JOHANNES TANDIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 14 November 2013

Appeal against sentence only

C.K. Mutevhe for the appellant
I Muchini, for the respondent

HUNGWE J. The appellant, a private in the Zimbabwe National Army was convicted, on his own plea of guilty, of culpable homicide as defined in section 49 of the *Criminal Law (Codification and Reform) Act, [Cap 9:23]*. He was sentenced to 4 years imprisonment of which 2 years imprisonment was suspended for 5 years on the usual conditions of good behaviour. He appeals against that sentence.

Two grounds of appeal were advanced on behalf of the appellant. The first ground was that the court a quo erred in imposing a sentence which was manifestly excessive to the extent that it induces a sense of shock given the mitigatory features in favour of the appellant. The second ground alleges that the learned magistrate erred in imposing an effective 2 year sentence without considering the imposition of community service as an alternative. In his heads of argument these grounds are amplified by emphasising the benefit to the administration of justice rendered by a plea of guilty by a first offender. For this submission counsel placed reliance on *S* v *Nkala* HB-85-03; *S* v *Sithole* HH-50-95; *S v Mpofu* 1985 (1) ZLR 255 and *S* v *Shariwa* HB-37-03. It was said that the learned trial magistrate only paid lip service to the guilty plea tendered by the appellant. More cases were cited to persuade us to interfere with the sentence imposed by the lower court. We were urged to interfere with the sentence on the authority of*S* v *Chireyi & Ors* HH-63-11 where it was held that to make no enquiry into the suitability of community service and to give no cogent reasons as to why community service is inappropriate constitutes a misdirection. We remained unmoved and dismissed the appeal against sentence on the turn. These are our reasons for that decision.

The matter proceeded in terms of s 271(2)(b) of the*Criminal Procedure and Evidence Act, [Cap 9:07]*. The agreed facts were set out in the State Outline. The following appears in it.

> "3. On the 11th day of February 2007 at about 01h00 the accused and his workmates were patrolling along the border with Mozambique and Zimbabwe at an illegal crossing point known as DRC.
>
> 4. The accused saw Kenias Betura walking along the footpath with the deceased and was ordered to stop by Lance Corporal Speke Marowa but he started to run away.
>
> 5. The accused fired a single shot using his AK47 rifle serial number 10191 hitting the deceased on the chest and died on the spot."

When the essential elements of the offence charged were put to the appellant, he admitted that he fired the shot which hit deceased on the chest. The questions were as follows:

> "Q: Do you admit that the complainant was hit on the chest with the bullet you had fired?"
>
> "A: Yes."
>
> "Q: Do you admit that you knew that there was a risk that complainant would be shot?
>
> "A: Yes"
>
> "Q: Do you admit that you realized that there were people running away from you?"
>
> "A: Yes."

The post mortem conducted on the remains of the deceased confirmed that the deceased was shot on the right side of his chest and that the bullet exited on the back. This post mortem is ex 1. On these facts it is apparent that the appellant must consider himself extremely fortunate that the State only preferred to charge him with culpable homicide instead of murder. The appellant, the facts show, shot in the chest and killed an unarmed civilian. Although the court *a quo* appeared to have accepted that the appellant was running

away from the appellant, it did not attempt to reconcile that averment in the facts with the findings by a pathologist that the deceased was shot on the chest. There was need to resolve this apparent contradiction.

Whilst the State is *dominus litis* in any prosecution and entitled to accept a plea tendered by an accused person where the justice of the case demands it, this time honoured practice should not be adopted where the interests of justice will be compromised in the process. The result is that the uninformed acceptance of improbable facts places the court in a difficult position when the question of sentence has to be considered. The court's hands are tied. It has to assess sentence on the basis of facts which are contradicted by other evidence. That evidence may point to a more serious charge. In*S* v *Fusirayi* 1981 ZLR 56 FIELDSEND CJat p58B-E stated:

> "The inter-relationship between the prosecution and the court is a very important one. Both are concerned with the impartial administration of justice. There is a danger of at least a suspicion of favouritism if prosecutors agree with the defence an improbable version of the facts which greatly mitigates what might otherwise be a serious offence; and like Caesar's wife, the prosecution must be above any trace of suspicion. It is not enough that the prosecutor has no evidence to refute an improbable version put forward by the defence: unless he has evidence or information on which he believes that that version may well be true-in which case he should explain his position openly to the court-he should not just accept the defence story. It is always open to him to lead his evidence of what occurred and leave it to the court to draw the proper inferences, in the light of what the accused may or may not say, and if the accused does give an improbable version in evidence he always has the weapon of cross-examination. I do not want to be understood to be saying that there is necessarily anything wrong in an agreed statement of facts. That procedure is essential in the normal run of cases to the smooth and speedy operation of the court's business. All I am saying is that prosecutors should not readily agree to accept facts which are inherently improbable, unless they have good reason for believing that they are in fact the truth.*"*

In the present case, not only do the facts *prima facie* disclose a more serious offence but counsel for the appellant as well as the State have not taken the court into their confidence and explain why this apparent state of affairs prevailed in the lower court. In considering the present appeal this court cannot paper over this state of affairs and pretend it does not exist when it does. It seems that the only basis for the charge of culpable homicide was that as a member of the border patrol unit, the appellant was empowered to effect arrest for the infraction of the law relating to the use of unofficial border crossing points. As such he resorted to excessive use of force in an effort to effect a lawful arrest. He ought to have warned the deceased and his party that he was armed. If it did not work, then a warning shot into the air probably would have done the trick. Still if it did not, then the expectation would

have been that he fired at the legs of the suspect who was in flight hopefully immobilising him. See *S* v *Chikukutu* 1996 (1) ZLR 702 (SC).

The general principle that killing by excessive use of lawful force may be culpable homicide is well settled. See *R* v *Detsera* 1958 R & N 51 at 54H – 58C; 1958 (1) SA 762 (FS) at 765E – 767D; *S* v *Sanyanga* S-106-86; *S* v *Mlambo* 1994 (2) ZLR 410 (S).

In *S v Mudzimu* HH-153-94 an off-duty policeman brandished a cocked pistol at two men fighting amongst a ring of by-standers. One round was fired. The bullet seriously injured one fighter and killed an onlooker. He was charged with murder and attempted murder. The court found that he had pulled the trigger either in trying to fire a warning shot in the air or carelessly. In regard to the injured man, he had no intention to kill but as it was objectively foreseeable that he could cause grievous bodily harm, and he did cause grievous bodily harm, he was guilty of assault with intent to cause grievous bodily harm. In regard to the death of the bystander, he was convicted of culpable homicide as he did not intend to kill the ultimate victim. He was sentenced to 3 years imprisonment with 2 years suspended on the assault with intend to cause grievous bodily harm charge and to 7 years with 3 years suspended on the culpable homicide charge. The sentences were ordered to run concurrently. See also *R* v *Oneas*1967 (1) SA 87 (RA).

In my view the court could not, on the facts before it, even on this version of agreed facts, be said to have misdirected itself in its assessment of sentence. It is a matter of public knowledge that illegal border jumpers do so not for any reason which could be construed as posing a security risk. They do so for economic reasons, which are reasons for survival. There is no suggestion that the deceased threatened the appellant but merely attempted to evade the law. The Zimbabwe National Army is a disciplined force. No doubt the appellant is a product of its high-level discipline. His conduct is unpardonable. His sworn duty is to respect, protect and promote the human dignity of all Zimbabweans at all times by upholding and defending the rights set out in the Constitution. If he failed, as he did in this instance he should be treated in the same way as any ordinary offender. The punishment which he should suffer must reflect the public revulsion of this type of conduct. In my view, a harsher penalty was called for. Had the State cross-appealed for an increase in the sentence, I would have favourably considered such a submission. It has not.

Lastly, the conditions upon which the prison sentence was suspended needs amendment. A court should never suspend a sentence on condition that the offender "is not

convicted of an offence involving an element of negligence" because negligence, by definition, does not involve an exercise of the will. The appellant, for instance, might be involved in a motor accident and be found guilty of culpable homicide. It would be quite wrong in such a case to bring into effect the suspended sentence.

In the result the appeal is dismissed in its entirety, save for the following:

1. The condition of suspension is deleted and replaced as follows:

   "On condition that accused is not convicted of an offence committed within that period involving the unlawful use of a firearm against the person of another, and for which he is sentenced to a period of imprisonment without the option of a fine."

Mavangira J agrees.....

Mugadza Chinzamba & Partners, legal practitioners for the appellant
Attorney-General's Office, legal practitioners forthe respondent