

THE STATE

Versus

BILLY SAMMY

IN THE HIGH COURT OF ZIMBABWE
NDOU & MATHONSI JJ
BULAWAYO 24 & 27 OCTOBER 2011

Appellant in person
W. Mabhaudi for the respondent

Criminal Appeal

NDOU J: At the close of submissions by the parties we held that the appeal succeeds with the result that the conviction is quashed and the sentence set aside. We indicated that our reasons will follow. These are our reasons. The appellant was convicted by a Bulawayo Regional Magistrate of one count of armed robbery (car jacking). He was sentenced to 12 years imprisonment, 2 years of that sentence was suspended on the usual conditions of future good behavior. He appealed against both conviction and sentence. The salient facts were that on 30 July 2003 at about 2130 hours the complainant, a medical doctor was driving his VW Polo Classic motor vehicle along Cecil Avenue towards Matsheumhlophe. He parked his vehicle outside the gate of 113 Edenfield Road. Whilst waiting for the gate to open a vehicle parked behind him. The complainant turned around and saw the driver of the said vehicle point a pistol towards him. Two of his assailants got out of the vehicle. They opened his car door and dragged him out of the vehicle. They robbed him of his phone, wallet and wrist watch. They forced him into the back of their vehicle and drove away with him. After driving him to an unknown location they removed his shoes and dropped him and left. The appellant was arrested on 19 August 2003 at Bulawayo Central Police whilst visiting detainees at the police station. Identification parade was held and the complainant identified the appellant. The issue *in casu*, is one of identity. Immediately after being identified, the appellant raised an objection on the manner in which the identification parade was conducted. Detective Assistant Inspector Foto who conducted the identification parade noted appellant's objection in the following terms-

“Was identify because of my eye, once saw witness in office.” [sic]

It is the conduct of the identification parade that is in issue. It is trite that to produce reliable evidence an identification parade must be carried out fairly. It must be carried out

carefully. *Judges Handbook*, Prof G Feltoe at page 96. The learned author outlines the following basic requirements for a fair parade.

- “- It must be conducted by an officer who has had nothing to do with the investigation into the case;
- The officer conducting the parade should not call the witness to the parade;
- A sufficient number of persons, say ten should form the parade;
- The persons on the parade must be approximately the same build, height and complexion and they should all wear similar clothing and preferably, clothing similar to that worn when the crime was committed;
- The witness must be kept somewhere where he or she cannot see the prisoner being guarded by police officers or the parade being assembled;
- The witness should not be told that the suspect is on the parade but should only be asked if he or she saw the suspect commit that crime is on the parade;
- The witness must be left to pick out the person he or she saw commit the crime if he or she can, without any form of assistance or prompting;
- The police should not attempt to point out or suggest someone either before or during the parade;
- It is also important that the identification parade be held as soon after the commission of the crime as possible to avoid memory impairment occurring with the passage of time – *Mavunga* 1982(1) ZLR 63(S).

In *Goma* HH-21-93, the court stated that evidence must be led showing the proper conduct of an identification parade in accordance with established police procedures, with all its safeguards. Unless these essential requirements are complied with, any evidence of identification at a parade must not be relied on. ... *Masawi & Anor* HH-111-94 ...”

In casu, the conduct of the identification parade leaves a lot to be desired. First, it was conducted by the Investigating Officer (according to the identification parade notes which read:-

“Officer conducting parade: 03939 T D/A/I Tada P ...

Investigating Officer: D/A/I Tada ...”

There is nothing to show that the identification parade was conducted by D/A/I Foto in the identification parade notes. This only emerged from the viva voce evidence of Foto. Be that as it may, it is common cause that the investigating officer Tada was present during the identification parade. It is clear that the identification parade was conducted by the police

officers directly involved in the arrest of the appellant and investigations of the case against the appellant. This is a serious flaw in the conduct of the identification parade. In view of the objection by the appellant, the runner, Detective Constable Ndlovu and the witnesses guard, Detective Constable Samkange should have been called to give evidence. Failure to call them has resulted in a material break in the chain of evidence. Further, the appellant has a distinct defective eye or cataract. If the witness, who is a medical doctor saw and identified appellant during the robbery, he would not have missed this feature of his face. If he missed the cataract because of the hat that appellant was wearing during the robbery, then he is unlikely to have identified him during the parade. The complainant confirmed that no other person had cataract in the parade. Further, the appellant established a possibility that the complainant saw him at the police station prior the conduct of the identification parade. When the appellant cross-examined the complainant (at pages 11-12 of the proceedings) this is what transpired;

“Q - Now if I put it to you that it is the first time when you saw me in handcuffs and leg irons in the Homicide Offices while you were busy filling in these forms? ... A - Well I saw several prisoners because I went to that office several times so it is possible that I saw you.

Q - It is possible you do not deny that? A - It is possible you were in the office at the same time.” (Emphasis added)

At page 15 when asked by the court, the complainant stated:

“Q - Did you see the accused person between the date of the offence and the date of the parade? Did you see him at the station?

A - It is possible that I saw him” (Emphasis added)

In her judgment, the trial magistrate conceded that there were problems with the conduct of the identification parade. She, however, convicted appellant on the basis that if he managed to appreciate that the complainant has seen him prior the identification parade, he must be the person who robbed him. In short, it was inferred that the only inference to be drawn is that he was at the scene of the robbery. That obviously is not the only inference to be drawn from that fact. Another simple inference is that when he saw the complainant being brought to identify him he immediately realized it is the same person he had met as Homicide Offices earlier on. With all these flaws the evidence of the identification parade is unreliable. There is no other evidence linking the appellant with the offence. It is for this reason that we quashed the conviction and set aside the sentence.

Judgment No. HB 163/11
Case No. HCA 158/06

Mathonsi J I agree

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