KENNETH MTONGA AND VICTOR KAONGA *v* THE PEOPLE

Supreme Court
Ngulube, CJ, Sakala and Muzyamba, JJS
4th January, 2000 and 15th February, 2000
(SCZ Judgment No. 5 of 2000.)

Flynote

Criminal Law – identification – need to be proper, fair and independent – Failure – Effect.
Criminal Law – recent possession – need not always be invoked.

Headnote

The first appellant was reported to have escaped from custody and a bench warrant was ordered to issue against him returnable whenever he will have been apprehended. This Judgment is confined to the appeal of the second appellant.

The second appellant together with the escapee were tried and convicted on a charge of aggravated robbery. The particulars of the offence alleged that they jointly and whilst acting together and whilst armed with a gun did rob Mable Mandela of her motor vehicle and at the time used or threatened to use actual violence to the complainant.

The second appellant and the escapee were each sentenced to undergo twenty one years imprisonment with hard labour after the learned trial judge convicted them of the non-capital type of aggravated robbery. The second appellant appealed against the conviction and sentence.

Held:

(i) The Police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

(ii) If, therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever on the identification, it would not be to nullify the identification given the ample opportunity available to the witnesses. (iii) If the identification is weakened then, of course, all it would need is something more, some connecting link in order to remove any possibility of a mistaken identity.

(iv) It is not always necessary that the doctrine of recent possession must be invoked especially where there is evidence of identification which if adequate on its own will be sufficient to sustain a conviction or which if requiring to be supported will then be supported by the possession of stolen goods.

Case referred to:

1. *Toko* v *The People* (1975) Z.R 196.
No appearance for the first appellant.
S.W. Chirambo, Deputy Director of Legal Aid for the second appellant.
J. Mwanakatwe, Principal State Advocate for the respondent.

Judgment

NGULUBE CJ, delivered the judgment of the court.

The 1st appellant was reported to have escaped from custody and a bench warrant was ordered to issue against him returnable whenever he will have been apprehended. We decided to proceed to hear the appeal of the second appellant and this judgment is confined to such appeal only. The 1st appellant will be dealt with separately whenever he will have been caught and if he will still be wanting to pursue his appeal. The second appellant together with the escapee were tried and convicted on a charge of aggravated robbery. The particulars of the offence alleged that they jointly and whilst acting together and whilst armed with a gun did rob Mable Mandela of her motor vehicle and at the time used or threatened to use actual violence to the complainant. The second appellant and the escapee were each sentenced to undergo twenty-one years imprisonment with hard labour after the learned trial judge convicted them of the non-capital type of aggravated robbery. The evidence established quite conclusively that the offence was committed on 19th October 1994, during the lunch hour. The complainant was robbed of the motor vehicle in the driveway at her house within the yard, as she was about to drive back for work by two men who wielded what appeared to be a gun. It was also a fact that two days later the second appellant and the escapee were found driving the motor vehicle, which was taken in Ndola, in Lusaka, and they were thus apprehended. The vehicle then bore a fictitious registration number, which belonged to a completely different vehicle by make and by any other description. The learned trial judge determined that the issues which had to be decided were those of the identity of the perpetrators of the offence. The learned trial judge accepted the evidence of the complainant PW1 as well as of the eye witnesses PWs 2 and 4 who both claimed to have been able to identify and who did identify the second appellant and the escapee at an identification parade. The learned trial judge rejected the alibi evidence which was given by the second appellant and his co-accused and found that even on the possession of the vehicle two days after the event, the accused persons were guilty as charged.

The defence stories which were rejected were a denial of participation in the robbery at the complainant's house and an explanation for the vehicle which was undeniably found in the possession of the accused persons. It was the escapees' case that he had sold some precious stones to a Senegalese called Yuba who had given him the vehicle on condition that the change of ownership would take place upon payment by the escapee of the balance. The second appellant who is now the appellant before us gave a similar story and explained that he was simply travelling with the first appellant in this vehicle which was given to them by the Senegalese. The learned trial judge disbelieved the whole of that story and convicted the second appellant and his co-accused.

On behalf of the 2nd appellant, Mr Chirambo advanced three grounds of appeal. The first ground alleged error and misdirection on the part of the learned trial judge in convicting on the basis of the evidence of identification by the witnesses PWs 1, 2 and 4. One argument and submission was that the events were traumatic and that the witnesses could not have had ample opportunity to make reliable observations so that there was in this case the possibility of mistaken identity. Mr Chirambo pointed out the experiences as narrated by the

complainant, PW1, the experiences as narrated by the gate man, PW2 who said he had paid very scanty attention to the men whom he had assumed were friends of the complainant until they began to stage the robbery. Mr Chirambo also drew attention to the evidence of PW4 a maid to the complainant who was so frightened that she was trying to run and was falling all over the yard and could not have been looking at the robbers.

The second line of attack on the evidence of the identification concerns the identification parade. It was alleged by the second appellant that he had found the identifying witnesses in the reception room at the Police Station looking at his passport as well as at some passport size photographs of himself which the police had put in the room, as the submission went, with the obvious intention of assisting the witnesses to make the identification. It was the second appellant's case that shortly thereafter, the parade was held and he was identified by these witnesses. The witnesses PW1 and PW4 denied completely ever having looked at any pictures or passport of the second appellant. However, the witness PW2 did concede in his evidence that he had seen the passport of the second appellant in the reception area and the question which Mr Chirambo asked was that, *"What would have been the need for the witness to go back to the reception room and to look at the second appellant's passport if it was not before the parade and with a view to assisting the witnesses to easily identify the second appellant?". We have considered the ground of appeal and in particular we have considered the submission that the identification parade was improper. In this regard, we have considered the case of Toko v The People (1) in which it was held, reading from head note number (i) that:*

"The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification."

We agree entirely with those principles and in a way we agree with Mr Chirambo that the presence of the second appellant's passport at the very least, in the reception room, at the police station would raise suspicion especially that one witness at least admitted to having seen the passport. It follows therefore, that if this were a proper case, the identification would be very suspect and could easily be nullified. However, as the head note we have quoted states, nullification of the identification can only result in a proper case, and before we can say that this as a proper case in which to do so we have to examine the evidence given by the witnesses which described the opportunity which they had to make a reliable observation. As the learned trial judge observed, the robbery itself took place in broad daylight. The second appellant and his co-accused were identified not by one but by three eyewitnesses. Obviously when more than one witness identifies and even if it can be said that two or more witnesses can make the same mistake, the case is nonetheless taken out of the realm of single witness identification and is on a better footing. The first witness may have been ambushed in such a way that on her own her observation may have been unreliable. However, as the learned trial judge said, she had noted certain features on the second appellant such as the gap in the teeth which he does have and which she had asked the police to let her see at the parade, by asking all the participants at the parade to open their mouth. She then identified the second appellant. The second witness testified that he had looked at the two young men, that is the accused persons, for a long time close to a half an hour prior to their staging a robbery and this was at a time when he was under no stress whatsoever; he identified. Then of course there was the evidence for whatever it was worth of the 4th witness for the Prosecution who also identified. If, therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever, on the identification it would not be to nullify the identification given the ample opportunity available to the witnesses. If the identification is weakened then, of course all it would need is something more, some connecting link in order to remove any possibility of a mistaken identification.

This leads us into the second ground of the appeal. It was Mr Chirambo's submission that it was wrong for the learned trial judge to convict the second appellant and his co-accused when they had given a reasonable explanation how they got the vehicle. He has cited some of our decisions on this point. We wish to take this opportunity to correct the misconception which is quite prevalent in this area of the law, that the so called doctrine of recent possession will always be invoked whenever an accused person is said to have been found in possession of stolen property. It is not always necessary that the doctrine of recent possession must be invoked especially where there is evidence of identification which if adequate on its own will be sufficient to sustain a conviction or which if requiring to be supported will then be supported by the possession of the stolen goods. In this particular case, there was evidence of identification and this was amply supported by the finding of the second appellant and his co-accused in possession of the stolen vehicle. Such possession provided the necessary connecting link to corroborate the eyewitness identification, thus removing any possibility of a mistaken identification. The point taken by Mr Chirambo, therefore, was misdirected. Indeed, the learned trial judge needlessly discussed the so-called doctrine of recent possession when the possession could simply have been used as support for the identification.

The third ground of appeal was that there was a dereliction of duty by the police when they failed to bring to court the Senegalese Yuba Mbai who was said to have given the accused the stolen vehicle. The evidence from the investigating officer which was accepted by the learned trial judge was that when the police went to the Senegalese's house with the accused persons and when they paraded the Senegalese found there, no one answering to the name Yuba Mbai was identified. In any event, once there was evidence of identification which was supported by the finding of the stolen car in the second appellant's possession together with that of his co-accused, the case had been established against the accused person and the argument that there might have been a dereliction of duty was irrelevant, quite apart from being incorrect. It follows from what we have been saying that the evidence to sustain the conviction was simply overwhelming and the appeal against the conviction is dismissed.

There was also an appeal against the sentence of twenty-one years imprisonment with hard labour. It was submitted that the second appellant was a first offender, that nobody was in fact injured in the incident and that the motor vehicle which was taken was recovered intact. We were urged to receive a sentence of twenty-one years with sense of shock and that it be reduced. We have considered this appeal against sentence and we note that the learned trial judge had taken a very dim view of offences of aggravated robbery which have become prevalent. He had observed that cases in which guns, whether they are imitation or otherwise have been used, were becoming too prevalent and that victims were losing too much valuable property. For that reason the court considered that it was important to impose a sentence which would be aimed at protecting members of the public and which would deter persons who may be tempted like the accused person to commit such offences. It was for this reason that a sentence of twenty-one years imprisonment with hard labour was inflicted. We have looked at the sentence and the reasons for its imposition and we are unable to say that the sentence was either wrong in principle or was so manifestly excessive that it must come to us with a sense of shock. The appeal against sentence is also dismissed.

Appeal dismissed.