IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 39, 40/2018**
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

BETWEEN:

SYDNEY MAMBWE	**1ST APPELLANT**
GIFT MWANSA	**2ND APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
26 MAY 2020
SUPREME COURT REGISTRY
P.O. BOX 50067 LUSAKA

Coram: Phiri, Muyovwe and Chinyama, JJS. On the 9TH July, 2019 and on the 26th May, 2020

For the Appellants: *Mr C. Siatwiinda, Legal Aid Counsel, Legal Aid Board*
For the Respondent: *Mrs M. Lungu, Deputy Chief State Advocate, National Prosecutions Authority*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **David Zulu v The People (1977) Z.R.151**
2. **Lazarous Kantukomwe v The People (1981) Z.R.125**
3. **George Nswana v The People (1988-1989) Z.R. 174**
4. **Molley Zulu & Others v The People (1978) Z.R. 227**
5. **William Muzala Chipango v The People (1978) Z.R. 304**
6. **Elias Kunda v The People (1989) Z.R. 100**
7. **Saluwema v The People (1965) Z.R. 4**
8. **Likando v The People (1975) Z.R. 161**
9. **Joseph Mulenga, Albert Joseph Phiri v The People (2008) 2 Z.R 1**

The two appellants were convicted by the High Court at Ndola, the late Chali J, presiding, of one count of Murder contrary to section 200 of the Penal Code and one count of Aggravated Robbery contrary to section 294(1) of the Penal Code. The particulars of offence in the murder count were that the appellants on 29th September, 2015 at Ndola murdered Fidelis Kafwimbi. The particulars of offence in the aggravated robbery count were that on the same date, the appellants at Ndola, jointly and whilst acting together stole 2 carpets valued at K1,400, a deep freezer valued at K1,600, a flask valued at K85, a blue GRZ radio, a dictionary and a mug altogether valued at K3,093 the property of Mabungo Primary School and that they used actual violence to Fidelis Kafwimbi at the time of stealing in order to obtain or retain the property or prevent or overcome resistance to its being stolen.

The facts in this case were that on 29th September, 2015 around 07:00 hours, PW1, Lovemore Mauzeka, a general worker at Mabungo Primary School in Ndola's Twapia Township reported for work and found that the school's administration offices comprising the Head Teacher's, Deputy Head Teacher's and Senior Teacher's offices had been broken into. It was discovered that

several items were stolen from the offices as follows: a dictionary with blue covers, a yellow 2 x 3m carpet from the Headteacher's office; a solar powered GRZ radio, a Defy 210 litres deep freezer, a flask and a mug from the Deputy Headteacher's office; a brown 5 x 3m carpet from the Senior Teacher's office. The school watchman, Mr Fidelis Kafwimbi was found lying dead nearby in a pool of blood with cuts on the head. There was a concrete block and a stone near the head. The matter was reported at Twapia Police Station. The deceased's body was taken to the mortuary at Ndola Central Hospital (so-called at the time. It is now called Ndola Teaching Hospital).

Later that same morning, around 09:00 hours, PW4 Robert Siwakwi, a taxi driver operating from Lubuto market within Ndola was requested by PW5, a fellow taxi driver named Michael Musolya to pick up some clients as he, Michael, did not have a vehicle at the time. They drove to a house near Kantolomba cemetery where they picked up three young men, two of whom turned out to be the appellants. The three men requested that they be taken to Twapia Township. When they reached Twapia, they stopped the vehicle near a house along the road. The trio went into the house leaving PW4 and PW5 in the car.

According to PW4 and PW5, the three men brought two carpets from the house which they folded and put in the car. One carpet was yellow and the other brown. PW4 also saw a book with a blue cover which he thought to be a dictionary. The three men got into the vehicle. PW4 started the vehicle and as they were moving away from the house, another vehicle stopped in front of them blocking the way. This was now between 10:00 hours and 11:00 hours. Some people came out of the vehicle and shouted "halt". PW4 stopped the vehicle. When he stopped the vehicle, the three passengers got out and ran away leaving PW4 and PW5 in the car.

The men in the other car who turned out to be police officers and included PW6, the arresting officer, chased after the three men. They returned with the appellants only. The third person had gotten away. They were taken to Twapia Police Station. PW6 testified that police had been alerted to the presence of the people at the house by an informer.

According to PW6, the suspects later led police to the house in Twapia where a Defy deep freezer, a GRZ radio, a flask, a mug and some breaking implements were recovered. Later, PW4 was taken to Ndola Central Police Station where he was detained for

two days before he was released after giving a statement to the police. PW5 was kept at Twapia Police Station for four days before he was released also after he gave a statement to the police.

PW6 alleged that the house in Twapia from which the property was recovered belonged to the 1st appellant's girlfriend named Metherine Chishimba. All items recovered were identified by PW1 and PW2, Patson Chibale, the Head Teacher, as the property stolen from Mabungo Primary School. A post-mortem report confirming the death of Mr Kafwimbi was also availed.

In defence, the 1st appellant testified that he was a businessman dealing in making pegs for sale and charging batteries. On 29th September, 2015 in the morning, he called PW5 on phone to take him to Twapia to buy timber which he was using to make pegs. PW5 told him that he did not have a vehicle but that he would ask a colleague who had one. While waiting for the vehicle, he met the 2nd appellant by the roadside near his shop in Kantolomba Township. The 2nd appellant whom he knew very well told him that he had come to attend the burial of a neighbour at the nearby Kantolomba cemetery which was to take place at 14:00 hours. They then sat together at his shop chatting.

Shortly, thereafter, PW5 arrived in a taxi driven by PW4. They chatted for a while and then the 2nd appellant went to answer a phone call. When he returned he requested that he too be given a lift to Twapia to see someone over a fridge.

The 2nd appellant's phone again rang and he went to the roadside to answer it. When he returned, he was with another man named Peter whom the 2nd appellant introduced as the one he wanted to see in Twapia about the fridge. They all got into the taxi and left for Twapia.

In Twapia, Peter directed them to a house near the market. When they reached the house only the 2nd appellant and Peter went to the house to see the fridge. He (1st appellant) remained standing near the car. When the duo came out of the house, the 2nd appellant said that they had failed to agree on the price of the fridge. As they were about to leave, Peter again asked for a lift and when he was allowed, he went into the house and returned with two carpets which he put into the vehicle. He asked to be dropped off at the market.

As they moved off they were blocked by the vehicle with gun totting policemen in it. The police started firing shots. Peter got out of the vehicle and ran away. The 2nd appellant also ran away.

According to the 1st appellant he got scared and also got out of the vehicle and started to run away but he was apprehended. He denied being involved in the robbery at the school and stated that he was implicated on account of the 2nd appellant who had asked for a lift in the taxi.

The 1st appellant denied that Metherine Chishimba was his girlfriend or that he knew her at all or where she lived. He stated that in the night of 28th September, 2015 to 29th September, 2015 he was at home with his wife. He stated that he had not told the police the story he was telling the court because the police beat him.

The 2nd appellant testified that he first met Peter on 25th August, 2015 at a place where he had taken his refrigerator to be repaired. Peter told him that they sometimes sold fridges at his place. He gave Peter his phone number to contact him when he found a fridge to sell. On 29th September, 2015 he went to Kantolomba in the morning with a view to attend the burial of a neighbour that afternoon. He sat at a bar and bought beer to drink while waiting for the burial. He then met the 1st appellant whom he knew very well. The 1st appellant told him that he was waiting for a vehicle to take him to Twapia to buy timber for his pegs

making business. In a short while, he received a call from Peter who told him that he had a fridge for sale and that it was in Twapia. Peter also told him that he was on his way to Kantolomba. When Peter arrived, he asked the 1st appellant for a lift to go and see the fridge. That was how they went to Twapia.

When they reached the house in Twapia, he and Peter disembarked and entered the house. He was shown the fridge but they could not agree on the price. He went outside and told the 1st appellant that they had failed to agree on the price and that they should leave. Peter came to the car and asked for a lift up to the market. When he was allowed, he went into the house and returned with two carpets. He put them in the car.

They started off but were shortly stopped by a vehicle which blocked their way in which police with guns were. The police fired a shot. Peter opened the door and ran away. The 1st appellant followed suit and he (2nd appellant) also started running away but stopped and he was apprehended.

The 2nd appellant confirmed that the fridge produced in court was the one shown to him by Peter in the house. He stated that PW4 and PW5 lied when they said that he, the 1st appellant and Peter ran away from the vehicle when police blocked their car. He

explained that on the night of 8th September, 2015 he was at his home with his very young children, his wife having gone to attend a funeral where she spent the night. He denied participating in the crimes at Mabungo Primary School.

In his judgment, the learned trial judge acknowledged that there was no direct evidence linking the appellants to the two crimes at the school in Twapia. He, however, took into account the cumulative evidence of PW4, PW5 and PW6 that all the three persons they had picked from Kantolomba had entered the house in Twapia which, according to the learned judge, was linked to the 2nd appellant's girlfriend; that the trio emerged from the house with the two carpets and a dictionary; that when their car was blocked by the vehicle carrying the police officers, the three people jumped out of the taxi and took to their heels but the appellants got apprehended. The learned judge decided, based on this evidence, that the appellants were found in possession of recently stolen property. Citing the cases of **David Zulu v The People**[1], **Lazarous Kantukomwe v The People**[2] and **George Nswana v The People**[3], the learned judge invoked the doctrine of recent possession. The judge, in this case, found it highly improbable that the property could have changed hands since it was stolen from the school as

the period in which it was recovered was too short. He rejected the explanations given by the appellants that they found themselves at the house in Twapia where the stolen items were recovered because of Peter who was at large as being unreasonable. He was of the view that jumping out of the taxi and running away at the sight of suspected police officers was inconsistent with an innocent conscience. The learned judge referred to the case of **Molley Zulu & Another v The People**[4] in which it was observed in relation to a suspect who ran away after seeing police officers but stopped when a warning shot was fired that-

> **"The running away could be said to be evidence of the [accused's] guilty conscience." (at p. 231)**

The learned judge concluded that being found in possession of recently stolen property and running away upon being confronted by police supported the prosecution's case that the appellants stole the property which at the material time was being guarded by the deceased watchman. He found both offences proved against the appellants and convicted them.

The appeal is on two grounds, namely that-

1. The court below erred in both law and fact when it accepted the evidence from PW4 and PW5 without

treating them as suspect witnesses whose evidence requires corroboration or something more.

2. The learned trial court misdirected itself by rejecting the appellants' explanation regarding the stolen items when the explanation could reasonably be true and by finding that the stolen items were found in possession of the appellants.

The two grounds of appeal were argued together by the learned Counsel for the appellants. It was submitted that the lower court should have treated PW4 and PW5, whose evidence it relied on heavily, as suspect witnesses having been in the vehicle in which the carpets were recovered and that they were detained by police and only released after they gave statements that implicated the appellants. Therefore, that their evidence required corroboration or something more before it could be accepted. The case of **William Muzala Chipango v The People**[5] was cited in support. It was, therefore, submitted that there was no corroboration or something more in the evidence on record that supported the two witnesses' assertions that it was the appellants and Peter who put the carpets in the car.

It was submitted that the appellants' explanations were not meaningfully challenged or shaken making it reasonably possible that it was Peter who was in possession of the stolen goods. The cases of **Elias Kunda v The People**[6] and **Saluwema v The People**[7] were cited in support. It was submitted that the appellants' explanations were further strengthened by the fact that there was no evidence that the house in which the stolen items were found belonged to the alleged 1st appellant's girlfriend, Metherine Chishimba; that this was inadmissible hearsay since the owner of the house was not called to confirm the fact.

It was submitted that the running away of the appellants from the scene should not be the basis for any adverse conclusions against the appellants because the arrival of the police at the scene was traumatic and the appellants were entitled to react as they did because they might have thought that the armed plain clothed police were armed robbers. We were urged to find the appellants' explanations to be reasonably true, uphold the appeal, quash the convictions on both counts, acquit the appellants and set them at liberty.

Responding to the arguments challenging the reliance placed on the evidence of PW4 and PW5, learned Counsel for the

respondent submitted that the trial court was on firm ground in both law and fact when it accepted the evidence of the two witnesses. It was contended that these witnesses' role was confirmed by the appellants themselves that they were merely hired to transport the appellants. On that basis, it could not reasonably be argued that PW4 and PW5 should be treated as suspect witnesses whose evidence required corroboration or something more before it could be believed.

It was submitted that if the evidence of PW4 and PW5 is believed that they were merely hired to provide transport, then the stolen property would be left in the hands of the appellants and Peter. That it was highly unlikely that the property changed hands within the short time between its being stolen and being found in the possession of the appellants.

As for the appellants' explanation, which placed the blame on Peter who was not apprehended, it was submitted that it cannot reasonably be true given the unchallenged evidence of PW4 and PW5. It was contended that the appellants' behaviour when confronted by police was suspicious. Therefore, that the only reasonable inference was that they stole the property recovered during which they assaulted and killed the watchman. We were

urged to dismiss the appeal and uphold the convictions and sentences. The foregoing was the evidence before the lower court, the decision of the lower court, the grounds of appeal and the arguments in the appeal.

We have considered the appeal. Although Mr Siatwiinda addressed both grounds of appeal at once, we think that they each raise distinct issues. We shall, therefore, address each ground separately.

In ground one the issue is whether PW4 and PW5 were suspect witnesses whose evidence required corroboration or something more. It is indeed true that the two witnesses were apprehended at the same time as the appellants, having been together in the same vehicle in which the carpets were recovered. They were also detained by police for several days and were released after giving statements to the police. Ordinarily, that would make the evidence of the two witnesses suspect *prima facie* because they would have reason to distance themselves from the crimes. As submitted by Counsel for the respondent, however, and confirmed by the appellants themselves, PW4 was hired at the behest of PW5, a fellow taxi driver, who did not have a vehicle at the time, to transport the appellants and Peter to Twapia. It is

obvious that the two witnesses explained their role in relation to the appellants to the police who found them innocent and released them. Their proper role having been established, there was no basis for categorising them as suspect witnesses to require corroboration or something more before their evidence could be believed. Indeed, it is not the law that every person who is apprehended and detained by police during the investigation of a crime is a suspect witness. There must be some evidence that must raise suspicion. In **Likando v The People**[8], for instance, this court guided that-

> **"A trial court cannot be criticised for its failure to consider whether a witness may have an interest unless the circumstances are such as to put the court on its inquiry; only then does it become necessary for the court to make a specific finding as to whether the testimony of the witness is to be regarded with the same caution as that of an accomplice."**

As we have noted, there was nothing in this case that should have put the court below on inquiry as to the interest of PW4 and PW5 in view of the common evidence that the two witnesses were merely hired to transport the appellants and their colleague, Peter. There was, therefore, no need for the court below to treat PW4 and PW5 as suspect witnesses because the issue did not arise. We,

accordingly, find no merit in the first ground of appeal and dismiss it.

We think that the issue which we must interrogate in the second ground of appeal is whether the explanation given by the appellants that they were wrongly implicated in this matter by the misadventure of being found together with Peter, is reasonably possible even if not probable. The evidence given by PW4 and PW5 was to the effect that the appellants and Peter were acting in concert: they found them together at Kantolomba and picked them up; the appellants and Peter led the two witnesses to the house in Twapia which all three entered and came out with the two stolen carpets as well as the dictionary which they put in the car; all three fled when confronted by armed police. During the cross-examination of the prosecution witnesses and particularly PW4 and PW5, the defence had an opportunity to challenge them on the material particulars of their evidence such as, whether PW4 and PW5 found the two appellants and Peter waiting for them; whether it is not Peter who directed PW5 to the house in Twapia and so on. A perusal of the record of proceedings shows that the witnesses where not challenged on the material evidence. Leaving such evidence unchallenged reduced the efficacy of the appellants'

defence especially that the two witnesses' credibility was not in doubt and there was no reason suggested why they should not be believed. To have remained mute in the face of this incriminating evidence implies to us that the witnesses were telling the truth; that the appellants' explanations were mere afterthoughts or improvisations cleverly crafted after considering the evidence given by the prosecution and we so find. Our decision in the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[9] is instructive in this area.

Part of the appellants' evidence was that after Peter had collected the carpets and put them in the taxi, he asked to be dropped at the market in Twapia. We find this evidence to be preposterous. It is illogical and utterly brazen. The fact that the crimes had been committed at the local school was clearly in the public domain within the community, a fact supported by PW6's evidence that police were alerted by an informer about the presence of the appellants' party at the house in Twapia. Therefore, it would have been folly for Peter to be left at the market lugging two heavy carpets, not to mention the dictionary. We take the view that the appellants offered this piece of evidence as an embellishment to make their defence believable.

Given the view that we have taken of the appellant's defence we are inclined to accept the learned trial judge's conclusion that the behaviour of the appellants in running away when confronted by police was inconsistent with an innocent conscience in the circumstances of this case. In any case none of the appellants stated in their evidence that they thought that the men who sprung out of the car blocking the appellants' car were armed robbers. The learned appellants' advocate's submission in that regard was, with due respect, misconceived.

We accept that the evidence that the house where the stolen property was recovered belonged to the 1st appellant's girlfriend was not substantiated bearing in mind that during the trial Counsel for the accused at the time had successfully objected to PW6 leading evidence as to what he was told by the said girlfriend and the court directed that the evidence relating to the girlfriend be excluded on the ground that the girlfriend would not be availed. We do not, however, agree that the lack of evidence that the house belonged to the 1st appellant's girlfriend strengthens the appellants' defence because from what we have said above, there is no truth in the defence.

We are in no doubt that the two appellants and Peter acted in concert throughout the transaction until they were apprehended and that the stolen property was effectively found in their hands. The period between the stealing of the property and its discovery in the hands of the appellants and Peter was certainly so short that it could not have exchanged hands in the interim, as found by the trial judge. In fact we are convinced that the appellants and Peter went to the house where the property had been hidden after the robbery in order to move it away. Unfortunately for them an informer alerted police of their presence and they were apprehended. On the evidence, we are satisfied that the appellants' explanation could not have been reasonably possible and the learned judge properly rejected it and convicted the appellants. We equally find no merit in the second ground of appeal and we dismiss it.

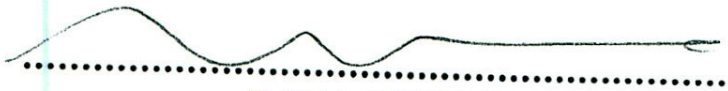
We would like to point out though that the evidence available to the police when they investigated the matter clearly showed that the appellants acted with Peter in committing the crimes. The particulars of offence should have as such narrated that the two appellants (accused persons as it were) acted jointly together with another person not known since Peter was not apprehended. This

omission notwithstanding, the appellants were deservedly convicted.

Applying section 15 (4) of the Supreme Court of Zambia Act, we see nothing wrong with the sentences imposed for the two offences in view of the violence with which they were committed. We uphold the sentences and dismiss the appeal altogether.

.....

G.S. PHIRI
SUPREME COURT JUDGE



.....

E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....

J. CHINYAMA
SUPREME COURT JUDGE