CHARLES LUKOLONGO AND OTHERS v THE PEOPLE (1986) Z.R. 115 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
16TH JULY, 1986 AND 28TH JANUARY, 1987
(S.C.Z. JUDGMENT NO. 26 OF 1986)

Flynote

Criminal law and Procedure - Confessions - Judge's Rules in force in Zambia - Interrogation of persons in custody without administering warning - Effect of.
Evidence - Confessions - Interrogation of persons in custody without administering warning - Effect of.
Evidence - Medical evidence - Necessity to call
Evidence - Dereliction of duty by police - Effect

Headnote

The appellants were each charged and convicted of two counts of murder and one count of aggravated robbery. There was evidence that the appellant had been questioned by the police while in custody but before being warned and cautioned. On appeal it was argued that the Judges Rules at present in force in Zambia required that persons in custody should be warned before being questioned and their answers were therefore inadmissible. It was further argued that footprints which were seen by the police should have been compared with the shoes of the accused persons; that the identification parade was unfair because the suspects were the only ones not wearing shoes; and that the articles found after improper questioning should not have been admitted in evidence.

Held:

(i) Before admitting a statement obtained contrary to the Judges' Rules a trial court should consider whether the prejudicial effect of the evidence outweighs its evidential value.
(ii) The Judges' Rules applicable in Zambia are the 1930 rules set out in paragraph 1118 of the 35th Edition of Archbold.
(iii) If medical evidence is available it should be called, rather than a courts relying on its own opinion.
(iv) Where evidence available only to the police is not placed before the court, the court must presume that, had the evidence been produced, it would have been favourable to the accused. This presumption can only be displaced lay strong evidence.
(v) At identification parades, accused persons should not be dressed conspicuously differently from the others taking part in the parade
(vi) Real evidence which is repentant to a fact in issue is admissible notwithstanding that it is unfairly or illegally obtained.

Cases cited:

(1) Zeka Chinyama and Other v The People [1977] Z.R. 426

(2) Chileshe v The People (1972) Z.R. 48
(3) Zondo and Others v The Queen [1963-64] N.R. & Z.R. 97
(4) Chimbo and Others v The People (1982) Z.R. 20
(5) Kalebu Banda v The People (1977) Z.R. 169
(6) John Timothy and Feston Mwaba v The People (1977) Z.R. 394
(7) Kapuloshi and Others v The People (1978) Z.R. 200
(8) Chisha v The People (1968) Z.R. 26
(9) Musonda v The People (1968) Z.R. 98
(10) Liswaniso v The People (1976) Z.R. 277
(11) R v Turnbull and Another [1976] All E.R. 549

For the appellant: Sebastian Zulu, S. Zulu and Co.
For the respondent: L.S. Mwaba, State Advocate

Judgment

CHOMBA, J.S.: delivered the judgment of the court.

The appellants in this case were convicted of three counts of which the first two charged murder and the third charged aggravated robbery. They each received the minimum sentence of fifteen years imprisonment with hard labour in relation to the charge of aggravated robbery and in so far as the murder charges were concerned the capital punishment was imposed on them.

The murder charges related to the brutal slaying of two security guards namely Geoffrey Nyirongo and Pepala Banda who worked for the National Breweries and the Forest Department, respectively in Chipata. The two guards had reported for duty on the 19th of June,1983 and the following day. Pepala Banda was found battered to death and lying within the precincts of his working place, while Geoffrey Nyirongo was found unconscious in the National Breweries premises. The latter was taken to hospital at Chipata but died within as few days. When these grim discoveries were made it was also noted that a safe at the National Breweries had been blown open with explosives although the previous day it had been intact. There was evidence to show that at the material time this safe contained over two thousand kwacha in cash and documents which included four motor vehicle certificates of fitness, one motor vehicle blue book and other articles. These contents were nowhere to be seen immediately on the discovery o the blowing open of the safe.

Det. Const. James Nkhata, who was prosecution witness No. 9 (PW9) took finger prints at the scene of the robbery at national Breweries early in the morning of the 20th June,1983. Meanwhile, Det/Insp. Dereck Mwangala, who was PW8, having previously received a report about the criminal outrages under consideration, left Chipata and proceeded to Mutenguleni in search of the culprits. As he drove along Chipata to Lusaka Road he found two persons who waved him down and, when he stopped, asked him for a lift. The two, according to the observations of

the Det/Insp. behaved suspiciously and it was observed that one of them had fresh multiple cuts on his face and arms. The Det/Insp. picked up the two and conveyed them to Chipata Police Station for questioning. These two turned out to be the second appellant Christopher Kambita and one Isaac

John Nkhoma, who, but for the fact that he died before the trial of this case started, would have been among the accused, now the appellants.

The same morning of the 20th of June, 1983, Point Mwanza, PW3 was driving a Mercedes Benz truck from Chipata proceeding towards Kazimule. In this truck there were also Adam Mwanza, the fourth prosecution witness and Bulisani Phiri the fifth prosecution witness both of whom were lorry mates. These three witnesses said that at a turn-off known locally as Kauzu Farm they saw three men emerge from a bush and wave the truck driver down; when he stopped the three asked for a lift to Katete, but as he was not going that far Point Mwanza agreed to convey them up to Kazimule. The three prosecution witnesses in that truck testified that one of the men they gave a lift to had injuries on his face. Point Mwanza drove on up to Mutenguleni where he stopped transitorily and when he left the vehicle his lorry-mates and the other passengers remained behind. Shortly afterwards and before the driver returned to the truck two of the hitch hikers on the truck walked away, not to be seen again that day. Only the hike with his injuries remained in the lorry.

In the mean time, after dropping off the second appellant and the deceased, Isaac Nkhoma, Det/Insp. Mwangala proceeded to Mutenguleni where on arrival he found a man in Point Mwanza's truck. This man had facial injuries which bore a resemblance to those noticed earlier on the second appellant's face. The Dep/Insp. conveyed this man, who has since become known as the first appellant to Chipata Police Station.

Meanwhile in the month of July,1983, an identification parade was held at Chipata Police Station. The identifying witnesses were Point Mwanza, Adam Mwanza and Bulisani Phiri. All these witnesses picked out the first appellant as the man who had facial injuries amongst the three to whom the witness had given a lift. Point Mwanza and Adam Mwanza also identified the third appellant as having been amongst the three persons to whom they gave a lift to Mutenguleni, while Adam Mwanza similarly identified the fourth appellant Johely Mwalubange.

According to Det/Sub Insp. Lawrence Siamunyati, who was PW7, when all the appellants were in custody they individually led him and other police officers in the investigation team to various places including the scene of the offences, a place off Lusaka road and a place near the Chipata Airport. From these places a number of articles, including motor vehicle certificates of fitness, a motor vehicle blue book and I.O.U. credit notes and a wad of partially burned bank notes were recovered. The certificates of fitness, blue book and the various receipts and invoices so recovered were identified by Goodwell Kabanda, who was the first prosecution witness and was employed as a cashier at National Breweries, Chipata as belonging to the said National Breweries.

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Det/Sub. Insp. Lawrence Siamunyati also testified that on the 20th June, 1983, he recorded a warn and caution statement from the second appellant and the deceased suspect earlier mentioned. On 22nd June 1983 he took a warn and caution statement from the first appellant and on 7th July,1983, he took one from the third appellant. Finally, on 21st July, 1983, he recorded a warn and caution statement from the fourth appellant. Suffice it to state at this stage that when all these statements were tendered in evidence the defence lawyer for all the appellants at the trial objected to them on the ground that they were obtained through duress. A trial within a trial was held and needless to

state that the police witnesses averred that the statements were freely and voluntarily made while the appellants, all of whom gave sworn evidence, alleged to the contrary. The appellants testified that they were all subjected to torture and, in the case of the second appellant, to a deprivation of drinking water and food. After the trial within the trial Sakala, J., as he then was, concluded that all the statements of the appellants were freely and voluntarily made and admitted them in evidence.

The only ones to give evidence in their defence in the main trial were the first and second appellants. It suffices to state that they both denied involvement in any of the three offences charged. The third and fourth appellants exercised their right to remain silent. The first appellant called one defence witness namely Violet Njovu and she strove to prove an alibi on behalf of the first appellant.

The foregoing is only a skeletal aspect of the evidence given at the trial. Other facts of the case will emerge as they become relevant to the points to be reviewed in this judgement and as they were raised in the course of hearing the appeal. Before this court all the appellants were represented by Mr Sebastian Zulu, holding the briefs on behalf of the Legal Aid Department. The State was represented by Mr. L. S. Mwaba, a State Advocate.

The first ground argued on behalf of the appellant was that the investigating officer, Det/Sub. Insp. Lawrence Siamunyati and his co-investigating officer, Det./Insp. Mwangala, breached the third and fourth of the pre 1964 Judges Rules. These rules state as follows, in so far as they are relevant to the arguments presented:

> "3. Persons in custody should not be questioned without the usual caution being administered
> 4. If the prisoner wishes to volunteer any statement, the usual caution should be administered."

Mr Zulu cited many passages from the evidence of these two police officers, showing that after the appellants had been confined in custody they each made self incriminating utterances when they led the police to the locus in quo, and other places where, as we have already shown in the outline of facts of the case, various articles of evidential value were recovered. Mr Zulu cited the following passages in particular from the evidence of Det/Sub. Insp. Siamunyati:

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> "On 21/6/83, Charles Lukolongo led me and Det. Insp. Mwangala to the scene at the National Breweries and at the Forest Department . . . and to a place where they had been hiding since their arrival in Chipata."

Mr Zulu urged the court to infer that the passage meant that the appellant named therein had told the police that that was the place where he and his colleagues had been hiding before committing the crimes. At page 17 of the appeal case record, Mr Zulu cited the passage which reads as follows:

> "On 21/7/83 the fifth man Johely Levy Mwalubange was brought from Lusaka. During interview he led us to the scene and place where they were hiding. Five batteries were found

and head of a torch said to be of Isaac Lungu was found."

From page 18 Mr Zulu quoted the passage that follows:

> "At the scene, I found a blue cap which Charles Lukolongo said was of John Nkhoma . . . There was also a lump of mud which the accused stated was being used when putting explosives."

As to PW8's evidence Mr Zulu quoted the following passages at pages 22, 23 and 24:

> "From the Forest Department office I went to National Breweries where he (i.e. Christopher Kambita, second appellant) said they broke and blew off the safe . . . He showed me a table where the watchman was left lying."

At page 23:

> "We branched off into the bush. We walked to a place where Kambita showed me a well where he said he had dropped all iron bars and other items he did not mention."

At page 24:

> "Thereafter I went with Lukolongo Chibuye (the first appellant) who directed me in the same places earlier directed by Kambita . . When we reached the office of National Breweries he demonstrated to me how they connected the detonation from the switch of the lights to the safe. He said he was with the late Isaac Nkhoma while Isaac Lungu (the third appellant), Christopher Kambita (the second appellant) and Levy Mwalubange (the fourth appellant) were outside holding the watchman. He explained the explosives exploded and burnt them."

It should be stated that apart from such quoted self incriminating statements and the warn and caution statements, which will be dealt with later on in this judgement; the only other evidence against the appellants was circumstantial. Mr. Zulu contended that those self-incriminating statements clearly influenced the trial judge in coming to the conclusion that the only inference that could reasonably be drawn from the circumstantial evidence was one of guilt. That was the more so, he argued, since in the judgement the learned trial judge

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did not show that he had warned himself that he would not take into account those inadmissible statements. To that end counsel submitted that the trial judge had misdirected himself.

In regard to that ground of appeal and the consequential arguments Mr Mwaba countered that the injunction imposed by the Judge's Rules against questioning persons in custody related only to persons who had been arrested as opposed to those merely apprehended.

With due respect to the State Advocate, his submission was based on a misapprehension as to

which Judge's Rules apply to Zambia. It should be appreciated that in 1964 the British Home Office promulgated new Judge's Rules in place of those which had been made by the same office on June 24, 1930. The first rule of the 1904 rules stated as follows:

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody, so long as he has not been charged with the offence or informed that he may be prosecuted for it."

It will be noted that this rule, in contradistinction to rule 3 of the pre-1964 Judge's Rules, authorises questioning of prisoners in custody as long as they have not already been charged. However, as it was rightly pointed out by Baron D.C.J., in the case of *Zeka Chinyama and Others v The People* (1) at pages 438 where he quoted from the judgment of the High Court in the case of *Chileshe v The People* (2), the 1964 Judge's Rules have never been applied to Zambia, but it is clear from the case of *Zondo and Others v The People* (3) that the 1930 rules are the ones which have been applied to Zambia. In the case of *Zondo* just sited Conroy, C.J. stated at page 101 as follows:

> "The new Judges' Rules have not been applied to this country as policemen have not been administratively enjoined to follow them. When I Speak of the Judges' Rules I therefore refer to the rules set out in paragraph 1118 of the 35th edition of Archbold."

An examination of the rules to which Conroy, C.J., had recourse shows that rule 3 is exactly in the terms that we have quoted it earlier on in this judgement. It therefore behoves officers investigating crime to maintain a strict adherence to the rules applicable in Zambia and to avoid acting in accordance with the 1964 rules.

In passing we would wish to observe that it is in the knowledge of this court that the practice by investigating officers of questioning prisoners in custody without first administering a warn and caution has been going on for many years. In the case of *Chileshe v The People* (2) the trial judge was constrained to restate the correct situation as to which rules applied to Zambian because when hearing the appeal in that case he had observed that the trial magistrate had admitted in evidence a confession which was obtained in violation of the third rule of the pre-1964 Judges' Rules but in conformity with rule 1 of 1964 rules in so

far as the two related to persons in custody. Five years later in the case of *Chinyama and Others v The People* (1) this court stated at page 438 as follows:

> "It is necessary for us to continent on a practice of investigating officers which is to be deprecated. The Judges' Rules concerning the administering of a caution before inviting a reply to a charge seem to be regularly followed. On the other hard the rules concerning the proper conduct of officers in relation to persons in custody and persons whom it has been decided to charge are not followed. As Chomba, J., pointed out in Chileshe vs. The People the English Judges' Rules were substantially revised in 1964 but these rules have not been

applied to Zambia; we still operate under the pre- 1964 rules."

The fact that almost ten years after *Chinyama v The People* (1) we are skill dealing win the same issue of the treatment of prisoners in custody is testimony to the fact that police officers have not paid heed to the utterances made by the judges in the cases we have cited herein.

Mr. Mwaba submitted further that even if the statements referred to by the appellants' counsel were improperly admitted, it should be borne in mind that it is not mandatory to exclude statements obtained in breach of the Judges' Rules but rather, that a judge has only a discretion to do so.

We are mindful that Judges' Rules are rules of practice and therefore that they have no force of law. However, we are of the view that where the prejudicial effect of any given piece of evidence far outweighs its probative value, justice demands that such evidence must, per force, be excluded. It is our considered opinion that the prejudicial effect of the statements in dispute in this case did outweigh their evidential value. The trial judge should therefore, in his discretion, not have allowed the prosecution to tender them in evidence. That he did admit them was a serious misdirection on his part.

Mr. Mwaba urged upon us that if we should find the trail judge to have misdirected himself in this regard we should apply to this case the proviso to Section 15 sub Section 1 of the Supreme Court Act. Cap.52 of the Laws. We consider it premature at this stage to enter upon a discussion of that proviso. On the other hand having found, as we have done, that the evidence complained of was wrongly admitted and therefore that the trial judge misdirected himself, we allow this ground of appeal.

Mr. Zulu next attacked the reception in evidence of statements said to have been made by the appellants under warn and caution. To this end he first pointed out a discrepancy in the evidence of Det/Sub. Insp. Siamunyati in which he said at one stage that on the 22nd of June, 1983, he charged the first and second appellants with the offence under review and that when warned and cautioned in that regard, they both denied the charges. Mr. Zulu contrasted that evidence with the fact that the warn and caution statement produced by the same witness and which

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he said he had recorded from the first appellant novas a confession. Counsel argued that if the first appellant denied the charges at one stage he could not on the same day leave made a confession.

We shall summarily dispose of this argument by pointing out that when at the trial the first appellant's warn and caution statement was offered in evidence its admission was objected to on the basis that it had been obtained under duress. The present argument by Mr. Zulu is therefore irreconcilable with the objection at the trial. It is untenable. In any event Mr. Zulu's other submission regarding the warn and caution statements of all the appellants is that they were obtained under duress. In this regard he complained about the trial judge's finding that the scars which all the appellants had exhibited at their trial could not have been the result of beatings they received from the police in order to induce them to confess. Mr. Zulu contended that as the scars had been proved to exist on the bodies of the appellants and in the light of the admission by

Det./Sub. Insp. Siamunyati that the scars could have been caused by an assault with a wire, only an expert medical witness could affirm or disprove the appellant's claims that they every caused by beatings from the police. It was further his contention that some of the appellant's were kept under interrogation for unnecessarily prolonged periods as a way of inducing them to confess. In particular he said that the first appellant's statement was taken two days after being confined in custody; and that in the case of the fourth appellant four days elapsed between the date he was confined and the date his warn and caution statement was taken. Only the second appellant had his statement taken within ten hours of being taken into custody. Mr. Zulu criticised the trial judge's findings that apart from the first appellant, the statements of the remaining appellants were taken shortly after they were taken to the police station. He concluded that had the trial judge found that the scars the appellants bore might have been the result of assaults on them by the police or that they were kept in custody for unduly long periods before getting statements from them the trial judge might have ruled against their admission in evidence. To the extent that the judge failed to treat the statements as suggested, he had misdirected himself, Mr. Zulu argued.

Mr. Mwaba disputed the contention on behalf of the appellants and supported the trial judge's finding in accepting in the evidence the warn and caution statements. He submitted that if the allegations of severe and brutal beatings were true as claimed by the appellants, they ought to have complained in the committal court since the claims were that at the time they appeared in that court they were still bleeding from the injuries they had sustained as a result of the beatings. As to the scars, Mr. Mwaba argued that they were so insignificant that the trial judge had not even noticed them. According to Mr. Mwaba the issue as to whether or not there were any beatings fell to be resolved on the basis of credibility of witnesses. To this end the trial judge preferred the evidence of the prosecution witnesses to that of the appellants, he argued. The judge had even considered his discretion to exclude these statements but had found no basis of doing so as the statements did not prejudice the appellants, according to Mr. Mwaba.

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In resolving this argument we wish to hasten to point out that the reference by Mr Mwaba to the trial judge having considered the question of exercising his discretion to exclude the statements was irrelevant to the arguments put forward by Mr Zulu. The attack by the appellant's counsel was this, put succinctly: the trial judge misdirected himself when he found that the statements said to have been made by the appellants were freely and voluntarily made. Firstly he ruled on insufficient evidence that the scars which the appellants bore could not have resulted from beatings by the police as alleged. Had he determined that the scars were the result of injuries received from beatings inflicted by the police the judge would have found that the statements were not voluntarily made. Secondly he erred in making the finding that apart from the first appellant all the others had their warn and caution statements taken shortly after they were taken into custody. Had he appreciated that they were kept from two o four days before they were made to give the statements, he might have found that such extended periods constituted an inducement. The statements should therefore not have been admitted. That was the argument.

During the trial within the trial all the appellants testified that they were assaulted by several police officers who used a sjambok, an electric cable and a hosepipe. All of them also showed to the court scars on their backs and claimed that those scars were the remaining testimony of the beatings they

received from the police during interrogation. The first appellant swore that as a result of the injuries he received he was treated at the prison clinic and that the treatment was recorded on prison file No 530. In his ruling after the trial within the trial the trial judge stated that the issue of voluntariness would be resolved on the basis of credibility. He observed that all the appellants had claimed that they had been assaulted severely for prolonged periods. If what they claimed was true the trial judge wondered how they could have walked after the assault, let alone how they were able to be alive to attend their trial. He commended the police that in dealing with the case they had acted with extra speed in completing the investigations. He further observed that with the exception of the first appellant the warn and caution statements of the rest of the appellants had been recorded within a matter of hours after being taken to the police station. As to the claims of the appellants that the dorsal scars they bore were the result of beatings, the judge ruled that in his opinion they could not be said to have been the result of beatings. In the final analysis be ruled that the warn and caution statements were freely and voluntarily made by the appellants. He admitted then in evidence and used them in resolving the guilt of the appellants.

As Mr Zulu stated, Det./Sub. Insp. Siamunyati not only admitted that the marks on all the appellants' backs were scars, but he also significantly, admitted that one of the scars on the first appellants back seemed to have been caused by an assault with a wire. This is significant because each appellant claimed that in assaulting them, the police had used, inter alia, an electric cable, which is an article similar to a wire. It is of local interest also that the first appellant had said that

the treatment record for his injuries received from the police was on prison clinic file No. 530. It is our view that the concession by Det/Sub. Insp. Siamunyati together with the reference to a medical record existing at a prison clinic were ample indications which made it imperative that the trial judge should call for medical evidence to verify the claims by the appellants. Instead of doing this he contented himself in relying on his own non-medical opinion. We think that this attitude by the trial judge amounted to another serious misdirection. What happened in this case is similar to the situation that obtained in *Chimbo and Others v The People* (4). In that case, which raised a similar issue whether the warn and caution statement was voluntarily made, two accused persons had claimed at their trial that they had been severely beaten by the police and had, as a result, attended a clinic for treatment. They even produced medical reports to bear out their stories. The findings recorded in the medical reports were consistent with the allegations of the accused persons. The trial judge, like in the present case preferred to resolve the issue before him on the basis of credibility alone. He ruled that if the beatings were as severe as claimed he should have expected the accused to have sustained more serious injuries than were reflected on the medical reports. He believed the police's evidence had found the warn and caution statements to have been freely find voluntarily made. On appeal it wail submitted on behalf of the accused that the trial judge erred in handling the issue of voluntariness on the basis of credibility alone. In commenting on that submission this court said at page 24 in the *Chimbo* case:

> "There is a great force in the submissions made on behalf of the first and second appellants. It is apparent from the record that no or inadequate consideration was given to a number of important issues raised. We do not see how, in the absence of expert medical evidence, any court can disregard a medical report and justify a bare belief on its part that a severe beating

must produce serious injuries. We do not see that such an argument is even relevant to an inquiry concerned faith an allegation that a confession was extracted by force. The Issues which we have already referred to were material and called for consideration if a proper determination of the question of voluntariness were to be made. An approach which fails to deal with all the issues raised and which gives little or no consideration to those aspects of the evidence favourable to an accused person is unsatisfactory. We are, in the circumstances, quite unable to say that had proper consideration been given to all such issues, the earned trial judge would inevitably have found that the prosecution had proved beyond all reasonable doubt that the confessions were voluntary. It follows from this conclusion that we consider the confessions to have been wrongly admitted and that the admission was a misdirection."

Although in the present case no medical report was produced enough evidence was before the trial court to put it on inquiry The first appellant's treatment record existed at a prison clinic in Chipata and by

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invoking its power provided under Section 149 of the Criminal Procedure Code the court could have called a witness to produce that record. That section in the main gives power to any court at any stage of an inquiry, trial or other proceeding under the Criminal Procedure Code to summons any person considered to have in his possession evidence which appears to be essential to the just decisions of the case. Clearly in this case the just decisions of the issue its the voluntariness with which the warn and caution statements were made depended on a meticulous consideration of all the essential arguments put forward by the prosecution as well as the defence including the calling of medical evidence. It was not enough in our view for the judge to have resolved the matter on the basis of credibility alone. It is a serious misdirection for any court to disregard medical evidence, the existence and ready availability of which has been brought to its attention. We therefore come to the conclusion that the war and caution statement of the first appellant was wrongly admitted. We further think that that if the judge had inquired into the first appellant's allegations as to police beatings he might have pursued the allegations of the remaining appellants. In the result we consider that the taint which has been cast over the admissibility of the first appellant's statement should be extended to the statements of the second, third and fourth appellants. After all the four men were being interviewed and interrogated contemporaneously. Therefore, we rule that the statements of the second, third and fourth appellants were wrongly admitted also.

Having concluded that the warn and caution statements ought not to have been admitted, we find it unnecessary to consider the connected argument put forward by Mr. Zulu that the period of time the appellants spent in custody before they were required to make the warn and caution statements tended to suggest the application of duress to induce the appellants to confess.

The next point taken by Mr Zulu touched on the judge's finding in regard to the nature of the injuries the first appellant had at the time of his apprehension. We have already noted that he had multiple cuts on the face and arms and that his explanation of how he had sustained them was that a muzzle loading gun had exploded into his face while he was trying to shoot a duicker. On the other hand the police urged the trial court to infer that the injuries were caused by explosives when the

appellant was blowing up the safe at National Breweries. The trial judge regarded these injuries as one of the aspects of circumstantial evidence on the basis of which he found that the only inference reasonably possible to be drawn was one of guilt. The injuries had been the subject of a medical examination and the doctor's report had stated that they were consistent with those sustainable from an exploding gun. Mr Zulu argued that the judge erred in this connection because the injuries did not lend themselves to only one inference as to their cause.

We have carefully studied the judgement of the court below and find that the learned trial judge did not draw the inference of guilt only on the basis of the evidence relating to those injuries. He had in fact acknowledged in the judgement what the medical report had stated as

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to the cause of the injuries. What the judge did was that he took the cumulative effect of four pieces of circumstantial evidence and then concluded that the erect supported only one inference, namely that of guilt. He was perfectly entitled to do that and therefore Mr Zulu's argument on this point does not find favour with us.

A further point was taken regarding a conflict between two police witness namely Det./Insp. Siamunyati and Det./Insp. Mwangala as to the dates when the first appellant led them to a place where a blue cap was said to belong to the deceased, Isaac Nkhoma, was found. He contended that the conflict raised the question whether the first appellant ever led the police to any place at all. While we accept that the discrepancy does indeed exist, we do not consider it to be very material to the substance of the charges. In any event the first appellant conceded in his evidence that he did lead the police to certain places in the course of investigations and therefore the actual date when that was done is of no essence in our view.

Mr Zulu then queried the evidence showing that when each appellant was taken to a particular place some item of property was found and when another was taken to the same place a different item was recovered. He argued that if the appellants were together when hiding those items of property then which ever of them was first to lead the police to the place they were hidden should have enabled the police to recover all of them at one time thereby obviating the need to take other appellants to the same place. He surmised that the police planted the items where they were found. In the alternative he contended that the deceased Isaac Nkhoma might have been the only one involved in the offences under review and therefore the only one who led the police to the places of recovery of the items.

With due respect to Mr Zulu, his argument on this point is like a double edged sword, in as far as the effect of the argument is speculative. Suppose that the perpetrators of the offences were in panic during their get away time, that could well explain why not all of them would know exactly where each single item which might have been carried by another companion was left. The argument was tempting the court towards a path of speculation but we decline to be led down it. Mr Zulu also referred to the discrepancy in the prosecution evidence showing that while one witness said that one I.O.U. slip of paper bearing the name Phiri was found another witness referred to three I.O.U. slips bearing the names Phiri, Zulu and Kamanga. The only observation we can make on this submission is that the power of observation of different persons varies. It is therefore not necessarily surprising

that the recollection of one witness is not exactly the same as that of another.

The next point taken on behalf of the first appellant was in regard to the finger print evidence. The effect of the argument on behalf of that appellant was that the impressions taken were those he left there after the police had tricked him into touching a number of things at the scene of the crimes. We have examined the evidence both on the record and that which is in the nature of exhibits. We have found that the folien

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bearing the finger impressions carry an endorsement showing that the prints were taken at 0700 hours on the 20th June, 1983. The first appellant had not been apprehended by that time. He was apprehended at Mutenguleni by Det./Insp. Mwangala at 11.00 hours on the 20th June,1983. It is therefore manifest that he could not have been at the scene with the police before 07.00 hours on that date.

Mr Zulu next dealt with the question of dereliction of duty. In this regard he reminded the court that a cash box which had been feloniously removed from the ransacked National Breweries premises was recovered by the police but no evidence was led as to whether there were any finger impressions on it belonging to any of the appellants. In similar vein he argued that all the appellants wore shoes at the time they were apprehended and that it had been shown that whoever had broken into National Breweries premises had-left shoe prints at the scene. He submitted that it was a dereliction of duty that the patterns of the appellants' shoes were not compared with lithe shoe print patterns found at the scene.

Decided cases on the question of dereliction of duty show, inter alia, that where evidence available only to the police is not placed before the court, the court must presume that had such evidence been produced it would have favourable to the accused. The presumption is not necessarily fatal to the prosecution case because the word "favourable" has been construed to mean "in favour of" and nor to mean ":conclusive". (See the case of *Kalebu Banda v The people* (6). In the case of *John Timothy and Feston Mwaba v The People* (6) it was also held that in cases of failure to take finger prints the presumption in favour of the accused will only be made if the article from which finger prints ought to have been taken had a surface on which finger prints could be detected. In the case of *Kapuloshi and Others v The People* (7) it was held that the presumption capable of being drawn in dereliction of duty cases is displaceable by a strong evidence to the contrary.

In the instant case it is true that one of the articles recovered by the police was a cash box which used to be kept in the safe that was blown open at National Breweries.. Goodwell Kabanda the first prosecution witness, a cashier at National Breweries testified that the cash box was one of the articles he identified as having been feloniously removed from National Breweries at the material date. However, there was no evidence led as to the kind of surface it had and in particular it has not been available to us in this court so that we might determine whether the surface it had was such that finger prints could be detected from it. We must observe that the necessary evidence regarding the kind of surface the cash box had should have been produced by the prosecution witnesses or some of them. To the extent that the prosecution did not give such evidence we hold that there was a dereliction of duty to adduce it. Pursuant to the cases earlier referred to we must hold further that

there is a resulting presumption from that failure that had the relevant evidence been given it might have been favourable to the appellants. The other aspect argued in support of the argument that the investigators of this case were guilty of dereliction of duty was that the

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prosecution failed to adduce evidence as to whether the pattern of shoe prints found at the scene matched those of the shoes which the appellants wore when they were apprehended. This aspect is especially relevant to the first and second appellants because they were apprehended within hours after daybreak following the night when the offences being considered here were committed. The evidence shows that Det./Sub. Insp Siamunyati did notice shoe prints which led from the scene of the crimes to a tarmac road and then petered out. Some of these prints had patterns while others were plain. It is evident that while the appellants were in custody as suspects the shoes found on the them at the time of apprehension were with the police. Police Insp. Thompson Zyambo, the 16th prosecution witness, who conducted the identification parade on 22nd July,1983, said that the reason why the appellants did not have shoes on at the time of the parade was that their shoes were at the prison. It is clear therefore that the evidence as to whether the patterns on the appellants shoes were the same as those of the prints found at the scene was available to the prosecution, as was also evidence regarding the possible presence of finger prints on the cash box. The failure to adduce that evidence was a dereliction of duty. However before we can consider the outcome of this dereliction of duty we must move on to consider other matters.

Mr Zulu next called as unfair the manner in which the identification parade was held. He said that of the fifteen persons in the parade from which the first, third and fourth appellants were identified only the suspects had no shoes. To him that meant that the police had deliberately that way made it easy for the identifying witnesses, namely Point Mwanza, Adam Mwanza and Bulisani Phiri, to identify the appellants. We have examined the identification parade pictures taken by Det/Const. James Nkhata and find that there were indeed five persons shown clearly to be barefooted. It is unfortunately true also that those shown as being identified by the witnesses were all barefooted.

The practice of allowing suspects in an identification parade to be manifestly and conspicuously different from the others as regards dress was depreciated in the case of *Chisha v The People* (8), and that of allowing identifying witnesses to see the accused persons at a police station before the identification parade was conducted was equally condemned in the case of *Musonda v The People* (9). To these unfair practices we must add the one complained of in this case, namely allowing suspects to be barefooted while others were not. Needless to mention that police officers conducting identification parades ought to show the highest standard of fairness and impartiality. Evidence of identification based parades which have been unfairly conducted is indefensible and in cases where such evidence is the only evidence implicating an accused person a conviction will be quashed on appeal.

In the instant case however the evidence of witnesses who identified the first appellant was partly that one of the passengers they gave a lift in the Mercedes Benz truck had facial injuries. When they stopped at Mutenguleni that man remained in the vehicle after the other two companions of his had disappeared. The man was still in the truck when

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the police arrived and later picked him up. The appellant's version on this point was that after had sustained facial injuries as a result of the muzzle loading gun exploding in his face, he went to the bus station at Mutenguleni to catch any transport which could take him to the hospital. A man driving a Mercedes Benz motor vehicle came along and agreed to take him to Saint Francis Hospital. He boarded that vehicle but shortly afterwards the police came and picked him up.

Although the first appellant's version as to how he cone to be at Mutenguleni differs from thirst given by three identifying witnesses already named, it is evident that the truck he was found in when the police arrived was that driven by Mr. Point Mwanza. This was confirmed by Det./Insp. Dereck Mwangala who testified that acting on information he had received while at Chipata, he proceeded to Mutenguleni where he found Point Mwanza. The latter told him that the police had been called in because of the man in his truck who had injuries.

As against the first appellant there is the further evidence which incriminates him, namely his finger prints which were lifted from a window inside an office at National Breweries shortly after the discovery of the breaking on the 20th of June 1983. Further still this appellant led the police to a place where the cash box and a blue book certificates of fitness for motor vehicles belonging to National Breweries and other articles the property of the same company were recovered. These articles were identified by Mr. Goodwell Kabanda. Cashier at National Breweries as property of National Breweries stolen in the night of 19-20 June 1983.

It is trite law that real evidence which is relevant to a fact in issue is admissible not withstanding that it is unfairly or illegally obtained. (See Phipson on Evidence, 12th Edition, paragraph 798 on page 342. Thus *Liswaniso v The People* (10) this court, after a wide ranging consideration of cases from a number of Commonwealth Countries, had this to say at page 286:

> "On examination of the authorities on the subject with which we are here concerned two opposing views emerge. The first one is that it is important in a democratic society to control police methods and activities in order to secure a satisfactory assurance of respect for the law it is argued that this can be achieved by denying to the police the right to use the evidence that has been illegally obtained on the basis that it is better that guilty men should go free than that the prosecution should be able to avail itself of such evidence. The second is that it is not desirable to allow the guilty to escape by rejecting evidence illegally procured and that what is discovered in consequence of an illegal act should, it relevant, be admissible in evidence but that the policeman or anyone else who violates the law should be criminally punished and/or made civilly liable for his illegal act. Although the law must strive to balance the interests of the individual to be protected from illegal invasions of his liberties by the authorities on one hand and the interests of the State to Justice persons guilty of criminal conduct on the other, it seems to us that the answer does not He in the exclusion of evidence of a relevant fact."

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In this case the investigating team contravened the Judges' Rules by interviewing the appellants

when they were in custody without first cautioning them. But the articles of real evidence which were recovered pursuant to what the appellants said proved to be relevant to this case. The fact, therefore, that the first appellant was the one who led the police to the places where those articles were found was good evidence against him. It can be seen therefore that in this case there is more evidence against the first appellant than just that of identifying him in the identification parade. This court is consequently of the view that the unfairness in which the identification parade was conducted does not, per se, strike a fatal blow at the prosecution case.

As we have already noted upon a consideration of cases touching on dereliction of duty by investigating officers, the presumption that evidence which was available to the police but which they failed to adduce at the trial was favourable to the accused person can be displaced by strong evidence to the contrary. In the instant case and in so far as the first appellant is concerned there was evidence that his finger prints were found at the scene, he was identified by three witnesses, that in the early part of the morning after the night the offences under review were committed he was given a lift from the Chipata area, and in the course of investigation of this case he assisted the police in the recovery of some of the stolen property. The cumulative effect of these pieces of evidence is that they have resulted in strong evidence which has displaced the presumption resulting from any dereliction of duty of which the investigators of the case were guilty. We are satisfied, in the ultimate, that had the trial judge correctly directed himself on the issues to be resolved he would have inevitably found ample evidence to sustain the conviction against the first appellant on all the counts. In other words we are of the considered view that the group of persons who blew up the safe and stole the money and other items of property mentioned in the indictment was one and the same one which cold bloodedly murdered the security guards mentioned in the remaining two counts of the indictment. The first appellant was undoubtedly one of the persons in that gang. Those persons had the common design of staling from the National Breweries and using any amount of violence available to them to overcome any resistance to the perpetration of the design. We would therefore apply to the case against the first appellant the proviso to Section 15 (1) Cap 52 of the Laws and uphold his conviction on all counts. His appeal therefore fails.

As to the second appellant he too was proved by the evidence of Det/Insp Dereck Mwangala to have been in the Chipata area on the morning following the night of the offences under review. The second piece of evidence against him is that he led the police to the place of the recovery of one blue book for vehicle no ADB 1810, three certificates of fitness for vehicles carrying registration Nos. ADB 152, ADA 5276 and ADB 2792, respectively. It was through him also that the police recovered certain invoices marked "National Breweries". All these documents were proved to be the property of National Breweries at Chipata and to have been removed from the National Breweries on the

occasion of the offences under consideration. The effect of these two pieces of evidence was also to displace the presumption resulting from any dereliction of duty of which the case investigators were guilty. Like in the case of the first appellant we are satisfied and feel sure that had the trial judge properly directed himself on the issues that fell to be resolved he would inevitably have convicted the second appellant on all counts. We, therefore, by parity of reasoning as regards the case of the first appellant, apply to the case of the second appellant the proviso to section 15 Sub Section (1)

Cap 52. We uphold his conviction on all the three counts and dismiss his appeal.

The only evidence against the third and fourth appellants was that of identification by the witnesses, Point Mwanza, Adam Mwanza and Bulisani Phiri. According to the principle formulated in the case of *R v Turnbull and Another* (11) evidence of identification ought to be treated with caution before it can be relied on as founding a criminal conviction. If the quality is not good there is need to look for supporting evidence to rule out the possibility of honest mistake in identification. It is our considered opinion that the evidence of identification of both the third and fourth appellants was of poor quality particularly in the light of the apparent unfairness in the manner in which the identification parade was conducted. There was therefore need for supporting evidence. In the absence of the warn and caution statements and the informal statement made when these two appellants were in custody but when they were not duly warned and cautioned - all these statements having been held in this judgement to have been wrongly admitted - the only pieces of evidence which appear to support that of identification is the evidence that on 27th July,1983, that is more than one month after the commission of the offences charged, the twain led the police to a place where a bunch of partially burnt bank notes were found. The evidence of Mr Goodwell Kabanda, the cashier from the National Breweries, who identified some of the stolen but later recovered items of property, was that the safe had contained some K2,000 odd petty cash. He did not say how that money was made up, that is whether in bank notes or coins. The partly burnt paper money recovered with the assistance of the third and fourth appellants was not described as to how much it amounted to and Mr Goodwell Kabanda was not asked to identify it, assuming that it was identifiable. Another piece of evidence appearing to support the identification evidence touching on the third appellant was that he led the police to a place where a screw driver was recovered. This was said by Det/Sub. Insp Siamunyati. As against the fourth appellant evidence was led by the said Siamunyati that he assisted the police to recover some torch batteries as well as a part of a torch which was described as a head. Neither the screw driver nor the batteries and torch seem to have any material significance referable to the offences under review unless of course one looks at the statements said to have keen made by the appellants when they were being interviewed while still in custody. But we have already ruled that those statements were inadmissible on the basis that they revere obtained in contravention of the Judges' Rules. The net result is that what appears to be supportive evidence in the nature of the partly burnt money, screw driver, batteries and part of a

torch may not be relevant to the changes. It must follow that the identification evidence adduced against the third and fourth appellants had remained of poor quality at the end of the day. In the final analysis we are of the view that the evidence against the third and fourth appellants is tenuous and therefore that the convictions based on the evidence are not safe and satisfactory. We consequently quash all of them and allow the appeals of these appellants.

1st and 2nd Appellants appeal dismissed.
3rd and 4th appeal allowed.
