DENNIS DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & CHEDA JJ
BULAWAYO 6 AND 9 JUNE 2011

Appellant in person
T. Makoni for the respondent

Criminal Appeal

NDOU J: The appellant was convicted of five (5) charges by a Bulawayo Regional magistrate. Counts 1, 2 and 3 were treated as one for the purpose of sentence and the appellant was sentenced to twenty (20 years imprisonment. Count 4 and 5 were treated as one and the appellant was sentenced to five (5) years imprisonment. Of the total sentence of twenty-five (25) years imprisonment, five (5) years were suspended on the customary conditions of good future behaviour. The offences for which the appellant was convicted are, count 1 unlawful entry into premises, count 2 robbery, count 3 rape, count 4 unlawful entry into premises and count 5 attempted rape in contravention of sections 131, 126, 65, 131, and 189, respectively, of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The background facts are the following:

Counts 1, 2 and 3

On 17 April 2007 at about 2300 hours the appellant was alleged to have unlawfully broken into a kitchen hut at Cornelious Akabondo's homestead at Village 2 Insuza. In this hut were four women fast asleep i.e. Bridget Akabondo, Gladys Thebe, Nakuluyi Akabondo and Debra Akabondo. The appellant allegedly awakened the women and ordered them to cover their heads with blankets and not to make any movements. Thereafter he allegedly robbed Bridget of Z$20 000. Thereafter he allegedly raped Debra. To achieve all this, the appellant allegedly threatened to harm these women with an axe and knobkerrie if they did not submit to his unlawful demands. The appellant raised a defence of an alibi. The main issue was whether the appellant was properly identified as the intruder. This is a straight forward denial of the prosecution case on the issue of identity. It is trite that there is no onus on the accused to prove his alibi, if on all the evidence there is a reasonable possibility that the alibi is true, there must be the same possibility that he did not commit the crime, and he is entitled to be

acquitted – *R* v *Dube* 1915 AD 557 at 582; *R* v *Biya* 1952 (4) SA 514 (A) at 521 C-D and *S* v *Mutandi* 1996 (1) ZLR 367 (H) at 369. The State exhibited a cavalier approach towards the crucial issue of identity in this case. This seems to be a common error by prosecutors these days. Such lackadaisical way of adducing identity is disturbing as it results in acquittals even when the state has evidence at its disposal to prove the guilty of the accused. Identification parades have become a rarity. In this case such a parade was necessary as the witnesses did not know the intruder prior the offences. Only one witness claims to have identified the appellant during the brief moment when he allegedly lit a match. This issue was not carefully canvassed in detail.

Suggestions of factors to be investigated included, but are not limited to – lighting, visibility, eye sight, extent of prior knowledge, accused's face, voice, build, gait and dress etc.

This issue was aptly captured by HOLMES JA in *S* v *Mthethwa* 1972 (3) SA 766 (A) at page 768 in the following terms:

> "Because of 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 eye sight; 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, built, 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 exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in light of the totality of the evidence and the probabilities." *S* v *Mehlaphe* 1963 (2) SA 29 (A); *S* v *Ndlovu & Ors* 1985 (2) ZLR 261 (S) at 263G – 264E; *S* v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 107 A-D; *S* v *Mutandi, supra*, at 117 (SC) and *S* v *Vhera* 2003 (1) ZLR 668 (H) at 672-4.

In casu, the learned Regional Magistrate made a bald statement that the appellant "was properly identified". The record is however, silent on what the magistrate relied on in arriving at that conclusion. As alluded to above, the offences occurred during a dark night. The witness did not have prior knowledge of the assailant. The witness only saw the alleged intruder briefly when a match was lit. The record does not say when the witness next saw the appellant and under what circumstances. With this in mind, the respondent does not support the conviction in counts 1, 2 and 3. The concession, in my view, is properly made as it is unsafe to sustain the conviction in such circumstances.

In counts 1, 2 and 3 the appellant is accordingly entitled to acquittal.

Counts 4 and 5

In count 4 the evidence against the appellant is overwhelming. He says he entered the complainant's house at night and deliberately did not announce his entry. He said he secretly entered the house because he wanted to drink water and disappear without the owner of the homestead noticing. He did this to avoid the talkative owner of the homestead. This story of seeking water to drink in the middle of the night is false and ridiculous. Why enter into someone's house secretly at night just to quench thirst? Appellant stated that he was about two (2) kilometers from his own homestead. This conviction is count 4 has to stand.

In count 5, the complainant disturbed the appellant before he did anything in the house. When appellant lit a match she screamed for help resulting in a struggle with the appellant. The appellant's intention cannot be discerned from the evidence adduced. Certainly there is no evidence that he had reached a stage of attempting to rape or sexually abuse the complainant. His intention remains unknown. The conviction in count 5 cannot stand.

Sentence

Because the appellant stands convicted only of one count of unlawful entry, the sentence has to be interfered with. The trial court treated the accused as a first offender. This issue was equally not pursued as to his credit, the appellant informed us that he was candid enough to inform us that he has a previous conviction for housebreaking. On appeal this is no longer relevant and we cannot use this factor against him. What it shows, however, is that prosecutors, out of convenience, are failing to prove the accused person's previous records. This is not acceptable. Every endeavour should be made to establish whether or not the accused is a first offender especially in serious cases. *In casu,* the appellant has to benefit from the prosecutor's weakness.

Accordingly, the appeal against conviction in count 1, 2, 3 and 5 is upheld and conviction is quashed and sentences set aside. The conviction in count 4 is confirmed. The sentence imposed by court *a quo* is set aside and substituted by a sentence of 3 years imprisonment.

Cheda J ……………………………………………… I agree

Criminal Division, Attorney General's Office, respondent's legal practitioners