Judgment No. HB 24.10
Case No. HCA 90/08
X Ref CRB 1375/08

GEORGE MAGOMBA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 22 JUNE 2009 AND 13 MAY 2010

C P Moyo for the appellant
T Makoni for the respondent

Criminal Appeal

NDOU J: The appellant was convicted by a Bulawayo magistrate for a crime of robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. Despite his protestations, he was convicted and sentenced to 9 months imprisonment of which 7 months were suspended on condition of good future behavior. We upheld the appeal and quashed the conviction and set aside the sentence and indicated that our reasons for doing so will follow. These are our reasons. To start with, the respondent did not support the conviction. We are in agreement that the court *a quo* did not fully investigate the appellant's defence of alibi and the possibility of mistaken identity. The appellant indicated that at the time of the alleged robbery he was at the seminary carrying out duties.

It is trite law that the state bears the onus to disprove the accused person's alibi. *S* v *Masawi & Anor* 1996(2) ZLR 472 (SC). Besides his own testimony, the appellant called two witnesses in support of his alibi. Father McQuillen, the Dean of Students at the seminary, testified that the seminary followed a daily timetable with prayers at 1215 hours and lunch at 1230 hours. Father McQuillen testified that the appellant was at the seminary and that it was indeed true that he was one of the organizers for a party for third year students. He, however, conceded that he (i.e. the witness) left the seminary just before the lunch and thus could not tell whether or not the appellant left the seminary at lunch time. Another witness, Gerald Chipangwa testified that he was with the appellant from morning until when they parted company at 1255 hours. If this testimony is accepted, then the appellant's defence of alibi should have succeeded – *S* v *Musakwa* 1995 (1) ZLR (SC). The trial prosecutor did not challenge this testimony under cross-examination. In the circumstances, Mr *Makoni*, for the respondent, rightly conceded that the issue of the appellant's alibi and the disparity in time was not fully canvassed to bring out the reasonable doubt. The facts of the case are mainly common cause.

On the 9th May 2008 at around 12 noon, the complainant was at corner George Avenue and Harare Road waiting for transport. She was confronted by a man she did not know and robbed of her handbag containing a Samsung E250 cellular phone and cash amounting Z$1 000 000,00. Her assailant fled. A police vehicle arrived at the scene and after a report the police details gave chase. The assailant dropped the complainant's handbag but the police details failed to catch up with him. Thereafter the complainant phoned her husband and gave him the description of her assailant's attire and the direction he took when he fled. Using his description, the husband apprehended the appellant around 1300 hours at Paddonhurst. The type of identification evidence is less than ideal. In *S* v *Mutandi* 1996(1) ZLR 367 (HC) the court rightly observed – "Mistakes often happen with identification evidence. Where a person identified claims he was elsewhere at the time of the crime, the police should check his alibi, as the onus is on the state to disprove his alibi" – *S* v *Shabala* 1986 (4) SA 734 (A) and *R* v *Mokoena* 1958 (2) SA 212 (T).

In casu, no identification parade was held after the apprehension of the appellant. This was necessary because the persons who apprehended him where not at the scene of crime, they were relying on a telephonic description given by the complainant. None of the police officers who gave chase at the scene testified as regards the description of the assailant's attire and his identification features. As alluded to above, there is a parallel between the time the offence occurred and the time that appellant allegedly left the seminary. This parallel in time created doubt that appellant's guilt was proven beyond reasonable doubt. More importantly, the description of the appellant as given by the complainant differed from that given by her husband, Mandla Khumalo. The latter indicated that he was phoned by the complainant to the effect that appellant was putting on a black jacket and rosary and yet the complainant indicated that appellant was wearing a blue jacket with orange stripes. This disparity escaped the eye of the trial magistrate. The state relied prominently on the identification of clothing. The attire was not produced. No other description was supplied by the several witnesses who testified. What value can be attached to such identification via clothing when there is disparity on the type of clothing. No real persuasive value can be attached to this kind of identification *R* v *Masemong* 1950 (2) SA 488 (A); *S* v *Sibanda & Ors* 1969 (2) SA 345 (T) and *S* v *Mlati* 1984 (4) SA 629 (A).

There was no testimony given about the appellant's sex, size, gait, colour or any other distinguishing features. It is trite that in all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or identifications they identify the person whom they claim to recognize – *R* v *Mokeona*, *supra*; *R* v *T* 1958 (2) SA 676 (A) and *S* v *Ndhlovu and Ors* 1985 (2) ZLR 261 (SC).

For the foregoing reasons, the conviction cannot stand. In passing, we note that the appellant expressed a desire to call a defence witness, Father Joshua Nyoni. The trial magistrate denied the appellant this right on the basis that father Nyoni's testimony could only match that of Father McQuillen. It is trite law that when a person is on trial for a criminal offence he has the constitutional right and must be given a full opportunity to give evidence in his defence and call such witnesses as he may wish – *S* v *Yusuf* 1997 (1) ZLR 102 (HC).

In the circumstances, we upheld the appeal and quashed the conviction and set aside the sentence.

Cheda J …….. I agree