IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 29/2020**
HOLDEN AT KABWE
(*Criminal Jurisdiction*)

BETWEEN:

EDWARD STEVEN NYIRENDA **1ST APPELLANT**
SHADRECK SADA PHIRI **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.

On 11th August, 2020 and on 20th August, 2020

For the Appellants: *Mrs S. C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *Mr C. Bako, 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. ***Crispin Mabvuto Banda and Andrew Tembo v The People (2011) 2 ZR 194.***
2. ***Nyambe v The People (1973) Z.R. 28***
3. ***Ilunga Kabala and John Masefu v The People (1981) Z.R. 102***
4. ***David Zulu v The People (1977) Z.R. 151***
5. ***Robertson Tembo v The People, SCZ Appeal No.309/2015***
6. ***Toko v The People (1975) Z.R. 196***
7. ***Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (1988 - 1989) Z.R. 163***

8. ***Simon Malambo Choka v The People (1978) Z.R. 243***
9. ***Bwalya v The People (1975) Z.R. 125***
10. ***Sydney Zonde and Others v The People (1980) ZR 337***

The record of appeal in this case comprised only the judgment of the Court below, the original record of appeal having not been found even though it was sent to the Supreme Court Registry by the Assistant Registrar at Chipata. This was according to an affidavit sworn by Mr McDonald Nyongani, a Marshal in the Registry. After reading the said judgment of the High Court we were satisfied that it contained a summary of the pertinent witnesses which would enable us to assess the weight of such evidence and to determine whether or not to interfere with the decision of the lower Court as we guided in the case of **Crispin Mabvuto Banda and Andrew Tembo v The People**[1].

The two appellants, as disclosed in the judgment of the court below, were tried and convicted by the High Court at Chipata (Phiri J., as he then was presiding) of two counts of the offence of aggravated robbery contrary to **section 294(1)** of the **Penal Code** (hereafter, the first and second aggravated robbery respectively) and

one count of murder contrary to section 200 of the Penal Code all occurring at Chipata in the Eastern Province.

The summary of the evidence in the first aggravated robbery count is that on 18th August, 2007, around 19:00 hours, PW1 was abducted by three men in Chipata, assaulted and three hours later dumped unconscious in a stream in Katete where he was left for dead. His car was stolen along with his Nokia 1600 phone and K30,000 cash (non-rebased). Later, PW1 identified the appellants at a police identification parade as having been among the three men that abducted him and stole his property. It was his evidence that he had observed them for 10 minutes before he was abducted when they came to his car in which he sat with the internal light on after dropping a client that he had just delivered. This was in Mchini compound in Chipata. There was also electricity lighting from the shops nearby that aided his observation. He did not, however, see the face of the third man who had covered his head in a coat.

There was also evidence from the arresting officer, Detective Sergeant Mwenya (PW7) that PW1 had contacted him to report the crime on the emergency 991 line and told him that he could identify

two of his attackers and was able to describe them. PW1's car was days later found abandoned in Sinda. PW5 presented a report on behalf of the police officer who conducted the identification parade and was outside the jurisdiction at the time of trial. He also presented pictures of the parade which depicted PW1 identifying the appellants.

The only evidence relevant to the first aggravated robbery in the appellants' defence was that they were identified at the parade by a person that had earlier been taken to the detention cells by police with scones which he offered to the 1st appellant but were received by the 2nd appellant. It was clear from their evidence, however, that they did not know who identified them and why they were identified.

Regarding the second aggravated robbery and the murder, the evidence from the prosecution was that on 1st September, 2007, Dickson Sakala, a taxi driver employed by PW2, Amon Chisela went missing together with PW2's car. The car was later found abandoned on Chadiza road with all four wheels removed together with the battery, starter motor, alternator, distributor, high tension cables, steering rack and the radiator. Mr Sakala's body was also found in the same vicinity as the vandalised car. The body had deep cuts on

the head and bruises on the back. Both legs were tied with a piece of cloth.

There was evidence that police received a tip-off that there were people selling car parts stolen from PW2's car. Police were led by an informer to the 1st appellant who was apprehended at his house. He in turn took police to another taxi driver, John Nyendwa (PW4). PW4 explained to the police officers that he had been approached by the 1st appellant earlier that night in the company of four men that included the 2nd appellant. They asked to transport four wheels, a radiator and a pump and they gave him the car parts. Police also took a tools box and the pump from PW4. Police retrieved the car parts from the boot of PW4's car. They picked PW4 and were led by the 1st appellant again this time, to the 2nd appellant whom they found at home within Mchini compound and apprehended him. The appellants and PW4 as well as the wheels and the car parts were taken to Chipata Police Station. Later, PW2 was invited to the police station and he identified the wheels and the car parts as those stolen from his car.

In his testimony, PW4 confirmed the story that the police witness (PW8) said he told the police. He stated that he was supposed to take the men to Msipasi area within Chipata at the time they agreed between 04:00 hours and 05:00 hours but this did not happen because police led by the 1st appellant picked him up at his home around 01:00 hours. He stated, however, that police released him that morning around 10:00 hours.

The 1st appellant's defence to the two offences was that on 31st August, 2007, he had gone to Chipata from Katete where his mother had sent him to collect money. Between 21:00 hours and 22:00 hours he was on his way to his uncle's house for the night when police apprehended him for moving at night. He denied being involved in the two offences.

The 2nd appellant's defence was that he was apprehended on 1st September 2007 in the night at his house just after he had returned from Kayeka Village in Chief Mpezeni's area where he had gone to buy maize on 15th August, 2007. He found the 1st appellant in police custody. That was when he came to know him.

The trial Judge found, in the main, that the two appellants were implicated in the first aggravated robbery by the evidence of the single identification evidence of PW1 which he found to be credible and satisfactory. The learned Judge also took note of the following issues which, according to the learned Judge, were not odd coincidences but gave credit to PW1's testimony: the fact that his car was recovered barely three days after the attack in the direction where PW1 found himself; the fact that there was a medical report; and the fact that he reported his escapade to PW7 from Katete.

With regard to the second aggravated robbery and the murder, the learned trial Judge found that the evidence of PW4 relating to the vehicle parts and the four wheels connected the appellants to the two offences. This was after cautioning himself that being the receiver of stolen property, PW4 was an accessory after the fact and (therefore) an accomplice, his testimony required corroboration. The learned Judge looked for corroborating evidence and found it in: (1) what he termed as similar fact evidence arising from the first aggravated robbery where PW1 was abducted, assaulted and left for dead in a stream but miraculously survived to tell the story and the identity of

his attackers. That in the second aggravated robbery the victim, Mr Sakala never survived to tell his story; (2) the evidence relating to the recovery of the vandalised and stolen vehicle parts so soon after the second robbery had occurred. That the appellants were sufficiently linked to the recovered property by PW4 as well as the police witnesses, PW8 and PW9. Further, that all the recovered vehicle parts together with the wheels matched the items stolen from PW2's car which Mr Sakala was driving when he was last seen alive; (3) the evidence that the 1st appellant led police to the apprehension of the second appellant. The learned Judge thus found the (circumstantial) evidence given in respect of the second aggravated robbery and the murder to be overwhelming against both appellants.

Consequently, the learned Judge found the appellants guilty on all three counts and convicted them as charged.

Two grounds of appeal were put up on behalf of the appellants as follows:

Count 1

1. The trial Court erred in law and fact when it convicted the appellants on the evidence of PW1 and PW5 on the identification of the appellants without due consideration of the circumstances surrounding the identification which could render both the identification by PW1 and the identification parade invalid.

Count 2

2. That the trial Court erred in law and fact by convicting the appellants on circumstantial evidence which was not cogent and did not take the case out of the realm of conjecture to warrant only a guilty inference.

Mrs Lukwesa's arguments in the first ground of appeal attacked the learned trial Judge's reliance on the evidence of PW1 that he saw the two appellants when they accosted him at Mchini and was able to identify them at the identification parade. Citing the case of **Nyambe v The People**[2], it was submitted that PW1's identification of the appellants could have been mistaken because the circumstances

under which PW1 saw his assailants were traumatic. That he even lost consciousness which could have affected his ability to recall who his attackers were. It was contended that the fact that the car was recovered in the same direction where PW1 said he was taken and dumped does not corroborate the identity of the attackers. It was further submitted that the identification parade itself was not properly conducted as there was no indication that the appellants were informed of their rights with regard to the purpose and conduct of the parade bearing in mind the guidelines given in the case of **Ilunga Kabala and John Masefu v The People**[3]. This was compounded by the absence at the trial of the officer that conducted the parade and further by the evidence of the appellants that the person who identified them had earlier seen them at the police holding cells.

Turning to the second ground of appeal covering the second aggravated robbery and the murder, the substance of the submissions were that the trial Court should not have relied on the evidence of PW4 who was a witness with a possible motive to give false evidence to implicate others to avoid prosecution. It was also

submitted that the Court erred in finding corroboration to support the second aggravated robbery and the murder in what the learned judge touted to be the similar fact evidence in support of the first aggravated robbery. Ultimately, it was submitted that the circumstantial evidence available fell short of the criteria provided in the case of **David Zulu v The People**[4] that such evidence should take the case out of the realm of conjecture and attain a degree of cogency that allowed only an inference of guilt. It was pointed out in this case that another inference could be drawn on the facts of this case that the deceased could have been murdered by other persons known to PW4. It was submitted further that the 2nd appellant's alibi that he was away on a maize buying mission at the material time was not discredited by the prosecution rendering it reasonably probable that he was not part of the aggravated robbery and the murder which should entitle him to an acquittal. We were thus urged to allow the appeal and quash the convictions and free the appellants.

Mr Bako's response on behalf of the State to Mrs Lukwesa's submissions in the first ground of appeal were that PW1's evidence was sufficient to warrant the conviction. It was submitted that this

witness had the opportunity to clearly observe the two appellants as found by the trial Judge during the 10 minutes he was negotiating with the men to take them to Chadiza turn-off. It was stated that at that time PW1 was not under attack or in fear of anything. It was contended, therefore, that the subsequent assault which rendered him unconscious did not affect his ability to recall the appellants' identity. It was submitted that the opportunity to see the assailants before the abduction was reliable as it did not arise out of a fleeting glimpse or made under traumatic conditions which would create room for doubt that the victim had made an honest but mistaken identification of his assailants.

With regard to the identification parade, it was submitted that the issue of fairness of the parade did not arise. Nonetheless, it was submitted that the appellants' evidence of what transpired at the parade was inconsistent referring to the appellants' inability to identify the person that they claimed police took to the cells where the appellants were, gave them scones and not long afterwards identified them at the parade. It was submitted that the trial Judge had an opportunity to look at the photographs of the appellants being

pointed out by PW1 and never brought up the issue of fairness of the identification parade with PW5 who submitted the report on behalf of the officer that conducted the parade.

Pertaining to the second ground of appeal, it was submitted that PW4's evidence was corroborated by PW8 who stated that the 1st appellant led police to PW4's house where recoveries were made. On this basis, the Court did not place reliance on similar fact evidence. It was submitted that there was overwhelming evidence to support the convictions.

We have considered the grounds of appeal, the judgment of the High Court and the submissions by the learned counsel. In the first ground of appeal dealing with the first aggravated robbery, Mrs Lukwesa took issue with the reliability of PW1's identification evidence both at the time of the commission of the crime and at the subsequent police identification parade. The issue with PW1's identification evidence at the time of the offence is that the possibility of an honest but mistaken identification had not been ruled out. Indeed in a plethora of cases including that of **Nyambe v The People**[2] cited by Mrs Lukwesa, the Court of Appeal, forerunner to this Court

and this Court have consistently urged caution in dealing with identification evidence and more so where the evidence is that of a single witness and insist on ensuring that the possibility of relying on honest but mistaken identification evidence is removed irrespective of whether or not the witness is proposing to identify someone known to the witness before or someone seen for the first time at the scene of crime.

In the case of **Nyambe v The People**[2] already referred to guidance was given that-

> **"(ii) There is great danger of honest mistake in identification, particularly where the accused was not previously known to the witness. The question is not one of credibility in the sense of truthfulness, but of reliability.**
>
> **(iii) The greatest care should be taken to test the identification. The witness should be asked, for instance, by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed - the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed.**
>
> **(iv) The adequacy of evidence of personal identification will depend on all the surrounding; circumstances, and each case must be decided on its own merits.**

Recently, in the case of **Robertson Tembo v The People**[5] we echoed that-

> **"It is settled law that evidence of a single identifying witness can sustain a conviction, provided it is clear and satisfactory in every respect. In the case of Chimbini vs. The People[1], this Court reiterated the principle that, where the evidence of a single witness in question relates to identification, there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of that single witness with particular care; and that the honesty of the witness is not sufficient, the Court must be satisfied that he is reliable in his observations."**

The case against the appellants in the first aggravated robbery was anchored entirely on the identification evidence of PW1, a single witness. The evidence which the learned trial judge reviewed before concluding that it was clear and satisfactory was that, PW1 had the opportunity to observe the appellants for 10 minutes before he was abducted. During those 10 minutes he was unaffected by any fear or other stress or trauma which could have negatively impacted on the witness's ability to make a reliable identification. When PW1 later reported the robbery to PW7 he told him that he could identify two of the robbers and described them which description it was not contended fitted the appellants implying that the loss of

consciousness had no adverse effect on his ability to recall what had transpired and the identity of the robbers. It is not contended in this appeal that this was not the evidence which PW1 gave to the Court. The learned Judge was clearly cautious in dealing with the evidence of PW1. He only relied on it after satisfying himself that the identification evidence was reliable. The learned trial Judge was, on the evidence, entitled to come to the conclusion that the danger of a mistaken albeit an honest identification had been removed as the evidence of PW1 was clear and satisfactory. We are thus satisfied that PW1's evidence relating to the identity of the appellants at the scene of the crime was reliable.

We turn now to the issue of the reliability of PW1's identification of the appellants at the police identification parade. Mrs Lukwesa's complaint appears to rest on the absence of the officer who conducted the parade as well as the evidence by the appellants that they were seen in the cells by the person who later identified them. It is on this basis that she submitted that the parade was unfair. A reading of the judgment from the Court below shows that the learned Judge had addressed his mind to the effect of the absence of a police officer who

conducted an identification parade during court proceedings but who had rendered a report of the parade. He noted that there was nothing wrong with the absence of the officer as the evidence showed that the parade was conducted at which photographs showing the appellants being identified were taken. We agree with the learned Judge and would point out that what would invalidate an identification parade should be something that happened at the parade or the manner in which it was conducted and not the absence at the trial in Court of an officer or person who conducted the parade. In any case Mrs Lukwesa did not demonstrate how the absence of the officer took away from the fairness of the parade. PW5 who presented the officer's report at the trial could have been cross-examined to demonstrate the unfairness posed by the officer's absence. This was not done. We see no merit in this argument.

As for the complaint that the parade was also unfair because the appellants were seen by the witness who was taken to the cells by police and later identified them at the parade, this would have been a valid ground for considering whether or not to deem the

identification parade nullified if the complaint was found to be true. In the case of **Toko v The People**[6] this Court stated 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."**

As pointed out by Mr Bako, however, the appellants' evidence as to who was the person that gave them scones at the cells and thereafter identified them at the parade was not consistent. Notwithstanding the evidence availed by PW5 through the photographs taken at the parade showing PW1 identifying them, they could not state with certainty the person that identified them. The impression we got was that the whole story about the person with scones was untrue. We, therefore, find no merit in the argument as well.

There was also the argument that the learned trial Judge wrongly relied on the fact that PW1 was attacked and he found himself in Katete where he was also hospitalised and his car was recovered as well and reported the matter to PW7 from there, as supporting the identification of the appellants. This is not how we understood the judgment. Our understanding is that the learned

Judge regarded those matters as giving credence to PW1's story that he had been attacked and the car was stolen from him and not necessarily confirming the identity of the robbers.

Having considered the arguments raised by Mrs Lukwesa as we have done, we find no merit in the first ground of appeal and uphold the conviction for the first aggravated robbery.

Turning to the second ground of appeal, Mrs Lukwesa's submissions indicate that the learned Judge placed undue reliance on the evidence of PW4 even after finding him to be an accessory after the fact and an accomplice. Indeed, the judgment indicates that the learned Judge took the view that PW4 was an accessory after the fact and an accomplice in the light of his role in the matter. The learned Judge, therefore, looked for corroboration supporting PW4's evidence and found it in the manner stated earlier. He concluded that the evidence of PW4 put the appellants in the spotlight and found them guilty of committing the second aggravated robbery and the murder.

It is quite obvious that PW4 was a key witness in the second aggravated robbery and the murder. We do not, however, agree with the classification of PW4 as an accessory after the fact or an

accomplice even though the implication of this is not so significant in resolving the appeal. There was no evidence that he was *participes criminis* or had guilty knowledge how the car parts were procured. The consistent explanation which he gave to police and the Court below is that the car parts were left in his car after he was hired by the men who included the 2nd appellant whom he knew because he was a cousin to one of his wives. At best he could only have been regarded as a witness with a possible interest of his own to serve, as alluded to at one point by Mrs Lukwesa, based on the fact that he kept the stolen property and he was picked up by police and detained. The approach to the evidence of a witness with an interest of his own to serve is, however, the same as an accomplice. As stated in the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People**[7]-

> **"(3) In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe.**

Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices."

And in the case of **Simon Malambo Choka v The People**[8] it was held by this Court that-

"(i) A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness."

The evidence relied upon by the learned Judge as constituting corroboration for PW4 which Mrs Lukwesa railed against, in our considered view, provides support for the witness. This includes the so-called similar fact evidence pertaining to the first aggravated robbery by which we understood the learned judge to be simply saying, look since the accused persons have been found to have acted together in committing that offence, they cannot now be heard to claim that they do not know each other. It is also notable that PW4 who stated that he was related to the 2nd appellant by marriage which the appellant did not challenge had no motive to falsely implicate his relative. The outcome of this is that this supporting evidence

excluded the possibility of PW4 falsely implicating the appellants and placed the car parts stolen from PW2's car in the hands of the appellants and their unknown confederates. In this vein the explanation made by the 1st appellant that he was in Chipata and particularly in Mchini on an errand for his mother cannot be true. Rather, the explanation goes to confirm that the appellant was within the vicinity of the crime scene in terms of material time and location. As for the 2nd appellant, his alibi was that he was in Kayeka village buying maize. There is no evidence that he gave police details of the people and places he had been to in Kayeka village which could have obligated the police to investigate the alibi as we guided in the case of **Bwalya v The People**[9]. Notwithstanding, the evidence of PW4 is that the 2nd appellant was one of the group of the five men that visited him and requested for transport. The circumstances of this case, in our view invites the application of the doctrine of recent possession. In the case of **Sydney Zonde and Others v The People**[10] it was held by this Court that-

> **The doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery.**

In the case before us, the evidence has shown that the car parts stolen from PW2's car were found in the possession of the appellants and the appellants did not offer any explanation at all how this came about. Having failed to explain their possession of the stolen car parts, there can be no inference other than that of guilt on the part of the appellants. Mrs Lukwesa's suggestion that there is another inference that can be drawn that the deceased was killed by other people known to PW4 is not supported by the evidence available. We reiterate that the only inference capable of being drawn is that the appellants along with their unknown confederates abducted Mr Dickson Sakala together with PW2's car which he was driving, killed him and vandalised it of the parts before abandoning the remains of the body and the car along Chadiza road. We find no merit in the second ground of appeal.

Consequently, we find no merit in the entire appeal and dismiss it.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE