FARAI KAMBARAMI
and
TADIOUS TAFIRENYIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 1 April 2014 & 28 May 2014

Criminal Appeal

Ms *S Gutsa*, for the appellants
E Makoto, for the respondent

HUNGWE J: The two appellants were convicted by the Regional Magistrate at Harare for armed robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*]. They were sentenced to 8 years imprisonment of which 4 years imprisonment was suspended for five years on conditions of good behavior. A further year was suspended on condition they both effect restitution in favour of the complainant on or before 28 February 2013. The sole ground of appeal was that the appellants had not been properly identified by the State witnesses called to prove identification and therefore they were wrongly convicted. A supplementary ground of appeal raised was that there was no proof that the taking of the money was induced by the use of threats of violence; therefore the offence of robbery had not been proved.

In order to deal with these two grounds of appeal, it is necessary to set out the findings of the trial court and decide, in light of the evidence led in the court *a quo*, whether there is merit in these two grounds.

Evidence led from no less than five witnesses establish the following:

Obey Chiwara, the complainant, told the court that on 10 April 2012, the first appellant together with the second appellant, approached their bus at the Roadport bus Terminus. The first appellant identified himself as Detective Kambarami. He was dressed in a suit. He demanded

US$2 000, 00 for their bus not to be impounded. The second appellant was dressed in police uniform. They both claimed that the bus carried smuggled goods. According to the witness, the first appellant then produced a fire-arm from his jacket stating that they were not joking. The witness, who is a bus conductor of the bus which had just arrived from Zambia, then handed over US$980, 00 to the two. They drove off in a white vehicle which had arrived at the scene after one of them had spoken on his mobile phone. The bus crew and the passengers discussed the incident. It was decided not to report this incident since, according to the witness; the two were well-known for this kind of behavior. It was felt they would return and appropriate action would then be taken. They decided to entrap them. Sure enough on 12 May 2012 the duo struck. Except for himself, the rest of the bus crew was present. He learnt later how these two were driven to the police station and arrested for the robbery of the 10 April 2012.

Mafios Meki, a traveler who was on board the bus on 10 April 2012 when the offence was committed stated that the 1st appellant was dressed in a suit and the second appellant in a police uniform. They had taken the conductor to the front of the bus which was lit up by both the headlamps of the bus as well as the flood lights at the terminus. He had also spoken to the second appellant during the commission of the offence and therefore had had a good look at him. His evidence corroborated that of the first witness in that they both confirm that they each spoke to one or other of the two appellants in a well-lit area. When he was later summoned to an identification parade, he was able to pick out the second appellant. He described the features by which he was able to pick out the second appellant which features he had taken note of earlier the previous month. Another witness, Caiphas Rino the bus driver, also confirmed that the two appellants were the same people who had accosted the bus crew and relieved the conductor of cash in April 2012 and were arrested a month later when they attempted to commit the same offence using the same tactics at Roadport. Regarding the incident in April 2012, the bus driver described the first appellant as having been dressed in a suit whilst the second appellant was in police uniform. He confirmed what Mafios Meki had told the court that the second appellant had boasted that he had once had an altercation with the bus conductor, the first state witness, when they were committing the present crime in April 2012. He maintained that on the day of their arrest, the two appellants had been spotted at a service station near Roadport called Engen. He had identified them and caused their arrest.

Naboth Chikomo, a taxi driver who plies his trade around the Roadport area testified that on the day in April 2012, when this crime was committed, he had identified the first appellant during the commission of the crime. The first appellant had chased him away on that occasion. He was later called to an identification parade where he was able to easily pick the first appellant out and described the features through which he had identified the first appellant. He disputed the evidence given by the appellants in respect of the manner in which the identification parade was carried out by the police. His evidence tallied with that of the police officer who carried out the identification parade.

Questions of identification are always difficult. This is the reason why extreme care should always be exercised when it is proposed to carry out identification parades, that is to prevent the slightest hint reaching the witness of the identity of the suspect. People often resemble each other and it is not uncommon that strangers are sometimes mistaken for old acquaintances. In *S* v *Dhliwayo and Another* 1985 (2) ZLR 101 (SC) it was held that:

> "Where an identifying witness has been shown to be careful and truthful, it is not always necessary for the witness to be asked to give details of every feature by which he identified the accused. Evidence of identification, however, must be treated with some caution and the reliability of the witness's evidence must be tested against the cumulative weight of such factors as lighting, visibility and eyesight, his proximity to the accused: his opportunity for observation, the extent of his prior knowledge of the accused, the accused's features and appearance, the result of an identification parade and the accused's evidence".

In *S* v *Ndhlovu and Others* 1985 (2) ZLR 261 (SC) it was similarly held that the positive assurance of identification by a single honest witness was not enough. The court went on;

> "The possibility of a mistake occurring in the identification, especiallywhere the witness has not known the person previously, demands that the greatest circumspection should be employed. As WILLIAMSON JA warned in *S* v *Mehlape* 1963 (2) SA 29 (AD) at 32F-G:
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> > 'The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

In similar tone HOLMES JA, in *S* v *Mthetwa* 1972 (3) SA 766 (AD) at 768 A-C, remarked with his accustomed lucidity:

> 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also 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 and suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and , of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.
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> (See also *Aluverino* v *R* 1963 R&N 614 (SR) at 615I-616H.) Hence a cautious approach is necessitated, not only because a conviction is sought upon the evidence of a single witness, but also because the identification of an accused person is a matter notoriously fraught with error. It is an area wherein the potential for honest mistake looms large.'"

In *S* v Nkomo 1990 (1) SACR 682 @ p 685 MCNALLY JA put the issue of identification this way:

> "Very broadly speaking the judgment of Lord Widgery was to the effect that good identification does not need corroboration or support, but poor identification does. Good identification he defined by examples. (1) A kidnapped person kept for many days in the company of his kidnapper, who identifies him without hesitation months later. (2) A suspect person kept under observation and seen by two policemen several times, identified by them six months later. (3) A colleague, known from work for several years, seen clearly stealing a wallet from a locker. Such cases, said Lord Widgery, could safely be left to the jury to decide. On the other hand identification is poor 'when it depends solely on a fleeting glance or on a longer observation made in difficult conditions'. 'Recognition, he said, elsewhere in the judgment, 'may be more reliable than identification of a stranger'. In such cases corroboration or support (and odd coincidences, unexplained, can, he said, be regarded as support) should be required."

The court *a quo,* in a well reasoned judgment, set out how it treated the evidence on identification and concluded that the State witnesses could be relied upon as truthful and not being mistaken when they identify the appellants as the culprits. It is important that the State witnesses had prior knowledge of the two. That is why they resolved not to report the offence on the day it was committed. They knew that these two, apparently, had a habit to harass bus crews over unsubstantiated allegations so as to gain some advantage of sorts. Their predictions proved true as, indeed, the two appellants struck the following month. It is no coincidence, in my view, that the 1st appellant who described himself as Detective Kambarami in fact turned out to be one Kambarami when he was picked out of an identification parade. This fact lends support to the correctness of the appellants by the State witnesses. It is also no coincidence that indeed they are police officers, both of them. Again this corroborates and confirms the correctness of the

evidence of identification relied upon by the court *a quo*. They were known by the taxi driver as well as by the traveler who was present when the appellants committed this crime. I am satisfied that the ever-present danger of honest but mistaken identification of an accused has been satisfactorily excluded in this case.

As for the essential elements of the offence, evidence led showed that the first appellant produced a fire-arm as the demand for money was made. In my view this meets the essential elements of the crime of armed robbery which require that the taking be induce by threats of violence or use thereof. In the result the conviction of the two appellants is unassailable.

The appeal against conviction is therefore dismissed in its entirety.

BERE J agrees.

Chingeya-Mandizira Legal Practitioners, appellants' legal practitioners
National Prosecuting Authority, legal practitioners for the respondent