LUCKY MHUNGU
and
THE STATE

HIGHCOURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 29 May & 5 June 2023

Criminal Appeal

Appellant in person
F Kachidza, for the respondent

CHIKOWERO J:

1. This is an appeal against the judgment of the magistrates court convicting the appellant on one count of robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and unlawful possession of a Firearm without a valid firearm certificate as defined in s 4(1) as read with s 4(2)(b) of the firearms Act [*Chapter 10:09*].
2. On the robbery charge the appellant was sentenced to 7 years imprisonment of which 2 years were suspended on the condition of good behaviour. As pertaining to the charge of unlawful possession of a firearm the appellant was sentenced to 12 months imprisonment.
3. The appeal against the conviction for unlawful possession of a firearm is attacked and conceded on the basis of an irregularity. Indeed, a reading of the record discloses that although the appellant gave a defence outline and evidence was led relating thereto the appellant was not asked to plead to count 2, which was that the appellant contravened the relevant sections of the Act by unlawfully possessing the firearm in question without a valid firearm certificate. That omission renders the conviction on that count irregular.
4. The appeal against the conviction on count 2 succeeds. Since the magistrate who presided over the trial has retired from service, we will direct that a trial do novo, in respect of count 2 only, be held before a different magistrate.
5. In respect of the remaining count, the court found that on 11 June 2009 and at Queensdale Spar, Harare, the appellant and two others, who were jointly charged with him, convicted

and similarly sentenced, had robbed employees of that supermarket of US$9125.00. The court found that the offence was committed around 9pm and that the appellant and his accomplices (the latter are not before us) had used a pistol to commit the offence.

6. The appeal is predicated on the contention that the court erred in finding that the appellant was correctly identified as one of the robbers.
7. We do not think the identification parade was fairly carried out. Although he did not see the faces of the persons on the parade as the parade was being assembled, one of the Spar employees, who testified for the prosecution, said that he saw the parade being assembled. The witness was in an office at the police station as were two other Spar employees, for the purpose of eventually proceeding to the parade to pick out the persons he saw committing the offence, at the formal identification parade, if they were there. Further, the Formal identification parade Guide For, which was produced by the prosecution as an exhibit, shows that the investigating officer was present at the identification parade. The investigating officer said that he was not present. He was believed by the learned magistrate yet the exhibit that we have referred to clearly showed that he was present. The court did not comment on the exhibit at all. In these circumstances, we must agree with the appellant that identity parade was fairly conducted. The basic requirements for a fair parade are listed by G Feltoe in his book, JUDGES HANDBOOK For Criminal Cases, First Edition at p 96.
8. Although we have excluded the evidence of the identity parade, we are of the view that there was other identification evidence which made the conviction safe. In this regard, Ms Kachidza referred us to *State* v *Mtetwa* 1972(3)SA 766 AD where HOLMES JA said at 768A-C:

> "Because of fallibity of human observation evidence of identification is approached by the court with some caution. It is not enough for the identifying witness to be honest, and the reliability of his observations must be tested. This depends on various factors such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress, the result of the identification parades, if any and the evidence by or on behalf of the accused."

9. The first witness, who was the cashier at Queensdale Spar, said he was in the cash office around 20.20hrs when he heard some disturbing noise emanating from the receiving gate.

He was knocking off for the day and was about to deposit the day's takings into a trunk. The noise continued for some time. There was a door connecting the cash office to the administration office. He heard voices commanding the persons in the administration office to lie down. He tried to close that door. The door was kicked open. In came the appellant and the third accused. The former produced a pistol. When the two got into the cash office the cashier was about to lock the trunk containing the cash into the safe. The appellant demanded that the witness surrenders all the money collected on that particular day. The witness asked what the money was for to which the appellant retorted that the former was not serious. The third accused told the appellant to either shoot the witness or to stab him with a knife. This prompted the witness to surrender the keys to the appellant. The appellant commanded the witness to unlock the trunk. The robbers got to the trunk and took all the money which the witness had rolled and deposited therein. The appellant handed up the money to the third accused. They then locked up the witness in the cash office together with two other Spar employees whom they brought from the administration office.

10. The court found that the first witness' evidence of identification not only of the appellant but also of the third accused was reliable. The lighting conditions were good as the lights were on. The appellant and the third accused were not putting on any face masks or other means of concealing or disguising their identity. He interacted with both at close quarters and was able to state what each had said and done during the course of the robbery. The witness' evidence that he played the closed circuit television footage of the robbery the following day and observed the two committing the offence was not disputed. In fact, the witness' testimony was that the footage also picked out accused two, who had remained by the gate. That the footage was neither played in court nor produced as an exhibit was of no consequence because the appellant did not dispute the contents of that footage. The cash office was about three metres long and when the appellant produced the pistol he was a mere two metres from the witness, so was the third accused. Although the witness knew neither the appellant nor the latter's partners in crime prior to the fateful day the court found that there were very strong factors present in the matter all pointing to the reliability of the testimony that the appellant was correctly identified as one of the robbers. As we have

pointed out, these were that the lighting conditions were good, the robbery occurred in the witness' small office, the witness talked to and did both robbers' bidding at close quarters and his evidence that he also viewed them on the closed circuit television system the following day was not disputed. That the robbery itself was committed and in the manner described by the first witness, was not in dispute. We agree with the trial court that the appellant's defence of an alibi, that he was in Gweru on the day of the robbery, crumbled like a deck of cards. The appellant's suggestion to the witness that the person who was seen committing the offence may have been the appellant's twin eptomised his desperation. It was not his evidence that he had a twin. The suggested twin was not named. Neither did that factitious person give evidence. Indeed he could not.

11. Our view is that even if the respondent had led evidence from the cashier only, the conviction of the appellant would still have been justified. The evidence of the cashier was clear and satisfactory in all material respects.
12. As it turned out, the witness' testimony, as correctly found by the trial court, was corroborated by two other Spar employees.
13. One of those witnesses was the Manager. He was seated in his office, reading the newspaper. He was waiting for the cashiers. The appellant entered the Manager's office, issued a three-fold threat to kill the witness whereupon he produced a pistol which he pointed at the witness' head. Puzzled, the witness asked why he was to meet his death. The appellant demanded the gate keys. As these were on the table, and unaware that the first witness had been robbed of cash, the manager wanted to hand over the keys to the appellant. Pistol still pointed at his head, the manager was ordered to pick up the keys and was ordered to accompany the appellant and the other man (who turned out to be accused three) to the gate where he was in the process of unlocking the same when he was commanded to leave the key in the lock and was marched to the cash office.
14. The court believed that the manager correctly identified the appellant. The lights in the manager's office were bright. The lights were on. The witness was seated on his desk, reading the newspaper, when the appellant and partner in crime entered the office. The manager had full view of the appellant's face when the latter came into that office. However, he did not observe the face of the accomplice because this one quickly went

behind the witness as the appellant interacted with the witness. The appellant spent about 5 minutes in the office, which provided enough opportunity for the witness to observe the unmasked appellant. We underline the fact that the manager independently observed and identified the appellant. He did not rely on the cashier's powers of observation and recollection. The cashier observed and identified the appellant and the third accused. This happened in the cashier's office whereas the manager identified the appellant only. That observation and identification happened not in the cashier's office but in the manager's office. This was after the robbery itself had occurred. The two pieces of evidence were independent of each other. The two witnesses did not collude yet they also spoke to the appellant as having indeed been one of the persons who committed the robbery.

15. The Loss Control Manager, again, independently identified not only the appellant but the second and third accused persons. He was in the room used as a bay for receiving goods. He was in the company of five other Spar employees. They had all knocked off and were about to go home. The lights shone very well. The appellant and accused three entered the room. The former ordered all the workers to lie down. He brandished a firearm. The appellant was very close to the witness. The appellant and the third accused rushed into the shop but failed to locate the cash box. They returned and demanded to know the location of the cash office. One of the female employees, while still lying down, said "straight on." The appellant and the third accused ran in that direction where, as we have already seen, they robbed the cashier.
16. The Loss Control Manager managed to identify the appellant because the lighting conditions in the receiving bay were good. He also saw the appellant at close quarters and was able to see that the latter was holding a firearm. Further, he was able to relate what the appellant did and said. The scene of his observation and identification of the appellant was different from those of the cashier and the manager. The scene of his identification preceded the robbery itself.
17. The need to interrogate the place of the firearm which was produced as an exhibit *vis-s-vis* the correctness of the conviction on the robbery charge falls away.

18. Further, our foregoing discussion of the identification evidence necessarily means that there is no merit in the contention that the trial court placed an onus on the appellant to prove his innocence. That contention does not call for any further examination.
19. In the result, IT IS ORDERED THAT:
    1. The appeal against the judgment of the magistrates court under CRB R734-36/09 convicting the appellant of robbery as defined in 126 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] be and is dismissed.
    2. The appeal against the judgment of the magistrates court under CRB R 734-36/09 convicting the appellant of the offence of possession of a firearm without a valid licence as defined in s 4(1) as read with s 4(3)(b) of the Firearms Act [*Chapter 10:09*] be and is allowed, the conviction quashed, the sentence set aside and the matter remitted to the court *a quo* for a trial *de novo* before a different magistrate.

CHIKOWERO J:…….

ZHOU J: Agrees……...

The National Prosecuting Authority, respondent's legal practitioners