NOMATTER CHAPFIKA
and
JEALOUS CHIWODZA
and
OWEN GOMBA
versus
THE STATE

HIGHCOURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE; 25 September & 16 October 2023

Criminal Appeal

I Ndudzo, for the appellants
T Mapfuwa, for the respondent

CHIKOWERO J:

1. This appeal is without merit.
2. The first and second appellants were convicted of seven counts of assault as defined in s 89 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). With all the counts treated as one for the purposes of sentence each appellant was sentenced to 20 months imprisonment of which 3 months were suspended for 5 years on the usual conditions of good behaviour.
3. As for the third appellant, he was convicted of 8 counts of the same offence. All the counts were treated as one for the purposes of sentence. He was sentenced to 24 months imprisonment of which 3 months were suspended for 5 years on the conditions of good behaviour.
4. The appellants were supporters of the political party called Zimbabwe African National Union (Patriotic Front), abbreviated as ZANU (PF). All the complainants were supporters of the political party known as the Citizens Coalition for Change (CCC).
5. The trial court found that on 23 August 2022 and at Uzumba, Mashonaland East, the appellants, as part of a group of ZANU (PF) supporters numbering around twenty persons,

assaulted the complainants. The reason for the assault was simply that the two groups supported rival political parties.

6. Despite Mr Ndudzo's valiant efforts, there is no basis for faulting the trial court's assessment that the complainants were credible witnesses. Having made that assessment, the court was on solid ground to find that the appellants assaulted the complainants. We point out that the common thread running throughout the testimony of all the complainants is that the appellants were part of the large group of ZANU (PF) supporters who followed the former as they had concluded their meeting and, without any provocation, assaulted them. As already indicated, the reason for the assault was that the complainants supported the opposition political party, CCC.
7. The conviction of the appellants is not vitiated by the fact that it was not in respect of each one of the counts that each of the appellants were found to have laid their hands on the complainants. Although the trial court convicted on the basis of what it referred to as the doctrine of common purpose, we think the learned magistrate had in mind the law relating to the liability of co-perpetrators as set out in s 196A of the code. We set it out:

> "196A Liability of co-perpetrators
> (1) If two or more persons are accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it wold be committed or the realisation of a real risk or possibility that a crime of the kind in question would be committed then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
> (2) The following shall be indicative (but not, in themselves necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they –
> (a) Were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
> (b) Were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
> (c) Engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.
> (3) ……."

8. All the appellants were armed with catapults. All drove the complainants from a nearby township. All associated themselves with the third appellant's command that the complainants lie down. Among themselves, they variously employed tree branches, sugar canes and catapults in assaulting the complainants.
9. The appellants made it easier for the prosecution to secure convictions. In their defence outlines, they all asserted that it was actually them who were assaulted by the complainants. They brewed a shocker when they testified in their defence. At that stage, and for the first time, all raised the defence of an alibi. They said they were elsewhere, not at the scene of the crime, at the material time. In the circumstances, the defences as given in evidence were rightly found to be afterthoughts.
10. In light of the foregoing, the need to discuss the effect of the prosecution's failure to produce medical evidence showing that the complainants were indeed assaulted and the propriety of the trial court's decision to convict in the absence of such evidence, falls away.
11. Similarly, the fact that the ninth complainant testified that he could not deny that the persons who assaulted him using catapults were not the appellants is immaterial. The appellants were correctly convicted of count 9 on the basis that they were co-perpetrators.
12. The sentence induces in us no sense of shock at all. The complainants were assaulted by a group. The trial court correctly observed that a suitable message had to be conveyed by imposing an appropriate sentence because there is always the inherent risk of death or serious injury to the victims of a group assault. The crime was committed in a public place. There was need to protect the public. The 8 complainants were males. They were all grown up persons, some of whom were in their fifties. They were force-marched and brutally assaulted. The appellants had not been provoked at all. They subjected the complainants to needless terror, panic, humiliation and indignity. Aware that the election season was approaching the court neither misdirected itself nor imposed disturbingly inappropriate sentences by deciding to be firm in its treatment of the appellants. It had to play its role in maintaining peace before the elections. This is a case where the mitigating factors were outweighed by the aggravation. The sentences imposed are not shocking.

13. The appeal be and is dismissed in its entirety.

CHIKOWERO J:……

ZHOU J:…….

I agree

Mutamangira and Associates, appellant's legal practitioner
The National Prosecuting Authority, respondent's legal practitioners