

WILSON MANGENA

And

TINOMUVONGA ZHOU

And

PHILLIP MLOTSHWA

And

ROSEMARY GUMBO

And

TREVOR NGWENYA

And

BONIFACE TEMBO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE AND NDOU JJ
BULAWAYO 17 JANUARY AND 10 MARCH 2005

Siziba for the appellants
A V Mabhande for the respondent

Judgment

NDOU J: The appellants were jointly arraigned before a Provincial Magistrate sitting at the Gwanda Magistrates' Court on 22 October 2003 facing a charge of public violence. They pleaded guilty to the charge and were each accordingly sentenced to 48 months imprisonment of which 3 months imprisonment was suspended for 5 years on the usual conditions of good behaviour. They are not satisfied with propriety of the sentence and have appealed against sentence only. The

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background facts are that on 15 October 2003 and at Boulder Greek Ranch, West Nicholson, the appellants and fourteen other persons thereabout, armed themselves with axes, knob-kerries, sticks, whips and knives and disturbed public peace or security or invaded the rights of others. In short they disarmed a National Parks and Wild Life officer of his official AK 47 rifle with a magazine of 26 rounds. They fired at him and his fellow game scouts. They shot and damaged the tyre and rim of vehicle registration number 735-785Q, a Mazda B2500, the property of Drummond Ranch. They confiscated two Motorola radios and car keys and an AK rifle from the scouts. They further assaulted the game scouts. The motive of the public violence was to “rescue” the wives, relatives and fellow villagers who had been lawfully arrested for poaching offences committed at the ranch. The complainants were carrying out their lawful duties of preserving and managing wild life and game at the time of the attack by the appellants.

At the conclusion of submissions we indicated that the appeal was partly successful. We set aside the original sentence and substituted it with one of 48 months imprisonment of which 24 months is suspended for 3 years on condition that the accused does not within that period commit an offence involving public violence and for which he or she is convicted and sentenced to imprisonment without the option of a fine. We indicated that our reasons will follow. This judgment provides the said reasons. Public violence, *vis, publica*, is generally a serious offence striking at the roots of orderly and peaceful co-existence. It is aimed at a vital and main objective of criminal law itself.

“In an atmosphere and under circumstances of disorderly mob rule, of a serious breach of public peace and orderly co-existence, the law itself may become endangered. Orderly administration may become difficult, if not impossible and the interests of law abiding members of society may be

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seriously and irreparably prejudiced ...” – *South African Criminal Law and Procedure Vol II, Common Law Crimes*, 3rd Ed, P M A Hunt and J R L Milton at pages 95-6.

Public violence usually calls for exemplary sentences – *S v Thonga* 1993(1) SACR 365 (V) at 372; *S v Mushonga* 1975 (1) SA 247 (RA); *S v Muyambo* 1981 (1) SA 385 (ZA); *S v Maseko* 1988 (4) SA I (A) at 3I-4A; *S v Khumalo* 1991(4) SA 310 (A) at 365; *S v Simbi* 1996(1) ZLR 167 (H) and *S v Quandu* 1989(1) SA 517(A).

In this case a large number of persons was involved i.e. the six appellants plus fourteen others. This is a relevant factor in the assessment of sentence. The appellants used an assortment of weapons as alluded to above. They assaulted complainant – Richard Moyo until he was “powerless” and disarmed him of the AK 47 rifle. Such a severe assault is an aggravating factor – *R v Cele* 1958(1) SA 144(N) and *R v Salot* 1955(1) PH H35 (N). The appellants damaged a motor vehicle as indicated above. This is also aggravating – *S v Mangcola* 1987(3) SA 791(C). From the facts all the appellants participated actively and played pivotal roles in the violence. This is an aggravating factor – *R v Mushonga, supra*; *S v Katsande* 1974(1) SA 355 (RA) and *S v Chaka* 1978(2) SA 65 (O). Another aggravating factor is that the appellants were challenging the authority of public officials i.e. National Parks and Wild Life game scouts and officials – *R v Mathabalala* 1957(1) SA 49 (T) and *S v Usayi & Ors* 1981 (1) ZLR 61 (A). Against all this the ages and personal circumstances of the appellants have to be considered – *S v Abrahams* 1990(1) SACR 172(C) and *S v Malinga* 1986(4) SA 296 (E). The appellants are first offenders. According to his reasons for sentence, the trial magistrate attempted to balance the mitigatory personal circumstances as against the seriousness of the offence. Generally, sentence is the province of the trial court which enjoys discretionary

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powers. This court of appeal is enjoined to be careful not to erode such discretion – *S v Ramushu & Ors* SC-75-93; *S v Mundowa* 1998(2) ZLR 392; *Matanhire & Ors v S* HH-18-02; *Mavhundura v S* HH-91-02; *Msindo & Ors v S* HH-25-02 and *Zulu v S* HB-52-03.

I propose to deal with the issues raised by the appellants in turn. Firstly, the appellants argue that there is a need to individualise the punishment I agree that the sentencing court has a duty to enquire into the subjective elements in order to individualise the punishment – *Maxaku, Williams v S* 1973(3) SA 248 (C); *S v Zinn* 1969(2) SA 537 (A); *S v Beman & Ors* HB-71-03 and *S v CM; S v ZD* HB-67-03. There is evidence that the trial magistrate was alive to this need as he sentenced the appellants’ accomplice who fired the AK 47 rifle more severely than the appellants. He individualised the offenders’ cases as best as he could. In view of the elastic nature of the public violence he cannot be faulted for the extent of the individualisation – *R v Kashion* 1963(1) RLR 727 (SR) and *S v Mzwakala* 1957 (4) SA 273 (AD) at 277.

Secondly, as for the period of the suspended sentence, Mr *Mabhande*, for the respondent conceded that a longer period of suspension was called for. I agree that this concession is proper bearing in mind the sentences in the cases that he referred in his heads of argument. It is only to that extent that we felt that the trial court misdirected itself. We accordingly altered the sentence as reflected above.

Chiweshe J I agree

Cheda & Partners, appellants’ legal practitioners
Criminal Division, Attorney-General’s Office, respondent’s legal practitioners