

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 67/2017

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

MAPALO TAYANI MANDA



APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Musonda, Kabuka and Chinyama, JJS

on 10th April and 7th August, 2018

For the Appellant: Mr. M. Kabesha, Kabesha & Co. appearing with
Mrs. M. K. Liswaniso, Legal Aid Counsel, Legal
Aid Board

For the Respondent: Mrs. R. N. Khuzwayo, Chief State Advocate,
National Prosecution Authority

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

- 1. Chabala v. The People (1976) Z.R. 19**
- 2. Maketo & 7 Others v. The People (1979) Z.R. 23**
- 3. Mwape v. The People (1976) Z.R. 188**
- 4. Chizu v. The People (1979) Z.R. 225**

5. **Mutambo v. The People (1965) Z.R. 19**

6. **R V Coney (1882) Q.B.D. 534**

Legislation referred to:

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

2. **Section 16 of the Supreme Court Act, Cap. 25**

The appellant was convicted by the Kabwe High Court on three (03) counts of aggravated robbery, four (04) counts of murder and one (01) count of attempted murder contrary to Sections 294(1), 200 and 215(a) respectively of the Penal Code, Chapter 87 of the Laws of Zambia.

The appellant had been arraigned for three offences comprising a total of 8 counts as follows:

Count One:

Aggravated robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant, on the 22nd day of November, 2012, at Kabwe, in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons and while being armed with one AK 47 rifle and three pistols, did steal from ENOCK CHABALA, I Nokia cell phone and a cash

sum of K500.00 altogether valued at KR800.00 the property of ENOCK CHABALA and that at or immediately before or immediately after the time of such stealing, did use or threatened to use actual violence to the said ENOCK CHABALA in order to retain, prevent or overcome resistance to the said property being stolen.

Count Two:

Aggravated robbery contrary to Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons and while being armed with one AK47 rifle and three pistols, did steal from ENOCK CHABALA, 960 iron sheets, 1 sewing machine, 80 mattresses, 100 foams, 120 cushions, 200 ridges all together valued at K96,230.00, the property of JOHN SIKAONGA and that, at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said ENOCK CHABALA in order to

retain, prevent or overcome resistance to the said property being stolen.

Count Three:

Aggravated robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons and while being armed with one AK 47 rifle and three pistols, did steal from Enock Chabala, a volvo truck registration No. ALF 2406 valued at K135,000.00 the property of STEVEN MBAO and that at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said ENOCK CHABALA in order to retain, prevent or overcome resistance to the said property being stolen.

Count Four:

Attempted murder contrary to Section 215 (a) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of

the offence under this count were that the appellant, on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons, did attempt to murder ENOCK CHABALA.

Count Five:

Murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant, on the 22nd day of November 2012, at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons, did murder MARTIN MWABA.

Count Six:

Murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant, MAPALO TAYANI MANDA on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia,

jointly and whilst acting together with four other unknown persons, did murder KALEBY SIMUYEMBA.

Count Seven:

Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons, did murder GIDEON BUPE SICHAMBA.

Count Eight:

Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence under this count were that the appellant on the 22nd day of November, 2012 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with four other unknown persons, did murder RODGERS MUBANGA.

In the course of prosecuting the appellant, the prosecution called a total of 12 witnesses. The first witness ("PW1") was Enock

Chabala who testified that on 22nd November, 2012 he drove to Lusaka from Kitwe for the purpose of collecting and subsequently delivering miscellaneous goods for a Mr. Kaonga at Kasama. The witness told the trial court that upon reaching Lusaka, he first drove to Mandevu compound where he loaded some iron sheets before proceeding to Lusaka's industrial area where he loaded 960 iron sheets together with ridges. Thereafter, PW1 proceeded to Kamwala Trading area of Lusaka where he loaded mattresses. The witness confirmed that the goods in issue were being loaded in the volvo 10 ton truck registration No. ALF 2406 which he was driving at the time.

PW1 further testified that after loading the mattresses, he went back to the industrial area where he collected 60 additional mattresses while an additional 50 iron sheets were also loaded in the truck. Later that day, PW1 set off for Kasama. At the time he was joined in the truck by Kasuba, Musyani, Shimapalo, Rogers Mubanga and one other person whose name the witness did not know.

PW1 further testified that after driving past Kabwe town and an area known as Manyumbi, and as he was approaching an area

called Green Leaf at around 21:30 hours, he looked through his vehicle's rear view mirror and saw a speeding vehicle which was flashing lights at him and trying to overtake. As the vehicle drew closer the person who was seated on the passenger side of this speeding vehicle produced a gun and ordered him to park. At the time, PW1 believed that he was being stopped by police officers because he noticed that the persons who were in the vehicle and which vehicle turned out to have been a Toyota Corolla, were wearing reflector jackets.

When PW1 stopped, he saw – in his rear view mirror – the people who were passengers in the corolla, walk to the passenger's side of the truck he was driving. Amongst this group of men was a woman, whom he later came to know as the appellant. These people then proceeded to open the passenger door to the truck. PW1 confirmed that he was able to see two of the men very clearly owing to the lights from the corolla which had been on full beam. The witness also confirmed that the lone woman had long hair.

PW1 further testified that four of the men entered the truck while holding pistols. The attackers had 3 pistols and one AK47 rifle. Three of the men entered the truck using the passenger door while the 4th entered the truck using the driver's door. PW1 further

testified that after entering in the truck, the bandits accused him of carrying drugs, which he denied. PW1 and the 5 passengers who were in the truck were ordered to move to the back of the truck. The attackers also demanded to be given the mobile phones which PW1 and his passengers had together with all their personal belongings. PW1 told the trial court that at that point he refused to comply and told the attackers that police did not behave in the manner they were behaving. On hearing this, one of the bandits hit PW1 with a pistol thereby causing him to bleed. One of the assailants then moved to the driver's seat of the truck and drove it off the tarmac and into the bush before stopping and parking after about 200 metres from the tarmac. The appellant, who had been driving the corolla, also parked nearby and asked the assailant who had driven the truck into the bush to switch off the lights. As the driver/attacker did not know how to switch off the truck's lights, PW1 showed him how to do it.

According to PW1's further testimony, the assailants then demanded to be given the keys to the container. The witness fetched the keys to the container before proceeding behind to open it. PW1 thereafter described the contents of the container to the bandits. The assailants confirmed that the truck in question was

what they had been looking for and ordered PW1 to close it. While all this was happening, one of the assailants had been pointing a gun at him.

PW1 also testified that as he was being led to the back of the truck and ordered to open the container, his passengers had been ordered to lie down. After closing the container, the lady assailant (the appellant) instructed the other assailants to take PW1 and his passengers into the bush and ignored their pleas to be taken to a police station.

According to PW1, the lady in question (the appellant) was light in complexion, had her hair plaited, wore a yellow T-shirt and a faded blue pair of jeans. She was tall, slim and had hips. The witness further informed the trial court that he had a good look at the lady when the vehicle lights were on because he thought that she, as a woman, would be more sympathetic and help him and his fellow victims because the men looked very brutal.

As PW1 and his fellow victims were being walked further into the bush by the assailants, one of them said that they were not police officers but thieves and that they (PW1 and his passengers) had reached the end of their lives. The witness also informed the

trial court that, as they were being led into the bush to be killed, the lady (appellant) had remained where the vehicles had been parked.

PW1 further testified that once the assailants had taken them to some area close to an anthill, the six (PW1 included) were ordered to lie down facing the ground. Before this final moment, the victims had individually pleaded with the assailants not to kill them. PW1 had even argued with the assailants.

The witness told the trial court that after all their pleas went unheeded, he heard gun shots. PW1 was shot at the back of his head. After the shootings, the assailants left.

After sometime, PW1 sat up and saw his colleagues lying down. Only one was slightly moving or shaking. He stood up and walked to the road, bleeding and falling down in the process. By the time he reached the main road, PW1 was too weak and unable to see. He decided to sit in the middle of the road so that he could attract immediate attention by motorists. Eventually, a minibus driver stopped. PW1 narrated his ordeal to him before the minibus driver decided to drive him back to Kabwe town. He was dropped off at Kabwe police station where he made his report before he was

taken to Kabwe General Hospital where he was treated and given a medical report. PW1 was subsequently discharged from hospital and participated in identifying the appellant as the lady who had been in the group of assailants that had attacked him and his colleagues. PW1 identified the appellant twice, even after she had changed into different clothes. PW1 also informed the trial court that he was even able to identify the appellant from her voice because he had heard her talk at the scene of the crime. PW1 also identified the appellant in court.

Under cross-examination, PW1 testified that he saw three of the assailants who had attacked them and that one of them was a woman. The woman is the one who had been driving the Toyota Corolla. The witness further testified under cross-examination that it was the woman who had instructed her male colleagues to take PW1 and the other 5 victims in the bush and have them killed. The woman's actual words in Bemba were: *'Batwaleni apo fast fast tubombeko fimbi'* which, when translated into English meant: *'Take them there quickly so that we can do other things.'*

The prosecution's second witness ("PW2") was Steven Mbaos who told the trial court that, on 21st November, 2012, his driver, Enock Chabala (PW1), informed him that he was in Kitwe with his

volvo truck registration number ALF 2406, white in colour. At the time, PW1 was with Gideon Sichamba who was PW2's nephew and PW1's lorry boy.

PW2 informed the trial court that PW1 had telephoned him (PW2) and informed him that there was a prospective customer in Lusaka who wanted to hire the volvo truck for the purpose of ferrying his goods from Lusaka to Kasama. PW2 confirmed that he immediately sanctioned this business opportunity.

According to PW2, he did not hear from PW1 again and only heard from PW1's wife on 23rd November, 2013 when the latter called to inform PW2 that PW1 had been attacked by thieves or bandits.

PW2 subsequently telephoned Kabwe General Hospital officials who confirmed to him that PW1 was an admitted patient at that hospital. PW2 also testified that when he made inquiries with Kabwe Police, he was informed that PW1 had been attacked with five others and that the 5 had been killed in the incident and that their bodies had since been retrieved.

PW2 further testified that he travelled to Kabwe and saw the 5 dead bodies earlier mentioned which included the body of his

nephew, Gideon Sichamba, which he duly identified. According to PW2, the value of his volvo truck was K135,000:00 in the rebased Zambian currency.

The prosecution's third witness ("PW3") was Kasuba Kalaba who testified that he was the one who had telephoned PW1 for the purpose of having him ferry Mr. Kaonga's goods from Lusaka to Kasama. PW3 further testified that he had helped with the loading of Mr. Kaonga's goods into the truck in question.

The prosecution's fourth witness ("PW4") was Humphrey Mumba who identified the body of his uncle Rogers Mubanga who was one of the five passengers in the volvo truck who had been killed by the bandits.

The fifth witness ("PW5") was Chimba Chisha who had travelled to Kabwe and had identified the body of his uncle, Martin Mwaba, one of the 5 victims of the bandit attack.

The 6th witness ("PW6") was Dorothy Yaluma Bowa who also identified the body of her cousin, Rogers Mubanga, the 5th victim of the bandit attack.

The prosecution's seventh witness ("PW7") was Detective Inspector Mbita Mphanzi who told the court below that he had

investigated the murder, attempted murder and aggravated robbery which were the subject of this matter.

PW7 told the trial judge that, sometime in May, 2013, he was conducting investigations in connection with a murder and aggravated robbery incident. In the course of those investigations, a number of suspects were arrested and subjected to police questioning. The suspects included Mercy Mutale Kasonde, Nicolas Mwelwa (also known as Rasta) and Joseph Kanko. These suspects had led them to other suspects, namely, Masopelo and Simon Zimba. The subject investigations led to the recovery of two motor vehicles and a pistol which had been used in some robberies.

PW7 further testified that it was some of the suspects identified above who revealed in the course of being questioned that they had also been involved in the aggravated robbery incident which occurred in Kabwe on 22nd November, 2012 and which had involved the volvo truck which we identified early on in this judgment. According to PW7, the investigations involving the theft of the volvo truck revealed that the appellant had been involved in that theft and aggravated robbery incident.

PW7 told the trial court that he had liaised with his colleagues at Kabwe in connection with the 22nd November, 2012 robbery and had established that out of the 6 persons who had been in the volvo truck, 5 had been shot dead and only one had survived the ordeal.

PW7 further testified that he was subsequently involved in an operation of ferrying criminal suspects to Lusaka from Kitwe. During that operation, a shooting incident erupted as a group of suspects who had been in another vehicle sought to rescue their friends. In consequence, the 5 suspects who were being ferried to Lusaka were gunned down as they tried to escape.

PW7 also told the trial court that after conducting further investigations, the appellant was arrested. According to this witness, the appellant confirmed that she knew one of the suspects by the name of Rasta who was gunned down during the shooting incident earlier mentioned. The appellant also admitted having been driving a greenish Toyota Corolla while following a volvo truck from Independence Stadium near Mandevu in Lusaka all the way up to Kabwe. PW7 further confirmed that the appellant was subsequently handed over to Kabwe police for further investigations.

The prosecution's 8th witness ("PW8") was Assistant Superintendent Harris Siakanyati who confirmed that he was a trained Scene of Crime Officer based at Kabwe. PW8 confirmed having been assigned the responsibility of conducting an identification parade in connection with this case which he did and produced a photo album in respect of the same.

In his testimony, PW8 confirmed that the appellant had been properly identified by PW1 both by voice as well as her physical appearance.

The prosecution's 9th witness ("PW9") was Rogers Kafula, a Detective Inspector based at Kabwe Central Police Station. PW9 confirmed having visited and having recorded a crime scene involving an aggravated robbery and multiple murders. During his visit to the crime scene, PW9 noticed 5 dead bodies which were lying near an anthill at a distance of about 3-4 kilometres off Great North Road. According to PW9, the 5 bodies had bullet wounds in their heads. The witness also confirmed that he found an empty cartridge of a pistol and two empty cartridges for an AK47 rifle close to the dead bodies. PW9 further testified that he visited the crime scene for the second time in the company of PW1 who had

positively identified the critical areas leading to the final place where the murder had been committed.

PW9 also testified that following the appellant's apprehension, she was transferred to Kabwe police station from where she and PW1 had led a team of police officers to the crime scene. When they reached the crime scene near Manyumbi police check point, PW1 led the officers to the location from where they had been attacked by the bandits and where the volvo truck had been parked. PW9 also informed the trial judge that the appellant had also narrated how the 4 people (bandits) she had been with got out of their vehicle and entered into the volvo truck while she remained in the small vehicle.

According to PW9, the appellant voluntarily led the police officers to the crime scene.

It was PW9's further evidence that, following the gunning down of the 5 suspects earlier identified in this judgment, he and other officers were joined by PW1 when they visited the mortuary at which PW1 identified the body of the person (Kenny) who had grabbed the steering wheel from him. According to PW9, the

appellant also identified the bodies of the dead suspects as Mercy, Kenny and Simon.

Under cross-examination, PW9 told the court below that the appellant told him that she had remained at the point close to where the volvo truck was grabbed and that she drove back to Lusaka thereafter.

The prosecution's 10th witness ("PW10") was Mpuyo Boston, a Detective Inspector, who informed the trial court that he had been tasked with the responsibility of conducting an identification parade in respect of the appellant. In this regard, PW10 confirmed having assembled persons of the same description as the appellant out of whom PW1 had positively identified the appellant as the person who had been involved in the crimes in question.

The prosecution's 11th witness ("PW11") was Senior Superintendent Steven Mvula, a Forensic Expert who confirmed having visited the crime scene involved in this matter. PW11 also confirmed that, according to the investigations which he had conducted, he was able to confirm that the wounds on the persons who had been travelling with PW1 were, indeed, bullet wounds.

The prosecution's last witness ("PW12") was Evans Kosamu, a Detective Inspector, Zambia Police Service, who informed the trial court that, on 23rd November, 2012 he was assigned a docket for murder, attempted murder and aggravated robbery in respect of which PW1 had been the complainant. PW12 essentially repeated the evidence of the other witnesses. PW12 also told the trial court that, following the apprehension of the appellant, she admitted during questioning that she had participated in the robbery involving the volvo truck and the associated murder and attempted murder.

According to PW12, the appellant had led the dealing police officers to the scene of the crimes in question where she had demonstrated how everything happened. According to PW12, the appellant informed him that she had remained in the car and did not follow the other bandits when they led their victims further in the bush. It was PW12's further evidence that, upon being shown the photographs of the bandits involved, she was able to identify 4 out of the 5. PW12 further testified that arising from the totality of the evidence which had been revealed during the investigations which had been conducted in this matter, he made up his mind to charge and arrest the appellant for the offences in question.

At the conclusion of the prosecution's case, the appellant was found with a case to answer and put on her defence. The appellant elected to give evidence on oath but called no witnesses.

Upon testifying on her own behalf, the appellant (or "DW1") told the trial judge that, sometime in 2012, one of her friends, by the name of Rasta who had since passed on, telephoned her and requested her to drive him and his Congolese friends from Kapiri Mposhi where they were to fetch a truck. She told the court that her friend, Rasta, was not in a position to drive himself as he had an ankle injury. According to DW1, it was for this reason that she was requested to drive Rasta from Kapiri Mposhi to Lusaka at a consideration of K800.00. DW1 confirmed before the trial judge that she agreed to drive Rasta and his two male friends. It was DW1's further evidence that her friend, Rasta, had introduced her to his friends, namely, Kenny and another person whose name she could not recall.

DW1 also testified that when they reached Manyumbi area, after Kabwe, the people she was with pointed at a truck which was in front as the truck they wanted. DW1 informed the court that the person who was driving flashed the lights of their car to which

the driver of the truck responded by stopping. The appellant then told the court that Jojo proceeded to the driver's side of the truck and took up the driver's seat while the other three passengers got out of the car and picked small travelling bags which had been in the boot of the car.

According to the appellant, as she was still in the car, Rasta asked her to drive and follow the truck behind. However, DW1 only drove a short distance before Rasta told her to stop.

The appellant/DW1 further testified that, after a short interval, Rasta returned and they started off for Lusaka. DW1 denied having gone to the location where the killings took place and insisted that she had remained behind in the vehicle (corolla). She also denied having uttered the words '*endesheni tubombeko fimbi*'. The appellant told the trial judge that Rasta had informed her that his friends were proceeding to Congo.

The appellant also testified that when she and Rasta reached Lusaka, Rasta left her in Chilenje and that two days later she was paid her K800.00 (rebased).

The appellant told the trial judge that she was apprehended by the police on 31st May, 2013 and that she subsequently led them

to the Manyumbi area, at the location from where she had turned back to Lusaka.

Under cross-examination, the appellant denied ever driving to the point where the murders were committed. She also denied any knowledge about the plans to kill the victims in question as well as having ignored the victims' specific pleas for her to help them.

The appellant, however, admitted in cross-examination that it was bizarre for a woman to be found with strange men at night. She also told the trial judge that she was unaware that the victims of the banditry had been killed. She also told the trial court that out of the dead suspects on the photos which she was shown she only knew Rasta very well.

Following the closure of the defence, both counsel involved filed submissions to support their respective positions. The learned trial judge reviewed the evidence which had been placed before her in the context of the submissions which counsel for the respective parties had filed and reasoned that:

“From the totality of the evidence, I have no doubt in my mind that the accused [had] participated in the brutal killing of the four people and the robbing [which had been involved]. She started off with Rasta and other bandits from Lusaka, pursued a truck,

attacked the people who were in it, killed them and robbed them of their belongings.” (at p. J22 of the judgment)

According to the learned trial judge,

“It [was] not in dispute that the accused... drove a motor vehicle which was used in committing the said offences, a fact which [was] corroborated by PW1’s testimony... that it was the [appellant] who drove the Toyota Corolla...

I find the evidence of PW1... very credible and [that the same had] corroborated that of the other prosecution witnesses, namely PW8, PW9, PW10, PW11 and PW12 especially on the identification of the [appellant] and the... dead suspects who were identified by the [appellant] herself...

PW1 had positively identified the appellant.”

In the view of the trial judge, the appellant knew what was happening as she and the other bandits set out to execute their mission. She was driving the car and flashed the truck to stop and one of the bandits produced a gun. The learned judge further noted:

“The [appellant] admitted driving the other suspects to the crime scene namely, Manyumbi, where the truck driver was ordered to stop... The [appellant] also admitted in cross-examination that the people she drove with wore work suits with reflector jackets which [gave the impression that they were] policemen.”

The trial judge further noted that it was the appellant who had ordered the other bandits to take the victims further into the

bush so that they could be killed. The judge also concluded that the testimony of PW1 was very credible and that the same was hardly shaken in cross-examination. The judge then made the following conclusions:

“In my considered view, the [appellant] was one of the bandits who had attacked PW1 and [his deceased passengers]. She instructed the men she was with to quickly kill the victims so that they could do other things... the men she was with killed the four people except PW1 who survived by the grace of God. It is my considered opinion that, based on the totality of the evidence, the (appellant) participated in the crimes with full knowledge... and must be treated as a principal offender.”

The learned trial judge accordingly proceeded to convict the appellant on each one of the 8 counts as highlighted early on in this judgment on the basis that she had been an active participant in the commission of the offences in question. In consequence, the appellant was sentenced to 15 years imprisonment in respect of the one count of aggravated robbery and on each count of aggravated robbery which were to run concurrently with effect from 31st May, 2013. As to the four counts of murder, the court below sentenced the appellant to death.

The appellant was displeased with her conviction and sentence and has now appealed to this court against both on the basis of four (04) grounds as set out below:

- “1. The trial judge erred in both law and in fact in convicting the appellant for the subject offences on evidence which circumstantially [did] not link her to the offences as a principal participant;**
- 3. The trial judge erred in both law and in fact by relying heavily on the evidence of PW1, PW8, PW9, PW10, PW11, and PW12 as corroborative whose evidence was largely hearsay [and, therefore] unreliable;**
- 4. The trial judge erred in both law and in fact in rejecting the appellant’s version but accepting that of PW1 on grounds of credibility which could not be supported;**
- 5. The trial judge erred in law and in fact by making assumptions of its own and ignoring the evidence adduced by witnesses.”**

At the hearing of the appeal, counsel for the two sides confirmed that they had filed their respective Heads of Argument upon which they entirely relied.

For his part, Mr. Kabesha, learned counsel for the appellant opened the appellant’s arguments relating to the first ground of appeal by contending that no evidence was laid before the trial court to demonstrate that the appellant intended and wilfully encouraged the commission of the crimes in question.

According to the appellant's counsel, his client was completely unaware that her friend by the name of Rasta and his friends were on a mission to commit crimes. She did not even know that the criminals were carrying guns. To support his contention, counsel cited our judgment in **Chabala v. The People**¹ where we said:

"If an explanation is given because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give a satisfactory explanation... There is no onus on an accused to prove his explanation. The court is required to consider whether the explanation might reasonably be true."

Learned counsel went on to contend that:

"The fact that the ... appellant drove the assailants to the place where the criminal acts were committed [did] not amount to encouragement."

To reinforce the above contention, counsel cited our decision in **Maketo & 7 Others v. The People**² where we said:

"In order to establish aiding and abetting on the ground of encouragement, it must be proved that the appellants intended to encourage and wilfully encouraged the crime committed. Mere presence at the scene of crime even though non-accidental does not *per se* amount to encouragement."

The appellant's counsel's final submission around the first ground of appeal was to the effect that no evidence was placed before the trial court to demonstrate the existence of a common design between the appellant on one hand and Rasta and his friends on the other. In the view of the appellant's counsel, there was nothing which the appellant did on the fateful day which could have entitled the lower court to treat her as a principal offender. The case of **Mwape v. The People**³ was cited to support this contention. In **Mwape**³, we said:

“In law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal.”

Turning to grounds 2, 3 and 4 which counsel for the appellant argued together, the learned counsel contended that the evidence of PW1 was unreliable and should not have been accepted to establish any facts in dispute in the absence of corroboration.

Counsel accordingly urged us to allow the appeal and set the appellant at liberty on the basis that the prosecution had not proved the appellant's guilt beyond reasonable doubt.

On behalf of the State, Heads of Argument were filed supporting the conviction of the appellant on the basis that she

was clearly linked to each one of the 8 counts via direct evidence which was tendered by PW1. It was also submitted on behalf of the State that even the identification of the appellant during the identification parade which was conducted in connection with the appellant's prosecution was well corroborated thereby rendering her conviction safe and satisfactory.

Adverting specifically to the first ground of appeal, counsel for the State contended that, contrary to the submission which was canvassed on behalf of the appellant to the effect that her conviction for the offences in question had been founded on circumstantial evidence, the correct position was that the appellant was convicted on the basis of direct evidence which was tendered by PW1 who was one of the victims of the crimes in question.

The prosecution counsel further submitted that the appellant had participated in the commission of the crimes in question as a principal and active participant as opposed to an innocent bystander. In the view of the prosecution counsel, the appellant was well caught by Section 22 of the Penal Code as an active participant in the joint enterprise with the other assailants. In this regard,

counsel pointed to the appellant's role of giving instructions to her male counterparts at the scene of the crimes in question.

Counsel for the prosecution further maintained that the appellant was part and parcel of the plan to rob and kill. She was fully aware of what was happening from the beginning of the criminal episode right up to its successful execution.

Counsel also argued that the general conduct of the appellant was not consistent with innocence. In this regard, counsel referred to the appellant's claim that she was hired to drive by her friend, Rasta, because he could not drive owing to a knee injury and yet she also confirmed that when she and Rasta returned to Lusaka it was the same Rasta who had dropped her off in Chilenje.

According to prosecution counsel, the trial court was on firm ground when it convicted the appellant on the basis of all the evidence which had been placed before it including the demeanour, identification and credibility of PW1, the prosecution's key witness.

With regard to the appellant's identification, it was contended on behalf of the State that the element of the appellant's identity in the whole murder/robbery drama was corroborated in the way of some odd coincidence whereby both PW1 and the appellant had

identified the body of Kennedy Masompelo, one of the assailants involved who was gunned down in the foiled rescue operation along Kabwe road.

Counsel distinctly submitted that Masompelo was one of the men in the Toyota Corolla which was pursuing the Volvo truck. PW1 had identified Masompelo as one of the robbers who had attacked him. A further element which corroborated the prosecution's evidence as to the appellant's identity was the fact that the appellant admitted in evidence that, like Masompelo, the other male assailants who had attacked PW1 wore reflective jackets similar to the ones used by Police officers.

According to counsel for the prosecution, the elements which have been highlighted above afforded something more in the way of PW1's corroborative evidence relating to his lone identification evidence at the identification parade.

The State concluded its arguments by submitting that this appeal offered an appropriate case in which this court can invoke the proviso to Section 16 of the Supreme Court Act, Cap. 25. Beyond this, counsel submitted that this court has, in fact, taken the position that so far as the evidence of a single adult witness

was concerned, a court was entitled to convict on the basis of uncorroborated evidence of a single witness. Counsel cited our judgment in **Chizu v. The People**⁴ where we said:

“There is no rule of practice or law for the corroboration of the evidence of [a] single witness and there is nothing improper in allowing the conviction to stand on the evidence of one prosecution witness alone.”

Counsel accordingly urged us to uphold the conviction by the lower court.

We are grateful to counsel for the two sides for their very helpful exertions. Having regard to the conclusion which we have reached in this appeal, we propose to deal with all the grounds of appeal holistically.

We examined the judgment of the trial court in the light of the evidence which was placed before that court. We also intensely considered the judgment of the trial court and the evidence on which the same was anchored in relation to the competing arguments which counsel for the two protagonists deployed before us. In this process, our impressions were shaped by certain pieces of evidence which we now highlight below.

The appellant confirmed in her evidence that, sometime in year 2012, she was hired or engaged by a male friend of hers by the name of Rasta, who had since passed on, to drive him from Kapiri Mposhi to Lusaka as he could not drive himself due to an ankle injury which he had sustained. According to the appellant, Rasta and his male Congolese friends, who included another man called Jojo, were to travel to fetch a truck in Kapiri Mposhi. The appellant further testified in the court below that she was to be paid K800.00 for her services.

The appellant also told the trial court that, sometime in the evening of the day which had been appointed for travel, she, Rasta and his Congolese friends set off for Kapiri Mposhi in a Toyota corolla car. After driving past Kabwe and reaching an area commonly known as Manyumbi, the people in the car pointed at a truck which was in front and confirmed that it was the truck they were looking for.

Although the appellant was clearly massaging her evidence, one veritable truth which stood out from her testimony was the fact that she was with the bandits in question. It was at night. According to the appellant's testimony, only Rasta was known to her. The rest were strangers. And the appellant claimed not to have

had any idea that the strange men were up to no good. How improbable indeed!

The evidence which unfolded before the trial Court revealed that, as the corolla in which the appellants and her male accomplices were was approaching the volvo truck, the driver of the corolla started flashing lights at the truck with a view to getting the truck to stop moving and park. In fact, in order to quickly achieve this, the corolla driver moved the vehicle in such a way that it was moving in a parallel position to the truck and, at that point, one of the bandits produced a gun and pointed it at PW1 while ordering him to park on the side of the road.

According to PW9, one of the prosecution witnesses, when the investigating officers were led to the crime scene by the appellant, the latter described how the robbery and murders were executed by the bandits. The appellant also confirmed to the investigating officers that when their victims were led away to be killed, she had remained behind in the Toyota corolla vehicle. Clearly, her remaining behind did not absolve her of the crime in which she had, as the trial Judge correctly noted, been an active participant. The appellant also confirmed in her own testimony that, after the

execution of the crimes in question she and Rasta drove back to Lusaka while the other bandits proceeded with the stolen truck in the direction of Kapiri Mposhi leaving behind what they believed to have been five dead bodies, all victims of their vicious crimes.

There was also evidence which was placed before the trial court to the effect that, following the gunning down of the bandits who attempted to rescue criminals who were being ferried to Lusaka, the appellant identified the bodies of the gunned down criminals as those of Mercy, Kenny and Simon. The appellant also identified 4 out of the 5 bandits when PW12 showed her their photographs.

To put it plainly, not only did the appellant confirm having been with the male bandits in the Toyota corolla motor vehicle right up to the point of the Manyuni area of Kabwe district where the victims were murdered and the volvo truck stolen, but she subsequently led the Police investigators to that crime scene where she even demonstrated how the robbery and murders were executed.

As regards the nature of the evidence which had implicated the appellant, we entirely agree with counsel for the prosecution

that the evidence was not circumstantial but was directly tendered by PW1 whom the trial judge repeatedly described as a very credible witness. There was no question of drawing any inferences as counsel for the appellant feebly suggested.

Although, as we noted in **Chizu**⁴, corroboration of PW1's evidence was entirely unnecessary and distinctly superfluous, there were sufficient pieces of evidence before the trial court which had the effect of corroborating PW1's evidence with regard to the identity of the appellant and her role in the crimes in question.

For the avoidance of doubt, there was no question of the appellant having been some kind of innocent voyeur who found herself with wrong people, at the wrong time, the wrong place and for wrong reasons. The stubborn truth, as the learned trial judge correctly determined was that she was a conscious, willing and active participant in the crimes for which the long arm of the law caught up with her.

Learned counsel for the appellant cited our decision in **Mwape**³ to support his contention that the appellant neither knew anything nor did she participate in the crimes in question. Consistent with this argument, counsel contended that there was

no evidence of the appellant having had a common purpose or common design with the bandits in whose company she was.

Quite clearly, counsel for the appellant chose to read and apply our decision in **Mwape**³ rather selectively and for the sole purpose of shading the reality of his client's circumstances. As we noted in **Mwape**³, our decision in that case followed what Charles, J, of the then Court of Appeal for Zambia had earlier formulated in **Mutambo v. The People**⁵ as to the meaning and effect of Section 22 of the Penal Code (which retains the same number in the current edition of the Penal Code being Chapter 87 of the Laws of Zambia).

In our view, the matter which fell to be determined by the trial court was whether the appellant and her confederates had formed a common intention to commit the offences of aggravated robbery and murder. In law, a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal. In this regard, Section 22 of the Penal Code, (now Cap. 87), provides that:

“22. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is

committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

According to Charles' J's formulation in the case of **Mutambo**⁵, in order to bring an accused person within the ambit of section 22, the following facts must be proved against him or her beyond reasonable doubt:

- "(i) That two or more persons, of whom the appellant was one, each formed an intention to prosecute a common purpose in conjunction with the other or others.*
- (ii) That the common purpose was unlawful.*
- (iii) That the parties, or some of them, including the appellant, commenced or joined in the prosecution of the common purpose.*
- (iv) That, in the course of prosecuting the common purpose, one or more of the participants murdered a person...*
- (v) That the commission of the murder was a probable consequence of the prosecution of the common purpose."*

In **Mutambo**⁵, Charles, J noted the following points affecting the application of this section at pages 26 and 27 that need to be noted:

- "(i) The formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is*

sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participating in that prosecution with the other or others;

- (ii) *It is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose.”*

The philosophical underpinnings of section 22 of our Penal Code have some ancient history. In the old English case of **R v Coney**⁶ which, in the context of the matter at hand, the trial judge made reference to what Hawkins, J, said at p. 557:

*“In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, as a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. **But the fact that a person was voluntarily and purposely present witnessing the commission of a crime,***

and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or, at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury [or judge] would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury (or judge) whether he did so or not (emphasis ours)."

In the context of this appeal, it cannot be questioned or doubted that the appellant voluntarily travelled to, and was purposely present at, the crime scene. Not only did she not dissent or express opposition to what was happening around her, but, as the trial judge found, the appellant even performed different roles in relation to the commission of the crimes in question. Indeed, quite apart from driving the Toyota Corolla in accordance with the instructions which were being issued to her by her accomplices, the appellant also issued instructions of her own to the assailants-urging them to expedite the crime execution exercise. Even after her fellow bandits had completed their despicable acts of brutally killing their victims, the appellant had to carry out the task of driving Rasta – her avowed friend- back to Lusaka. All this was happening very late in the night.

In spite of what, to any ordinary and innocent person, should have been a traumatic experience at that crime scene where the appellant had been, she carried on over the subsequent days as if nothing had happened, and notwithstanding the wide national publicity which those cruel events at Manyuni had generated.

Undoubtedly, the appellant was able to carry on as if nothing as traumatizing as what had happened to PW1 and the other victims of the crimes in question had occurred because, as the learned trial judge aptly observed in her judgment, the appellant –

“... was one of the bandits who attacked PW1 and the four other deceased persons. She instructed the men she was with to quickly kill the victims [which they did]. PW1 survived by the grace of God. Based on the totality of the evidence, the [appellant] participated in the crimes with full knowledge ... and must be treated as a principal offender...”

In our view, and on the basis of the totality of the evidence which had been placed before the trial Court, there can be no secure or legally justifiable basis on which the convictions which the trial judge pronounced against the appellant can be impeached. In this regard, we are in no doubt that the trial Judge’s analysis of the evidence which was placed before her and the conclusions which she reached were impeccable.

In truth, this is a completely hopeless appeal which we have no difficulty to dismiss in its entirety, and so do we.



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M. MUSONDA, SC
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE