OBERT NYAHUNA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE, TAGU JJ
HARARE, 13 February 2014 and 25 February 2014

Criminal appeal

F. Kajokoto, for the appellant
F Kachidza, for respondent

TAGU J: The appellant was convicted by the court of Regional Magistrate of one count of Attempted Murder and another of Assault after a contested trial. He was sentenced to 6 years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions of good behaviour in respect of the Attempted Murder charge. He was further sentenced to pay a fine of 100 dollars or 20 days imprisonment on the Assault charge.

This appeal concerns the conviction and sentence in respect of the Attempted Murder charge. The appeal is opposed by the respondent.

The grounds of appeal against conviction were firstly that the magistrate readily accepted the complainant's version of what transpired despite the fact that no independent witness was called to corroborate the state case. Secondly that it quickly brushed the appellant's averments despite the fact that there is a likelihood that he was telling the truth of what happened. Thirdly that the evidence led was not supportive of the charge being preferred against appellant and fourthly that there is no risk of permanent injury hence attempted murder could not be sustained.

As to the sentences the grounds of appeal were that appellant was a first offender, a family man, was provoked and that the sentence was excessive so as to induce a sense of shock and that a non- custodial sentence would have met the justice of the case.

I do not think there is any validity in the points taken. The magistrate's judgment is very clear. He rejected the appellant's version for the reasons which he stated. While I consider that it would have been necessary that one Obert Katiyo should have been called, the

evidence of the complainants corroborated each other. Even the evidence of the appellant's own defence witness was clear that it was the appellant who lifted the second complainant and took him out of the shop, not that the appellant left the shop under attack. The appellant was only attacked later outside the shop. The evidence was clear that when all this started first complainant was not present and was not drunk. The manner the two complainants were stabbed showed that this was not an accidental stabbing. The appellant actually produced the knife from his pocket, opened it and then stabbed the complainants. The counsel for the appellant actually conceded on this point. This was not an act done in self- defence.

I also do not agree that the evidence was not supportive of the charge of attempted murder. The counsel for the appellant was indeed correct to concede that the injuries sustained by the complainant supported the charge of attempted murder.

The medical report produced during trial showed that the first complainant suffered severe injuries. There was penetrating trauma to the left abdomen, sustaining left kidney laceration, small bowl penetration and left diaphragm laceration. Among other treatments complainant needed intensive care. Though there was no permanent injury likely to occur charge of attempted murder is sustained. The magistrate in his well reasoned judgment explained how appellant exceeded the bounce of self- defence.

From the authorities cited by the counsel for the respondent there is no need for a permanent injury to occur for a charge of attempted murder to suffice. See *S* v *Munodawafa* S 220 /95. The weapon used and the part of the body injured all point to an intention to cause death.

In casu the trial magistrate cannot be faulted when he said-

> "but I do not understood why the accused produced a deadly weapon from his pocket to stab first complainant in the stomach a delicate part of the body. The fact that he produced the okapi knife and directed it at a delicate part of his body to the extent that his intestines actually came out means that he foresaw the real possibility that he might cause such harm as might seriously affect his health or did not care whether death resulted or not. His actions were disproportionate to the provocation event."

It is my view that appellant was properly convicted of the charge of attempted murder in respect of the first complainant. If it was an accident as he wants this Honourable Court to believe, how does he explain the stab wound sustained by the second complainant as well? The counsel for the appellant properly conceded that the first complainant did not fall on the knife. He deliberately stabbed him.

Coming to the sentence and borrowing from the authorities cited by the counsel for the respondent an effective custodial sentence for this kind of offence in the region of 3 years imprisonment is appropriate. However, the counsel for the respondent conceded that the complainants were also to some extent to blame. Hence a sentence of 6 years is on the high side. I agree with that observation. Counsel for the respondent suggested a sentence of 3 year with a portion suspended. But be that as it may an effective prison term is called for. See *S* v *Bhero & Anor* SC 73 /94, *S* v *Bassoppo-Moyo* SC 12/ 85

Wherefore, it is ordered as follows-

1) The conviction and sentence in respect of count 2 is hereby confirmed.
2) The appeal against conviction in respect of count 1 is hereby dismissed.
3) The appeal against sentence in respect of count 1 is allowed to the extent that the sentence imposed by the court a quo is hereby quashed and substituted with the following sentence-'3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition that the appellant will not within this period commit any offence involving attempted murder or assault perpetrated on the person of another for which on conviction appellant is sentenced to imprisonment without the option of a fine.

TAGU J …….....

BERE J Agrees …….....

Majokoto & Company, appellant's legal practitioners
Attorney General's Office, for the state