IN THE SUPRME COURT OF ZAMBIA APPEAL NO. 205 OF 2011

HOLDEN AT NDOLA

(Criminal Jurisdiction)

B E T W E E N:

**GERTHIN CHILUFYA MUSONDA** 1ST APPELLANT

**JOHN MWENYA** 2ND APPELLANT

**BRIAN LUBAMBA** 3RD APPELLANT

**MABVUTO PHIRI** 4TH APPELLANT

-VS-

**THE PEOPLE** RESPONDENT

CORAM: **CHIRWA, AG. DCJ, CHIBOMBA AND WANKI, JJS**

On 6th December, 2011 and 20th March, 2012

For the 1st,3rd and 4th Appellants: Mr. K. MUZENGA, Acting Principal Legal Aid Counsel

For the 2ND Appellant: Mr. L. MOONO of Messrs Nkana Chambers

For the Respondent: Mrs. N.MUMBA, Acting Assistant Senior State Advocate

**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:

1. **Zeka Chinyama and Another -Vs- The People, (1977) ZR 426.**
2. **George Nswana -Vs- The People, (1988/1989) ZR 174.**
3. **Douglas Mpofu and Washington Magura -Vs- The People,**

**(1988/1989) ZR 24.**

1. **Ilunga Kabala and John Masefu -Vs- The People, (1981) ZR 102.**

STATUTES REFERRED TO:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 18.**

The appellants were convicted on two counts and sentenced to death by the High Court, Kitwe.

The first count was for MURDER, contrary to **Section 200 of the** **Penal Code, Chapter 87 of the Laws of Zambia**. Particulars were that on 6th January, 2003 at Kitwe, the appellants, jointly and whilst acting together did murder one Chama Obby Chilumba.

The second count was for AGGRAVATED ROBBERY, contrary to **Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia**. Particulars were that, on 6th January, 2003 at Kitwe, the appellants jointly and whilst acting together, and whilst armed with stones, did steal one motor vehicle registration number ACG 4147 Toyota Sprinter valued at K19,000,000.00 from Chama Obby Chilumba, the property of Simon Musanda and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said Chama Obby Chilumba in order to obtain, retain or prevent the said property from being stolen.

The appellants’ conviction was based on the evidence of five witnesses, namely, Boyd ZULU, PW2; Number 23169 Detective Sergeant Simon CHUSHI, PW3; Simon MUSONDA, PW4; Number 18592 Detective Sub/Inspector Borniface M. SAKATU, PW5; and Number 22984 Detective Constable Lot CHINYANTA, PW6.

PW2’s evidence was that, on 8th January, 2003 around 11.00 hours while he was at KMB, Musonda CHILUFYA, 1st appellant whom he had known before went to him and told him that he went to sell a spare wheel to the Congolese at Chisokone but were not willing to buy it. He therefore went to him to borrow K5,000.00 for transport. He agreed to lend the 1st appellant K5,000.00 and he left the spare wheel as security. Two days later, the 1st appellant went to him with Police Officers to whom he surrendered the spare wheel. He identified the spare wheel and the Court marked it as ID2.

PW3’s evidence was that, as a Scenes of Crime Officer, on 12th January, 2003, he visited the Scene of Crime for Murder off Chibulu Market, Kalulushi Road. He was in company of other Police Officers; the owner of the motor vehicle and suspects whom he came to know as Gerthin Chilufya MUSONDA, John MWENYA, Brain LUMAMBA and Mabvuto PHIRI. The suspects led him to the Scene of Crime at Old Charcoal Stream where they alleged to have buried the taxi driver after murdering him. Before exhuming the body, he took some pictures and he asked the suspects to demonstrate how they got hold of the deceased Obbie CHAMA.

They demonstrated how they dug a shallow grave before burying the deceased. He took pictures of that demonstration. The whole body was covered by soil except the toes which were not covered. The body was decomposed.

He took pictures of the four appellants leading them to the Scene through the foot path; how they threw the deceased on the ground; and how they were pointing at the grave they had dug.

His evidence under cross-examination was that, all the appellants said that they knew where they buried the deceased and were all able to lead him there. It was not 1st appellant who led them, but all four appellants. In front and photo 2 shows the 1st appellant. It was not one person leading them. As it was a bush path, the suspects were changing. On photo 1, the 1st appellant was behind the 2nd appellant. All of them gave him the information as to direction. On that basis the appellants led them to the Scene. All demonstrated.

PW4’s evidence was that, he had a car which was a taxi and he had as his driver CHAMA.

On 5th January, 2003 his driver went out with the taxi Registration Number, ACG 4147. It took three days without him returning. He looked for him, but he did not find him. Later, on 9th January, 2003 he decided to report to the police and on 11th January, 2003 he went to the Police Station. It was then that, the police asked him to accompany them to a house in Ndeke Village where he identified his taxi which was parked in the garage which was inside a fence. Thereafter, the police searched the owner of the house the 1st appellant and his car keys were found in the pockets. When he was asked, he said he lent CHAMA K500,000.00 and he got the vehicle as security, and that CHAMA had gone to Tanzania. When he was asked about the spare wheel, the 1st appellant said he had given his friend to sell it. Thereafter, he led them to the recovery of the spare wheel.

Later, the 1st appellant said he was with his friends who stayed at St. Anthony. They went and the police apprehended them. Thereafter, he was invited to accompany the police where the appellants had buried CHAMA in the bush. They went with the appellants who pointed where they buried him. After exhuming the body, he recognized it as that of CHAMA.

PW5’s evidence was that, on 12th January, 2003 he learnt that the 1st appellant was apprehended as a suspect for murder and aggravated robbery after a Toyota Sprinter motor vehicle was recovered from him without the driver of the motor vehicle. When he was asked as to the whereabouts of the driver, he said he could not recall anything unless his friends who were with him were apprehended in the compound. Subsequently, the 1st appellant led them to St. Anthony Compound where the other three appellants were apprehended. They were taken to the police station where the appellants were interviewed separately about the motor vehicle and the whereabouts of the driver. As the appellants were being interviewed, the 2nd appellant, said, ‘MUSONDA don’t waste time to show them where the body of the driver is buried in Kalulushi Area.’ Then Brain LUMAMBA (the 3rd appellant) and Mabvuto PHIRI (the 4th appellant) said the same.

Thereafter, the 1st appellant said that, ‘since everything has been revealed, they would lead them where the body was.’ Then a Scenes of Crime Officer, (PW3) and other police officers went with them. They were directed to Chibuluma road by the 1st appellant together with his friends. They proceeded in the direction of Kalulushi, and after crossing the railway line, they turned into an access road up to where it ended.

After, that the 1st appellant showed them where the vehicle was parked before the driver was killed. He then showed them how they dragged the driver from the vehicle. Since all the appellants knew, he made them to be in a single line and to be changing as they walked to the place where they buried the driver. They showed them at a place where charcoal was burnt sometime back near an anthill. There the 1st appellant pointed at a place where they buried the driver and all confirmed. Thereafter, they exhumed the body, and it was taken to Kitwe Central Hospital.

His evidence in cross-examination was that, there was no material evidence connecting the 2nd appellant. The evidence connecting him was the story of the 1st appellant that he was there. The 1st appellant implicated the 3rd and 4th appellants. He warned and cautioned the appellants before they went to the police. The 1st appellant was the leader who was leading and when he pointed at the grave all confirmed that, that was the place. There was nothing found on the 3rd and 4th appellants.

PW6’s evidence was that, on 10th January, 2003 he was assigned a docket of conversion not amounting to theft. On 11th January, 2003 he received information about a vehicle that was parked at a certain house. Acting on the information, they went to the house in Ndeke Village accompanied by the complainant, PW4.

At the wall fenced house they found the vehicle that PW4 identified in the garage. When they asked the wife the whereabouts of her husband, she told them that he had gone to town. Since he knew the owner of the house, they went to town where they found him. Upon searching him, the 1st appellant was found with car keys which opened and started the vehicle.

When he was asked about the vehicle, the 1st appellant said that Obbie CHAMA left it at his house for safe keeping and had gone to Tanzania. Later, the 1st appellant said he bought the vehicle from Brian LUMAMBA, Mabvuto PHIRI and CHISENGA. After that the 1st appellant took them to St. Anthony compound where they found the other appellants at a tavern. The 1st appellant pointed at the three other appellants as the people who sold him the motor vehicle in question.

When they returned to the police station, the appellants were interviewed separately. In the course of the interview, the 2nd appellant told him that they killed the driver who was driving and had buried him somewhere. After that, they brought them together and all agreed that they had killed the driver and buried him somewhere. On the same day, they led them to Mindolo where they buried the driver. They were in a convoy in a single line since they were on a path and first in front was the 1st appellant, then they were changing until they reached where the driver was buried. They then exhumed the body after which it was taken to the hospital.

On 13th January, 2003, the 1st appellant led him to KMB where he sold the spare wheel to Boyd ZULU, PW2 and he recovered the spare wheel. Later, on 14th January, 2003 a postmortem was conducted on the body of the deceased. Subsequently, he arrested the appellants for the subject offences.

His evidence in cross-examination was that, all the appellants were leading him to the Scene because they were changing positions to go in front as the path was narrow. The connection of the 3rd and 4th appellants was the leading and not the implication by the 1st appellant. The appellants were in front. Apart from leading them to the Scene, there was no other evidence against the 3rd and 4th appellants.

The 1st appellant in his defence stated that, in the first place he knew nothing about the matter. On the day of his apprehension, he was found at CR Bus Station drinking beer. The three police officers picked him and his friend and took them to Kitwe Central Police Station where he was put in the cells without being asked any questions. The following day at 04.05 hours, the very police officers who picked him took him to Riverside where they took him to a certain house and asked him to identify the owner of that house. He failed to identify that person and they brought him back to Police Station. The same man was summoned to the Police Station. In his presence they interviewed him as to whether he knew him and what he used to do. After those questions, the man was set free and he was taken back to the cells.

The 2nd appellant in his defence stated that, he did not know the 1st appellant. On 12th January, 2003 he was at St. Anthony Compound drinking Chibuku beer. Later, he saw three police officers who came where he was. They asked him to give them the beer he was drinking in order to taste it. He was then apprehended by the police officer who was behind others and taken to a van where he found other people he did not know. He was taken to Central Police Station. He did not see any person who pointed at him to the police.

He further stated that, at the Police Station he was put in the cells he found three people he did not know. While in the cells, the police asked him whether he knew them and he denied. The police charged him with the offences of aggravated robbery and murder. He did not lead the police where the body was recovered as PW3, PW5 and PW6 stated. The one who led the police to the scene was the 1st appellant. The police did not find him with any property of the deceased. Nobody saw him kill Chama.

The 3rd appellant in his defence stated that, on 12th January, 2003 at 15.00 hours, he was drinking beer at Chiseke tavern in St. Anthony Compound. There were many people in the tavern. Whilst drinking, there came some police officers who apprehended him. He did not know why he was apprehended. After searching his house, the police took him to Central Police Station. He was apprehended alone. At the Police Station, the police started beating him because he was refusing to admit the charge of murdering a person. He was beaten by Sakatu and Chinyanta.

He further stated that after that, he was put in the motor vehicle with other people he didn’t know. He found the three people at the Police Station in the office. These were Mabvuto Phiri, John Mwenya and Musonda Chilufya. While in the motor vehicle they blind folded him with a black cloth. He did not know where they were going. When they reached the bush they removed the black cloth from his eyes. The police were in front and after a short distance they reached at a certain point where the police ordered them to dig out. He was following the police officers behind. These were three police officers in front. They were the ones who were behind the police officers.

The road was about three metres. It was only one person who could walk on the road. Apart from the police the 1st appellant was leading the group. When they reached a certain place the police started to dig, after digging they found a dead human body. They took the body into the motor vehicle fearing that if they did not do that they would be killed. From there, they were taken to the Police Station where after explaining the charge to them they were arrested. He denied the charge, that it was not him who killed the deceased. There was nothing found in his possession. On 6th January, 2003 around 21.00 hours he was at home.

The 4th appellant stated in his defence that, he did not recall the 6th January, 2003 at 20.30 hours. On 12th January, 2003 as he was at his stand, in St. Anthony selling diesel he was approached by police officers who ordered him to follow them. When he asked them where they were going, the police officers said he shouldn’t argue, if he did then it meant that he knew something. He accompanied them, and was put in a vehicle where he found some people who appeared to have been assisting the police. He did not know them. They were taken to Kitwe Central Police Station where he was put in cells in which he found about ten people. He was asked to point at the people he knew but he didn’t know them.

In side the room he was blind folded with a black cloth before they were put into a vehicle and ordered to lie down. After that, they started going to an unknown place. When they removed the black cloth from his eyes, he discovered they were in the bush.

From there, they walked a short distance. When they reached at a certain spot, they were ordered to dig and remove the soil. From the vehicle was a small path for one person. There were three police officers, and one of them was taking photos. He was in the middle within the road as many police officers were on their sides. Musonda, the 1st appellant followed behind the police who were in front. After digging they found a dead body of a person. He did not know the deceased. They were ordered to put the dead body into the motor vehicle. Thereafter, they were told to get into the same vehicle. He had never been to that place before. From there, they went to Kitwe Central Hospital. They were with police and other people. They exhumed the body with Musonda, Brian and John.

Thereafter, they were taken to Riverside Police Cells where he remained and the other three were taken to Central Police. The reason why he was detained was that they had murdered a person and took away his motor vehicle. After arresting them, he denied the charge that he was not involved in the case. From there he was taken to Central Police Station and then to Kamfinsa State Prison.

The Court below after considering the evidence found that, the prosecution had proved both charges against all the appellants beyond reasonable doubt and found them guilty on both charges, and accordingly, convicted them as charged. The appellants were then sentenced to death.

Dissatisfied with their conviction and death sentence, the appellants appealed to the Supreme Court against their conviction and the death sentence. The 1st, 3rd and 4th appellants have advanced three grounds of appeal, namely:-

**GROUND ONE:**

**The learned trial Court erred in law and in fact when it proceeded to hear the case in the absence of a legal representation of the appellant’s** **choice.**

**GROUND TWO:**

**The learned trial Court misdirected itself in law and in fact when it allowed confessions and unfairly obtained statements to be placed on the record of the Court considering that he was not represented.**

**GROUND THREE:**

**The learned trial Judge erred in law and in fact when it convicted the 3rd and 4th appellant on unreliable co-accused’s evidence and the unfairly obtained evidence.**

Further, to the fore grounds of appeal, the 1st, 3rd and 4th appellants filed heads of argument which were augmented by submissions at the hearing.

In support of the first ground of appeal, on behalf of the 1st appellant, it was pointed out that throughout the beginning of the trial, the appellant sought and asserted his right to be represented by Counsel of his own choice. When he realized it may be difficult to get Counsel of his choice, he opted for legal aid representation, but because of the conflicting interests of the appellants, he requested to be given separate Counsel. After his futile attempts, he decided to protest by way of disrupting proceedings so as to assert his right.

It was further pointed out that, the 1st appellant was facing the charges of aggravated robbery and murder which are both capital offences and was at peril of being sentenced to death.

We were referred to Article 18(2) (c) and (d) of the Constitution of Zambia which provides:-

**“Every person who is charged with a criminal offence -**

**(c) Shall be given adequate time and facilities for preparation of his defence;**

**(d) Shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the Court in person, or his own expense, by a legal representative of his own choice.”**

It was contended that the foregoing provisions are mandatory, thereby, implying that there should be no compromise.

It was submitted that the requests for adjournment; the concerns of conflicting interest; and the requests for Legal Aid Counsel of his choice were genuine and ought to have put the trial Court on notice and make appropriate arrangements.

It was further contended that, when the trial Court decided to proceed in disregard of the 1st appellant’s rights, it fell in error.

It was prayed on this ground that the appeal be allowed and in the interests of justice and compliance with the Constitution a retrial be ordered before a different Judge.

In relation to ground two, it was pointed out that, it was clear from the record that the interviews which were conducted by the police with the 1st appellant were full of violations of the Judge’s rules. The police knew very well that the 1st appellant was a suspect they proceeded to interview him without informing him of his right. The same applied to the evidence of leading and demonstrations.

It was submitted that, the evidence of leading and demonstrations, amounted to confession statements which must in ordinary situations be subjected to the test of voluntariness.

It was further submitted that, the 1st appellant was not represented, thus the trial Court ought to have asked him whether they were free and voluntary or not, failure to do so, was a misdirection.

It was contended that, it was clear from the evidence of PW5 that, there was a blatant breach of the Judge’s rules. It was further contended that, even if those pieces of evidence were held voluntary, they ought to be excluded on the basis of unfairness. The 1st appellant relied on the case of ***ZEKA CHINYAMA AND OTHERS -VS-*** ***THE PEOPLE***. (1)

It was pointed out that, if the above evidence was excluded, the only evidence against the 1st appellant would be that of being found in possession of recently stolen property.

In support, we were referred to the case of ***GEORGE NSWANA*** ***-VS- THE PEOPLE*** (2) where we held that:-

**“The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case, that indicate that, the applicant cannot reasonably claim to have been in innocent possession, was the thief or a guilty receiver.”**

It was contended that, the leading in the case at hand was faulty as alluded to earlier and the recovery of the deceased’s body could have been occasioned by any of the other co-accused persons.

It was finally submitted that, the only possible offence was that, of receiving stolen property and not that of the major offence which could reasonably be inferred from the facts.

It was prayed on this ground that this Court allows the appeal, quash the convictions and in their place find the 1st appellant guilty of receiving stolen goods and impose an appropriate sentence.

In support of ground three of the appeal, it was pointed out that, the main evidence against the 3rd and 4th appellants was that of being implicated by the 1st appellant and that of demonstrations, which as earlier alluded to amounted to confessions which must be voluntary.

It was contended that, notwithstanding that Counsel for the 3rd and 4th appellants never objected to the evidence in question, that evidence must be excluded as not having been fairly obtained, as there being no evidence of compliance with the Judge’s rules.

The appellants relied on the case of ***ZEKA CHINYAMA AND*** ***OTHERS -VS- THE PEOPLE*** (1) in which we held *inter alia* that:-

1. **When dealing with an objection to the admission of an alleged confession the trial Court must first satisfy itself that it was freely and voluntarily made; if so satisfied, the Court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore strictly speaking admissible, on the ground that in all the circumstances, the strict application of the rules as to admissibility would operate unfairly against the accused;**
2. **The Court is not required in every case to make a decision whether or not in the exercise of its discretion to exclude a confession; where every circumstance which might conceivably be regarded as indicating unfairness has been considered in the very decision that the confession was voluntary the question of the exercise of the Court’s discretion does not arise;**
3. **The question of the discretion to exclude a confession made to a police officer falls to be considered when such confession has been held to have been voluntarily made, but there has been a breach of the Judges’ rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to judge that there is danger of unfairness;**
4. **The circumstances in which the reception of evidence would operate unfairly against an accused will depend on the facts of a particular case and do not lend themselves to precise definition. The discretion ought to be exercised in favour of the accused where, but for the unfair or improper conduct complained of the accused might not voluntarily have provided the evidence in question or the opportunity to obtain it.**
5. **The Court must be satisfied on a balance of probabilities that its discretion to exclude evidence ought to be exercised.”**

It was contended that, the evidence against the 3rd and 4th appellants was manifestly unreliable and a conviction for the subject offences cannot be upheld.

It was therefore submitted that, in the absence of corroborative evidence, it is not safe to uphold a conviction in respect of the 3rd and 4th appellants.

It was finally prayed on this ground that, this Court allows the appeals, quash the convictions, set aside the sentences acquit the appellants and set them at liberty.

In respect of the 2nd appellant, Mr. MOONO informed the Court that, he was advancing three grounds of appeal on his behalf.

**GROUND FOUR:**

**The Court below erred when it convicted 2nd appellant on uncorroborated evidence.**

**GROUND FIVE:**

**The Court below misdirected itself when it convicted the 2nd appellant on the evidence of 1st appellant.**

**GROUND SIX:**

**The Court below erred in law and fact when it allowed the confession.**

Mr. MOONO informed the Court that, he proposed to argue the first and second grounds as one.

He pointed out that, the only evidence which was before the Court below, was that the 1st appellant led to the apprehension of the 2nd appellant from St. Anthony in Kitwe.

He submitted that, that was the uncorroborated evidence that led to the conviction of the 2nd appellant. There were no exhibits found on the 2nd appellant and there was no one who saw him commit the offence. The 1st appellant in his evidence denied implicating 2nd appellant.

Mr. MOONO further submitted that, the Court below fell in error by failing to identify the person who led the police to the recovery of the body of the deceased. He contended that, it was not possible for all appellants to lead the police to the recovery of the body.

He further contended that, the trial Court, made findings of fact that the 2nd appellant made admission to have committed the offences when there was no confession to that effect.

He finally submitted that, it was not safe to convict on the evidence of the police alone. He prayed that the 2nd appellant be acquitted.

On behalf of the respondent Mrs. MUMBA, Acting Assistant Senior State Advocate submitted that, she supported the conviction of the appellants.

In response to the grounds of appeal and arguments on behalf of 1st, 3rd and 4th appellants, she submitted that the Court below was on firm ground to have proceeded with the case against 1st appellant.

He was afforded enough opportunity to prepare his defence in accordance with Article 18 of the Constitution. She pointed out that, the case was adjourned for more than a year. The application for the 1st appellant to represent himself was made by Counsel who informed the Court that the 1st appellant, wished to represent himself. It was against that background, she submitted, that the Court below was on firm ground. Thereafter, the 1st appellant was given opportunity to recall the witnesses.

She argued that, it was not the duty of the Court to force an accused to be represented. She prayed that the Court finds that the Court below did not err when it proceeded.

In respect of the other grounds, she submitted that there was sufficient evidence against all the appellants.

As for the 1st appellant, Mrs. MUMBA pointed out that, he was found in possession of the vehicle that was being driven by the deceased. He did not give any explanation as to how he came in possession of the vehicle; and he led the police to the recovery of the decomposed body of the deceased. She submitted that, there was no evidence that the police knew where the body was before they were led. There was evidence that all four led the police. Mrs. MUMBA contended that, the guidelines in the case of ***DOUGLAS MPOFU AND WASHINGTON MAGURA -VS- THE PEOPLE*** (3) were met. At the scene all demonstrated.

As regards the 2nd appellant, Mrs. MUMBA pointed out that, it was not disputed that at the time of his apprehension, the 2nd appellant told the 1st appellant not to waste time but to lead the police to the body.

She submitted that, notwithstanding the absence of enquiry as to voluntariness of the confession, the Court below was on firm ground. She finally, implored the Court to confirm the conviction of the four appellants.

In reply, Mr. MUZENGA pointed out, in respect of ground one of appeal that according to the record of appeal at page 18, the matter started on 12th January, 2003. There were a number of adjournments, not all were occasioned by the 1st appellant. He contended that a period of one year could not be considered to be unreasonable. It was not unreasonable for the 1st appellant to request that he be represented by more than one Lawyer to avoid conflict of interest.

He submitted that, the failure to accord the 1st appellant legal representation caused evidence which was prejudicial to the 1st appellant and which was not supposed to be admitted.

Mr. MOONO in reply pointed out that at page 53, line 23 of the record of appeal, when he cross-examined him the 1st appellant answered that: **“I have no idea how my co-accused persons, I don’t know them -.”**

He submitted that, the vehicle was not found in possession of 2nd appellant.

He further submitted that, the evidence that the 2nd appellant told the 1st appellant not to waste the police time should not be taken as the truth. That evidence came from the police which was meant to convict 2nd appellant.

We have considered the grounds of appeal; the arguments in support; the submissions on behalf of the parties and the judgment of the Court below.

In the first ground, the 1st appellant has attacked the trial Court for proceeding with the hearing of the case in the absence of a legal representative of his choice.

It was argued on his behalf that the Court below’s decision to proceed with the case violated Article 18(2) (c) and (d) of the Constitution which provides that:-

**“Every person who is charged with a criminal offence –**

**(c) Shall be given adequate time and facilities for the preparation of his defence;**

**(d) Shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the Court in person, or at his own expense, by a Legal representative of his choice;**

The issue that we have to determine is whether the Court below’s decision to proceed with the trial in the absence of the 1st appellant’s legal representative was in breach of the foregoing provisions and amounted to the 1st appellant not being accorded a fair trial.

From the record of appeal; when the case came up on 5th August, 2003, the 1st appellant informed the Court that he had hired Mr. MWANSA. The case was then adjourned for trial. On 6th November, 2003, the 1st appellant informed the Court that the Lawyer he wanted earlier was found to be expensive so he went to Mr. DAKA whom they paid. The case was then adjourned to 10th November, 2003. On that day, the 1st appellant applied for an adjournment on the ground that he was waiting for his Lawyer.

The case was accordingly, adjourned to 11th November, 2003. When the case came up on that day, Mr. BWALYA informed the Court that the 1st appellant still declined and says he still wanted his Lawyer Douglas DAKA. The 1st appellant asked the Court to find him a private Lawyer. The case was then adjourned.

When the case next came up on 12th November, 2003, the 1st appellant informed the Court that, he would like the Legal Aid to represent him separately because his interest in the matter was different from the other accused persons. Mr. BWALYA, on behalf of the 3rd and 4th appellants complained that the matter had been adjourned on three occasions and that Legal Aid did not have adequate manpower to afford two Lawyers in one case.

It was then that the Court directed that the 1st appellant would stand on his own.

As would be noted from the foregoing, the 1st appellant was afforded adequate opportunity to retain a legal representative of his own choice at his own expense. When he failed, he made what we would consider an unreasonable demand that he be given a Legal Aid Counsel of his own; which was not tenable in light of the shortage of manpower.

We do not see the conflicting interest which could support the first appellant’s request for legal aid Counsel of his own.

We would therefore agree with Mrs. MUMBA that the 1st appellant was given adequate time to find Counsel of his own choice.

The Court below cannot be faulted for directing that the 1st appellant would defend himself, as that is within the provisions of **Article 18(2) (d)** of the Constitution.

In the circumstances, we find no merit in ground one of the appeal.

In ground two, the Court below has been attacked when it allowed confessions and unfairly obtained statements to be placed on record.

The complaint, according to the submissions, relates to the interviews with the 1st appellant, the leading and the demonstrations which are said to be in breach of the Judges’ rules.

It is clear from the record of appeal that, the 1st appellant and Counsel, who was representing the 3rd and 4th appellants, did not raise any objection to the evidence being complained of.

Further, from the record of appeal, at page 36, PW5 stated that all were cautioned about the offence they had committed. That was before each of the appellants was interviewed and before the leading where the body was buried. There was therefore no violation of the Judges’ rules.

In the circumstances, the Court below did not misdirect itself in law and fact when it allowed the evidence relating to the confessions, the leading and demonstrations by the 1st appellant.

In any case, there was overwhelming evidence against the 1st appellant. He was found in possession of the vehicle and keys, and he led to the recovery of the spare wheel.

In the circumstances, we find no merit in ground two of the appeal. The same is dismissed.

In ground three of the appeal, the Court below has been attacked, when it convicted the 3rd and 4th appellants on the unreliable co-accused’s evidence.

We have considered the evidence that was adduced against the 3rd and 4th appellants as contained in the record of appeal.

It was contended that the main evidence against the 3rd and 4th appellants is that of being implicated by the 1st appellant and that of leading and demonstrations.

The evidence linking them to the offences was that given by PW3, PW5 and PW6 that the two participated in the leading to the scene and demonstrations.

In the case of ***DOUGLAS MPOFU AND WASHINGTON MAGURA -VS- THE PEOPLE***, (3) we held that:-

**“Where a number of accused persons are alleged to have led the police to where incriminating evidence is found it is essential for the trial Court to ascertain what is exactly meant by ‘leading.’ Except in the most exceptional cases only one person could do the actual leading and evidence should be advanced to show which of a number of persons alleged to have done the leading did in fact have the guilty knowledge.”**

In the evidence that was adduced before the Court below, PW3, PW5 and PW6 stated that all four appellants led them to where the body was found. That evidence in our view is not in accordance with the guidelines in the above case. The trial Court, in its judgment, did not ascertain which of them did the leading. In fact, the Court below, in its judgment did not base the conviction of the 3rd and 4th appellants on the evidence of leading. It instead, based it on the circumstantial evidence which it said had taken the case out of the realm of conjuncture, which could permit only an inference of guilty. The Court below did not state what could have amounted to the circumstantial evidence. A search through the evidence that was adduced before the Court below as contained in the record of appeal has not revealed the existence of any other evidence linking the 3rd and 4th appellants to the offences.

In the circumstances, we find merit in ground three of the appeal. The appeal by the 3rd and 4th appellants is allowed. The convictions are quashed and the sentences imposed on them are set aside. They are acquitted.

In ground four of the appeal, the Court below has been attacked for convicting the 2nd appellant on uncorroborated evidence.

We have considered the evidence against the 2nd appellant, as contained in the record of appeal.

The evidence linking the 2nd appellant was that he advised the 1st appellant in the presence of PW5 and PW6 not to waste the police’s time but to lead the police where they buried the taxi driver; that he admitted that they had killed the driver who was driving and had buried him somewhere; and that he led the police to the scene where he demonstrated. Mr. MOONO represented the 2nd appellant in the Court below, but he did not object to the foregoing evidence being admitted. The evidence against the 2nd appellant did not require corroboration.

The Court below cannot be faulted, for convicting the 2nd appellant. We therefore, find no merit in the fourth ground of the appeal. It is, accordingly, dismissed.

In ground five of the appeal, the 2nd appellant has attacked the Court below when it convicted him on the evidence of the 1st appellant.

From the evidence in the record of appeal, the 2nd appellant’s conviction was not based on the evidence of the 1st appellant. As discussed in ground four of the appeal, the 2nd appellant advised the 1st appellant not to waste police’s time; he admitted the offence; and led the police to the scene where he demonstrated. The only part, the 1st appellant played was in the apprehension of the 2nd appellant and the others.

In the circumstances, we find no merit in ground five of the appeal. It is, accordingly, dismissed.

In ground six of the appeal, the 2nd appellant has attacked the Court below when it allowed the confession.

We have, considered the evidence as contained in the record of appeal.

We note that Mr. MOONO represented the 2nd appellant throughout the trial.

However, we note that he did not raise any objection when the evidence was introduced that the 2nd appellant advised the 1st appellant not to waste police’s time; that he confessed to having killed the taxi driver and buried his body; and that he led to the scene and demonstrated. There being no objection, the Court below cannot be faulted. As a Senior Counsel, Mr. MOONO could not expect to be asked. He was expected to rise and object to any evidence that he felt incriminated the 2nd appellant.

In the circumstances, we find no merit in ground six of the appeal. It is, accordingly, dismissed.

In the light of the foregoing, we find no merit in the appeal by the 1st and 2nd appellants which is accordingly, dismissed.

The conviction of the two appellants and the sentence imposed on them are accordingly confirmed.

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D. K. Chirwa,

**ACTING DEPUTY CHIEF JUSTICE**

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H. Chibomba, M. E. Wanki,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**