

THE STATE

VERSUS

ABRAHAM MUGUNI

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 JULY 2014

Criminal Review

MOYO J: The accused person was charged with and convicted of Robbery as defined in Section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] in that on the 9th of April 2014 at around 23:00 hours and along Godlwayo Road, Old Magwegwe, Bulawayo the accused person together with Luckson Chivhorovhoro took an iphone cellphone and \$133-00 by intentionally using violence by assaulting complainant with stones once on the head and at the same time taking away the complainant's property in order to induce the complainant, one Gilbert Muzamhindo who had control over the property to relinquish his control over it.

The facts of the matter are that the complainant was accosted by two assailants outside Marisha Beer garden who assaulted him and searched him in the process taking his cellphone and cash amounting to \$133-00.

The complainant was in the company of one Nomatter Ncube when the incident occurred and Nomatter Ncube ran away. Whilst the facts of the matter are straight forward, it is the identity of the two accused persons that concerns me.

The complainant gave evidence to the effect that he did not know the accused persons prior to the attack and that he only saw the accused persons during the attack. He stated in his evidence in Chief that because accused 1 was in front of him during the attack, he had seen his face and height. Asked what in particular he had noted of accused 1's face he said its complexion. He said he was not sure of accused 2's identity. The other state witness Nomatter Ncube told the court that she had seen accused 1 at the beerhall prior to the attack. She told the court that the 1st accused person had confronted her at the beer hall and asked her to vacate her seat. Asked what

in particular she had noted of accused 1 at that stage, she then said the long sleeved striped shirt which was black and white and some “all stars” shoes and a cap. At the scene when they met the accused persons again, she fled and left the two accused persons attacking the complainant. She told the court that she is the one who caused the arrest of accused 1 when he came 3 days later to the beer hall and that the reason why she noticed accused 1 was because when he came and saw her, he panicked. She then said the accused person was still wearing the same clothes he was wearing during the attack. She also told the court that the second accused person was also there during the attack. She also told the court that she had seen the second accused person’s face as he wore a hat. Under cross-examination accused 1 reminded this witness that at the police station she had in fact told the police that he wore a jean jacket. She then said accused 1 wore a striped shirt inside the jean jacket.

The two accused persons were adamant that it was a question of mistaken identity. Accused 1’s defence was that he was never in Magwegwe on the day in question and that he knocked off duty at his work place around 9pm and he went to the back of the same building where he sleeps. He said he never went outside.

Accused two stated that he never went to Marisha, he was at work and on night duty. He said he went home around 7am and when he got home he slept.

It is apparent from the court record that the alibis tendered by the accused persons were never investigated.

In matters of identification the court should exercise caution for the simple reason that human observation is very fallible and experience has shown that genuine errors can easily be made by witnesses who have identified culprits. The relevant factors to take into consideration in identification matters were fully canvassed in *Nkomo and Another v The State* 1989 (3) ZLR 117 (Zimbabwe Supreme Court). One of the factors stated in that case is whether the accused person has any distinct facial features or pronounced or extraordinary features. Both accused persons in the matter were wearing hats, in fact one wore a hat and one wore a cap according to the second state witness Nomatter Ncube. Nomatter Ncube was also adamant that the second accused person was the one she had seen at the scene despite the glaring inadequacies on his identification. The trial magistrate rightfully acquitted the second accused person. The situation in this case is worsened by the fact that both accused persons had alibis which were apparently not followed up by the state.

In *Musakwa vs The State* SC 1/95, the complainant was conned out of money by two men. One chatted to her for 10 minutes and she saw one of them at the same spot shortly afterwards and identified him. He denied any involvement and said that he had been elsewhere. The police did not check his alibi. The trial court believed the complainant and accepted her evidence on identification. The Supreme Court held that mistakes happen, the question is not simply whether there was opportunity for reliable recognition but that the state must also disprove the alibi. Obviously the bold assertion by a witness that he is certain that he had identified the right person should not be accepted at face value. The objective basis of his identification must be carefully examined.

I accordingly find that the identification of the accused person in this case creates a danger of false incrimination and also the lack of investigation of the accused persons' alibi exacerbates the whole scenario giving rise to a finding that the conviction of the accused person in this matter on these facts is not safe. The state can not be found to have proven its case beyond a reasonable doubt in these circumstances.

I accordingly order as follows:

- 1) The conviction is set aside.
- 2) The accused person is found not guilty and is acquitted.

Moyo J.....

Takuva J agrees.....