IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.14/15 OF 2018**

HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MABVUTO BANDA **1ST APPELLANT**

NCHIMUNYA MUKUWA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 22nd May and 22nd August 2018

For the Appellant: *M. M Mwenya (Mrs.) Legal Aid Counsel, Legal Aid Board*

For the Respondent: *F. N Tembo (Mrs.) Senior State Advocate, National Prosecutions Authority*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. Sipalo Cibozu and Chibozu v The People (1981) ZR 28
2. Mushemi Mushemi v The People (1982) ZR 71
3. Yoani Manongo v The People (1981) ZR 152
4. R v Shippey and Others (1988) CRIM LR 767
5. Saluwema v The People (1965) ZR 4
6. Kalonga v The People (1976) ZR 124
7. Mwewa Murono v The People (2004) ZR 207

8. Bwalya v The People (1975) ZR 125
9. Chimbini v The People (1973) ZR 191
10. Chimbo and Others v The People (1982) ZR 20
11. Mwansa Mushala and Others v The People (1978) ZR 58
12. Muvuma Kambanja Situna v The People (1982) ZR 115
13. Dickson Sembauke Changwe and Ifellow Hamuchanje v The People (1989) ZR 144
14. Coghlan v Cumberland (1898) 1 CH 704

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia

This is an appeal against conviction and sentence. The Appellants appeared before the High Court sitting at Lusaka charged with two counts. In count one, they were charged with the offence of murder contrary to section 200 of **The Penal Code**[1]. It was alleged that the Appellants on 29th March 2015, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder Erick Kazangaza, the deceased.

In the second count, the Appellants were charged with the offence of aggravated robbery contrary to section 294 (1) of **The Penal Code**[1]. The particulars of the offence alleged that the Appellants, on 29th March 2015, 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 whilst armed with iron bars and other unknown instruments, did steal assorted groceries altogether valued at K40,661.00 from Erick Kazangaza and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to the said Erick Kazangaza in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

After the trial, the lower court convicted the Appellants of murder and aggravated robbery and sentenced them to death and 15 years with hard labour respectively.

The evidence on record is that, the Appellants worked as security guards at a car park belonging to **PW3, Goodson Kazangaza**. The deceased, **PW1, Joseph Banda and PW4, Amon Banda** all worked for PW3 as shopkeepers and lived in a house at the same car park.

According to PW1, during the night of 29th March 2015, between 01:00 hrs and 02:00 hrs, PW1 and PW4 whilst asleep in the sitting room, persons unknown broke into the house and went into the bedroom where the deceased was sleeping and began

beating him. When PW1 and PW4 decided to go outside, they were accosted by two persons whom he recognised as the 1st and 2nd Appellants. They started beating them with pangas and iron bars. PW1 sustained injuries on his head and arm.

It was his testimony that he recognised the 1st and 2nd Appellants because they were his co-workers whom he had known for about eight months. According to PW1, the car park was well lit as it had big and small lights; one big light above the shop and the other lights at the gate.

PW1 further testified that, when he was beaten, he was rendered unconscious and only regained consciousness at the hospital. He further told the court that, the deceased met his demise on the same day and alleged that the assailants got his phone valued at **ZMW 250.00**.

It was **PW2, Josephine Thole's** evidence that on the date in question, around O1:00 hrs she was awakened by a knock on the door by the 1st Appellant who informed her about the incident at the shop. PW2 thereafter called PW3, her in-law and informed him of what had transpired. It was her testimony that, five minutes later, she heard PW3 cry out that his brother had been

killed. It was at this point that PW2 went to the scene and found PW3 with the deceased and PW1 on the floor with wounds. She further testified that the deceased had three cuts on his head and the Appellants had small wounds.

PW3, Goodson Kazangaza, the owner of the premises where the goods were stolen from and brother to the deceased, testified that, he received a phone call from PW2 around 01:49 hrs informing him about the incident at his shop. When he arrived at the scene, he found the 2nd Appellant and PW4 at the gate. According to him, PW4 was in bad condition and his face was covered in blood.

He further testified that, when he entered the house, he found PW1 lying on the floor and the deceased was dead and various goods were missing. He stated that the value of the goods missing amounted to **ZMW 40, 661.00**.

According to PW3, the Appellants were not injured and did not appear to have been beaten. He further stated that, some of the instruments found at the scene were iron bars, fork rake, hammer and a hoe. He confirmed that, the hammer and hoe

belonged to him but denied knowing who the other two instruments belonged to.

PW4, Amon Banda, confirmed the testimony of PW1 that they had been attacked and that the Appellants were part of the assailants that attacked them. In addition, he testified that, the 2nd Appellant got hold of him and squeezed him by the neck before he was dragged to an area where the mini buses parked. One of the unknown assailants demanded for money from him in the presence of the Appellants and threatened to kill him. He alleged that, he was robbed of **ZMW 160.00** from his pockets.

It was his testimony that, he was unable to identify the person who demanded for money because he was wearing a mask, however, he was able to hear the assailant's voices and see their clothes. He further testified that, he was injured with a panga and iron bar and as result; he sustained a cut on his head and on the left side of his head.

It was his further evidence that, his legs were tied with an electric cable and he was then moved to the house where he found PW1. After a while, he untied himself and when he managed to get

outside, he found the 2nd Appellant and they walked to the gate where they found PW3.

PW4 confirmed that, the car park was well lit with two spotlights and he was able to identify the Appellants because he had worked with them.

During cross examination, PW4 testified that, he recalled seeing the Appellants in the police van when heading to the hospital. He also admitted that when giving his statement to the police he did not mention to the police that the Appellants participated in the attack.

PW5, Munangisa Kennedy, the arresting officer, testified to being allocated a docket of aggravated robbery and murder. It was his testimony that he rushed to the scene and confirmed that the said incident occurred and he also went to UTH where he found PW1 and PW4 who were in bad condition. Upon inquiry, PW5 learnt that two other victims had survived the attack, being the Appellants. When he interviewed them, he was of the view that the Appellants gave different versions of events.

It was his testimony that a few days later, he interviewed PW1 and PW4 who informed him that the Appellants were among those who attacked them.

PW5's further evidence was that, a postmortem was conducted on the body of the deceased and it revealed that the cause of death was due to head injuries. PW5 thereafter charged and arrested the Appellants for the offences of murder and aggravated robbery.

PW5 opined that it was not plausible for the 1st Appellant to have jumped over a 3 metre wall to inform PW2 about what had transpired; this is because when PW5 visited the scene, he noticed a very big ditch and according to him for a person who was in that state, he would have fallen in the ditch. He further testified that, the period between PW2 informing PW3 about the attack and the time it took PW3 to arrive on the scene was too short for the assailants to have stolen goods worth **ZMW 40, 661.00.**

According to PW5, he was not aware that the Appellants sustained any injuries hence the reason they were not issued with any medical reports.

In their defence, the Appellants gave sworn evidence. The 1st Appellant told the court that, he worked as a security guard for PW3. On the date in question, he arrived late for work at about 20:45 hrs because of the rains. According to him, when he arrived for work he found the 2nd Appellant, PW1, PW4 and the deceased.

He further testified that, at about 01:00 hrs, he heard someone shouting and when he tried to check who it was, he was captured and ordered to lie down. It was his testimony that he was taken to a certain place where he found PW4 and the 2nd Appellant who were also captured and tied with a rope and the 2nd Appellant was bleeding from the back of his head.

It was his testimony that, the attackers made them all lie down but PW4 managed to escape. When the thieves proceeded to chase after PW4, the 1st Appellant escaped and jumped over the wall and informed PW2 about the incident and asked her to call PW3. It was his further evidence that, when he got back to the car park he found that all his co-workers were injured and the deceased was dead.

It was his testimony that, they were all taken to UTH because of the injuries they sustained. He was given some medicine to apply on his injury, as he had a swollen hand.

The 1st Appellant denied taking part in the incident and alleged that he was also attacked by the thieves. He further confirmed that he had worked with PW1 and PW4 for almost eight months.

The 2nd Appellant testified that, on the date in question, he reported for work late. That around 01:00 hrs, he felt someone pull his clothes from the back and he was hit at the back of his head with an iron bar and he passed out. When he regained consciousness, he found that his legs were tied. He managed to untie himself and entered the house where he found PW4 who informed him that they had been attacked by thieves.

The 2nd Appellant equally denied taking part in the attack and alleged that he was also a victim.

Upon considering and evaluating the evidence before her, the learned trial Judge found that, it was not in dispute that PW1, PW4 and the Appellants all worked for PW3 and that their evidence placed the Appellants at the scene on the material day.

The learned trial Judge also found that, during the night of 29th

March 2015, the premises belonging to PW3 were broken into and goods worth **ZMW 40, 661.00** were stolen and that the deceased met his demise during the said break in. She also found that PW1 and PW4 were badly beaten and sustained serious injuries.

With regard to the identification of the Appellants, the trial Judge accepted the evidence of PW1 and PW4. She found no reason to doubt their identification because the Appellants were well known to them and the Appellants through their own testimony confirmed that they were at the scene on the material day. She therefore ruled out the danger of an honest mistake and false implication. She opined that the premises were well lit with spotlights and therefore the quality of the evidence was good.

The trial Judge then went on to consider the provisions of section 21(1) of **The Penal Code**[1] and came to the conclusion that the Appellants participated in the commission of the said offences as principles or accessories and that the prosecution had discharged its burden of proof.

Dissatisfied with the Judgment of the lower court, the Appellants appealed to this Court advancing one ground of appeal couched as follows:

The lower court erred in law and fact when it convicted the Appellants despite the many doubts raised by the defence in this matter.

At the hearing of this appeal, Counsel for the Appellants, Mrs. Mwenya, relied on the arguments advanced in the Appellant's heads of argument.

In support of their lone ground of appeal, it was contended that, the evidence of PW1 to the effect that the Appellants were part of the assailants that attacked them was an afterthought. It was submitted that, PW1 testified that, when the police arrived on the scene the assailants ran away, but PW1 did not inform the police that the Appellants were involved in the incident. According to Counsel, the evidence led by PW1 was merely meant to falsely implicate the Appellants.

It was pointed out that, the evidence of PW1 had some inconsistencies in that, in one breath, he told the court that when he knocked off he handed over duties to the 1st and 2nd

Appellants and in another he denied having seen the 1st Appellant report for work and having handed over to the Appellants. We were referred to pages 9 and 10 of the record of appeal (hereinafter referred to as the record)

It was Counsel's contention that, PW4 contradicted himself and the evidence of PW1 when he testified that when they knocked off they went to buy food at the market and left the keys with the 1st Appellant and PW1. PW4 further told the court that, when they were going to sleep, the 1st Appellant had not yet reported for work.

Counsel, further submitted that, PW4 told the court that the assailants were wearing masks and he was unable to identify them. According to Counsel, it was illogical that the Appellants who were well known to PW1 and PW4 would decide to attack them without the masks on and that, this piece of evidence goes to show that it was meant to falsely implicate the Appellants.

It was Counsel's contention that, at page 45 of the record, PW4 testified that, after the whole ordeal, he and the 2nd Appellant talked about the attack while walking to the gate where they met their boss PW3. According to Counsel, PW4 did not at this point

inform his boss about the involvement of the Appellants, neither did he inform the police when they arrived at the scene. This, according to Counsel, raises doubts as to the participation of the Appellants in the said attack and the consequent death.

According to Counsel, the prosecution has not proved their case beyond reasonable doubt, in light of the inconsistencies in the evidence of PW1 and PW4. The Appellants were present at the scene when the police arrived; as such PW1 and PW4 had the opportunity to inform the police about their involvement. Had the police been informed, they would have arrested them. This inaction according to Counsel shows that the participation of the Appellants in the offences was an afterthought to falsely implicate them. According to Counsel, this is the reason PW4 only came to testify after a bench warrant was issued.

Counsel referred us to the case of **Sipalo Cibozu and Chibozu v The People**[1], where the Supreme Court held that:

> *"The failure by the learned trial Judge to observe the inconsistency in the prosecution evidence constitutes a serious misdirection."*

It was submitted that, the learned trial Judge misdirected herself by not considering the discrepancies in the evidence of the Prosecution witnesses.

Counsel further drew our attention to the case of **Mushemi Mushemi v The People**[2], where the Supreme Court held *inter alia* that:

> *"(i) The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The Judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others"*

According to Counsel, the trial Judge in her Judgment, did not address the issue that PW1 and PW4 did not inform the police about the involvement of the Appellants in the attack and did not consider the motive of the witnesses. Further, it was submitted that, the trial Judge did not state in her Judgment her reasons for believing the evidence of PW1 and PW4 over that of the Appellants who testified that they were also victims of the attack.

It was Counsel's contention that the lower court should have addressed the demeanour of the witness before it and such a failure was misdirection on its part.

In support thereof the case of **Yoani Manongo v The People**[3] was cited where it was held as follows:

> *"The evidence of all prosecution witnesses should be tested and if it is found to fall short of the required standard in criminal cases, namely proof beyond reasonable doubt, an acquittal must follow."*

Counsel further referred us to the case of **R v Shippey and Others**[4] where it was held that:

> *"The requirement to take the prosecution evidence at its height did not mean picking out all the 'Plums' and leaving the 'duff' behind, the Judge should assess the evidence and if the evidence of the witness upon whom the Prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness."*

It was contended that, the evidence of PW2 corroborated the evidence of the 2nd Appellant and was therefore favourable to the Appellants. Counsel submitted that, it would be unreasonable for the 2nd Appellant to seek help for an offence he had just

committed instead of running away. Counsel opined, that the conclusion by the trial court that, if indeed the 1st Appellant sought help during the attack, the police would have still found the criminals in the act, was essentially shifting the burden of proof on the accused.

It was her submission that, firstly the 1st Appellant was captured and moved into the house; secondly it took sometime before PW3 opened the door after he knocked; thirdly PW2 and the 1st Appellant had to ask for a phone from the neighbours to call PW3 who then called the police. Counsel submitted that, while PW1 testified that the attack was close to 15 minutes, taking into account all the above pieces of evidence, it exceeded 15 minutes and it is possible that by the time the police arrived, the assailants managed to run away.

It was further submitted that, the evidence of PW3 was based on the fact that, the Appellants' injuries were not as severe as those of their co-workers and as such considered the Appellants as part of the assailants. According to Counsel, the severity of injuries during an attack relates to the amount of resistance one offers to that attacker.

According to Counsel, the Appellant's defence was credible and corroborated by the prosecution witnesses and was probable in light of all the facts in the present case.

Counsel relied on the case of **Saluwema v The People**[5], where it was held that:

> *"The accused case was reasonably possible, though not probable and the prosecution could not be said to have discharged its burden of proof."*

Our attention was also drawn to the case of **Kalonga v The People**[6], where the Supreme Court held that

> *"The test is that an explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it, an accused is not required to satisfy the court as to his innocence but simply to raise a reasonable doubt as to his guilty."*

Further the case of **Mwewa Murono v The People**[7] was cited where it was held as follows:

> *"In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is high."*

Lastly, Counsel submitted that, the prosecution failed to prove their case beyond reasonable doubt and the Appellants ought to be acquitted.

On the other hand, Counsel for the State, Mrs. Tembo responded *viva voce* and submitted that, the offence of aggravated robbery and murder against the Appellants had been proved beyond reasonable doubt. She stated that PW1 and PW4 identified the Appellants as part of the assailants that had attacked them. The witnesses testified to the effect that they found the Appellants at the door as they tried to escape. The Appellants dragged them to the car park and that this evidence was not discredited.

She further submitted that, the trial Judge properly ruled out the possibility of an honest mistake in her Judgment at page J25 based on the fact that the Appellants were well known to PW1 and PW4 and that the place where the incident occurred was well lit. Reliance was placed on the case of **Bwalya v The People[8],** where the Supreme Court held as follows:

> *(i) On the question of identification, taken by itself the magistrate's comment would raise doubt as to his approach. It is not sufficient to be satisfied that a witness is honest; the*

court must be satisfied that the possibility of honest mistake has been ruled out.

Further the case of **Chimbini v The People**[9] was cited where the Supreme Court held *inter alia* that:

> *"(i) Where there is direct evidence by a complainant that she identified as her assailant a man whom she had known before, and this evidence, if accepted, establishes the guilt of the accused..."*

It was Counsel's submission that, the trial Judge was on firm ground to have accepted the identification evidence as there were no issues of credibility and the prosecution clearly established that there were no visibility issues as the place was well lit.

Regarding the inconsistencies in the evidence of PW1 and PW4, it was submitted that, there were no inconsistencies as regards the vital elements of proving the offences. It was Counsel's contention that, the trial Judge found that the evidence of PW1 and PW4 regarding the whereabouts of the Appellants was supported by the evidence of the Appellants which was that, the 1st Appellant did not report for work but was only seen during the incident. According to Counsel, the trial Judge dismissed the evidence of the 1st Appellant and found that the same was implausible.

Regarding the omission by PW4 to inform PW3 and the police that the Appellants were involved in the attack, Counsel submitted that, PW4 explained that after the incident, he had no strength to talk. She further submitted that, the trial Judge in her Judgment was of the view that it was not in dispute that PW4 was in a bad state and he was bleeding. According to Counsel, PW4 was in shock and had to be hospitalized.

We were urged to uphold both the conviction and sentence.

We have carefully considered the evidence on record, the Judgment of the trial court and the submissions by both learned Counsel.

The evidence as it stands is that, during the night of 29th March 2015, the deceased, PW1 and PW4 were attacked. PW1 and PW4 both sustained serious injuries and the deceased was killed in the course of the attack. Further, goods valued at **ZMW 40, 661.00** belonging to PW3 were stolen.

The sole ground of appeal as we see it mainly deals with whether or not the Appellants are responsible for the attack and the resultant death.

Regarding the identity of the Appellants at the scene, the trial Judge found that the issue of identity of the Appellants does not arise as they were persons previously known to the four witnesses (PW1, PW2, PW3 and PW4). The court further found that the Appellants did not dispute being at the scene where the said offences took place.

The trial Judge further considered the possibility of an honest mistake. She was of the view that, the danger of an honest mistake had been ruled out as PW1 and PW4 testified to the effect that the premises were well lit by two spotlights. She was also of the opinion that the quality of the evidence was good and there was no need for supporting evidence to rule out the possibility of an honest mistake.

It is clear from the record that, the identification of the Appellants by PW1 and PW4 was by way of recognition as opposed to identification of a stranger. The Appellants were persons known to PW1 and PW4 prior to the incident. The Supreme Court in the case of **Chimbo & Others v The People**[10] had an opportunity to discuss recognition evidence and it was held inter alia that:

" i) Although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake."

Further in the case of **Mwansa Mushala and Others v The People**[11], the Supreme Court held as follows:

"(i) Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognise someone whom he knows, the trial Judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation the greater that possibility becomes. The momentary glance at the inmates of the Fiat car when the car was in motion cannot be described as good opportunity for observation."

The Supreme Court went further to discuss the need to subject the witness to searching questions in order to rule out the possibility of an honest mistake. In the case of **Muvuma Kambanja Situna v The People**[12], the Supreme Court held that:

1) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all

the prevailing conditions and the basis upon which the witness claims to recognise the accused.

2) 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 would render mistaken identification too much of a coincidence.

In the case of **Yoani Manongo v The People[3],** it was held that:

1) The concept of honest mistake is normally associated with single identifying witness cases, but of course it is not inconceivable that in a case where there are more than one identifying witness, an honest mistake can be made.

2) The evidence of all prosecution witnesses should be tested and if it is found to fall short of the required standard in criminal cases, namely, proof beyond reasonable doubt, an acquittal must follow.

In light of the guidance given by the Supreme Court in the above cited cases, it is clear that even in cases where the trial Judge is faced with identification by way of recognition, there is need for such evidence to be tested and evaluated in order to rule out the danger of an honest mistake.

The test seeks to determine the prevailing conditions that existed at the time the alleged recognition was made such as the time, was it day or night; if it was the latter, was there sufficient light to enable identification; does the person being identified have distinctive features that allowed for his identification; was the person being identified known to the witness previously; was there sufficient time or opportunity for the witness to observe the accused and did any other witness see the accused person.

Much therefore, depends on the quality of the identification evidence. The evidence on record is that the Appellants were identified by PW1 and PW4. The alleged identification was made during the night time between 01:00 and 02:00 hrs, when they tried to escape and found the Appellants at the door. As to the nature of the lighting, PW1 and PW4 testified that, there was sufficient lighting from two spot lights, one above the shop and the other at the gate.

In addition, the Appellants were not masked like the other unknown assailants and the evidence shows that PW1 and PW4 were sufficiently familiar with the Appellants, as they all worked for PW3 for about 8 months.

Further, from the time of the initial confrontation at the door, when PW4 was dragged to the car park near the mini buses and one of the assailants demanded for money and searched his pockets, the Appellants were watching on. PW4 therefore had ample opportunity and time to observe the attackers at the material time.

We also observe that, this is a case in which there was more than one identifying witness and taking into account the above prevailing conditions, we are satisfied that, the environment was conducive for a reliable recognition as these were persons known to the witnesses. We find that, PW1 and PW4 were properly held as reliable witnesses. Therefore, the issue of a possible honest mistake has been ruled out. The learned trial court was therefore, on firm ground when it found that the Appellants had been positively identified by PW1 and PW4.

Regarding the participation of the Appellants in the offences, the trial Judge found that PW1 and PW4 had no known reason to falsely implicate the Appellants. The duo only sustained injuries after they were confronted at the door by the Appellants. She

further found that the duo testified as to the role the Appellants played during the attack. She therefore concluded that the Appellants participated in the commission of the offences as principals or accessories and relied on section 21(1) of **The Penal Code**[1]. Section 21 provides as follows:

21. (1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

The evidence on record shows that, when PW1 and PW4 attempted to escape, they were confronted by the Appellants at the door who attacked them. Further, the Appellants watched as one of the unknown assailants demanded for money from PW4 and assaulted him. It is therefore evident that, the Appellants were aiding the commission of the offences and as such were part

and parcel of the attackers. There can be no doubt that the Appellants were active participants in the joint venture and indeed are principal offenders within the meaning of section 21(1) of **The Penal Code**[1].

The main line of attack by the Appellants was centered on the inconsistencies in the evidence of PW1 and PW4. While we accept that there were some inconsistencies in their evidence, like whether PW1 handed over duties to the 1st and 2nd Appellants or whether the 1st Appellant was seen at the work place before the attack or not. We find that these inconsistencies were minor and not fatal to the prosecution's case. In the case of **Dickson Sembauke Changwe and Ifellow Hamuchanje v The People**[13] the Supreme Court stated as follows:

> *"For discrepancies and inconsistences to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or on particular points."*

We find that no such doubt was raised in this present case because not only were the inconsistencies not fatal to the prosecutions' evidence, the Appellants' evidence is very clear to the effect that the 2nd Appellant arrived at his workplace late between 20:45 hrs and 21:00 hrs. The 2nd Appellant confirmed

that when PW3 left the shop, the 1st Appellant had not yet arrived for work. The Appellants in their own testimony placed themselves at the scene on the fateful night when the attack occurred. We therefore find merit in the State's argument that the inconsistencies did not go to the root of their case and were therefore not so serious that the convictions based on their evidence cannot stand.

Another line of attack by the Appellants was that the trial Judge in her Judgment did not state her reasons for preferring the evidence of the prosecution witnesses over that of the Appellants. Having perused the Judgment of the trial Judge, it is evident at page J27 of her Judgment that she did consider the 2nd Appellant's evidence. She found that his testimony that he jumped over the wall to inform PW3 about the attack was farfetched. She was of the view that if he had done so in the time he said he did, the assailants would not have managed to steal the amount of goods they stole and they would not have managed to escape.

It was the evidence of PW3 that it took close to seven minutes for him to get dressed and get to the car park and this was

corroborated by the evidence of PW2 who stated that a few minutes after she informed PW3 about the attack, she heard him cry out that his brother had been killed. Having considered this evidence and the manner in which the attack was executed, if indeed the 2nd Appellant sought help, the assailants would have been captured.

Regarding the evidence of the 2nd Appellant, after he felt some one pull his clothes, he was beaten and he passed out and could not see what happened. When he regained consciousness, he found that his legs were tied. He managed to untie himself and entered the house where he found PW4 who informed him that they had been attacked by thieves. This evidence was discounted by that of PW1 and PW4 who were found to have been reliable witnesses and who testified that they met the Appellants at the door as they tried to escape.

In the case of **Coghlan v Cumberland**[14], it was stated as follows:

> *"...When as often happens much turns on the relative credibility of witnesses who have been examined and cross examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them, it is often very difficult to estimate correctly the relative credibility of the*

witnesses from written dispositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses who stole. But there may obviously be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge when on question of fact turning on the credibility of witnesses whom the Court had not seen.

In light of the holding in the above case, we find that the trial Judge did consider the evidence of the Appellants and had the advantage of seeing and hearing all the witnesses. She was therefore entitled to arrive at the decision she did and we find no reason to substitute that finding.

Regarding PW4 not informing PW3 and the police about the involvement of the Appellants in the offences. The evidence on record reveals that the circumstances under which PW1, PW4 and the deceased were attacked were brutal. The medical reports indicate that PW1 suffered multiple scalp laceration and linear frontal skull fracture, while PW4 suffered two deep lacerations on the scalp and fracture of second metacarpal. In addition there is evidence from PW3 and PW5 that PW1 and PW4 were in bad

condition and had to be hospitalized. We are therefore of the view that PW4 not informing the police or PW3 immediately after the attack was due to the traumatizing experience as opposed to him falsely implicating the Appellants as contended by Counsel.

We are therefore satisfied that regarding the offence of aggravated robbery, the ingredients of the offence had been proved and the trial Judge was on firm ground to have convicted them of the said offence.

As regards the offence of murder, it was conclusively established by the prosecution that the deceased met his demise on 29th March 2015 during the course of the attack. The deceased died as a result of injuries inflicted by the assailants. This evidence was corroborated by the postmortem report which revealed that the cause of death was brain haemorrhage due to sharp force head injury.

The question to consider at this point is whether the Appellants had the necessary malice aforethought in terms of section 204 of **The Penal Code**[1]. Sections 200 and 204 of **The Penal Code**[1] require that the offence of murder be accompanied with a specific frame of mind; it follows therefore that the prosecution must

satisfy this requirement before a conviction of murder can be attained. Section 204 provides as follows:

> *204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
>
> *(c) an intent to commit a felony;*
>
> *(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

The evidence on record shows that, the victims were attacked using pangas and iron bars. As a result, PW1 and PW4 suffered serious injuries that led to them being hospitalized while the deceased died. Certainly the Appellants and their fellow attackers reasonably ought to have known that the use of such weapons would cause death or grievous harm to their victims.

Taking into account section 204(b) above, we are of the view that even though the Appellants did not specifically assault the deceased to death, they had the necessary knowledge and realisation that using such weapons, serious harm was a natural and probable consequence. The Appellants and the unknown assailants had formed a common purpose and were prepared to rob the shop at all costs.

Death in this case was a probable consequence of the use of offensive weapons and we find therefore that the Appellants and the other unknown attackers intended to cause grievous harm. The trial court was therefore on firm ground when it found that the Appellants were responsible for the death of the deceased and we find that section 200 of **The Penal Code**[1] has been satisfied.

We will now consider the sentences meted out by the trial Judge, with regard to the offence of aggravated robbery; this was an offence committed under aggravated circumstances that led to the death of the deceased and serious injuries inflicted on PW1 and PW4. We find that the imposition of the minimum statutory sentence was inappropriate and therefore comes to us with a sense of shock. We are of the view that the appropriate sentence

for this offence is life imprisonment with hard labour. We accordingly set aside the sentence of fifteen (15) years and substitute it with life imprisonment with hard labour.

Regarding the offence of murder, there are no extenuating circumstances in this present case, as such the death penalty is maintained.

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J. CHASHI
COURT OF APPEAL JUDGE

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F.M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE