THE STATE
versus
DOUGLAS DURI

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 21 March 2023 & 7 July 2023

Assessors: Mr Chakuvinga
Mr Gweme

Criminal Trial

Ms V Ngoma, for the State
Ms Y Chigodora, for the accused

MUTEVEDZI J: When the resolution of a crime is dependent on the identification of the accused by witnesses, the diligence and integrity of the police to gather evidence that provides a thorough and exhaustive representation of the suspect becomes invaluable. This case exposes the consequences of shoddy and cut-throat methods of police investigations.

The deceased in this case, Li Ke, a Chinese national employed at Lightweight Mining Company in Murewa was killed in cold blood. Prosecution alleged that after devising a plan to rob gold from the mine, the perpetrators of the murder comprising of Douglas Duri (the accused), Farai Fundi, Collin Dube and Lawrence Mboga, carefully planned the execution of their mission. That included the surveillance of the operations at the mine for two days. The mission itself was undertaken in the wee hours of 30 July 2013. The assailants approached the mine where they disarmed Ben Makuna, a security guard who was on duty. They confiscated his firearm after binding both his legs and hands. One of them kept guard over him. Three of them proceeded to the tents which were used as accommodation at the mine. In one of the tents they confronted three Chinese nationals namely Zhao Liaquan, Jia Junguo and Chen Liquang who were asleep. One of the robbers then pointed a firearm at the three demanding that they show him and open the safe in which they kept gold. The assailants threatened to kill the Chinese if their demands were not net. Douglas Duri, the accused in this case, then allegedly confiscated keys to a truck which was parked outside. He went and started the engine. The noise of the running engine awakened the deceased who was asleep in

another tent. He advanced towards the robbers. Farai Fundi then shot the deceased on the chest. The robbers ran to board the truck which the accused was driving in a bid to escape from the premises. They drove for a short distance but failed to completely exit the mine premises. The deceased succumbed to the injuries he sustained from the gunshot. His remains were examined and the pathologist concluded that his death was a result of haemorrhagic shock secondary to gunshot wounds on the chest. It was from the above conduct, that the State preferred charges of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] against the accused. The allegations were that on 28 July 2013, the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct could lead to death and persisting with the conduct despite the realisation of the risk or possibility shot Li Ke with a shotgun on the chest. The deceased died from the injuries sustained.

The accused denied the allegations. He pleaded an alibi. He alleged that on 28 July 2013 he was not in Uzumba Maramba Pfungwe but at his home in Shamva. He added that he was arrested after police officers investigating this case visited Shamva and inquired from some residents of the mining town about people whom they knew as gold panners. The officers subsequently came to his residence where they arrested him for a murder which had occurred at Lightweight Mine. The police alleged that he had been implicated in the commission of the crime by one Christopher Chikupiza. Thereafter the officers assaulted him before taking him to the crime scene. At the mine he saw many employees of the mine including one Ben Makuna. The following day he was taken for an identification parade where Ben Makuna had the easy task of identifying him amongst other suspects given that he had seen him the previous day. He also had visible injuries sustained from the recent assault by the police. In addition, he alleged that the State acknowledged that the deceased had been shot by Farai Fundi. It was surprising therefore that the deceased's death was being attributed to him. He prayed for his acquittal.

The State Case

The prosecutor opened her case by applying to tender an array of exhibits. The defence consented to the production of all of the exhibits which the state sought to tender into evidence. These included the post mortem report, the *rosi* shotgun allegedly used for the commission of the offence and the ballistic forensics examination report in relation to that same gun. These were marked as exhibits nos. 1, 2 and 3 respectively. The prosecutor also tendered by consent a bunch of photographs taken during the indications which were

conducted allegedly at the instance of the accused. They were admitted and marked as exhibits 4(a) -4(z). In addition, the prosecutor applied to produce the photographs depicting how the identification parade to identify the accused was conducted. Once more by consent of the defence they were accepted and became exhibits 5(a) - 5(d). Thereafter witnesses to give oral testimonies were called. They narrated their evidence as follows:

1. **Ben Makuna**

Although he was now a retiree, at the time of the death of the deceased, he was a security detail at Lightweight Mine. He was on patrol duties coming from what he described as the purifying plant intending to return to his post on the night in question. Along the way there were mining trucks and other equipment parked. He said he regularly checked to see if the batteries and other exposed components of the machinery had not been vandalised or stolen. To his astonishment, when he beamed his torch under one of the trucks he noticed that there were men hiding there. He trained the light at one of them before they suddenly sprung up and attacked him. They overpowered him and confiscated his gun. They covered his head with a plastic and bound his hands behind his back. Using his trousers belt, they also bound his legs together. Some of the assailants attempted to pluck out his eyes. They then shoved sand into his mouth and eyes before pushing him under the truck where they left him. A few minutes later, Ben said he heard the sound of three gunshots. He was immobile and blind. He could not tell who had fired the shots. He however kept struggling to free himself. He could feel the belt binding his legs gradually loosening. He kept squeezing until it slipped off. With the legs free, Ben crawled from underneath the truck. He kept wriggling in the direction of the sound of the engines of mine trucks until someone rescued him. He said he doesn't know who it was. We supposed he was still blind. Later he was taken to where the deceased was lying. From his layman's assessment he concluded that the deceased was long dead. He had been shot in the chest. The police were called in and they attended the scene the next morning. On his part, he was taken to Harare for treatment. At some period, the dates of which he could not recall, an identification parade was held at Murewa Police station. He managed to identify the accused amongst many other suspects, so his story went. He insisted that he managed to positively identify the accused because he had seen him during the fateful night. He recalled that he was wearing a pair of trousers which appeared greyish in colour.

The witness was taken to task during cross examination. He was required to comment on the fact that he had supposedly identified the accused at the parade because of two reasons. First because when the accused had been taken to the crime scene for indications, the

witness was present. He had seen the accused. Secondly, the witness had been freshly and severely assaulted by the police. The witness denied the allegations and insisted that he had not been at the mine at the time the indications were carried out or that the accused had visible injuries during the identification parade. He was also asked for how long he had observed the robbers and he admitted that the whole episode from discovering the robbers to the time they left him under the truck had taken about five to ten minutes.

We will return to deal with the identification of the accused by Ben because in our view, it is critical. The resolution of the guilt or innocence of the accused may turn on that aspect alone.

2. **Christopher Chikupiza**

He was supposed to have come to court to testify that he knew the accused and his accomplices who are still at large because he frequently drank beer with them. At one of the drinking binges he had supposedly been advised by one Simon Douglas that the accused and his accomplices had killed a Chinese national in Mutawatawa in the course of a robbery. He was also supposed to tell the court that on another day, the accused had confided in him that he and his colleagues were on the run following a robbery and murder they had committed at Lightweight Mine.

The prosecutor must have realised the inadmissibility of the witness's evidence about what he was told by Simon Douglas. It was obviously hearsay. Even if the witness had attempted to give it in court the hurdle of its inadmissibility would have confronted the State head-on. Fortunately the witness's testimony in court was far from that. He simply stated that he knew the accused because they had grown up in the same neighbourhood. He knew nothing about why the accused was in court. He had never given the police the accused's name in connection with the murder. The police had arrested him for smoking marijuana. As already said the witness's evidence meant nothing. We are not sure what prosecution intended to achieve from it.

3. **Paddington Chinyati**

He is the investigating officer in the case. His evidence was that in 2013 after the commission of the murder, he together with is colleagues went to Shamva. They met Christopher, the second State witness. Christopher gave them information about another person who knew who had committed the murder at Lightweight Mine. It was through such information that they then planted detectives at the accused's residence and arrested him. Their investigations had taken them to Shamva after they picked information that prior to the

murder, four strangers had been spotted in Mutawatawa. The strangers were inquiring after one Personal Zuze, a suspect who had previously stolen from Lightweight Mine. After interrogating the accused, the officer said they took him to his residence where they recovered a grey trousers and a stripped t-shirt which matched the description which had been given by one of the vendors who said they had sold *sadza* to the gangster strangers in Mutawatawa.

We note with concern once more that the police officer could not speak to such evidence because none of those vendors was called to testify. None of them gave any statement to the police. Worse still the clothing items in question were not produced as exhibits to allow the defence to cross examine on them. Nonetheless the officer continued to testify. He said thereafter they took the accused to Mutawatawa where he made indications to them. During the indications the accused took the detectives to Lightweight mine. Along the way, he pointed to the officers the routes to take to reach the mine. He said the police took pictures and videos during the journey to the mine. It is however interesting that in court the video was not produced. Only the static pictures were. Later on they conducted an identification parade at Murewa prison as earlier stated. He described the procedure of the identification parade. In his words about ten men whose physical features resembled those of the accused were identified. They were paraded. Witnesses were required to identify the man they had seen earlier. The witnesses who participated were the three Chinese nationals who had survived the robbery, Ben Makuna and a woman called Virginia Kafura. Unfortunately the Chinese nationals could not come to court to testy because after the offence was committed and due to the lapse of time from 2013 to date, they went back to China. It was difficult to locate them. All the witnesses were however said to have been able to positively identify the accused as one of the perpetrators of the crime. The same issues earlier suggested to Ben Makuna regarding the deficiencies of the parade were suggested to the officer. He denied them. Asked on what evidence they had gathered from their investigations, the officer said the accused had led them to a forest where he and his colleagues were camped during the time they were carrying surveillance on the operations of the mine. He showed them a place where they had lit a fire and the area where they had disposed of the riffle after the commission of the offence. The riffle had later been recovered from the same area after a local herd boy had stumbled upon it.

After the evidence of the investigating officer, the prosecutor applied for the formal admission into evidence of the testimony of Shakeman Dzongera, another police officer in

terms of s 314 of the Code. By consent the evidence was so admitted. It was colourless. Thereafter the prosecutor closed her case.

The Defence Case

The accused testified. He was the sole witness in his defence. He adopted his defence outline as part of his evidence in chief. At the material time he said he was a conductor of a commuter omnibus in Shamva. He does not know why the police arrested him but he suspected that when the investigators visited Shamva they had pre-identified their suspects. They raided each of those people's houses. During those raids, one of the police officers accidentally shot himself and died. It incensed his colleagues. After he was arrested the police took him to Murewa. He spend a night in the holding cells. The next morning he was taken for the so-called indications. Along the way, the police would stop the car at junctions and ask him to point at certain directions. He was advised to follow their instructions or else they would shoot him given the prevalence of robberies. He compiled. The police shot static and motion pictures. When they arrived at the mine, there were a lot of people in attendance including some Chinese nationals. The following day he was taken to court and was remanded in custody. A day after he was taken out of prison and paraded behind the prison kitchen with other inmates to allow witnesses to come and identify the suspects in the murder. The first witness, so he continued, was a woman whom he had never seen. It is the same woman who was being spoken about in court. Even in those circumstances where it had been made obvious that he was the intended suspect, the woman still failed to identify him. He admitted however that Ben and one Chinese national pointed him out. He was not perturbed by the identification. He added that he was visibly injured and his legs were swollen. The Chinese national had also been present at the mine on the day he had been taken for indications. He had even given the police detectives food. He added that he had told the police officers from the time of his arrest that he had been at his home in Shamva at the time they alleged the crime was committed and not in Mutawatawa. The accused also alleged that all the workers at the mine had his photographs which being circulated by the detectives after they had taken them from his cellular phone. He argued that it was incredible that Ben had seen him once at night and then would remember him that well after a month. Thereafter the accused closed his case.

Common cause issues

There are issues which are not in dispute in this case. These are that:

a. The deceased was shot by a group of robbers who besieged Lightweight Mine on the fateful night.

b. He died from the wounds sustained from the gunshot.

c. The only witness who claimed to have seen the robbers is Ben Makuna.

The Issue

The issue which really sticks out in this case is whether the accused participated in the robbery. Put differently it is whether the accused was seen at the crime scene on the night of the robbery and murder. The resolution of that issue rests on the identification which was made by Ben Makuna at Murewa prison during the identification parade. That evidence is the only nexus between the commission of the murder and the accused. We reach that conclusion because for inexplicable reasons Virginia Kafura the woman who prosecution alleges to have also positively identified the accused at the parade was never called to testify. The Chinese nationals also did not testify.

The Law on Evidence of Identification

In *S* v *Nkomo* 1989 (3) ZLR 117 (S) MCNALLY JA cited with approval the remarks of LORD WIDGERY CJ in the case of *R* v *Turnbull* [1976] 3 All ER 549 (CA) which when paraphrased, were to the effect that good identification generally doesn't require corroboration but poor identification almost always does. Instances that served as good identification were then stated to include a kidnapping victim detained in the presence of the kidnapper for many days, who them identifies the kidnapper without hesitation months later; a suspect kept under observation for a considerable period by two police officers several times who is then identified by them six months later; a colleague known from work for several years, seen clearly stealing a wallet from a locker. Conversely poor identification is when it is entirely dependent on a flirting glance or a longer observation made in difficult circumstances. The conclusion was reached that more often than not recognition may be more trustworthy than identification of a stranger. In such instances corroboration or support of the identification is required.

In *S* v *Dhliwayo and Anor* 1985 (2) ZLR 101 (S) DUMBUTSHENA CJ held that:

> "Because of the 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 eyesight; 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, build, gait and dress; the result of identification parades if any; and of course the evidence by or on behalf of the

> accused…These factors are not individually decisive but must be weighed one against the other in the light of the totality of the evidence and the probabilities…"

In, South Africa, in the case of *Naki Oscar Xolile* v *The State* (A257/2017) [2018] ZAGPJHC 509 KAIRINOS AJ cited with approval the test recommended in Volume 18 of LAWSA at para 263 that:

> "Judicial experience has shown that evidence of identity should, particularly in criminal cases be treated with great care. Even an honest person is capable of identifying the wrong person with confidence. Consequently, the witness must be thoroughly examined about the factors influencing his or her identification… Particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness..."

The remarks of the Canadian Court of Appeal in the case of *R* v *Atfield* [1983] AJ. No. 870 are equally pertinent. It was held that:

> "The authorities have long recognised that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the perpetrator is the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. The correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witness will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe…"

The principle which cuts across the dicta in all the above authorities is simply that the testimony by a witness who alleges that the appearance of an accused person whom he/she did not know prior to the incident resembles that of the person he/she observed committing the offence charged is usually untrustworthy unless certain considerations, many of which were stated in the cited authorities, have been employed to test its reliability. That an accused resembles the person who offended cannot be used as the basis of convicting that person. It is inadequate. The frailties pointed out can easily corrupt identification evidence. To ensure the reliability of identification evidence I suggest that investigative agencies must obtain from any witnesses who purport to have identified a suspect a full description of that witness immediately after the purported observation. That description would then be juxtaposed against the actual description of the suspect and the description made by the witnesses during their testimonies in court. That way the danger of tailored, coloured and make-as we-go

descriptions are obviated. Obviously such route requires investigators with utmost integrity and who are not easily swayed by the presentation of a quick fix solution to the crime they are investigating. It equally requires eagle eyed prosecutors who refuse to prosecute cases that are based on clearly unreliable identification evidence. That in turn would force the police to do more. The thinking that one arm of the administration of the criminal justice may not do its work properly and simply push half investigated cases to prosecution which in turn pushes the responsibility to the court in the hope that its deficient conduct will be swept under the carpet in the guise of the suspect having been acquitted in court will be exposed for what it is. On numerous occasions, witnesses begin their testimony in court with the prosecutor asking them the question, *"Do you know the accused person in the dock?"* Where identification is in issue, that question is suggestive to the extreme. The witness will more often than not be tempted to say *"yes he is the one!"* An averagely intelligent witness will not fail to describe the facial features of a witness whom he/she is staring in the face as they give their evidence. For that reason, describing the appearance of a witness in court in the absence of a prior description must be regarded as of very little if any probative value.

Application of the Law to the Facts

The accused's identification in this case was not based on anything. In short there was no identification at all. At best it was a flirting glance made under extremely stressful circumstances. To begin with, the state's star witness in regards the identification, Ben Makuna did not give any description of any of the assailants to the police or to anyone else for that matter, soon after the commission of this crime. The investigating officer betrayed that gap in Ben's evidence. When he and his colleague detectives went to Shamva, they did not have any description of the suspects from Ben. The little they had which was equally described in very imprecise terms was that some women vendors in Mutawatawa had served strangers one of whom was wearing a grey trousers and a stripped t-shirt. In fact, the investigating officer only revealed that when he wanted to introduce the evidence of the clothing apparel confiscated from accused's residence. What must have come first was the vendors' statement or testimony describing the appearance of the suspect(s). Needless to say there was no such evidence. The court wouldn't be off the mark if it logically inferred that the police officer may have never been told of any description by the so-called vendor. If Ben had any description of one of the suspects he should have given that to the police from the onset. In court Ben did not describe the accused. All he stated was that the accused was the one that he saw on the night in question. It was an empty declaration.

We went to great lengths and gave Ben the benefit of doubt that he may have seen the accused that night. That necessitated us to scrutinise the conditions and circumstances under which Ben said he had observed the accused. He was on patrol. He was oblivious of any danger. When he suddenly discovered the robbers hidden under the lorry he must have been startled and must have been very afraid. The starting point therefore is that the observation if there was any was made under very stressful conditions. In those circumstances, the power and ability to observe become different from someone observing models at a beauty pageant. In addition, Ben admits that there was no lighting at the premises. It was dark. His only source of light was the torch he had. He argued that it was bright. He may be right but there were four assailants as he said. He gave no reason why he would only focus on one and not the rest of them. The robbers immediately sprung from their lair and attacked him. He admitted he was terrified and horrified. They covered his head with a plastic immediately blinding his vision. To ensure his complete blindness and silence they shoved sand into his eyes and mouth respectively. They tied both his hands and legs to immobilise him. He was a sitting duck. Asked for how long he had observed his assailants, Ben's answer was that the entire episode from the time he discovered them until they hurled him under the truck was about five to ten minutes. The scene was highly fluid. There was violence in which Ben was totally helpless. He did not have the slightest opportunity for a proper observation. He did not know any of the robbers prior to this incident. By his own admission the only aspect he noted was that the accused was wearing a greyish pair of trousers. Ben did not see any peculiar feature about the accused. He did not see and could not describe his gait, his build or his voice. It is for those reasons that we concluded that there was no identification at all in this case.

From the above, the purported identification conducted at Murewa Prison was farcical. Given that Ben did not know the accused by any feature it is incomprehensible how he could positively identify him amongst the inmates he had been lined up with. The accused was not even wearing the greyish trousers which Ben said he had seen on the night of the murder. That lacuna supports the accused's contention that Ben had had the opportunity to see him when he was dragged for the supposed indications at the mine. In addition he had been assaulted, had fresh wounds and swellings from the assaults. His photographs had been circulated to the mine's workers including Ben. The accused was therefore an easy pick for anyone. The only conclusion we draw from these circumstances is that the identification parade was stage managed to suit the outcome which the police wanted. The very poor if not

non-existent identification which Ben had allegedly made needed corroboration. The State's case provided none. As already pointed out the other witnesses who are alleged to have seen the accused on the night of the murder and later identified him at the parade were the Chinese who did not testify in court. Virginia Kafura did not testify in court. Even if she had her allegation was simply that she had seen accused in Mutawatawa and nothing more. She was not at the crime scene.

Disposition

As indicated earlier, the resolution of this case depended entirely on Ben Makuna's identification of the accused. The accuracy of that identification is doubtful. It would lead to a serious miscarriage of justice were the court to rely on it. Once that conclusion is arrived at it becomes unnecessary for the court to determine the veracity of the accused's alibi defence. He was not seen at the crime scene. He has no responsibility to prove his defence. Rather it is the state's responsibility to prove his guilt. In our considered view, the state got nowhere near proving that guilt beyond reasonable doubt as required by law. **In the circumstances we are left with no option but to direct that the accused be and is hereby found not guilty and acquitted of the charge of the murder of Li Ke.**

National Prosecuting Authority, State's legal practitioners
Caleb Mucheche and Partners Law Chambers, accused's legal practitioners