ENOCK PANGANAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 5 June and 20 June 2019

**Criminal Appeal**

Ms *E Ngorima*, for the Appellant
Mr *J Chingwinyiso*, for the Respondent

MUZENDA J: On 20 December 2018, the appellant appeared before the Provincial Magistrate Mutare facing Robbery as defined in s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State alleged that on 1 August 2018 and at Zimunya Business Centre, Mutare, the appellant and other unknown accomplices all and each one or more of them unlawfully pulled Ronald Mhlanga to the ground, hit him with a metal object on the neck forcibly grabbed his neck in order to steal Ronald Mhlanga's black shoes, solar light, sun hat and $13.50. He pleaded not guilty but was convicted after a full trial. He was sentenced on 31 January 2019 to 5 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of future good behaviour.

On 8 February 2019 the appellant filed an appeal against conviction and outlined the grounds of appeal as follows:

> "1. The learned trial Magistrate erred and misdirected himself at law by failing to properly and judiciously consider the issue of alibi raised in applicant's defence.
> 2. The learned trial Magistrate erred and misdirected himself when he failed to apply his mind to the inherent dangers of accepting the complainant's testimony (without corroboration) as a single witness to the incident. Ultimately he failed to apply caution to that evidence.
> 3. The learned trial Magistrate erred and misdirected himself when he rejected the evidence of the appellant's witness(es)."

The facts of the matter are that appellant and the complainant are neighbours at Temberere Village Chief Zimunya, Mutare. On 1 August 2018 at around 1900 hours at Zimunya Business Centre, one of the accused's alleged accomplice approached complainant asking for some money and was given 0.50c. The complainant and that person then parted

ways. The person who had been given 50c followed complainant and walked together proceeding to Temberere Village. When the complainant and that outstanding accomplice had crossed the Mutare-Masvingo road, appellant and the third accomplice came from behind running. Appellant tripped the complainant to the ground, forcibly stopped and grabbed the complainant's neck. The second accomplice sat on the complainant's stomach whilst the 3rd accomplice was holding legs and appellant assaulting the complainant using an unidentified metal object on the face several times, hitting complainant on the mouth and forehead using fists. The complainant became unconscious and later regained due to cold weather. He discovered that his black shoes, solar light, sun hat and cash were missing. Complainant was medically examined and he sustained a painful neck and chest, bruised eyes and had a headache due to the assault.

WHETHER THE TRIAL COURT FAILED TO PROPERLY AND JUDICIOUSLY CONSIDER THE ISSUE OF ALIBI RAISED IN APPELLANT'S DEFENCE

In its reasons for judgment, the learned Provincial Magistrate did not directly deal with appellant's alibi *perse*. Instead it dwelt much on the fact that the complainant who was a neighbour could not have been mistaken about appellant. Complainant has seen appellant earlier on at the business centre and he had torched appellant's face at the scene of the offence. During the attack complainant had also managed to identify the appellant. The court *a quo* disbelieved the appellant as well as his witnesses' evidence on the aspect that appellant was in Revesai Village at the time of the alleged robbery. The court *a quo* went on to compare the evidence of identification led by the State and based on credibility dismissed appellant's version.

In the matter of *Stephen Mhlobo Nkomo v The State*[1] MC NALLY JA quoting the English case of R v Turnbull[2] had this to say:

> "Very broadly speaking the judgment of Lord Widgery was to the effect that good identification does not need corroboration or support, but pour 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 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

[1] SC 142/89
[2] [1976] 3 ALL ER 549 (CA)

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."[3]

In the matter of *S v Mutandi*[4], it was held that:

> "Where there is direct or circumstantial evidence which points to the accused as the criminal, the most satisfactory form of rebuttal is for him to show that he could not have committed the crime because he was somewhere else. This is known as the defence of alibi, but it was a straight forward denial of the prosecution's case on the issue of identity. There is no onus on the accused to prove his alibi, if on all the evidence there is a reasonable possibility that the alibi evidence is true, there must be the same possibility that he did not commit the crime and the accused is entitled to be acquitted.
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> If the prosecution case relies on identification by a single witness, it is not enough to find that the witness honestly believes that he has correctly identified the accused confidence, a good demeanour and sincerity are not enough. The witness might be honestly mistaken. The reliability of the observation must be tested, for there are numerous factors and circumstances which affect that reliability. These factors must be weighed against one another, in the light of all the evidence (including the accused's) and the probabilities. For these reasons, a cautious approach is needed. Caution is not demonstrated by a mere statement by the judicial officer that he is aware of the need for caution. It is not even necessary for such utterances to be made. What is necessary is a demonstration in his reasoning of a cautious approach and of alertness to the real dangers which the cautionary rule seeks to address."

The examination of the record of proceedings, more particularly the judgment indeed shows that the trial court failed to deal with the issue of alibi applying in its reasoning the cautious approach. It is trite law that the onus to disprove defence of alibi does not lie on the accused. It does lie on the State. However, in this case the accused went on to call the defence witnesses who could have been probed by the police.[5] Nevertheless the court *a quo* went on to believe the State witness and rejected the defence version. The failure by the court to isolate the issue of identification and deal with it cautiously is not fatal to the judgment.

In our view the court *a quo* accepted the complainant's identification as good and sufficient and proceeded to reject both the alibi as well as mistaken identity. It reached that decision relying on its assessment of credibility of the complainant which is the domain of the trial court. The complainant and the appellant were not strangers, complainant had earlier on seen the appellant and went on to torch his façade and heard appellant making utterances, certainly it is improbable that complainant would have been mistaken of the appellant. We are satisfied that the first ground of appeal had no merit.

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[3] P4 of the cyclostyled judgment
[4] 1996 (1) ZLR 367 (h) per GILLESPIE J at 367 E-368A
[5] See Phineas Ndhlovu v the State SC 18/86

WHETHER THE TRIAL COURT ERRED IN ACCEPTING COMPLAINANT'S TESTIMONY

> "It is not every time that a single witness gives credible evidence which is beyond reproach. There are different degrees of credibility. One witness may give unblemished evidence. Another may give evidence which although trustworthy has some unsatisfactory features as in the circumstances."[6]

In the matter of *S v Sauls and Others*[7] it was seminally stated:

> "There is no rule of thumb test or formular to apply when it comes to a, consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide. Whether its trustworthy and whether despite the fact that there are shortcomings or defects or contradictions on the testimony, he is satisfied that truth has been told. The cautionary rule referred to by DE VILLIERS JP in a1932 may be a guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender of the witnesses' evidence were well founded (per SCHREINER JA in R v Nhapo (AD, 10 November 1952) quoted in "*R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

The appellant did not provide a critique of the features which were either contradictory or unsatisfactory of the complainant's evidence. We assume that in the absence of such, the appellant has no factual basis to impugn complainant's evidence. The court *a quo* saw it safe to accept the evidence of the complainant. The appellant did not deny that he had been seen by the complainant at the shops before the offence was committed. Appellant did not deny or challenge claiming evidence of the complainant when he said that through the assistance of the torch the complainant was able to see the face of the appellant.

Failure by the appellant to challenge such evidence confirms the credibility of the complainant. It is true that single witness' evidence must be approached with chameleonic caution and analysed in Solomonic wisdom and should be followed by judiciary officers and the judgment must be by necessity precisely reflect that. Once the identification of the appellant by the appellant was acceptable by the court *a quo*, the cautionary approach to single witnesses was used globally and the court *a quo* came to a conclusion that the witness, the complainant was a credible witness. The second ground of appeal against conviction is equally without merit.

[6] David Worswick v The State SC 27/85 at p.3 of the cyclostyled judgment
[7] 1981 (3) SA 172 (AD) at 180 EG

WHETHER THE TRIAL COURT ERRED IN REJECTING THE EVIDENCE OF THE APPELLANT'S WITNESSES

The appellant's counsel vehemently submitted in her heads that the trial Magistrate misdirected himself when he rejected appellant's witnesses' evidence corroborating appellant's defence of alibi. The court *a quo* in principle discredited Katey Huragu and Grace Mukaro's evidence. Both defence witnesses cannot be ordinarily classified as independent and indeed the court *a quo* did not analyse the two's evidence in isolation. It juxtaposed their evidence with complainant's evidence.[8]

> "The magistrate made an adverse finding on the credibility of the appellant and his witness and that finding was based on the facts before him and his observation of the witnesses that appeared before him. There was no misdirection in him finding of credibility. It is my view that an appellate court should not disturb that finding without having been shown that the magistrate's decision on credibility was wrong."[9]

The third ground of appeal is equally without merit and is dismissed. The State managed to prove its case and the trial Magistrate properly in our view convicted the appellant. The Isolano case cited (*supra*), the learned Chief Justice cited the proper approach used in the English case of *Miller v Minister of Pensions*[10] where His Lordship, Lord Denning described the degree of proof at 373 H as follows:

> ""….and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused is found guilty. That degree is well settled. It need that reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would foul to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence", the case is proved beyond reasonable doubt but nothing short of that will suffice."

We are persuaded that the Magistrate was correct in rejecting the defence evidence and in accepting the prosecution evidence. There is no doubt in our minds that on the evidence before him the Magistrate arrived at the right decision.

Accordingly, I would dismiss the appeal against conviction.

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[8] See the matter of the S v Isolano 1985 (1) ZLR 62 (S)
[9] DUMBUTSHENA CJ , s v Isolano (supra) on p. 64A-B
[10] [1947] 2 AII ER 372 (KB)

MWAYERA J agrees_____

*The Legal Aid Directorate*, appellants' legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners