GABRIEL FRANK
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 5 February 2025 & 27 February 2025

Criminal Appeal

Advocate *G.R.J Sithole,* for the appellant
Ms *T. L Katsiru,* for the respondent

SIZIBA J:

INTRODUCTION

1. The appellant was convicted of two counts of assault by the Magistrates Court sitting at Mutare on 12 November 2024. He was alleged to have contravened s 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*]. He was sentenced to a fine of US$210 or in default thereof to imprisonment for fifteen days. In addition, he was sentenced to two months imprisonment which was wholly suspended on usual conditions of good behavior.

2. Having been dissatisfied with both the conviction and the additional wholly suspended two months imprisonment sentence, the appellant then appealed to this court against both conviction and sentence. When we heard the appeal on 5th of February 2025, counsel for the state raised a preliminary point on the imprecise nature of the grounds of appeal as well as the failure by the appellant to pray for the appeal against conviction to be upheld. We decided to condone the appellant on these defects as we were satisfied that we could relate to the merits of the appeal. We found no merit in the appeal against conviction and dismissed it. We found merit in the appeal against part of the sentence and upheld it by setting aside the two months suspended portion of imprisonment so that the sentence would read as follows:

> "The accused shall pay a fine of US$210.00 or its Zig equivalent and in default of payment he shall serve fifteen days imprisonment."

THE EVIDENCE PRESENTED BEFORE THE COURT *A QUO*

3. The allegations against the appellant were that on 13 January 2024, he committed an act of assault upon the complainants by setting his vicious dog upon them and thereby causing it to bite and injure them. The complainant in the first count was Lovemore Sithole who was bitten by the dog on the left thigh and left knee. The complainant in the second count was Reason Mlambo who was bitten by the dog twice on the right leg and twice on the right thigh.

4. It is common cause that the appellant is a security guard employed by Mutare Border Mills. On the day of the alleged incident, it is common cause that the appellant and his colleague one Cosah Chamunorwa were on foot patrol at Alumina 4, Ngagari Claim, Penhalonga in Mutare. It is also common cause that the appellant and his colleague were accompanied by Mafasi, the male German Shephard dog which was brown and black in colour.

5. The complainants were adamant both in their evidence in chief and also under cross examination that when the appellant saw them, he questioned why they were there and accused them of stealing and then he instructed his vicious dog to catch them and it went after them and bit them. Their testimony was that they had been waiting for their manager when the accused found them at the crime scene. They were employed at the nearby mining claim. As a result of the injuries sustained, the complainants were taken for treatment and medical examination by their manager. Medical reports were tendered which showed that the complainants had been bitten by the dog. The two complainants insisted that it was the appellant who instructed the dog to catch them. They did not know him prior to the incident but they maintained that it was him and not his colleague who unleashed the dog upon them.

6. On the other hand, the appellant's version was that he was not a dog handler. It was his colleague Cosah Chamunorwa who was handling the dog. He testified that when he was on patrol on the day in question with his colleague, he met some individuals and

he asked them who they were but they responded by calling their colleagues and as a mob they chased them with stones, switches and logs. They were forced to flee and the dog which was handled by his colleague also escaped and when it arrived at their base it was limping. He would not know whether anyone was bitten by the dog or not. Cosah Chamunorwa testified as a defense witness to the effect that he was a dog handler and that he was on patrol on that day together with the appellant. He supported the appellant's version of events.

FINDINGS MADE BY THE COURT *A QUO*

7. The court *a quo* found the complainant's version persuasive. It found that the appellant was properly identified by the two complainants as the culprit who set the vicious dog upon them. The learned magistrate also dismissed the defense's attack on the medical affidavit which was mainly based on wrong names of the hospital as the complainants had referred to Old Mutare hospital instead of Victoria Chitepo hospital since they were not well versed with the area of Mutare. The learned magistrate also dismissed the version that the appellant was not a dog handler as there was no evidence to support such apart from the mere say so of the appellant and his witness. He found the charges to have been proven by the state and convicted the appellant of the crime of assault as charged.

THE GROUNDS OF APPEAL

8. The appellant assailed the conviction on the following grounds:

1. The court *a quo* erred and grossly misdirected itself when it convicted appellant of assault on the complainants Lovemore Sithole and Reason Mlambo when there was no evidence to prove the essential elements of the charge raised against Appellant, mainly in that;

(a) There was no evidence tendered to support that the complainants were assaulted on 13 January 2024.

(b) There was no positive identification of the accused person as the Complainants' assailant.

2. Further, the court *a quo* erred and grossly misdirected itself when it convicted the appellant for assault when there is no evidence on record to show that the appellant was the dog handler on the date of the alleged assault.

3. The court *a quo* erred in law and grossly misdirected itself when it ignored that in the event it finds any "assault" to have taken place on 13 January 2024 and appellant perpetrated it, appellant would not have been criminally liable for the offence as he is protected by the law because of the nature of his employment.

9. The attack upon part of the sentence being the two - month suspended prison term was premised upon the following ground:

4. The court *a quo* erred and grossly misdirected itself by sentencing appellant to a wholly suspended two months of imprisonment when it is clear that such sentence was unwarranted, accused having already been committed to a fine and convicted of indirect assault.

SUBMISSIONS BY COUNSEL

10. *Advocate Sithole*'s submission was that there was insufficient evidence to prove the *actus reus*. He stressed that there had been no identification parade and that it was not disproved that the appellant was not a dog handler. His submission was that the trial magistrate in the court *a quo* had reversed onus in having required the appellant to prove that he was not a dog handler. He abandoned the third ground of appeal which sought to indemnify the appellant on the basis of the nature of his work and this was proper in our view as no law supported such a defense since the appellant was not a Game Ranger employed in the Parks. There was also a submission that the suspended portion of the imprisonment sentence was unjustified after the imposition of a fine upon the accused.

11. On the other hand, Ms *Katsiru*'s submission was that both the conviction and the sentence of the court *a quo* were unassailable. She submitted that the state witnesses had managed to identify the appellant at the crime scene as the culprit. She maintained that there had been no misdirection on the part of the court *a quo*.

THE APPLICABLE LEGAL POSITION

12. Regarding the conviction, the main issue for determination in this appeal is whether the court *a quo* can be faulted in having found the appellant guilty of having assaulted the complainants by unleashing his vicious dog upon them. The basis of an appellate court's interference with a lower court's findings of facts is limited to those instances where the lower court would have been irrational or grossly unreasonable in its findings of facts or assessment of evidence in a manner that can be shown to vitiate its decision. See *Mupande and Others* v *The State* SC 58-22 at p 6 to 7 of the cyclostyled judgment. On the same vein, findings of credibility of witnesses are chiefly in the province of a trial court and an appellate court does not have to interfere in the absence of any misdirection. See *Khumalo* v *The State* HB 28-24. Put differently, an appellate court will not interfere with a lower court's decision in the absence of a misdirection on the law or on the facts.

13. In the present matter, the trial court assessed the testimony of the witnesses who testified before it as well as the documentary evidence that was tendered before it. It came to the conclusion that the appellant had been sufficiently identified by the complainants. It is common cause that the appellant was present at the crime scene. The complainants managed to see him in broad daylight. It is also common cause that the dog was at the crime scene. The medical affidavits corroborate that the complainants were attacked and injured by the dog. The leave form that was tendered by the appellant's colleague showed nothing further than that he was also employed as a security guard. The assertion that he was a dog handler was the mere say so of the appellant and his colleague which the court *a quo* rejected and such rejection cannot be said to be irrational in face of the evidence of the complainants who saw the appellant at the crime scene. There was no need of any identification parade since the appellant agreed that he was at the crime scene. It was not also his version that his colleague whom he alleges to have been the dog handler unleased the dog to the complainants. This therefore excludes the possibility that the complainants might have mistaken the actions of his colleague and himself. We do not therefore see where the trial court erred

in its findings of fact and as such we have no legal basis to interfere with the conviction of the appellant.

14. On the sentence, we were persuaded by appellant's counsel that having imposed a fine upon the appellant, there was no need for the trial magistrate to impose an additional suspended term of imprisonment and the rationale for such does not even appear on the record.

15. It is therefore on the basis of the above reasons that we dismissed the appeal against conviction and upheld the appeal against sentence.

_____

MUZENDA J agrees

Maunga Maanda & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners