

MPHOLISI NDLOVU

And

TELMORE DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 22 OCTOBER 2018

Criminal Appeal

R. Ndlovu for the appellants

Mrs C. C. Muhwandavaka for the respondent

MAKONESE J: This is an appeal against the decision of the Regional Magistrate sitting at Bulawayo on the 21st of May 2017. The appeal is against both conviction and sentence. The appellants were convicted and sentenced of contravening section 12 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), i.e. robbery. It is alleged that on 15th April 2017 and at 3rd Avenue Pharmacy, Bulawayo, both appellants, one or more of them unlawfully and intentionally used threats of violence by pointing a firearm, immediately before taking US\$642,00 in cash. The appellants were convicted of armed robbery and sentenced to 12 years imprisonment. Aggrieved by the conviction the appellants now appeal against conviction only.

The state called three witnesses who gave evidence. The first witness was **BONGANI MKANDLA** who testified that whilst on duty two male accused persons walked into the pharmacy. One of them was dark in complexion, aged around 40 years and with a depression on the top of his eye. He was putting on a hat. This witness did not capture the description of the other since he was paying attention to the gentlemen he was conversing with. He only noticed that the other accused was light in complexion. The dark man approached the counter asking for 25mg of pheburbitone tablets, while the other went to stand close to the corridor. The dark man suddenly produced a pistol and pointed at him and uttered words to the effect that this was a robbery and

any slight movement he was going to shoot. The complainant was ordered to lie on the ground and he called his workmate who was counting money in another office. When she came the accused person demanded cash from her. The evidence of Bongani shows that there were two accused persons at the scene, one of them was identified as Khumbulani Mpofu who is at large and the other is unclear as to whether it was accused one or two since Bongani did not pay attention to the second man at the scene.

The second state witness **CAROLINE CHIKEREMA** told the court that she collected cash for the day from the till and went to count it in an office. As she was counting the money she heard Bongani calling her and she went out of the office and saw 2nd appellant in the corridor. She observed one of the robbers whom she described as being dark in complexion holding a gun. This other accomplice, demanded cash in Ndebele saying “Sinike imali”, meaning give us some money. He was pointing a gun at the witness who then panicked and went back to the office followed by the second appellant. The second appellant then took the money that was on a table. Caroline was invited for an identification parade on the 20th April 2017. She identified the second appellant as the man she had seen at the pharmacy. The witness indicated that she had the appellant under observation for about 10-15 seconds. The witness clearly had the second appellant under observation for too short a period for one to correctly identify someone hence there was a high chance that the complainant would be mistaken.

The third witness was **MEHLULI SIBANDA**. He was the Investigating Officer. He testified that he received a report of armed robbery which had occurred at 3rd Street Pharmacy. He told the court that when he visited the scene he interviewed **CAROLINE CHIKEREMA** who gave a full description of the suspects. The witness immediately matched the description of one of the suspects with Khumbulani Mpofu who was on the police wanted list for a string of robberies in the city. The police started looking for Khumbulani Mpofu and his known accomplices matching the description of the second appellant. On the 20th April 2017 the second witness Caroline identified the second appellant as one of the person who had robbed them.

Upon his arrest second appellant denied any involvement in the robbery, but instead implicated the first appellant of that robbery. The police then arrested the first appellant who gave positive indications at the scene of the crime. In his evidence, Khumbulani admits being at the scene of the robbery. He however states that when they arrived at the pharmacy he was not aware that Khumbulani was armed. First appellant testified that he was ordered to collect cash from Caroline. He complied. After collecting the cash he handed the loot to Khumbulani and they left the scene and boarded a kombi

The evidence of the first state witness, Bongani is largely leaned towards Khumbulani Mpofo. He was mainly focused on the gentleman who wanted to buy some medication and who later produced a gun. The second witness Caroline told the court that she had the 2nd appellant under observation for about 10-15 second which is too short a time for one to carefully observe peculiar features of a person under the circumstances considering that a gun was involved. What makes the whole case intriguing is that the second appellant denies being at the scene of the crime. The first appellant placed himself at the scene of the crime, though he indicates that he had no knowledge that Khumbulani was armed and that there were going to the pharmacy to carry out a robbery. First appellant states that he was following the instructions of Khumbulani.

In *S v Polosi & Ors* HH-210-15 one of the accused persons painted a picture that he had not repost because he required to confirm with accused two first. This rendered its testimony exaggerated or spiced with a view to dissociate himself from the offence given that accused two was a mere constable. He sought to portray a picture that he was just a sheep being driven by the second accused and another.

In the present case the first appellant told the court that he was not part and parcel of the armed robbery. He was just following the instructions from Khumbulani. If that were the case first appellant would have reported the matter to the police. This defence was clearly false and the court *a quo* cannot be faulted for rejecting the first appellant's defence.

In *S v Woods & Anor* 1993 ZLR 258, the court held that where persons participated and rendered significant assistance to the actual perpetrator they are both equally guilty. In the matter

there can be no doubt that Khumbulani and first appellant set out on a common criminal enterprise. They set out to rob a pharmacy. They both had the requisite *mens rea* to commit the offence. The first appellant did not disassociate himself from the offence once he realised that Khumbulani had produced a gun. The appellant's role was to collect the cash whilst Khumbulani induced fear in the witnesses. The state succeeded in proving any reasonable doubt and that first appellant committed the offence.

As regards the second appellant the court *a quo* held as follows at page 49 of the record;

“This was a well planned robbery by three accused persons and the two accused are in court today want to exonerate themselves because Khumbulani Mpofu has yet been arrested ...”

There can be no doubt that there was no factual basis for the court to reach this conclusion. The finding that three persons were involved in the robbery is not supported by the evidence on record. Both Bongani and Caroline that they were robbed by two persons. On being questioned on the number of people who robbed the pharmacy Bongani confirmed that two persons were involved. The following exchange between the defence counsel and this witness occurred at page 13 of the record:

“Q - Would you confirm that the people who robbed you were two?

A - Yes there were the people who walked into the pharmacy.”

The prosecution was in the court *a quo* alive to the fact on the evidence placed before the court only one of the appellants could be convicted. It is for this reason that in its closing submissions, the state made a case for the conviction of 1st appellant only. The state had no credible evidence against the 2nd appellant. The identification of the 2nd appellant by Caroline is problematic. She had the suspect under observation for 10-15 seconds. It is a trite principle of our law that evidence of identification must be treated with caution. See *Nyathi v S* HB-60-13 where the court provided the guidelines on how the court should evaluate the evidence of identification. There is a reasonable probability that given the fact that the witness was under immense fear after

the production of the gun, and the fact that the witness had very limited time to observe the suspect, the possibility for mistaken identity cannot be eliminated.

For the foregoing reasons, I am satisfied that the first appellant was properly convicted. The conviction of the second appellant is however unsafe.

In the result it is ordered as follows:

1. The conviction and sentence of first appellant is hereby confirmed.
2. The 2nd appellant’s appeal against conviction and sentence succeeds.
3. The conviction and sentence in respect of 2nd appellant is set aside.

Moyo J I agree

R. Ndlovu & Company, appellants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners