MEHLULI DUBE **1ST APPELLANT**

And

LOVEMORE NDLOVU **2ND APPELLANT**

Versus

THE STATE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE

NDOU J AND CHEDA AJ

BULAWAYO 26 MARCH & 12 JULY 2012

W. Nyabadza for appellants

Miss A. Munyeriwa for respondent

Criminal Appeal

CHEDA AJ: The two appellants were charged with robbery in the Regional Court. They pleaded not guilty but were convicted and sentenced each to 15 years of which 3 years were suspended for 5 years on the condition that they do not, during that period, commit any offence of which violence on the person of another or dishonesty is an element which on conviction accused is sentenced to imprisonment without the option of a fine.

They have now appealed against both conviction and sentence. Each one of them applied for leave to note an appeal in person and the applications were granted. Each wrote his notice of appeal by hand and they said the same thing almost word for word.

The notices of appeal were not elegantly drafted but a reading of each notice reveals that their main grounds of appeal can be summed up as follows.

a) They were not properly identified by the victim;
b) The magistrate did not conduct the trial fairly and did not record all the evidence;
c) The evidence of the police officers differed from that of the complainant;

d) They wanted to be re-tried by a different court.

The appellants did not say anything about sentence.

However, at the hearing of the appeal the appellants were now represented by counsel. The arguments on appeal centered mainly on the issue of identification. It was submitted that the only evidence linking them with the offence is that of two eye witnesses. The evidence of the witness Elizabeth Nkomo was not helpful as it said very little about their identity. It was submitted that that left only the evidence of the complainant on this issue of identification. The evidence of Martin Richards, the complainant, is that he got out of the house and returned after about 15 minutes. The time was about 07:15 hours. The witness Elizabeth confirms that this was in the morning. It cannot be doubted in the circumstances that it was then daylight in March and that visibility would have been good at day light. He said he was confronted by the two or three intruders in the passage. He screamed and they started fighting him. The fighting eventually stopped and they demanded his car keys. He gave them. They then tied his hands to his back, tied his legs and staffed some material in his mouth. One of them, the shorter one, approached him with a knife and demanded some money. He said this shorter one would approach him to demand money. They came back and pushed him off the bed to the floor. When they failed to start the car they came back, removed the material from his mouth so that he could tell them how to start the car.

This shows that the complainant had plenty of time to observe the appellants. He noticed that one was shorter than the others. He must have been facing them when they confronted him in the passage. He must have been facing them when they were fighting as they could not be fighting while standing back to back. He was able to see one of them pulling a bar then threatening him with it. It cannot be argued that when all this was going on the complainant would not look at his assailants. They must have been facing each other right at the beginning of the encounter when they fought. Thereafter several opportunities were available for him to see them. At the trial he was asked:

Q Do you know the people who stole from you

A Yes, it's you and the other accused

Q Are you saying so because of our heights

A I looked at you, it's your facial features

Q Were you able to identify your assailants

A Yes, it was you and your other accused

Q You were brought to us this morning where I was seated with other prisoners what was it for

A I pointed out you and your co-accused as people who robbed me.

The above shows that the complainant was able to identify his assailants from among other prisoners.

It is not correct that this evidence is the only link of the appellants with the crime. The witness Sidingulwazi Ncube said he knew accused one who sold him a microwave and a DVD. This was part of the property taken during the robbery.

Further evidence that links the appellants with the crime is the recovery of various items that were recovered following indications by accused one, that is, the lap-top and DVD. The accused persons also led the police to a cave where part of the property was recovered. The witness Sidingulwazi Ncube gave evidence and stated that accused one told him he was based in Victoria Falls in a sculpture business and that is where he bought the property. This shows that the accused does not dispute being in possession of and selling the property, but he lied about its source. Clearly he was hiding how he came to possess the property.

Accused admitted leading the police to Sidingulwazi's place where the microwave was discovered. Sidingulwazi's evidence is therefore truthful. Accused one admitted that he implicated accused two, but suggested that he implicated him as he had seen him buying property. This cannot be a reason for implicating someone in a case of robbery.

Much was also said about the appellants wearing masks. This is a misplaced argument by the appellants. The complainant was robbed twice, and the masks were mentioned in relation to persons who had robbed him prior to this case.

The evidence of identification of the appellants by the complainant is therefore not the only one linking them with crime. They admitted possession of the property, their selling it to certain persons and giving different sources of the property points at them as being the persons who robbed the complainant of the property.

The appellants also sought to rely on the concession made by the respondent on identification. The respondent referred to general principles of identification which I find to be inapplicable to this case. Such principles would apply where the question of identity calls for such scrutiny. In this case, given the evidence of the complainant and the opportunity he had of seeing his assailants, the time of the day and the time they spent in his house as well as the number of times they got close to him and spoke to him making certain demands, leaves no doubt as to his ability and opportunity to identify them. There is no basis for rejecting his evidence of identification.

I now turn to deal with some of the evidence led from the other witnesses. It is a cause for concern that the magistrate and the prosecutor ignored completely the well established rules concerning hearsay evidence. Police witnesses were allowed to say what certain people told them. Such evidence is not permissible. The police were allowed to say what accused persons told them. This was not proper. Our law requires that evidence of statements by accused persons to the police should not be led unless the court has satisfied itself that the accused person had been properly warned and cautioned. The court should never allow a prosecutor to ask questions that lead to such answers by the police witnesses. Police witnesses should never be allowed to say what an accused person said without first satisfying the court that the accused had been warned and cautioned and that he made certain statements freely and voluntarily.

No witness should be allowed to say what he was told by another person unless certain conditions are met. The exceptions to such requirements are if the accused person was present and heard for himself what was said but failed to respond or challenge what was said or where the witness is stating some fact in confirmation of what another witness stated in the presence of the accused.

Such hearsay evidence is in breach of the general rules of procedure and should never be allowed as it will lead to a mistrial. Such evidence has the potential to seriously prejudice the accused person.

Having said that, I now proceed to point out that in this case the conviction by the accused persons was not based on any of the inadmissible evidence. There was sufficient real evidence on which a conviction can be sustained. This is the evidence of the identification by the complainant and the dealings in the proceeds of the robbery by the appellants.

In arriving at his conclusion on judgment the magistrate had this to say:

"What is worth noting in the evidence led by the state is the following:

1) That complainant saw and identified accused two during the robbery as he demanded money and threatened to cut off his ear.
2) Accused one led to the recovery of the property stolen during the robbery.
3) Accused two was found in possession of the plates which went missing at complainant's house during the robbery."

On the basis of the above it is clear that the conviction was supported by some other real and admissible evidence.

The fact that no identification parade was conducted does not change anything in view of the evidence of the complainant and the way he responded to questions on identification under cross examination.

Not much was said on sentence. The complainant was attacked at his house in broad day light. He was assaulted and had his hands and legs tied. He was threatened with a knife. A lot of valuable property including his motor car was stolen though later recovered. I see no basis for interfering with the sentence imposed by the trial court.

The appeal against both conviction and sentence is dismissed.

Ndou J ……. I agree

Majoko & Majoko, appellant's legal practitioners

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