HB 359/17
HCA 331-7/13

CEPHAS MAHARA

And

RUSSEL MPANDLA

And

FUNNY MPANDLA

And

ADOLF PAMBWAUNGANA

And

OBERT MAPONDA

And

JOHN MUSARIRI

And

WATSON GOMBE

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI & TAKUVA JJ
BULAWAYO 30 OCTOBER & 23 NOVEMBER 2017

Criminal Appeal

B. Dube for 1st, 3rd, 5th and 7th appellants
Hlabano for 6th and 8th appellants
No appearance for 2nd and 4th appellants
W. Mabhaudi for the state

TAKUVA J: After hearing argument, we dismissed this appeal in its entirety and indicated that our reasons would follow. These are they.

What is worrisome in this case is the level of banditry displayed by the appellants at Olympia 34 Mine Shurugwi on 28 December 2009. Pursuant to their arrest, all appellants were convicted by the Regional Magistrate at Gweru of robbery and attempted murder on 27 March 2012. They were sentenced to 12 years imprisonment of which 2 years imprisonment were suspended on condition each appellant paid restitution to the complainant in the sum of US$1 568,00 through the clerk of court by 31st May 2012.

The facts appear in the State Outline filed of record. Briefly they are that on 28 December 2009, all appellants acting in common purpose and with intent to kill Cosmas Hove, attacked him with stones, axe, machetes and a firearm. Cosmas suffered serious life threatening injuries on the head as shown in the medical report. Cosmas who is an employee of the mine owner had been working together with other employees when the appellants arrived and chased them into the hills. When some of his colleagues returned to retrieve their personal belongings, they were ambushed by the appellants who viciously attacked him.

In respect of the robbery charge, appellants were alleged to have violently removed three tonnes of gold ore belonging to Nicholas Gara. The ore was in the custody of Cosmas Hove and other employees. After forcibly subduing Cosmas and company, the appellants took the ore to Refuse Makiwa Plant where they forced the staff there to mill it without producing proper documentation. In fact when the driver of the truck had refused to drive it due to the non-availability of relevant documents, the 1st appellant commandeered the truck and drove it to the mill. Despite the intervention of the Zimbabwe Republic Police to stop the milling of the ore, the appellants persisted in their criminal venture as a group.

After a lengthy trial in which 14 witnesses testified for the state and 9 for the defence, they were all convicted as charged and sentenced to the sentence referred to above. They have all appealed against conviction and sentence having been aggrieved. Their grounds of appeal are set out on pages 1 to 2(d) of the record. The synthesis of these grounds is as follows:

(a) that the court *a quo* erred when it found that there was common purpose amongst appellants;

(b) that there was no evidence that the appellants committed the offences;
(c) that the court *a quo* erred in accepting Gara and Cosmas' evidence as this evidence was speculative;
(d) that the court *a quo* erred in concluding that the appellants were at Olympia 34 when in actual fact they were at Olympia 54;
(e) that the court erred when convicting appellants of criminal involvement when the circumstances show that this was a "mere dispute between appellants and complainants over Olympia 54 mine and not 34."
(f) the court erred in concluding that the firing of the gun "in the air" was attempted murder when in actual fact it was in self defence;
(g) that the appellants' defence was not rebutted during the trial.

As regards sentence, it was contended that:

(1) a sentence of 12 years imprisonment is manifestly excessive and induces a sense of shock particularly in that:
1.1 the appellants are 1st offenders
1.2 their involvement was minimal
1.3 they did not benefit from the commission of the offence
(2) the sentence should be reduced to five years imprisonment for both counts.

During the hearing, both legal practitioners conceded that the appeal against conviction was without merit. Consequently, they abandoned it and pursued the appeal against sentence. This concession is proper at law as I shall demonstrate hereunder.

The court *a quo* gave sound reasons for its decision in that it properly assessed all the evidence before it including that from the defence. It gave cogent reasons why it believed the state witnesses and disbelieved the appellants. The court *a quo* properly found that the state had proved its case beyond reasonable doubt. That finding is unassailable in light of the credible evidence on record.

Turning to the specific grounds of appeal we find that appellants' banal denial of the existence of common purpose in this case is indicative of how desperate and false their defence is. The court *a quo* did not misdirect itself in its finding that there was common purpose amongst the appellants because a reading of the evidence on record shows that all appellants were present wherever this gold ore was, be it at the mine or at the mill. Further, they were identified not only by Cosmas Hove, Edias Hove and Gilbert Chiromo but also by such independent witnesses as Patrick Zvidza (lorry driver), Shelton Dube (the miller) and Alec Badza and Takawira Tsvangirai (who are police officers).

The law

Section 196A of the Criminal Law (Codification and Reform) Act [Chapter 9:23] provides:

> "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 would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, 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) factor 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."

I must point out that the new s196A only came into operation on 1 July 2016. However, prior to that, that is at the time of the offence and the trial, the situation was governed by s196 (1) and (2) which had similar provisions. Therefore the clause does not assist the appellants.

The appellants admitted in their defence outlines and evidence in chief that they had some common interest in removing ore from the mine. Further, the following facts are common cause;

(a) that Cosmas Hove and his team who were employed by Nicholas Gara were mining gold at Olympia 34 mine on 28 December 2009 and had stockpiled their ore next to the shaft they were mining
(b) that Nicholas Gava was the lawfully registered owner of that mine
(c) that Cephas Mahara and others visited the mine at 0700 hours and started pegging using GPS machine and they later left.
(d) that a group of Mahara's employees returned to the mine later that afternoon and violently muscled their way into the mine during which the complainant was savaged and left for dead
(e) that Cosmas sustained the injuries described in the medical report produced in court
(f) that after assaulting Cosmas and causing him and his colleagues to run into the hills, leaving their belongings and stock piles of ore, Mahara and his lot hired a lorry and loaded the ore enroute to the mill. When the police intervened appellants were in a war-like mood and continued to remove the ore.
(g) that the ore in question was delivered to Custon Refuse Mill by all the appellants at the witching hour of 0100 hours and one Shelton Dube was forced to mill it without documentation and that when Gara and the police arrived to stop the milling, the group again used threats of violence to ward them off. Consequently, all the ore was milled and the resultant gold was taken away by the group. Nothing was recovered.
(h) that the 1st appellant (Mahara) boasted that the police officers failed to arrest the group because he as the "sponsor" had greased their palms.

In view of the above overwhelming evidence, the court *a quo's* decision to dismiss appellants' defence of claim of right is unassailable as it simply could not be sustained. The doctrine of common purpose as set out in s196A of the Criminal Law Code, caught all of them in respect of both charges because they had the requisite *mens rea* to commit the crimes. In respect of the attempted murder charge, the conduct of the actual perpetrator is deemed to be the conduct of every co-perpetrator by virtue of s196A of the Code.

As regards sentence, we did not find any misdirection on the part of the sentencing court. In view of the brutality and brazenness of the appellants, the court *a quo* actually erred by imposing a lenient sentence. The appellants showed no contrition whatsoever. Cosmas Hove is now permanently disabled and they have not paid even a cent as compensation. Worst still, most of them have previous convictions of offences involving violence.

For these reasons, the appeal is without merit and is hereby dismissed in its entirety.

Mathonsi J ……. I agree