IN THE SUPREME COURT OF ZAMBIA **Appeal No. 183/2013**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E E N :

JOE BANDA **APPELLANT**

v.

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Malila, JJS**
on 12th January, 2016 and 2nd March, 2016

For the Appellant: Mrs. K. M. Simfukwe - Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. P. Mutale – Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Chimbini v. The People [1973] ZR 191*
2. *Mavuma Kabanja Situna v. The People [1982] ZR 115*
3. *Fawaz and Chelelwa v. The People [1975/77] ZR 3*
4. *Nachitumbi and Another v. The People [1975] ZR 285*
5. *Kateka v. The People [1977] ZR 35*
6. *Haamenda v. The People [1977] ZR 184*
7. *R. v. Turnbull [1976] 3 ALL ER 549*
8. *Love Chipili v. the People [1986] ZR 115*
9. *Mwansa Mushala and Others v. The People [1978] ZR 58*

10. *Nyambe v. the People [1973] ZR 228*
11. *John Mkandawire and Others v. The People [1978] ZR 46*

The appellant was tried and convicted by the Lusaka High Court of the offence of aggravated robbery, contrary to section 294(1) of the Penal Code, chapter 87 of the Laws of Zambia. The particulars of the offence were that the appellant, on the 18th day of January, 2014 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, and while armed with knives and other objects, did steal various items of property from Joseph Mwape, to wit, a wallet, K560.00 cash, a blackberry cell phone, two spare tyres, a pair of shoes, a subwoofer, and a pioneer speaker, all valued at K4,460.00, the property of the said Joseph Mwape, and that at, or immediately before, or immediately after the time of such stealing, did use or threaten to use actual violence to the said Joseph Mwape in order to obtain or retain the said property, or overcome resistance from him.

Two prosecution witnesses testified against the appellant while the appellant testified in his own defence.

The prosecution's evidence, as given by the victim of the robbery (PW1), was that on 18th January, 2014 around 24:00 hours, the victim was driving on a public road in Kuku compound in the Chawama area when he seemed to have lost direction to his destination after the road he was driving on appeared impassable. He inquired from a passerby who gave him directions to use an alternative road. As he drove along the alternative road suggested to him, the victim found that the road had been blocked with stones. He decided to reverse and make a U-turn. All of a sudden, five men and two women sprung up and stood in front of the vehicle. They were armed with screw drivers, knives, and iron bars. They warned him not to attempt to go back if he valued his life.

One of the assailants proceeded to hit the windscreen of the victim's car using a knife and making a crack on it in the process. Another assailant went on to the driver's door and grabbed the keys from the ignition. The victim was pulled out of the vehicle and was then beaten by two of the assailants. He was also searched. The motor vehicle was searched too. The two women watched the whole ordeal from close range. The victim was ordered to surrender

everything he had or else he would be killed, and he obliged. He was then ordered to open the boot of his car for the assailants who took two spare tyres and a speaker from it. He attempted to run for his life but was pursued and caught a short while later. The car keys were thrown at the victim before the assailants all disappeared from the scene.

The victim then got into the car and drove to Chawama Police Station to report the incident. With police officers in his company, the victim drove back to the scene of the crime. They did not find any person at the scene of the crime but, as they patrolled around the area, they saw two men whom the victim identified to the police as part of the team that had earlier on assaulted and robbed him. The police apprehend one of the two while the other one managed to run away. The apprehended suspect was then taken to Chawama Police Station. He turned out to be the appellant in these proceedings. The victim identified the appellant in court as one of the persons who assaulted and robbed him, and whom he identified to the police on the night of the robbery.

The second prosecution witness (PW2) was Detective Constable Moses Kafita of Chawama Police Station. He testified that on the day in question he attended to a complaint by Joseph Mwape who alleged that he had been robbed by five men and two women. PW2 issued a medical report to the complainant and also visited the crime scene with the complainant and his colleague, Sergeant Kafula. Although they did not find anyone at the scene of the crime, they observed that the road had indeed been blocked by rocks. And while they were patrolling the area along Katambalala road, they saw two men coming from the opposite direction. The victim identified the two men as being part of the gang that attacked and robbed him earlier on.

As the police patrol vehicle was slowing down, the two men started to run away. The police gave chase and managed to apprehend the appellant while the other suspect escaped. The apprehended individual explained that he was coming from buying beer and was walking to a friend's relative's funeral. The police officers were not satisfied with the explanation that the appellant tendered. He was, therefore, charged and arrested for the offence of

aggravated robbery for which he was subsequently tried by the High Court.

The appellant, in his defence, explained that on the day in question he was with a friend called Fred, around midnight as they were coming from buying alcoholic beverages on their way to a funeral house. They saw a police vehicle with lights in full beam. As they passed this vehicle, it reduced speed. When they noticed two armed police officers in uniform coming out of the vehicle and cocking their guns, the duo run away. The appellant, however, did not run very far as he fell down and was apprehended. The appellant informed the police that he knew where Fred, his colleague, stayed and that he could lead them there. The police did not ask him to take them to the place where there was a funeral.

At the close of the trial, the learned High Court Judge was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt. He, therefore, found the appellant guilty of the offence of aggravated robbery and convicted him accordingly. The appellant was sentenced to 25 years

imprisonment with hard labour with effect from the date of his arrest.

It is from the said conviction that the appellant has now appealed on two grounds framed as follows:

1. **That the trial court erred in law and in fact when it relied on PW1's evidence of identification when this evidence was unreliable owing to the circumstances in which PW1's observations were made; and**

2. **The trial court erred in law and in fact when it convicted the appellant on the evidence of a single identifying witness when there was no other evidence before it connecting the appellant to the offence.**

When the appeal was called for hearing, it was evident to us that neither the appellant nor the respondent was prepared to proceed since there were no heads of argument filed. When we asked Mr. Mutale, learned Deputy Chief State Advocate, whether the State did indeed support the conviction, he answered in the affirmative. After explaining the cause of her inability to file the appellant's heads of argument, Mrs. Simfukwe, Senior Legal Aid Counsel for the appellant, requested for time within which to file the appellant's heads of argument. We allowed her to do so within

two weeks. We also allowed Mr. Mutale to file a response if necessary one week after the appellant's heads of argument had been filed. Mr. Mutale orally agreed to do so. Mrs. Simfukwe filed the appellant's grounds of appeal and heads of argument on the 26th January, 2016. As at the date of writing this judgment, the respondent's heads of argument had not been filed. We proceed, therefore, to determine the appeal on the basis of what is on the record.

In arguing ground one, Mrs. Simfukwe, submitted that the evidence regarding the identification of the appellant was unreliable and raised doubts as to whether or not PW1 correctly identified the appellant as one of the assailants in the aggravated robbery subject of the present appeal. According to Mrs. Simfukwe, the victim confirmed in his statement that the appellant was a stranger to him and that the attack occurred at night with minimum visibility. It also occurred in traumatic circumstances and lasted a few minutes. Quoting from **Chimbini v. The People**[1] the learned counsel submitted that there were many factors in the present case which suggested that the first prosecution witness may have made an honest

mistake in identifying the appellant as one of the assailants. The learned counsel argued that visibility appeared to have been poor as could be noted from the statement of the victim at page 7 lines 29 to 30 of the record which reads:

"I could not see their faces. No lights but there was moonlight."

And also from lines 14 and 15 on page 7 of the record in which PW1 stated that:

"I saw two females and five men. That's the only description."

It was counsel's submission that although the car lights were on at the time, PW1 did not identify the assailants as noted in the passages that the learned counsel referred the court to.

As regards the duration of the attack, Mrs. Simfukwe asserted that although PW1 claimed that the attack lasted 40 minutes, it is clear from the breakdown of events as noted by PW1 himself, that it was unlikely that the whole episode took anything close to 40 minutes. According to Mrs. Simfukwe, the stages of the robbery were described in terms of seconds and minutes by PW1, so that the 40 minutes claimed to have been the time for the robbery was way exaggerated. It took a minute to pull him out of the car;

seconds for the assailants to come from the front to attack him; and not more than two minutes to chase him over a distance of about fifty meters. The search in the car could not have lasted three minutes and beating the victim occurred in mere seconds. Mrs. Simfukwe, also argued that PW1 had indicated in court that he was terrified by the experience, which is not unusual in cases of aggravated robbery. She referred us to the portion in the record of appeal where PW1 confirmed this position. According to Mrs. Simfukwe, PW1 was threatened with knives and screw drivers; he had the screen of his car broken; he was beaten repeatedly; he attempted an escape; he was threatened with a knife; was dragged back to the car before being released by the robbers. He was hardly stationary during the whole traumatic experience.

The learned counsel also argued that PW1 failed to give a description of the assailant whom he named as the appellant when he gave a statement to the police on the 20th of January, 2014. According to counsel, PW1 did not give a description of the alleged assailants when he gave a statement to the police on the 20th January, 2014. The only statement allegedly giving the description

of the appellant as one of the assailants was made three months later on 17th March, 2014 which was marked as 'ID3' during the trial. That statement only describes the assailant as having worn a blue T-shirt. Mrs. Simfukwe submitted that this description was wholly inadequate as the witness did not give the police any distinctive mark or features of the assailant who the witness claimed to be the appellant.

Mrs. Simfukwe found it remarkable that PW1 was able to give a detailed description of the attacker in court and not at the earliest point when such description would have been clearer and more vivid in his mind. She submitted that the description, given months later to incriminate the appellant, was not reliable and should therefore, be discounted.

Mrs. Simfukwe, also referred to PW1's claim that he had seen a man dressed in black near a bar before he got to the place at which the attack occurred. This man was not part of the attackers and the appellant told the court that he was not in blue but black and he had been at a bar that night. Mrs. Simfukwe, reiterated

that the evidence of identification was faulty and certainly not reliable for purposes of securing a conviction.

In regard to ground two, the learned counsel for the appellant impeached the trial court's reliance on the evidence of the single identifying witness when there was no other evidence connecting the appellant to the offence. After quoting from the cases of **Mavuma Kabanja Situna v. The People**[2] and that of **Fawaz and Chelelwa v. The People**[3] and that of **Nachitumbi and Another v. The People**[4] regarding single witness identification, Mrs. Simfukwe submitted that there is nothing in the evidence adduced before the trial court that linked the appellant to the offence so as to give credit to the otherwise unreliable identification of the appellant as one of the assailants. According to the learned counsel, it is clear from the record that the appellant was not found at the crime scene at the time of his apprehension, which was barely minutes after the offence had occurred. The learned counsel pointed out that **'none of the stolen items were recovered from the appellant either.'** The appellant was not found with any of the alleged weapons used in the attack occasioned on the complainant and no finger prints were

lifted from the vehicle suggesting that the appellant was part of the group of the assailants.

According to Mrs. Simfukwe these observations are supported by the evidence of PW2 recorded at page 16 line 15 of the record where the witness stated that:

> **"I looked at accused but nothing connects the accused to the crime. The connecting evidence is that he was identified by the complainant."**

It was Mrs. Simfukwe's submission that the mere fact that the appellant ran away at the sight of police did not, as the prosecution sought to convince the court, confirm that he had been involved in the robbery. In her view, there are many reasons why an individual would run away from the police officers in the night including mere fear of the police as indicated by the appellant in his defence. In the circumstances, Mrs. Simfukwe submitted that there was no evidence to support the poor evidence of identification which the court relied upon. She urged us to uphold the appeal on this basis.

We are grateful to the learned counsel for the appellant for the pointed submissions made. The substratum of the appellant's case revolves around identification of the appellant. To us, the real and in fact only question we have to address is whether the evidence of identification of the appellant as one of the seven perpetrators of the robbery, was sufficient to secure a safe conviction.

It is of course competent for a court to convict on the evidence of a single identifying witness. As we stated in **Chimbini v. The People**[1], such evidence should be clear and satisfactory in every respect. We stressed that it is necessary to test the evidence of a single witness with due care. The honesty of the witness is not the abiding consideration. The court must be satisfied that the witnesses' observation is reliable. Similar sentiments were strongly carried in **Kateka v. The People**[5]. There, we reiterated that when it comes to identification of the accused, the question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should be taken to test the identification. In the present case, the identification of the appellant was done solely by PW1. Was this identification reliable and of good quality?

In the case of **Haamenda v. The People**[6], guided by Lord Widgery CJ's *dicta* in **R. v. Turnbull**[7] we observed that:

> **"where the quality of the identification is good and remains so at the close of the defence, the danger of mistaken identification is lessened; the poorer the quality, the greater the danger. In the latter event the court should look for supporting evidence of identification. Odd coincidence can provide corroboration."**

In **Mavuma Kabanja Situna**[2] we pertinently observed that, if the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which should render a mistaken identification too much of a coincidence.

A perusal of the evidence recorded by the trial court shows clearly that it was solely the evidence of PW1 as to identification of the appellant that supported his conviction. PW1 was accosted by a gang of seven. He claims that he was able to identify the appellant as one of the seven because he was wearing a blue T-shirt. The whole robbery occurred in very traumatic circumstances. In **Love Chipili v. the People**[8] we observed that where the circumstances of

the attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had previously been seen by the identifier does not render an identification safe. Similar views were recorded in **Mwansa Mushala and Others v. The People**[9].

As Mrs. Simfukwe pointed out in her submission, the evidence of identification of the appellant was wanting in material respects. The identification was through the clothes the appellant is alleged to have worn when he committed the offence. He was found walking, not in the same road where the robbery occurred, but in the next road. Nothing was recovered from the appellant in the form of goods stolen from the victim, or any offensive weapons. According to PW2, the victim did not describe the seven assailants to the police when he first reported the matter. In cross-examination, PW1 admitted that he could not see the assailants' faces. It follows that he was unable to specify any distinctive features of the appellant which made identification credible. We stated in the case of **Nyambe v. the People**[10] that:

> **"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."

We have in a number of cases sounded a caution to trial courts that in the case of a single identifying witness, there should be some other evidence supporting the identification. The cases of **Fawaz and Another v. The People**[3] and **John Mkandawire and Others v. The People**[11] are authority for this position.

The learned judge was clearly alive to the danger implicit in relying, without qualification, on the evidence of identification of a single witness and the need, as we pointed out in **Mavuma Kabanja Situna**[2], to have some other connecting link between the accused and the offence. At J30 of the judgment, the learned judge stated as follows:

"I have found the something more in the evidence of the Accused himself that he was able to identify the police and see the guns and thus corroborating the fact that the visibility was good at that time and that is how PW1 was able to identify the accused. The robbery occurred within the same area and within a short space of time the Accused was apprehended in the next road."

We do not think that the learned trial judge was correct in finding the appellant's evidence of what the appellant had perceived in a different street at a different time and in different circumstances, as additional evidence linking the appellant to the offence and thus supporting the evidence of identification. The two circumstances are totally different and cannot complement each other. To us, the learned judge had plainly misapprehended the guidance we have repeatedly given in regard to the need for additional connecting evidence where the identification is by a single witness.

Although the learned trial judge quite fairly doubted the demeanuor of the appellant as a witness, having had the benefit to observe him in court, we hold that he did not subject the whole evidence of identification to proper qualitative and quantitative evaluation. Had he done so, he would have no doubt come to the conclusion that we do, namely, that the evidence of identification by PW1 of the appellant was abysmal and, therefore, not satisfactory to secure the appellant's conviction.

In coming to the conclusion that the appellant was guilty as charged, the learned trial judge made numerous findings of fact which are recorded at pages 25 to 28 of his judgment. These findings of fact were substantially on facts not in issue, namely, that PW1 was attacked and robbed by a group of seven people; that PW1 was permanently deprived of his property and that violence was used by the assailants at the time of the robbery. These facts were common cause. The disputed facts related to the appellants alleged involvement in the robbery.

On the issue of the T-shirt worn by the appellant on the day of his apprehension, there was doubt generated by the evidence given, particularly by the appellant. While PW1 and PW2 maintained that the appellant wore a blue T-shirt, the appellant, in his evidence, maintained that he wore a black T-shirt on the day in question. He was not cross-examined on this aspect. In determining the conflicting testimonies on the colour of the appellant's T-shirt at the time, the leaned trial judge stated at J32 as follows:

> **"The Defence in their heated thorough cross-examination did not suggest that the Accused was wearing a black T-shirt. The issue of the black T-shirt only surfaced in the Accused's evidence after the**

prosecution had closed its case. In my view that was an afterthought after realizing that cogent evidence had been led on the identity of the assailant who had a personal countenance with the victim. I reject that piece of evidence."

A perusal of the record of proceedings in the court below shows that PW1 claimed that the appellant was wearing "a blue T-shirt with white labels on the chest" and that he had long hair, dark in complexion and slim. This is the description given in court at trial and after the appellant had been in custody for three months, but not at the police station when PW1 first reported the matter. PW1 only gave a statement to the police on 17th March, 2014, long after the incident, where he described the appellant's dress on the material day as a blue T-shirt.

In his evidence in defence, the appellant told the court that he wore a black T-shirt on the day in question. As we have already observed, there was no question put to the appellant in cross-examination to test his evidence on the colour of the T-shirt. The learned judge reasoned that the defence should have suggested in cross-examination of the prosecution witnesses that the appellant was wearing a black T-shirt, and the fact that the appellant merely

mentioned the colour of his T-shirt in his evidence after the close of the prosecution case meant, in the learned judge's view, that this was an afterthought. To us, this seems to be a surprising conclusion for the learned trial judge to make on the facts before him. There is no obligation on the part of the defence to prove as false, every allegation in the prosecution's case. Were this to be the case, it would reverse that golden thread that runs through our criminal justice system, namely, that the burden of proof rests through out on the prosecution to prove their case against the accused person beyond reasonable doubt. The accused person is entitled to bring up any issue relevant for his defence. And in our considered view, the appropriate time to do so is when it is his turn to give evidence in his defence. In the present case, it was while testifying for himself that the appellant indicated that he was wearing a black T-shirt on the material day. It was then up to the prosecution to discount the appellant's claim, either through cross-examination or some other form of rebuttal.

It is not at all apparent to us on any realistic view of the evidence before the trial court, given also the procedural requirements for discharging the burden of proof, why the court surmised that the evidence by the appellant that he was wearing a black T-shirt and not a blue one, was an afterthought. With great respect to the opinion of the trial court, we are bound to hold that this was a misdirection.

In sum, we are of the firm view that the evidence of identification of the appellant, given solely by PW1 and taking into account the circumstances in which the robbery occurred, was not sufficiently credible to support a safe conviction of the appellant. Furthermore, the appellant's testimony as to the colour of the T-shirt he wore on the material day, which regrettably was not pursued by the prosecution, introduces reasonable doubt from which the appellant is entitled to benefit.

We think on the whole that the appeal has merit. We allow it and acquit the appellant forthwith.

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G. S. Phiri
SUPREME COURT JUDGE

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE