PADDINGTON JAPAJAPA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & KWENDA JJ
HARARE, 15 June 2020, 16 June, 2020 & 9 October 2023

Criminal Appeal

G Mutisi, for the appellant
R Chikosha, for the respondent

KWENDA J: *Introduction*

The appellant was tried, convicted and sentenced in the Provincial Magistrates court at Harare for the crime of Incitement to commit Public Violence as defined in s 187(1) as read with s 36 (1) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*. He was sentenced to imprisonment for three years of which one year was suspended for five years on conditions of good behavior. The state allegations were as follows. On the 31 July 2018 the appellant was at the Harare International Conference Centre, (HICC) as an accredited local election observer representing the MDC Alliance political party awaiting the announcement of the results of the Zimbabwe harmonized elections by the National Elections Command Centre. Following the announcement of the results, the appellant was alleged to have protested the results in a tirade during which he was alleged to have uttered the words quoted below, forming the basis the charge which were considered inflammatory by the State. The State alleged that the appellant intended, by such communication, to incite public violence or knew that there was real risk that his target audience would, by such communication, be persuaded or induced to commit public violence. He was said to have uttered the following: -

> "If people come to rallies it means they appreciate the candidate. You cannot follow a candidate whom you cannot vote for. So we are saying all those people who were coming for example in Mkoba the stadium was full to capacity with more than 45 000 people. In Mutare, I attended. In Masvingo, I attended. Chamisa was pulling more than 30 to 40 000 and now we are seeing a different scenario altogether. So we are saying, as people of Zimbabwe this is a watershed election. It's a do or die we are not going to accept this rubbish. ZEC must do the right thing by announcing the proper results. Failure to do this as a leader of Civic Organization, I am going to call for chaos in this country. We are not concerned about the consequences. We want the right thing to be done. And we are going to have an audit of this election and if there are any irregularities I am sorry as Civic Society Organizations we are not going to accept this rubbish……"

It is common cause that on the following day members of the MDC Alliance political party, of which the appellant is a member, protested the results announced by the national Command Centre in countrywide civil unrest which turned violent. The State case was based on a video clip uploaded onto an internet online platform known as *YouTube.* The video evidence was downloaded and preserved on compact disc by a state witness who testified at the appellant's trial. It depicts the appellant at the Harare International Conference Centre (HICC) wearing the full election observer's regalia which included a bib, addressing listeners out of the picture and uttering the inflammatory words. It was the State case that the video was genuine because the appellant was, indeed, at the HICC on the day in question and wearing the election observer regalia.

The appellant denied the charge. He admitted that he was at the HICC on the 31 July 2018 as an accredited agent of the MDC Alliance. He also admitted that it is him who appeared in the video and that it correctly depicts what he was wearing on the day in question. He however, denied, making the utterances attributed to him in the charge. He said the video was created by the State through a process called 'photo shopping'. He explained that by 'photo shopping' he meant that his correct image was used, accompanied by some voice over, to make it appear as if he had addressed a press conference and made the inflammatory statements. He put the State to the proof of its allegations against him.

Evidence adduced at the trial

The State called two witnesses. The first to give evidence was Jealousy Nyabasa. He was an Assistant Commissioner in the Zimbabwe Republic Police at the time of giving evidence. In July, 2018 he was deployed to police the Harare area during the harmonized election held during that period. On the 31st July, 2021, in the evening, he was watching a show called 'Just Imagine'

on *YouTube*, when he stumbled on a video of the appellant speaking in, what appeared to be, an interview during which he uttered the inflammatory words forming the basis of the charge. It appeared to be a question and answer session because the appellant was fielding questions. The video later went viral on social media that evening. On the following day, 01 August, 2018, members of the MDC Alliance party protested the results of the harmonized elections in violent protests during which they destroyed and set several properties on fire. He concluded that the demonstrators were members of the MDC Alliance because they were wearing MDC Alliance regalia. He instructed the Law and Order division of the Zimbabwe Republic Police to investigate the issue of the video which he had seen *YouTube* the day before the violent protests broke up because he believed that the disturbances were incited by the appellant's utterances. The appellant had called for chaos in the video. He denied any suggestions that it was a mere coincidence that the turmoil took place after the video had been posted on *YouTube* and that the video was created by the State to falsely accuse the appellant of inciting the violence. He asserted that the video was genuine and not 'photo shopped', as alleged by the appellant, because he (the witness) knew the appellant's voice and demeanor on television.

The second witness to give evidence for the State was Simba Nyamayauta who was called by the State to testify as cyber expert. He held a Bachelor of Science Degree in Management of Systems and a Certificate in 'Reducing Cybercrime through Knowledge and Capacity Building. His evidence was as follows. He had 10 years' experience in the Zimbabwe Republic Police and was, at the time of giving evidence, working at the Criminal Investigations Department's Headquarters as a Systems Administrator. His job involved maintenance of ICT equipment. On the 3rd August, 2018 he downloaded, from *YouTube*, a video depicting the appellant addressing what appeared to be a press conference and preserved it on compact disc for future reference as evidence. He noted that the video had been uploaded on the 31st of July, 2018. He had the knowledge and skill to download the video from the internet. With the consent of the appellant, he produced and played in court during his testimony. The appellant also consented to the production of the transcript of the utterances accompanying the video, which the witness produced. During cross examination, the defence the defence played a video depicting the then, and now late, President of Zimbabwe which they said had been manipulated to demonstrate that videos could be created or manipulated. The witness could not be drawn to say whether the video

of the late President had been edited or photo shopped. He confirmed that photo shopping exists and describe it as a process whereby a photograph or a video is edited to show or add characters, pictures or features which were not in the original video or picture. He confirmed the violent protests by the MDC Alliance of the 1st day of August, 2013.

The State the closed its case after calling the two witnesses whose evidence is summarised above. The appellant then gave evidence in his defence. He repeated his assertions in the defence outline. He denied saying the words attributed to him and claimed that the video produced in court had been 'doctored' by security agents to nail him for political reasons. He urged the court to reject the video evidence because it was not credible in the absence of any audience as part of the video and evidence regarding who had uploaded it onto the internet.

At the end of the trial the appellant was convicted and sentenced to imprisonment for (3) years of which one (1) year was suspended for five years on condition of good behavior. In its reasons for judgment the court made the following findings. The second state witness had conceded that it was possible for a video recording to be tempered with. He had also conceded that he (the state expert) could not dispute that the video was susceptible to alteration before being uploaded to Y*ouTube*. Having observed as above, the court still found that the video produced in court was authentic and credible and therefore safe to rely on. It said it had taken into account all the attendant circumstances of the case. The video had been uploaded on the 31 July, 2023. The appellant had not disputed that he was the person appearing in the video. He was, indeed, at the HICC as the MDC Alliance election observer on the day in. It was satisfied beyond reasonable doubt that the appellant's utterances were inflammatory. The court accepted that there was no direct evidence linking the utterances in the video with the civil protests that took place on the 1st August, 2018. It however, concluded that there was a real likelihood that the publication of the video through the social media had instigated the political violence which erupted on the 1st August, 2018.

The appellant was aggrieved by the outcome whereupon he appealed in person against both conviction and sentence on the 25 July, 2019. He later amended the grounds of appeal through his legal practitioner on the 8 August, 2019. He replaced all his initial grounds of appeal with new ones. The grounds of appeal against conviction, as amended, now read as follows: -

1. "The court a quo erred at law in basing the appellant's conviction on video evidence whose authenticity and reliability had been put in issue without, first of all, pronouncing itself on whether or not the video was authentic and reliable.
2. The court *a quo* erred when it placed reliance on the evidence of the witness called by the State to testify as an expert yet his testimony consisted of speculation or conjecture.
3. The court *a quo* erred in basing the appellant's conviction on circumstantial evidence, when there were no established facts from which a reasonable conclusion and inference could be drawn justifying the decision.
4. Having pronounced itself on the essential elements of the offence on the charge, the court *a quo* misdirected itself in not deciding on the material question as to whether the same was proved beyond reasonable doubt by the State.
5. The trial court erred in coming to the conclusion that the appellant instigated the violent that ensued the day after his utterances yet there was no evidence that the protesters saw the video
The appellant moved the court to allow the appeal and quash the conviction."

The grounds of appeal against sentence are as follows: -

"Should this Honourable court find that the conviction by the court *a quo* to be proper, then the sentence imposed should be varied for the following reasons:

1. Having made the finding that the penal provision called for a fine first and or up to ten (10) years imprisonment, the court a quo misdirected itself in not pronouncing itself on the non-custodial sentences and so erred in only being subsumed with an excessive desire for deterrence.
2. A fortiori, the court a quo erred in considering the political situation and the appellant's responsibilities at the electoral commission in sentencing the appellant and in not pronouncing itself on the legal principles of sentencing.
3. In the absence of evidence being led to the effect that the appellant announced his own election results, the court *a quo,* erred in pronouncing itself on that issue (using extraneous evidence) to come to the conclusion that it was an exaggeration of the offence in question to announce results which were not verified.

Wherefore, the appellant prays in the alternative that: -
The appeal against sentence be allowed.
The sentence imposed by the court *a quo* be and is hereby set aside and substituted with the following:

The appellant is hereby sentenced to a fine of $200.00 to be paid through the clerk of Court Harare"

We note that the appellant's fourth ground of appeal against conviction is not clear and specific. The ground of appeal is to the effect that, having pronounced itself on the essential elements of the offence on the charge, the court *a quo* misdirected itself in not deciding on the material question as to whether the same had been proved beyond reasonable doubt by the State. The ground of appeal, however, falls short of identifying the specific essential element(s) of the

crime which was (were) not proved. It is therefore, too generalised and, based on it, the appellant could advance any argument. We find it invalid and strike it off.

The appellant's argument on appeal with regards to the rest of the grounds of appeal against conviction.

The appellant's counsel made the following written and oral arguments in motivating the appeal against conviction. The trial court erred and therefore misdirected itself by placing reliance on a contested video evidence, to convict the appellant, without giving reasons for treating the video as authentic. The trial court was required, at law, to but failed to give reasons for its decision to rely on the video because the appellant had had contested its authenticity. The failure by the court to give reasons was a misdirection which vitiated the conviction. As authority for the argument appellant's counsel cited *Gwaradzimba* v *Petron and Company (Pty) Ltd* (S) 2016 (1) ZLR 28 and S *v Makawa & Anor* 1991 (1) ZLR 142.

The appellant's counsel also argued that a feature peculiar to tape recordings is that they could be altered (and materially altered), in such a way that even experts cannot detect the alteration. It is quite possible to edit out material from a tape recording, without an expert being able to detect that an edit had occurred. See S v *Tvangirai* 2004 (2) (H) ZLR 210. The trial court ought, therefore, to have determined the authenticity of the video before relying on it. In doing so, the court *a quo* would have then applied the guidelines and principles set out in the case of *S* v *Ramgobin and Others* 1986 (4) SA 117 (N) and applied in this jurisdiction in the *Tvangirai* case, supra. The failure by the trial court to give reasons for relying on the video, therefore meant that the authenticity and reliability of the video evidence remained in doubt. The possibility that video may have been edited before uploading onto *YouTube,* was not eliminated by any evidence at the trial and that, too, made the conviction unsafe.

The appellant's counsel also submitted that expert evidence is characteristically opinion evidence. On the authority of the case of *S* v *Motsi* 2015(1) ZLR 304 (H) and *S* v *Fombe* 2013, the appellant's counsel argued that the role of the expert was to help the court understand and determine a fact in issue. In order to be cogent and useful the expert evidence ought to have satisfied the certain requirements. In considering the weight to place on expert evidence the court takes into account the following: -

1. The methodology used by the expert ought to have been capable of being tested
2. Whether there was any known room of error with the methodology
3. Whether the methodology has been subjected to peer review by others in the expert's field

The appellant's counsel argued that, to the contrary, the second state witness purported to give evidence as an expert yet his testimony was based on insufficient facts or data and thus consisted of mere guesswork and conjecture.

The appellant's counsel further argued that the court *a quo,* erred in convicting the appellant in the absence of evidence *aliunde* confirming that the appellant held a press conference. However, in the event that the court correctly found that the appellant uttered the words forming the basis of the charge that, alone, did not amount to telling anyone to commit violence. The appellant did not call for violence in the video. He promised to do so in the event that ZEC announced incorrect results. His threat was, therefore, predicated on the event that the Zimbabwe Electoral commission announced the wrong results and there was no evidence that ZEC announced the wrong results. There was no evidence linking the appellant's utterances with the violence which occurred the following day. He cited the case of *S* v *Evans Mawarire* HH 802/17 at pages 14 to 15 of the cyclostyled judgment where this court stated the following: -

> "The State referred the court to the case of *CR* v *Njenje & Or* 1966 (1) (SRA) as authority for the proposition that if a conspirator incites other conspirators to commit a crime, he may be liable to conviction as a principal offender even though he is not present when the crime is committed, and or if it is proved that he otherwise aided and abetted in the actual commission of the crime. This case is distinguishable from the circumstances before us for the simple reason that, not a single witness was called to testify as a perpetrator of violence, and no evidence was adduced to establish that the perpetrators of violence acted on the strength of any urging to do so by the accused. None of the arrested citizens implicated the accused as having incited them to violence. In fact, one of the state witnesses told the court that they all refused to testify against the accused person. It has not therefore been proved or even shown to be probable that the violence started on the accused's instigation."

The appellant's argument on appeal with regards to the rest of the grounds of appeal against sentence.

The appellant's counsel submitted that in the event that the appellant did not succeed against conviction, there was a sound legal basis for this court to interfere with the sentence. Firstly, the effective imprisonment was not called for because the sentence of imprisonment of 24 months imposed by the court *a quo* was within the threshold of the non-custodial option of

community service. See *S* v *Cleto* HH 63/11 and *S* v *Usavi* HH 182/10. Secondly, the trial court misdirected itself by placing undue weight on the fact that the appellant's conduct contravened the Electoral Act, a consideration was irrelevant to the charge which the appellant had been convicted of. The Electoral Act creates offences and the appellant was not charged with any. Thirdly, the trial court misdirected itself when it failed to take into account that the appellant did not announce results.

The State's submissions and argument on appeal

The appeal was opposed by the State. The State counsel based the opposition on the following argument with respect to conviction. The evidence led by the State at the trial was overwhelming and proved that the appellant uttered the words forming the basis on the charge at a time when emotions were running high. He made the utterances as the Zimbabwean citizenry eagerly awaited the official announcement of results of the Presidential election. The appellant had not disputed, at his trial, that he was the person shown in the video on *YouTube* wearing an election bib. It was evident from the background that the video originated from the Command Centre. The appellant was, indeed, at the Command Centre on the 31July, 2018. It was, therefore, common cause that he was present at the HICC at the Command Centre as an election observer and wearing the attire worn by observers which included the bib also worn by him in the video clip. It was common cause that the appellant was a member of the MDC Alliance political party and that he had attended the political party's political rallies at Mkoba, Masvingo and Mutare which he attended. It was also common cause that that his political party were involved in violent countrywide protests the 1st of August, 2018, that is a day after the video had been published on *YouTube*. The State counsel conceded that the State did not adduce direct evidence to prove that the protesters were instigated to commit violence by the inflammatory utterances. He argued, however, that the connection could safely be inferred. In any event, in terms of our law, it was not necessary for the State to establish a direct connection between the inflammatory words and the violence which occurred the following day. He based the submission on s 187(2) of the Criminal Law Code which says that it shall be immaterial to a charge of incitement that the person who was incited was unresponsive to the incitement and had no intention of acting on the incitement or that the person who was incited did not know that what he or she was being incited to do or omit to do constituted a crime.

As regards the sentence, the State submitted that the sentence was appropriate and there was no justification, in the circumstances of this case, for this court, sitting as a court of appeal, to interfere with the sentencing discretion of the trial court. The trial court had given adequate reasons for the sentence and had not misdirected itself or committed an irregularity. In any event the sentence did not induce a sense of shock.

We accept the case law cited by the appellant on the legal principles which apply to the assessment of the reliability of video evidence. The admissibility of and weight to be given to electronic evidence is set out in s 379 of the Criminal and Procedure and Evidence Act [Chapter 9:07] (Criminal and Procedure and Evidence Act). In this case the appellant consented to the production of the video evidence. He contested, only, the weight to be placed on the video evidence. I quote 5379 E (2) below: -

> "**379E Admissibility of electronic evidence**
> (1) …
> (2) In assessing the admissibility or evidential weight of the evidence, regard shall be given to—
> (a) the reliability of the manner in which the evidence was generated, stored or communicated;
> (b) the integrity of the manner in which the evidence was maintained;
> (*c*) the manner in which the originator or recipient of the evidence was identified; and
> (d) any other relevant factors.
> (3) The authentication of electronically generated documents shall be as prescribed in rules of evidence regulating the integrity and correctness of any other documents presented as evidence in a court of law.
> (4) This section shall apply in addition to and not in substitution of any other law in terms of which evidence generated by computer systems or information and communications technologies or electronic communications systems or devices may be admissible in evidence."

The person who uploaded the video on *YouTube* is not known. However, the absence of such evidence is not the end of the enquiry. That is only one of the factors the court takes into account. The court is, therefore, entitled to take into account other relevant factors. That the video was showing on *YouTube* and thus circulating on the internet was an undeniable fact. The source of the video produced in court was therefore known and easily accessible by the appellant. The state witness simply downloaded and preserved the video for production in court. It was common cause that the Police did not change the video showing on *YouTube.* The second witness was able to download it without changing its contents and preserved it professionally. He did not interfere with its contents. The attack on the second witness' evidence was therefore baseless because his role was simply to download and preserve the evidence for production in court.

We agree with the trial court's finding that the video evidence was confirmed by other State evidence either admitted or not controverted by the appellant at his trial. It was common cause hat the person appearing in the video was the appellant. He appears in the video wearing regalia identical to what he was wearing measuring at the Command Centre on the 31 July, 2018 as an election observer. The appellant did not say he was similarly dressed and wearing the election monitor's bib on any other day or at any other place. The utterances attributed to him are accurate in as far as they relate to information peculiarly known by him about his personal involvement in the activities of the MDC Alliance political party. He was indeed at the places for the activities stated by him in the video.

The determination of appeals by this court is governed by s 38 of the High Court Act *[Chapter 7:06]*. We will quash the appellant's conviction in the exercise of appellate jurisdiction, only, if we are satisfied that the conviction is unreasonable or unjustified or wrong at law or that on any other ground there was a miscarriage of justice. (See subsection 2 of s38 of the High Court Act which states that nnotwithstanding that the High Court is of the opinion that any point raised on appeal, might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred).

In this case, the appellant was not consistent in his defence. The first contradiction was that it was one thing for him to contest the video evidence on the basis that the video was edited. What this means is that he did not contest the existence of the video in which he appears making certain utterances. It was a completely different thing for him to object to the video on the basis that it was create by the Police. The other contradiction was that the appellant initially denied the charge on the basis that he had not made the utterances attributed to him in the charge. He said the inflammatory utterances were added as 'voice over' to his picture manipulated by his State to make it appear as if he had addressed a press conference and made the said inflammatory utterances. After conviction, all that changed. He confessed in mitigation that he uttered the words forming the basis of the charge "…as a result of temptation and emotional stress". He said his moral blameworthiness was reduced by the fact that he succumbed to temptation and the 'circumstances surrounding him'. In his argument on appeal before us, the appellants' counsel sought to downplay the submissions in mitigation. He argued that the mitigation did not

necessarily constitute a confession to the crime. The appellant was merely abiding by the judgment of the court which had convicted him. We are not persuaded by the argument. Abiding by the judgment of the court which has convicted the accused means that the accused person is entitled to rely on trial court's findings of fact in mitigation. That the accused uttered the words as a result of temptation and emotional stress and that he succumbed to temptation and the circumstances surrounding him was not part of the judgment of the court which convicted him. Those were facts unknown to the court until he started making submissions in mitigation. The appellant was, therefore, volunteering information which was peculiarly known to him which he wanted to be considered as the truth of what transpired. He was, thus, taking the court into his confidence as a sign of remorse and repentance. See *S* v *Kanongo* HH 158/19. His submissions were accepted by the trial court as true and correct. See *S* v *Ngulube* 2002 (1) ZLR 316 (H). His insistence on appeal that the video is a creation of the state and that he did not utter the words which form the basis of the appeal was, therefore, not *bona fide.*

That the appeal against conviction is not *bona fide* is confirmed by the other telling admissions made in written and oral argument by appellant's counsel. He argued that the trial court erred in convicting the appellant because of the possibility that the appellant spoke with a forked tongue by saying one thing when he meant another or that he had a secret code which only his followers could decrypt. He submitted that the words uttered by the appellant should not be interpreted to be telling anyone to be violent or chaotic. He said there was no evidence establishing a connection between the appellant's utterances and the violence which occurred the following day. The submissions amount to admissions that the appellant was indeed recorded on video making the utterances. In something akin to confession and avoidance. The appellant's counsel was conceding that the video is authentic but sought to show that the appellant did not mean any harm by the utterances. It does not make sense that the appellant would deny making the inflammatory utterances and in the next breath admit making them *albeit* innocently. It is either he uttered the words or he did not.

It was not necessary for the prosecution to adduce direct evidence connecting the appellant's utterances with the violent protests which occurred. In terms of s 187 of the Criminal Law Codification and Reform Act it is immaterial to a charge of incitement that the appellant's

target audience was unresponsive to the incitement or that the people targeted had no intention of acting on the incitement or that they did not know that they were being incited.

For the reasons stated above, the appeal against conviction lacks merit.

Appeal against sentence

As stated above, this court sitting as a court of appeal does not interfere with a sentence imposed in a lower court unless it considers that a substantial miscarriage of justice occurred. There is a miscarriage of justice if there was a material misdirection or if the sentence is disturbingly inappropriate or so severe as to induce a sense of shock. Lacking a misdirection or an irregularity, this court will not interfere with the sentencing discretion of the trial court unless the severity of the sentence amounts to a miscarriage of justice. *See S* v *Sadat* 1997(1) ZLR 487 (S).

In this case the appellant has not made any specific allegation of a misdirection or an irregularity or that the sentence induces a sense of shock. He has simply asked this court to substitute its own discretion.

We find no misdirection in the manner in which the trail court approached the issue of sentence. It gave detailed reasons for sentence after weighing the mitigating and aggravating factors. It properly took into account the appellant's chronic health condition. He suffers from asthma and hypertension. It settled for imprisonment because it was of the view that the appellant's utterances had a strong bearing on the disturbances that occurred on the day following his utterances. The disturbances were widespread and violent. He was a senior member of the MDC political party and he ought to have known that his utterances would have a real impact on his flock.

The court *a quo* considered the non-custodial options of a fine or community service but ruled them out giving reasons. It is not correct, as alleged in the first ground of appeal against sentence, that the court did not pronounce itself on the option of non-custodial sentencing options. In so doing the court judiciously exercised its sentencing discretion which is not lightly interfered with on appeal.

The penalty prescribed for public violence is either a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both. The penalty clause is unambiguous. It shall be an aggravating circumstance if, in the course of or as a result of the public violence there

was an attack on the police or on other persons in lawful authority; or bodily injury or damage to property occurred; or the person who has been convicted of the crime instigated an attack on the police or other persons in lawful authority or instigated the infliction of bodily injury or the causing of damage to property. In this case, it is common cause that there was widespread violence on the 1 August, 2018 following the utterances by the appellant on the 31August 2018 during which members of the MDC Alliance destroyed a lot of property and engaged in running battles with the Police. An effective term of imprisonment was called for to act as deterrent to like-minded people. Unauthorised pronouncements concerning the outcome of an election are not only unnecessary but are clearly motivated by the desire to incite the rejection of the official results, yet elections are an emotive issue, hence the violence. Non-custodial options of sentencing are not deterrent enough.

The appeal against sentence, therefore, also lacks merit.

In the result we order as follows:

The appeal is dismissed in its entirety.

CHATUKUTA J: Agrees ……………………………

Msendekwa-Mtisi, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners