**IN THE SUPREME COURT FOR ZAMBIA APPEAL NO 68c/2004**

**HOLDEN AT NDOLA AND KABWE**

(**Criminal Jurisdiction**)

**B E T W E E N:**

**SIMON MWANSA APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CORAM:** **Mumba, Ag/DCJ., Chibomba and Phiri JJS**

**On 20th March, 2012 and 15th August, 2012**

**For the Appellant: Mr. M.N. Chomba, Acting Deputy Director, Legal Aid Board.**

**Ms. M.T. Weza, Acting Senior Legal**

**Aid Counsel.**

**For the Respondent: Ms. M.T. Mumba Acting Senior State**

**Advocate.**

**JUDGMENT**

**Mumba, Acting DCJ, delivered the Judgment of the Court.**

*Cases Referred to:-*

1. ***Chimbini Vs The People (1973) ZR 191***
2. ***Nyambe Vs The People (1973) ZR 228***
3. ***John Mkandawire and Others Vs The People (1978) ZR, 46.***
4. ***Jack Maulla and Asukile Mwapuki vs The People (1980) ZR 119***
5. ***Green Nikutisha Vs The People. (1979) ZR 16***
6. ***Mwansa Mushala and Others vs. The people (1978) ZR 58***

This is an appeal against conviction and sentence. The appellant was convicted on the second count of aggravated robbery contrary to **Section 294** (2) (a) **of the Penal Code, CAP 87.**

The particulars were that the appellant together with other assailants on 26th April 1999 in Lusaka in the Lusaka District of Lusaka Province of the Republic of Zambia, jointly and whilst acting together and whilst being armed with an offensive weapon namely, AK47 rifle, did rob Ronnie Kapisha of 1 carpet, 2 mountain bicycles, 1 sharp radio cassette, 2 wall clocks, I sharp television, 3 pairs ladies shoes, 5 blankets, I bed spread, I double mattress, 2 suitcases, 1 cooler box, 1 black coat, 1 hand bag, 3 serving pots, 1 suits, 1 jersey, US$111, 2 (graduate and post graduate) Certificates

of degrees in Economic Science, 1 diploma, 2 presentations and 2 sewing machines altogether valued at K11 million, these being property of Ronnie Kapisha and at or immediately before or immediately after the time of robbery did use or threaten to use actual violence to the said Ronnie Kapisha in order to prevent resistance to the property being stolen.

Upon conviction the appellant was sentenced to death.

There are three grounds of appeal:

The first ground of appeal is that under circumstances of the case, the learned trial Judge erred in law and fact when she convicted the appellant on the evidence of a single identifying witness.

The second ground of appeal is argued in the alternative to the first ground that the learned trial Judge erred in law and in fact when she convicted the appellant of armed aggravated robbery when there was no evidence to support the conviction.

The third ground of appeal is that the learned trial Judge erred in law and in fact when she sentenced the appellant to death without considering the evidence on record.

There were written heads of argument which were augmented by oral submissions in support of the appeal.

In supporting the first ground of appeal, Mr. Chomba, first pointed out the details of Section 294 (1) (2) (a) of the Penal Code. He submitted that for the offence to constitute armed aggravated robbery, the accused must be (1) armed with an offensive weapon or, being together with one or more persons (2) steals anything and, (3) at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property (4) with intent to obtain or retain the thing stolen, or prevent or overcome resistance to its being stolen or retained. He submitted further that to established an offence under 294 (2) (a) of the Penal Code, the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act, Cap 110, that it was a lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.

Mr. Chomba submitted that the case against the appellant was based on the evidence of PW3, Keagan Kapisha, who testified that during the robbery the appellant who was the 3rd accused, came

into the room saying, **“time is going, its morning**” and the fact that the appellant was found in the house full of some of the identified stolen property. It was also submitted that the evidence of PW3 alluded to the fact that he did not know the appellant before the incident.

Mr. Chomba contended that although it was competent to convict on the evidence of a single identifying witness, there was always a risk of an honest mistake on the part of the witness, the trial court ought to have warned itself against that risk on the evidence of a single witness in that the evidence should be tested with particular care in order to eliminated the risk.

In support of this submission Mr. Chomba relied on the cases **Chimbini vs. the People¹** and **Nyambe Vs the People**².

In ***Chimbini’s case1****, this* court stated: -

***“it is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect, where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of* *the witness is not sufficient; the court must be satisfied that he is reliable in his observation.”***

In ***Nyambe’s case2***, this court said:

***“The witness should specify by what features or unusual marks if any he alleges to recognize the accused and the circumstances in which the accused was observed the state of light, the opportunity for observation, the stress of the moment should be carefully canvassed”.***

He submitted that the test of reliability failed after examining the evidence on record. The trial court did not satisfy itself that given the opportunity for observation, PW3 did not give an accurate description of the assailant whom he observed so briefly and further, that because of fear, it could not be said that PW3 had sufficient opportunity to observe the assailant. It was submitted that PW3 had a fleeting moment to observe the assailant whilst hiding under the bed and that from that hiding place PW3 was not able to observe the physical features of the assailant. It was contended that from where PW3 was, he could not have had an opportunity to see what was happening as well as observe the assailant to be able to identify him. In support of these submissions, the case of ***Mwansa*** ***Mushala & Others vs.*** ***The people6*** was reliedupon. In that case, it was held that:

“***where the period for observation was so momentary and fleeting the witness could not be said to have had sufficient opportunity to observe.”***

Mr. Chomba further submitted that PW3 did not give any description of the features of the appellant and the trial court did not test the evidence of PW3 to the required standard when it concluded that PW3 was in a position to accurately identify any of the assailants, let alone the appellant. Thus the conviction based on the evidence of PW3 was not safe as his evidence ought to have been discounted.

Mr. Chomba submitted finally, that even though the appellant was found in the house of his brother-in-law where stolen goods were also found, the explanation of the appellant was sufficient. For some of the goods later identified as stolen from the house of PW1, the appellant had explained that they were bought by his brother- in-law; that an opportunity was available for the goods to change hands from the time of theft to the time of recovery of the said goods.

On the second ground of appeal, which was argued in the alternative to the first ground of appeal, Ms. Weza submitted that the trial Judge erred in law and fact to convict the appellant of armed aggravated robbery when there was no direct evidence to support it.

Ms. Weza further submitted that PW1, PW2 and PW3 who were eye witnesses did not give any evidence of seeing the alleged gun used in the commission of the offence. She contended that these prosecution witnesses only heard gun-shots, later, empty cartridges were found on the scene. Counsel contended that it is very difficult to distinguish a gun-shot from the sound of fireworks, and that it was possible that it was the sound of fireworks which were heard. She submitted that empty cartridges found at the crime scene, enabled the trial court to determine that there was use of a fire arm as defined in the Fire Arms Act. She submitted that even though the Police Officer who was handling the case had died, as the same were not personal property, they could have been presented by the Police Officer who took over the case, yet he failed to produce them before the court. She contended that it was dereliction of duty on the part of the police when they failed to conduct an examination of the cartridges found on the scene. She submitted that without production of physical evidence to support the charge when such was critical to the case, it meant that the prosecution had failed to prove the charge beyond reasonable doubt. Such doubt, it was submitted, should have been resolved in favour of the appellant.

On ground 3, it was submitted that the sentence was excessive in view of the fact that there was no direct evidence of the use of a firearm. It was submitted that the sentence should therefore be set aside and the appeal upheld.

Ms. Mumba,on behalf of the State, supported the conviction and submitted that the trial court was on firm ground when it convicted the appellant on the second count. With regard to defence submissions on the single identifying witness, Ms. Mumba submitted that PW3, who saw the appellant during the robbery, he made reliable observations. On page 15 of the record, the evidence shows that PW3 was calm when he observed the appellant for about four minutes, he was able to describe appellant’s body built and height. Further, that because the robbery took about twenty to thirty minutes, PW3 was calm. Counsel submitted further that according to the evidence of PW6 who conducted the identification parade where PW3 identified the appellant, there were no complaints in the manner the parade was conducted. Ms. Mumba submitted that other than the identification of the appellant by PW3, there was something more, connecting the appellant to the offence in that PW7 found the appellant in the house where stolen property was recovered. Counsel contended that the stolen property in the room where appellant was found goes to support the reliability of the observation of the appellant by PW3 during the incident and also goes further to eliminate the possibility of an honest mistake regarding the identification of the appellant. Ms. Mumba relied on the case of ***John Mkandwire and Others³.*** In that case, this court held that:-

***“The evidence of a single identifying witness must be treated with the greatest caution because of the danger of an honest mistake being made,”***

*And that:-*

***“Usually this possibility cannot be ruled out unless there is some connecting link between accused and the offence which would render a mistaken identification too much of a coincidence”***

Ms. Mumba submitted that the finding of the appellant in the house where stolen property was recovered goes to support the identification made by PW3 and that the conviction was correctly founded. She urged the court to confirm the conviction.

Responding to ground 2, Ms. Mumba submitted that there was sufficient evidence to justify the finding of the use of a fire arm. PW1, PW2 and PW3 heard gun shots; PW8 found the cartridge at the scene and PW3 also alluded to finding 2 cartridges at the scene. Counsel submitted that it was interesting to note that the evidence of PW1, PW2 and PW3 on gunshots was not challenged. On non-production of cartridges found on the scene, Ms. Mumba submitted that the explanation by PW8 was reasonable that the same were in the custody of the officer who had died by trial time. She submitted that the prosecution had proved that a fire arm was used during the attack and urged the Court to accept that finding.

On sentence, Ms. Mumba submitted that as the prosecution had proved the use of a fire arm, the law was clear on the mandatory sentence. She urged the Court to confirm the conviction and sentence and to dismiss the appeal.

We are indebted to Counsel for their spirited submissions. We have carefully considered these submissions, the evidence on record and the cases cited.

On the first ground of appeal, submissions attacking the identification of the appellant hinge on the observation of the appellant by PW3. There are certain aspects of the prosecution evidence which support the identification of the appellant. The robbery took some time as the evidence of PW1 shows that he went into the toilet room and prayed for 15 minutes, he remained there until he was called by PW3. PW3 said that the robbery took about 20 to 30 minutes. PW3 was not confronted by any of the assailants; he was hiding under the bed together with another member of the family. He heard noises throughout the period he was under the bed, he then observed other assailants picking out items they stole after that he observed the appellant who came into the room telling fellow assailants that time was running out and that, it was morning. In his evidence PW3 stated:-

**“A3 came later into the room saying that time**

**is gone its morning and that’s when I saw him.”**

Under cross examination PW3 said,

**“…I saw them within 4 minutes…”**

**“A3 was a bit taller and of medium built.”**

PW3 lay under the bed from where he was making these observations because of the lengthy time assailants took during the robbery. This evidence does not give the impression of a fleeting glance or momentary observation. We find that the observation by PW3 was sufficient, that was why he was able to pick out the appellant on the identification parade. The appellant was the person who walked into the room, he did not rush in and out, he even spoke words which were understood by PW3 who was observing him. It is normal that when a person who is being observed speaks, more attention is paid to that person. In our view, the question of an honest but mistaken identification on the facts of this case, is too far-fetched. It has been submitted that PW3 did not know the appellant before the incident. We are satisfied that, the circumstances under which PW3 observed the appellant eliminated the risk of an honest mistake. The trial Judge cannot, therefore, be faulted when she accepted the evidence of PW3 regarding the appellant’s identity as sufficient. On the submission that there was sufficient time for stolen goods to have changed hands and that the explanation by the appellant was reasonable, we are of the view that the conclusion of the trial Judge is on firm ground that it was too much of a coincidence. PW7, Detective Chief Inspector Mwangala Mushimbeyi, only found three people in the house where some of the stolen goods were found. There were no children contrary to the evidence of appellant that he went there to look after his sister’s children. The first ground of appeal therefore, fails.

On the second ground of appeal, which was argued as an alternative to ground one, on submissions as to whether or not a fire arm was used during the robbery, the evidence of PW1, PW2 and PW3 on the gun-shots which they heard, was not challenged. As to whether the three witnesses heard gunshots or fireworks, there was no evidence that shortly before or during the robbery or, indeed, shortly afterwards, there were fireworks blasted anywhere near the scene. Further, the evidence of PW8 on the recovery of cartridges and observation of bullet holes at the scene was not challenged at trial. There was therefore, nothing to suggest that this evidence could not be relied upon to prove armed robbery. The prosecution’s failure to produce exhibits recovered at the scene did not weaken the prosecution case. It is not incumbent upon the prosecution to produce all the evidence available, or indeed to call all witnesses, the duty of the trial Judge was to make a finding whether the onus on the prosecution to prove the case beyond reasonable doubt had been discharged. In the cases ***Jack Maulla and Asukile Mwapuki vs. The People,*** that was what was found

to be the obligatory requirements in criminal prosecutions. In ***Jack Maulla***, this court, citing ***Green Nikutisha5,***stated as follows:-

***‘The need for the calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt. If there is no doubt about a witness, there is no need for supporting evidence, nor is there any need for comment by the trial court on the absence of such evidence.”***

In the prosecution of criminal cases, the burden on the prosecution has always been to prove the charge beyond reasonable doubt, that is, to prove all material particulars of the offence charged. It is not the duty of the prosecution to call all witnesses or to produce all exhibits. We are satisfied that the trial court was within its rights to find that the offence was proved as armed robbery. The second ground of appeal also fails.

The third ground of appeal was on the sentence pronounced by the trial court. Having dismissed the first and second grounds of appeal it follows that the third ground cannot stand. The sentence for armed robbery is mandatory. We, therefore, cannot disturb it. We confirm the sentence passed. The third ground of appeal also

fails. All the three grounds having failed, the appeal is dismissed.

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**F.N.M. MUMBA**

**ACTING DEPUTY CHIEF JUSTICE**

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**H. CHIBOMBA G.S. PHIRI**

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