**IN THE SUPREME COURT OF ZAMBIA Appeal No. 176/2008**

**HOLDEN AT NDOLA**

**(Appellate Criminal Jurisdiction)**

**IN THE MATTER BETWEEN:**

**MATTHEWS TEMBO 1ST APPELLANT**

**AUGUSTINE MWILA KANGWA 2ND APPELLANT**

**ANDREW CHAMA CHASEKWA 3RD APPELLANT**

**LAMECK MUSENGE PHIRI 4TH APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**Coram: Chirwa, Silomba and Chibomba, JJS.**

**On 2nd March, 2010 and on 10th October, 2012.**

For the 1st, 2nd and 4th Appellants: Mr. K. Muzenga, Senior Legal Aid Counsel.

For the 3rd Appellant: In Person.

For the Respondent: Messrs M.B. Nawa, Senior State Advocate.

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

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

**Cases and Other Materials referred to:**

1. Chimbini Vs The People (1973) ZR 191

2. Champion Manex Mukwakwa Vs The People (1978) ZR 347

3. Ilunga Kabala and John Masefu Vs The People (1981) ZR 102

4. The Law offices of Kevin J. Mahoney, P.C.’s www.relentlessdefence.com

5. Boniface Chanda Chola and Others Vs The People (1989) ZR

6. Emmanuel Phiri and Others Vs The People (1978) ZR 79

When we heard this appeal, Honourable Mr. Justice Silomba sat with us. He has since retired. This Judgment is, therefore, by the majority.

We are also compelled to explain the circumstances that led to the delay in the delivery of this Judgment. Honourable Mr. Justice Silomba was supposed to write the Judgment of the Court before he retired. This, however, was not possible. The record was only surrendered back to the other members of the panel in August, 2012 when Chibomba, JS, was requested to write the Judgment. The delay is deeply regretted.

The four appellants appeal against the Judgment of the High Court at Ndola which convicted them of one count of Aggravated Robbery Contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia. In Count 2, the 4th appellant was convicted of Attempted Murder Contrary to Section 215 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence in the first count were that:-

**“MATTHEWS TEMBO, AUGUSTINE MWILA KANGWA, ANDREW CHAMA** **CHASEKWA** AND **LAMECK MUSENGE PHIRI** on 1st October, 2004 at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together and whilst being armed did steal from **NASON MWEWA SHILELA**, 1 motor vehicle, Toyota Hiace Registration number ACE 3568 valued at K18,000,000.00 at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to the said **NASON MWEWA SHILELA** in order obtain or overcome resistance to the property being stolen”.

The particulars of the offence in Count 2 were that:

“**LAMECK MUSENGE PHIRI** on 15th day October, 2004 at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, did attempt to murder **WINFORD KAMBALE**”.

In support of the Prosecution’s case, 7 witnesses were called. The sum total of the Prosecution evidence was that on 15th October, 2004 at about 21:00 hours, PW1, a Taxi Driver, was hired by two men whom he identified as the 1st and the 3rd appellants to drive them to a house along Buntungwa Road in Luanshya. The two were in the Company of Moses Musonda whom PW1 had known before. It was PW1’s further evidence that the 1st appellant sat in the front passenger seat while the 3rd appellant sat at the back. On reaching Buntungwa Road, he was told to take the men to Roadside House Bar where the men entered the Bar. When they took long to come out, PW1 followed them inside. They later rejoined PW1 and asked him to take them to a house along Lumumba Road. On arrival at that house, the 3rd appellant got out of the motor vehicle while the 1st appellant remained with PW1. It was then that PW1 saw five men coming out of the house running. One of the men whom he identified as the 4th appellant had a gun which he raised, aimed and fired. PW1 ducked and put his head down. He was then pulled out of the motor vehicle and put in the back seat and all the men got into the motor vehicle. The 3rd appellant drove the motor vehicle while the 2nd and the 4th appellants sat with him on the back seat of the motor vehicle.

It was PW1’s evidence that he only managed to get off the motor vehicle when it stopped as fuel had run out. PW1 said that it was when the 3rd appellant who had been driving the motor vehicle opened the door that he heard the men say that they had shot one of their friends.

It was the prosecution’s further evidence that the empty cartridge that was picked from the scene matched the gun that was recovered, vide, PW5’s evidence. It was the Prosecution’s further evidence that PW1 identified all the four appellants at the identification parades that were conducted after the robbery.

The 1st appellant’s evidence was that in fact, the taxi driver whom he and his friend, Moses Musonda, had hired to take them to Moses Musonda’s uncle’s house hit him with “something” and that he only woke up in Thompson Hospital on 16th October, 2004. He said he sustained a deep cut on the head but that on 18th October, 2004, Police picked him and charged him with the subject offence. He said he found the 2nd appellant at the Police Station.

The 2nd appellant’s evidence was that the 1st appellant did not come back from Luanshya on 15th October, 2004 and that on 16th October, 2004 a nurse called him and told him that the 1st appellant had been admitted at the Hospital. The 2nd appellant denied being in the taxi in question.

The 3rd appellant’s evidence was that on 15th October, 2004 he was in Ndola at his parents’ house. He denied knowing the 4th appellant or taking part in the Aggravated Robbery in question. He also denied smearing faeces on his face to avoid identification.

The 4th appellant denied involvement in the aggravated robbery on 15th October, 2004 saying his mother died that day at Ndola Central Hospital at 20:00 hours in his presence.

After considering the evidence before her, the learned trial Judge came to the conclusion that the Charge in Court 1 had been proved beyond reasonable doubt against the four Appellants and she convicted them as charged and sentenced each one of the four appellants to death. She also convicted the 4th appellant on the second Count for Attempted Murder of PW1 and sentenced him to 15 years imprisonment with hard labour effective from the date of arrest.

Dissatisfied with their conviction and sentences, the appellants have appealed to this court advancing one ground of appeal as follows:-

***“The trial Judge erred when she convicted the appellants on the identification evidence of PW1 when there was no connecting link”.***

On behalf of the 1st, 2nd and 4th Appellants, the learned Senior Legal Aid Counsel, Mr. Muzenga, relied on the arguments in the Heads of Arguments filed. The 3rd Appellant also relied on his Heads of Argument.

It was submitted on behalf of the 1st, 2nd and 4th appellants that the learned trial Judge erred when she convicted the Appellants as there was no connecting link. It was pointed out that the evidence of identification by PW1 did not ensure that the greater danger of honest mistake was ruled out. That the 1st, 2nd and 4th Appellants were not known to PW1 prior to the robbery which occurred at night after 21:00 hours and hence, visibility and opportunity to make observation was limited as PW1’s evidence was that some of the attackers sat in the back seat which made it difficult for him to observe their faces. It was argued that PW1 only had a momentary glance of his attackers when the car light in the cabin came on after the motor vehicle ran out of fuel. And that PW1’s evidence was that he was afraid and that he had put his head down when he saw the five men approaching the motor vehicle and when he heard the gunshot. Further that PW1 did not even state by what features or unusual marks if any, that enabled him to recognize his attackers or their stature or the clothes that they wore. Therefore, that PW1’s evidence of identification was unreliable. The case of **Chimbini Vs The People1** was cited in whichit was held that:-

***“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 honest of the witness is not sufficient, the court must be satisfied that he is reliable in his observation”.***

It was argued that PW1’s evidence on identification of the appellants was therefore not reliable. And that the identification of the appellants at the identification parades did not remedy the poor evidence of identification of the attackers at the scene of crime. The case of **Champion Manex Mukwakwa Vs The People2** was cited in which we held that:

***“Although the Appellant was identified by two witnesses which itself reduced the danger of honest mistake, the circumstances in which the offence was committed were traumatic and opportunities for observation poor; it would therefore be unsafe to rely on the identifications without some link connecting the appellant with the offence”.***

It was pointed out that it is on record that the 3rd and 4th appellants had smeared human faeces on their faces, a clear disguise. Therefore, that in the absence of special features relied upon makes the possibility of an honest mistake even greater and hence, placing the 3rd and the 4th appellants on an identification parade merely gave the identifying witness a clue as they were conspicuously different thereby making the identification parade unfair. The case of **Ilunga Kabala and John Masefu Vs The People3** was cited on the duty of the Police to ensure that identification parades conducted are free from unfairness. It was contended that the trial Court, therefore, ought to have acquitted the appellants as there was nothing else connecting them to the offence.

In case of the 1st appellant, it was submitted that the trial Judge misdirected herself when she found that the gun recovered and fired inflicted the wound on the 1st appellant. It was pointed out that Forensic/Medical evidence ought to have been adduced to establish that the 1st appellant’s wound was caused by a bullet of the same calibre as that discharged by Exhibit P4 as opined by the authors of**, “Relentless Defence4,”** whohave stated that:-

***“The type of gun used in the shooting can usually be determined by examining the gunshot wound. Gunshot wounds can be characterized by massive tissue destruction and embedded wadding if the shot was within 10 feet”.***

It was pointed out that medical evidence could have established the type of gun used. Therefore, that the failure to establish this amounted to dereliction of duty and raises a presumption that the 1st appellant’s wound was not caused by Exhibit P2. Further, that the blood stains on Exhibit P6 should have been tested and compared and matched with that of the 1st appellant.

In case of the 2nd appellant, it was submitted that he was only apprehended because he was a friend of the 1st appellant as there was nothing to connect him to the offence. That the evidence of leading the Police to the scene of crime where the Police had already been was a mere attempt to obtain a confession and thus inadmissible. The case of **Boniface Chanda Chola and Others Vs The People5** was cited in which we stated that:-

***“The disputed leading of the Police to a place they already knew and where no real evidence or fresh evidence was uncovered can hardly be regarded as a reliable and solid foundation on which to draw an inference of guilt”.***

That in that case, this Court went on to hold that:-

***“This was not a case where the leading of the Police to the scene or elsewhere by an accused, whether voluntarily or not, had resulted in the discovery of real evidence – which is always admissible or the discovery of anything else not already known by the Police. The only utility to such evidence at all is that the prosecution expects it to be treated as confessionary evidence”.***

It was submitted that caution ought to have been exercised to ensure that the leading was free and voluntary. Further that the tendering of this evidence was objected to in this case. And that the leading on different occasions by the 2nd and the 1st appellants amounted to a demonstration which in fact, was a confession which was inadmissible in the absence of proof that it was free and voluntary.

In case of the 4th appellant, it was submitted that the only connection to this offence is that he led the Police to the 3rd appellant from whom exhibit P4 was recovered. It was argued that mere knowledge of the whereabouts of the 3rd appellant could not conclusively connect the 4th appellant to the commission of the offence as the 4th appellant was apprehended for a house-breaking case as was attested to by PW7. And that it cannot be said that the 4th appellant knew of the whereabouts of exhibit P4 as it was concealed by the 3rd appellant. Therefore, that having challenged the identification by PW1 of the 1st, the 2nd and the 4th appellants, this Court must resolve the doubts in favour of the Appellants and acquit them.

In respect of the 3rd appellant, more or less the same submissions were made in his Heads of Argument. In supporting his contention that the trial Judge erred in relying on PW1’s evidence of identification, which he contended, did not ensure that the great danger of honest mistake was ruled out, it was pointed out that the 3rd appellant was not known to PW1 prior to the offence. And that since the offence occurred at night, the visibility and opportunity for observation was clearly limited. And that since the offence occurred on 15th October, 2004 in Luanshya, the 3rd appellant said he was in Ndola. And that consequently, as per evidence of PW7, this Court must have doubts which must be resolved in favour of the 3rd appellant.

On the other hand, the learned Senior State Advocate, Mrs Nawa, informed the court that the State was supporting the conviction of the four appellants. Mrs Nawa submitted that the trial Judge was on firm ground when she convicted the appellants on the evidence of PW1 as it is clear from the evidence on record that PW1 was booked by the 1st and the 3rd appellants and that he took them to a bar where they took long to come out thereby prompting him to follow them inside where he was able to identify them. That the 1st and the 3rd appellants told him to wait a little longer and then he left but that the 1st and the 3rd appellants followed him to another taxi rank where they booked him to take them to a house along Buntungwa Road. Mrs Nawa contended that this shows that PW1 spent a lot of time with the 1st and the 3rd appellants and hence, the issue of mistaken identity cannot arise as he had ample opportunity to observe the two.

In respect of the 2nd and the 4th appellants, Mrs Nawa submitted that it was PW1’s evidence that he identified the 4th appellant as the person who carried the gun and later sat with him on the back seat of the motor vehicle. It was submitted that PW1 was able to describe the role played by the 4th appellant during the attack and that he saw his face when the light in the car came on. Counsel submitted that PW1 also identified the 2nd appellant as the person who drove the motor vehicle and that he also saw his face when the car stopped and the light came on. It was Mrs Nawa’s further submission that PW1 had a good opportunity to observe the appellants and therefore, the possibility of mistaken identity was ruled out. Further, that PW1 was also able to identify his assailants at the identification parades conducted on 26th October, 2004 and on 7th December, 2004.

Mrs Nawa submitted that although the record shows some variances between the evidence of PW1 and that of PW3 and PW4 with regard to the people identified by PW1, the inconsistencies are not fatal because the police officers who conducted the identification parades were secondary witnesses while PW1 was the eye witness. That what is important is that PW3 and PW4 stated that PW1 identified two people on the first and on the second identification parades. Therefore, that PW1 who was the only eye witness was able to identify his assailants.

Mrs Nawa submitted further that the learned trial Judge also reminded herself of the danger of convicting on the evidence of a single identifying witness. She submitted that there was also a connecting link which connected the appellants to the commission of the crime. In case of the 1st appellant, he was shot at on the material date and the empty cartridge of the gun that shot him matched with the firearm that was found on the 3rd appellant.

As for the 2nd appellant, that he is the one who recounted about the wounded friend.

For the 3rd appellant, Mrs Nawa submitted, he was found in possession of the firearm whose empty cartridge was found at the scene of crime.

In respect of the 4th appellant, Mrs Nawa submitted, he is the one who led to the apprehension of the 3rd appellant who was found with the firearm used during the armed robbery.

It was contended that all the four appellants were therefore, linked to the commission of the offence in addition to being identified by the complainant. Further that there are many odd coincidences as referred to above and that this constitutes the “something more”, as outlined in the case of **Emmanuel Phiri and Others Vs The People6**. It was submitted that it was for this reason that the State contends that the four appellants are the ones that robbed the complainant and hence they were properly convicted.

In terms of Count 2, Mrs Nawa contended that the evidence on record shows that when PW1 tried to start the car, it was then that the 4th appellant decided to shoot and fired the shot that hit the 1st appellant. That the gun was however, aimed at PW1 when he tried to escape.

In conclusion, Mrs Nawa submitted that the four appellants were properly convicted and that accordingly, this court should dismiss the appeal against conviction and should uphold the Judgment of the trial court against all the four appellants.

We have seriously considered the sole ground of appeal together with the arguments advanced in the appellants’ Heads of Argument and the submissions by the learned Senior State Advocate and the authorities cited. We have also considered the Judgment by the learned Judge in the court below and the evidence adduced in the court below.

This appeal challenges the evidence of identification and raises the question whether the appellants were properly identified and linked to the commission of the crimes they were convicted of.

 It has been submitted on behalf of all the appellants that the possibility of an honest mistaken identity was not ruled out as the effences occurred at night, the identification was by a single eye witness, the witness was traumatised when he saw five men emerge from the house one of whom had a firearm which he fired, the witness was made to sit in the back seat, hence, the contention that PW1 did not have proper opportunity to observe his assailants as he only had a momentary glance of his attackers when the car light came on after the motor vehicle ran out of fuel. Further that the identification parades conducted were also challenged on ground that the parades were not fairly conducted as in case of the 3rd and the 4th appellants, they had smeared their faces with human faeces to disguise themselves.

We must however, state that we entirely agree with the authorities cited by the learned Counsel for the appellants as that is the correct position of the law on the issues raised.

However, to properly determine the issues raised, it is crucial to have the evidence adduced in the court below in perspective. This was that the 1st and the 2nd appellants hired PW1 to inter-alia, take them to the house of Moses Musonda’s uncle. At the house, the 3rd appellant went inside. A gang of five men emerged from the house, one of these men, the 4th appellant, had a gun which he fired at PW1. PW1 had ducked and the bullet instead hit the 1st appellant. PW1 identified all the four appellants at the identification parades that were conducted. PW1 said the 2nd appellant had sat at the back of the taxi with him after the attack. The 1st appellant had a gun-shot wound on arrest. The 4th appellant was implicated by the gun that was used in the robbery. The cartridge picked from the scene matched the calibre of the gun that was recovered from the 3rd appellant. The 3rd appellant was found with the gun that was used in the robbery. He was also a friend of the 4th appellant who led to the arrest of the 3rd appellant.

In this matter, although it was argued at length, on behalf of the four appellants, that the possibility of an honest mistaken identity was not ruled out, it is our considered view that there is sufficient evidence to link all the four appellants to the commission of the offence in the first count.

In case of the 1st and the 2nd appellants, they were with PW1 for a long time when they hired him to take them to Buntungwa drive and thereafter, to a house along Lumumba Road where the attack took place. They had stopped over at a bar where they had gone inside. When they took long to come out, PW1 had followed them inside and they told him to wait a little longer. They later followed him to a different taxi rank where they again hired him to take them to the house along Lumumba Road where the attack took place and the motor vehicle was grabbed from him. He was shoved into the back sit. PW1 was also with the 1st appellant and the 2nd appellant up to the place where the motor vehicle ran out of fuel and stopped. The 1st appellant also had a gun-shot wound. PW1’s evidence was also that he heard the appellants say that they had shot one of their friends instead of him. In the case of the 3rd appellant, he was connected to the offence by the gun that was used in the robbery and was recovered from him.

In the case of the 4th appellant, he was implicated by the gun that was used in the robbery. PW1 also identified him to have been the one who had the gun and fired at him but instead hit the 1st appellant. As per evidence of PW5, the empty cartridge that was picked at the scene matched the calibre of the gun that was recovered from the 3rd appellant. In addition to all these odd coincidences, PW1 identified all the four appellants at the identification parades that were conducted.

In view of this overwhelming evidence, we are satisfied that the possibility of an honest mistaken identity was ruled out by the rather strong evidence of identification from PW1 who was also able to identify the four appellants at the identification parades conducted.

Further, the learned trial Judge did also properly remind and cautioned herself of the danger of convicting on the evidence of a single identifying witness.

Therefore, the sole ground of appeal has no merit as the evidence ruled out the possibility of an honest mistaken identity and also properly linked the four appellants to the commission of the offence in Count One.

We, therefore, uphold the conviction of the 1st, 2nd, 3rd and 4th appellants and the death sentence meted out to each one of the four appellants in respect of the offence in Count One.

As for Count 2, we find that the 4th appellant was properly convicted of the charge of Attempted Murder of PW1 as he had aimed the gun at PW1 who had ducked and the bullet instead hit the 1st appellant who was found with a gun-shot wound when he was arrested. PW1 positively identified the 4th appellant as the one who had carried the gun and fired it at him. We, therefore, uphold both the conviction and the sentence of 15 years imprisonment with hard labour meted on the 4th appellant by the Court below.

The sum total is that this appeal has failed. The same is dismissed.

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D. K. CHIRWA

**SUPREME COURT JUDGE**

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S. S. SILOMBA (RTD)

**SUPREME COURT JUDGE**

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H. CHIBOMBA

**SUPREME COURT JUDGE**