of the appeal record and not the heep of extraneous matter which the parties may have wanted to present but did not do so. This is not a trial court. It is remarkable that all this has been done without even attempting to challenge the correctness of the appeal record. Quite to the contrary the appellant's legal practitioner certified the record as "a true reflection of the proceedings in court." He appended his signature signifying certification on 2 February 2017 more than three weeks before filing the offending heads of argument.

According to the certified record when the appellant appeared before the court *a quo* on 15 April 2016 he immediately tendered a plea of guilty to assault. After that the state outline was read to him and understood by him before the court canvassed the essential elements. He admitted the facts as set out in the state outline as the magistrate routinely put them to him. It was only after that session that a guilty verdict was returned. A medical report on the injuries sustained by the complainant was read out to him and he understood the contents. That is what is on record and that is what informs the resolution of this appeal by this court.

The appellant cannot, without altering his plea of guilty to not guilty and without even beginning to point to any circumstance, suggesting that he did not understand what was happening or that there was some other irregularity in the truncated proceedings recording the

guilty plea, seek to argue that the conviction should be set aside. It's a complete waste of the court's time.

In his heads of argument, Mr *Mpofu* for the appellant did not advance any arguments whatsoever for upsetting the sentence content to argue only against conviction, a conviction which followed a guilty plea. Upon realizing that he had strayed into the wilderness counsel hastely, desperately and belatedly tried to conjure submissions against sentence. He suggested that a person convicted of assault as defined in s89 (1) of the Penal Code should be considered for the imposition of a fine. This is because the penal provision allows for a sentence of a fine up to level fourteen or imprisonment for a period not exceeding 10 years or both. Mr *Mpofu* suggested that the court must substitute a fine especially as the appellant served a period of 4 months after conviction and sentence before being granted bail. I do not agree.

This was a very serious case of assault in which the appellant used an okapi knife to stab the complainant, not once but three times inflicting injuries to the mouth, hand and the chest. It has not even been suggested that the appellant was provoked to attack the complainant the way he did. It was just a senseless and drunken attach which could have easily resulted in an unnecessary loss of life as clearly the intension to cause grievous bodily harm was there for all to see. In terms of section 189 (3) of the Act:

> "In determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations a court shall have regard to the following—
>
> (a) the age and physical condition of the person assaulted;
> (b) the degree of force or violence used in the assault;
> (c) whether or not any weapon was used to commit the assault;
> (d) whether or not the person carrying out the assault intended to inflict serious bodily harm;
> (e) whether or not the person carrying out the assault was in a position of authority over the person assaulted;
> (f) in a case where the act constituting the assault was intended to cause any substance to be consumed by another person, the possibility that third persons might be harmed there by, and whether such persons were so harmed."

In this case injuries were inflicted on the left side of the chest as well as the face with a sharp object, an okapi knife, using severe force and the said injuries were found by the doctor

who examined the complainant to be serious. It was certainly not a minor assault. The sentencing court was required to take into account all the factors outlined in s 89 (3) and it had the discretion to impose a prison term of up to 10 years. Bearing in mind that sentencing is the discretion of the trial court which an appeal court can only interfere with where there is a glaring misdirection this court has not been able to find any misdirection. The court is satisfied that the court *a quo* properly exercised its sentencing discretion in the circumstances.

In my view a person who stabs another with an okapi knife in a state of drunkenness directing the blows even to the chest should not expect to be treated with kid's gloves. In fact such an assailant does not qualify for the sentence of a fine unless there are really compelling reasons as to why resort to such action was taken. There is therefore no merit in the appeal against sentence either.

Accordingly the appeal is hereby dismissed in its entirely.

Takuva J …… agrees

Samp Mlauzi and Partners, appellant's legal practitioners
National Prosecuting Authority, state's legal practitioners