TINASHE MBATHA
and
TINOTENDA CHIMINYA
and
JEREMIAH CHENJERAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARRARE, 23 and 26 January 2023

Criminal Appeal

R Nyamukondiwa, for the 1st and second appellants
A Mugiya, for the 3rd appellants
R Chikosha, for the respondent

CHIKOWERO J:

1. This is an appeal against both conviction and sentence. The appellants were convicted of extortion as defined in s 134 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Each was sentenced to 26 months imprisonment of which 12 months were suspended for 5 years on the usual conditions of good behaviour. A further 4 months imprisonment was suspended on the condition that each appellant paid restitution.
2. The appellants were found to have exerted unlawful pressure on the complainants to pay an amount of US$1500. What happened was this. The first and third appellants were at the material time police officers based at Southlea Park Police Station. The second appellant, also a male adult, was unemployed. The two complainants were not only sisters but vendors. They, together with another female vendor (who did not testify) hired the second appellant to transport them to and from Mutoko to acquire gold. Since he also wanted to have a feel of Mutoko, he did not charge for the trip. However, the complainants purchased the fuel for not

only the Harare to Mutoko trip but also for the return journey. They spent three days, together, in Mutoko

3. On return, the second appellant claimed that he had found a buyer who could purchase the gold from the complainants at a handsome price. He led them to Candy Shopping Centre, Southlea Park, Harare. There, he sought and obtained the permission of Noel Mudete, a mechanic, to use the latter's gas equipment to purify the gold. By then the complainants had given a certain amount of money to the second appellant as a token of appreciation.
4. Having purified the gold, but while still at the scene, the first and third appellants appeared. They were in civilian attire. They announced that they were police officers and proceeded to arrest the complainants for unlawfully possessing gold without a licence. They drove the appellants to "Southlea Park Police Station". To the complainants' amazement, they were instead taken to a building at the Mbudzi roundabout where, in the presence of persons in police uniform, the first and third appellants demanded that the complainants should pay US$1500 to secure their release. On parting with the sum ofUS$500, the first and third appellants released the complainants but not without making it clear that they would only release the gold, weighing 41g, on the complainants paying the balance of US$1000. All this while, the second appellant remained in custody of the gold. That was not all. As his co-appellants were demanding payment of US$1500 from the complainants, the second appellant weighed in to demand that the complainants pay him for the three days he spent in Mutoko
5. The trial court rejected the first and third appellants' defences. Both had averred that they were not at Candy Shopping Centre when the offenders arrested the complainants and drove them to the building we have already referred to whereat the offence of extortion was committed. Put differently, the first and third appellants raised the defence of mistaken identity. As for the second appellant, his defence, too, was found to be beyond reasonable doubt false. It was this. He was not at Candy Shopping Centre when the complainants were arrested. The only time he was in their company post Mutoko was when the trio appeared at Southlea Park

Police Station to seek resolution of the dispute over payment of his dues for the Mutoko trip.

6. The appeal against conviction questions the correctness of the findings of fact made by the trial court. Those findings are the result of an assessment of the credibility of the complainants and the other State witness. We can only disturb such findings if satisfied that they are outrageously irrational and not consistent with the evidence led. See *A-G* v *van Aardt* 1975 (1) RLR 89 (A).
7. In the absence of a misdirection by the trial court, we have to proceed on the basis of the presumption that the conclusion of the trial court is correct, unless we are convinced that the finding was clearly wrong. See *State* v *Mashonganyika* 2018 (1) ZLR 216 (H).
8. That the offence itself was committed was not an issue at the trial.
9. What was in dispute was whether it was the appellants who had committed it.
10. We agree with Mr Chikosha that the court did not misdirect itself in finding that the appellants, acting in common purpose, arrested the complainants at Candy Shopping Centre, drove them to Mbudzi roundabout whence they exerted illegitimate pressure on the latter to pay to secure their release.
11. Both complainants gave detailed and harrowing accounts of the arrest, detention and the extortion itself. They corroborated each other. Their evidence withstood the test of cross-examination.
12. The complainants knew the second appellant. He it was who had transported them to Mutoko whence they spent three days together. There was no way that they could be mistaken that it was him who lured them to the place of the eventual arrest leading to the extortion at Mbudzi roundabout in Harare. His defence that the only time that he was in the company of the complainants after Mutoko was when they pitched up at Southlea Park Police Station to resolve the dispute over non-payment of his dues was correctly rejected. Noel Mudete, who did not know the complainants and the second appellant before the gold purifying incident, confirmed that it was that appellant, in the company of three ladies, who sought and obtained the use of the gas equipment. The witness corroborated the evidence of

the two complainants. He was believed. We see no basis to interfere with the trial court's assessment of the credibility of the witness and the finding of fact made pursuant thereto.

13. Similarly, the court correctly found that the first and second appellants had been placed at the scene of crime. Despite raising a defence suggestive of an alibi the first appellant placed himself at the scene of the crime while cross- examining the second State witness, Loveness Mapfumo, at record p 33. There, he put it to the witness that it was him who drove one of the vehicles from Candy Shopping Centre to what the complainants thought would be Southlea Park Police Station. While confirming that the first appellant was indeed one of the persons who apprehended them at the Shopping Centre, the witness was clear that it was not the first appellant who was behind the steering wheel. In these circumstances, from the first appellant's own lips fell words demonstrating that his defence was manifestly false.
14. As for the third appellant, the court correctly found that the appellants not only disclosed their surnames in conversing during the commission of the offence, as testified to by the complainants, but that the complainants had no reason to pluck his surname from the air and to falsely claim that its bearer was one of the offenders. The complainants did not know the third appellant prior to the commission of the offence. Though he was clad in civilian attire, the record discloses that the complainants spent an appreciable amount of time in the company of the third appellant- from their arrest at the Shopping Centre in Southlea Park to their eventual release at Mbudzi roundabout- to be able to recognize him as one of the offenders.
15. Candy Shopping Centre is in the vicinity of Southlea Park Police Station, where the first and third appellants were stationed, traced and arrested. The court found that it was no coincidence that out of the entire pool of police officers deployed at Southlea Park Police Station the complainants somehow knew that there was a Mbatha (1st appellant) and Chenjerai (3rd appellants) which names also happened to be those of two of the offenders. In our view, it correctly found that the

complainants knew these names only because the offenders inadvertently let the cat out of the bag, so to speak, at the time of the commission of the offence.

16. The evidence of connivance among the appellants was overwhelming. There can be no doubt, as argued by Mr Chikosha, that there was a prior arrangement to pounce on the complainants at Candy Shopping Centre. The trio made use of the inside information availed by the second appellant that the complainants possessed the gold. He took the victims there. The co-appellants never at any time seized the gold from the second appellant. Why? He was part of the gang. His co-appellants accorded him preferential treatment. He boarded the first appellant's car at the Shopping Centre while the complainants were driven away in the car which had taken them to the Shopping Centre. He did not contribute to the US$500 paid to his peers at the roundabout. He openly became hostile to the complainants, unjustly demanding that they pay for the three day stay in Mutoko, even as the co-appellants were applying illegitimate pressure on the complainants to pay for their freedom. After the complainants had paid US$500 ostensibly to the first and third appellants only, the second appellant retained the gold in his custody. Even when the complainants were released and left the building the second appellant remained behind to enjoy the company of the first and third appellants. It is not an element of the crime of extortion that the offender should be in a position of authority vis-à-vis the complainant. Accordingly, the second appellant, although a civilian, was correctly found to have acted in common purpose with the first and third appellants in committing this offence.
17. We are fully persuaded that the appeal against conviction, in respect of all three appellants, is completely wanting in merit.
18. So too is the appeal against the sentence.
19. The power to assess an appropriate sentence reposes in the trial court. Only in limited circumstances can an appellate court interfere with the exercise of that sentencing discretion.
20. Section 134(1)(b) of the Criminal Law Code provides for a penalty of a fine not exceeding level thirteen or not exceeding twice the value of any property obtained

as a result of the crime, whichever is greater or imprisonment for a period not exceeding fifteen years, or both. The court settled for 26 months imprisonment. It suspended almost half of the custodial sentence on the usual conditions of good behavior. It suspended a further 4 months imprisonment on the condition that each appellant paid restitution. This left the effective custodial sentence at 10 months imprisonment in the event that each appellant restituted.

21. The appellants argue that this sentence is manifestly excessive as to induce a sense of shock. We cannot agree. The first and third appellants were public officers. As correctly noted by the trial court, the manner in which they committed this offence borders on corruption and abuse of duty as public officers. A custodial sentence were therefore merited unless there were cogent reasons to the contrary. No such factors of mitigation were proferred. Indeed, ordinary mitigating circumstances were all that the first and third appellants tendered. Both were first offenders and had family obligations. These were taken into account. This particular extortion was a serious offence. It was premeditated, carefully planned and meticulously executed. The appellants harassed and threatened the complainants. The latter were traumatized. It was a gang offence involving the bringing in of inside information by the one appellant and the abuse of their positions as police officers by the other two to achieve the common purpose of extracting an advantage. The moral blameworthiness of the appellants was thus found to be so high that only a custodial sentence was merited. The reasoning of the trial court is sound and the sentence passed proper. The sentence is not at all excessive. It induces in us no sense of shock at all.

22. . It is not a principle of law that first offenders should never be incarcerated. Each case depends on its own circumstances. We are amply satisfied that there was no misdirection in passing custodial sentences in the circumstances of this matter. We cannot agree with Messrs *Nyamukondiwa* and *Mugiya* that the sentencer over-emphasized the need for individual and general deterrence to such an extent that he paid lip service to the fact that the appellants are first offenders. We have already highlighted that the trial court settled for an imprisonment term of just over two

years out of which generous portions were suspended on suitable conditions. All this was in recognition of the mitigating circumstances, in particular that the appellants had transgressed the criminal law for the first time.

23. The first and third appellants attack the sentence in so far as it encompasses restitution. They argue that ordering restitution of the value of the gold was sanctioning an illegality because the complainants did not have a licence to lawfully possess the gold. However, two things must not be forgotten. Firstly, there is no evidence that the complainants were tried and convicted for unlawfully possessing the gold in question. Secondly, the complainants' unchallenged evidence was that they embarked on the trip to Mutoko to acquire the gold on the back of the second appellants word that he held a licence. They were riding on his licence to possess the gold. Whether they could lawfully do so was never an issue at the trial. It cannot be an issue on appeal because the learned magistrate was not called upon to pronounce himself on it.
24. The remaining issue on restitution requires us to invoke our powers of review. Each appellant was ordered to pay restitution in the sum of US$812. That was a mathematical error. The gold was worth US$1700. In addition, the complainants were compelled to pay US$500 to secure their release. The total prejudice was thus US$2200. In round figures, each appellant should have been ordered to pay restitution in the sum of US$734-00, not US$812-00.

25. In the result, save for correcting the sentence passed by the magistrates court to reflect that each accused shall pay restitution in the sum of US$734, the appeal be and is dismissed in its entirety.

CHIKOWERO J:……

ZHOU J:…… I Agree

Mashayamombe and Company Attorneys, first and second appellant's legal practitioners
Mugiya and Muvhami Law Chambers, third appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners