IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 172 AND 173/2018**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

LENGWE THOMSON MUMBA **1st APPELLANT**

JOHN SIHUBWA **2nd APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 23rd April, 26th April and 21st May 2019

For the 1st Appellant: *N. Chanda, Messrs. Nicholas Chanda and Associates and C. Siatwiinda, Legal Aid Counsel, Legal Aid Board.*

For the 2nd Appellant: *D. B. Mupeta, Messrs. D.B Mupeta and Company.*

For the Respondent: *G. Mulenga (Mrs.) Principal State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chashi, JA delivered the Judgment of the Court.

Cases referred to:

1. Mabuluku v The People (2001) 2 ZR 30
2. Saluwema v The People (1965) ZR 4

3. Elias Kunda v The People (1980) ZR 100
4. Joe Banda v The People - SCZ Appeal No. 183 of 2013
5. The People v Gibson Muleya, Ernest Machona, Evans Muyasani and Alfred Malambo - HP/149/2012
6. Molly Zulu, Abraham Musanga and Smiling Banda v The People (1978) ZR 227
7. Abdulla Sinwendo and Another v R (1953) 20 EACA 166
8. Mbundi Nyambe v The People (1973) ZR 288
9. Mwansa Mushala and Others v The People (1978) ZR 58
10. Woolmington v Director of Public Prosecutions (1935) AC 462
11. Peter Yotamu Haamenda v The People (1977) ZR 184
12. Ivon Ndakala v The People (1980) ZR 180
13. Dorothy Mutale and Richard Phiri v The People (1997) SJ 51
14. George Musupi v The People (1978) Z.R. 271
15. Kambanja Muvuma Situna v The People (1982) ZR 115
16. Liswaniso Sitali and Others v Mopani Copper Mines Plc (2004) ZR 176
17. Karuma Son of Kaniu v The Queen (1955) AC 197
18. Calls v Gunn (1963) ALL ER 677
19. Tapisha v The People (1973) ZR 222
20. James Mwango Phiri v The People SCZ- Judgment No. 171 of 2018
21. Wester Kayi Lumbwe v The People (1986) ZR 93
22. Director of Public Prosecutions v Risbey (1977) ZR 28
23. Kenmuir V Hattingh (1974) ZR 162
24. Nelson Banda v The People (1978) ZR 300
25. Shamwana and 7 Others v The People (1985) ZR 41
26. Maketo and others v The People (1979) ZR 23
27. Green Nikutisha v The People (1979) ZR 16
28. John Timothy and Feston Mwamba v The People (1977) ZR 394
29. Nzala v The People (1976) ZR 221
30. Ilunga Kabala and John Masefu v The People (1981) ZR 102

31. Jack Maulla and Asukile Mwapuki vs. The People (1980) ZR 119
32. Dickson Sembauke Changwe and Ifellow Hamuchanje v The People (1989) ZR 144
33. Kasebya Mwaba v The People CAZ- Appeal No. 135 of 2018
34. Christopher Nonde Lushinga v The People SCZ – Judgment No. 15 of 2011
35. Simutende v The People (1975) ZR 294
36. Phillip Phiri and Javas Sakala CAZ – Appeal No. 157 and 158 of 2017

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia.
2. The Firearms Act, Chapter 110 of the Laws of Zambia.

This is an appeal against conviction and sentence.

The Appellants were originally charged with two counts of Aggravated Robbery contrary to section 294(1) of ***The Penal Code***[1] by the High Court sitting at Ndola. At the stage of no case to answer, they were acquitted of the second count.

The particulars of the offence were that the Appellants on 9th August, 2016 at Luanshya, in the Luanshya District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other unknown persons and whilst armed with

an AK 47 Rifle, one round of ammunition and two iron bars, did rob Eleckson Malupande of K74,883.50 cash the property of Antelope Milling Company Limited and at or immcdiately after such stealing, did use or threaten to use actual violence to Eleckson Malupande in order to obtain or retain the said property.

The prosecution summoned eleven witnesses in support of their case.

The brief facts giving rise to the charges being preferred against the Appellants are as follows; on the material day, PW1, the debt collector and PW2, the driver, employees of Antelope Milling were robbed of K74,883.50 at Mpatamatu depot, whilst they were collecting monies from depots on what was known as the local route. In the process of the said robbery two gun shots were fired.

The robbers sped off in a Corolla and PW1 gave chase in the company vehicle, a Toyota Hilux. In the process of the chase, the driver of the Corolla failed to negotiate a corner and the car fell into a ditch. Four people came out of the vehicle and ran. PW1 focused on the 1st Appellant and closely gave chase. The 1st Appellant was apprehended by PW1 with the help of two members of the public.

From the vehicle, the police recovered the firearm (AK 47), the masks which had been worn by the robbers, iron bars and a wallet.

The trial court found that the prosecution had established a prima facie case against the Appellants and put them on defence.

The 1st Appellant gave evidence on oath and claimed that he was mistakenly apprehended. He claimed he was innocently running to catch a minibus, as he was coming from Zmart, where he had gone to attend interviews. The 1st Appellant denied knowing the 2nd Appellant and denied any involvement in the offence.

The 2nd Appellant elected to remain silent.

At the end of the trial, the learned trial Judge noted that, although the statement of offences referred to section 294(1) of **The Penal Code**[1], the particulars of the offence disclosed the use of a firearm and therefore the charges they faced fell under section 294(2) and found that no prejudice had been occasioned to the Appellants by the omission to bring the charges under section 294(2). In support of this finding, the trial Judge relied on the case of **Mabuluku v The People**[1].

Upon considering the evidence adduced before him, the learned trial Judge found the Appellants guilty, convicted them and sentenced them to suffer the ultimate death penalty. It is this conclusion that triggered this instant appeal.

The Appellants aggrieved with the Judgment of the trial court appealed to this Court. They separately filed their grounds of appeal. The 1st Appellant advanced a sole ground of appeal couched as follows:

> *"The trial court erred both in law and fact by dismissing the 1st Appellant's explanation as an afterthought when his explanation could be reasonably possible."*

The 2nd Appellant raised five grounds of appeal couched as follows:

1. **That the Honourable High Court Judge erred in law and fact by accepting hearsay evidence from PW8 at page 16 lines 10 to 13.**

2. **That the Honourable High Court Judge erred in law and fact when he summarised at page J24 of the Judgment from lines 5 to 7 as follows: "PW10 and as confirmed by**

PW8 showed that A2 supplied the information on the movement and position of PW1 to A1 and his accomplices."

3. **That the Honourable Court below erred in both law and fact to hold at page J26 lines 13 to 17 that because of certain information from A1, A2 was positively linked to A1.**

4. **That the Honourable Court again erred in fact at page J29 from lines 5 to 11 by concluding that because PW11 the MTN witness testified that A2 and PW8 frequently communicated at a particular period and that A2 was a money collector before with Antelope Milling Company Ltd, A2 supplied information to A1.**

5. **(a) The Honourable Court erred in law by warning itself on the burden of proof as being collective instead of personal or individually.**

   (b) The Honourable Court did not explain each Accused's rights before being put on defence.

When the matter came up for hearing on 23rd April 2019, the 1st Appellant was represented by Learned Counsel Mr. Chanda and Mr.

Siatwiinda, whereas the 2nd Appellant was represented by Learned Counsel Mr. Mupeta. Mrs. Mulenga appeared for the Respondent. Mr. Chanda, requested for an adjournment to enable him file an additional ground of appeal and heads of argument.

At the hearing of the Appeal on 29th April 2019, Mr. Siatwiinda appeared for the 1st Appellant while Mr. Chanda was not in attendance. However, we did note from the record that he did not file an additional ground of appeal as earlier indicated but instead adopted the sole ground of appeal filed into Court by his Co-Counsel, Mr. Siatwiinda and filed supplementary heads of argument.

Mr. Mupeta, Counsel for the 2nd Appellant indicated that he was abandoning grounds five, six and eight, leaving the grounds set out above.

Counsel for the Appellants relied entirely on their written submissions and Mr. Siatwiinda gave oral submissions in reply.

In support of ground one, Mr. Siatwiinda argued that, the 1st Appellant's narrative of what transpired on the material day was coherent as opposed to the findings of the trial Judge. He contended

that, while PW1 in his evidence narrated that he received help from two members of the public in apprehending the 1st Appellant, they were not called to give an account of what transpired. According to Counsel, their evidence was vital in proving how they managed to apprehend the 1st Appellant. It was argued that in the absence of such evidence, PW1's account of events was unsatisfactory.

It was further submitted that, it was improbable for PW1 who did not disembark from his vehicle to pursue the 1st Appellant in an area that was crowded and that it was strange that PW1 opted to pursue the robber who did not have the bag containing the money and leave the robbers who did. No explanation was proffered for such an odd decision.

According to Counsel, it is possible that, members of the public could have chased and apprehended the wrong person as stated in the 1st Appellant's defence. Coupled with the fact that when the 1st Appellant was apprehended, there was nothing on his person that could have connected him to the commission of the offence.

It was further contended that, the prosecution's case had contradictions regarding where the 1st Appellant was seated in the

Toyota Corolla, as PW1 in his evidence alleged that the Appellant sat at the rear, whilst PW10 alleged that he was informed by PW1 that the 1st Appellant was the one driving the motor vehicle.

Mr. Siatwiinda indicated that, such inconsistency goes to the credibility of PW1 and reveals that PW1 did not closely pursue the robbers and that, the only reasonable explanation is that when PW1 arrived at the accident scene, the robbers had already scampered in different directions and did not actually see the 1st Appellant coming out of the vehicle. It was submitted that the only reasonable explanation was that tendered by the 1st Appellant. Mr. Siatwiinda cited the case of **Saluwema v The People**[2].

We were further referred to the case of **Elias Kunda v The People**[3], where the Supreme Court held that:

> *"There cannot be a conviction if an explanation given by the accused, either at an early stage (such as to the police) or during the trial, might reasonably be true."*

According to Counsel, the explanation proffered by the Appellant during trial could reasonably be true and the fact that the

explanation was only introduced during the defence, cannot be considered as an afterthought. The prosecution still had the opportunity to bring in evidence in rebuttal or cross examine the 1st Appellant on the same, as was held in the case of **Joe Banda v The People**[4].

Lastly, Counsel submitted that the prosecution cannot be said to have discharged its burden of proof and as such the trial Judge erred by rejecting the 1st Appellant's defence.

Mr. Chanda, raised an issue of identification, the thrust of which is that, the robbers who attacked PW1 and PW2 were masked and as such it was impossible for PW1 to have identified the 1st Appellant who was not known to him before the incident. Counsel submitted that the evidence on record is not clear whether the Appellant was still wearing the mask when he was apprehended or whether the mask was removed and if so at what point it was removed. He further submitted that, no evidence was led by the prosecution to connect the Appellants to the masks that were found in the vehicle.

In addition, Counsel submitted that the circumstances under which the whole ordeal occurred were traumatic making a positive

identification difficult. To buttress his submissions, Counsel relied on the following authorities on identification evidence; **The People v Gibson Muleya, Ernest Machona, Evans Muyasani and Alfred Malambo**[5], **Molly Zulu, Abraham Musanga and Smiling Banda v The People**[6], **Abdulla Sinwendo and Another v R**[7], **Mbundi Nyambe v The People**[8] and **Mushala v The People**[9] and submitted that it is highly possible that the 1st Appellant was mistakenly apprehended and that this possibility was not excluded.

According to Counsel, the prosecution failed to discharge their burden of proof as there was doubt cast on their evidence arising from the fact that the robbers were masked. Reliance was placed on the case of **Woolmington v DPP**[10].

Relying on the case of **Peter Yotamu Haamenda v The People**[11], it was submitted that, there was a dereliction of duty on the part of the police for failure to uplift fingerprints from the firearm, it was therefore argued that the Appellant ought to have been acquitted. We were further referred to the cases of **Ivon Ndakala v The People**[12] and **Dorothy Mutale and Richard Phiri v The People**[13]

where it was held that where doubts have been raised, they must be resolved in favour of the accused.

Lastly, it was Counsel's argument that the trial Court should not have relied on the evidence of PW8 as she was a suspect with an interest to serve, as she was initially arrested with the Appellant and was in custody for a longer period thereby compromising her position in the matter. On this point, we were referred to the case of **George Musupi v The People**[14].

Mr. Mupeta, Counsel for the 2nd Appellant relied on his filed heads of argument. In support of ground one, Counsel argued that the lower court misdirected itself by admitting hearsay evidence from PW8 to the effect that one Ms. Mulenga, informed her that the 2nd Appellant had been apprehended in connection with a robbery. According to Counsel, this statement amounted to hearsay as it was an assertion of the truth of what it contained. It is Counsel's argument that the evidence led by PW8 was from a person who was not called as a witness, thereby depriving the 2nd Appellant of an opportunity to test the truth of the statement by way of cross examination. We were referred to the case of **Muvuma Kambanja Situna v The People**[15].

In relation to ground two, Counsel argued that, the trial court fell into grave error in the treatment or handling of evidence from PW10. When PW10 sought to lead evidence of what amounted to an admission, defence Counsel objected and the same was sustained by the trial Judge, who used his discretion to exclude evidence illegally or unfairly obtained. That, despite the objection having been sustained, PW10 managed to sneak in a crucial part of the alleged admission to the effect that he was led to the 2nd Appellant's house by the 1st Appellant. According to Counsel, this amounted to a confession which essentially means that the trial court accepted what it had already ruled out. Counsel referred us to a number of authorities; **Liswaniso Sitali and others v Mopani Copper Mines Plc[16], Karuma Son of Kaniu v the Queen[17]** and **Calls v Gunn[18]** on the discretion of the court to disallow evidence where the strict rules of admissibility would operate unfairly against an accused. We were also referred to the case of **Tapisha v The People[19]**.

Another line of attack, was on the following statement by the trial court:

"PW10 and as confirmed by PW8 showed that Accused 2 supplied information on the movement and position of PW1 to Accused 2 and his accomplices"

Counsel submitted that, nowhere on record did PW10 state that the 2nd Appellant supplied information on the movement of PW1 and neither did PW8 in her evidence state that the 2nd Appellant supplied any information to the robbers. Counsel submitted that he wondered how the trial court came up with such statements.

Further, Counsel submitted that, the trial court admitted hearsay evidence when PW10 testified to the effect that the 2nd Appellant was an employee of Antelope Milling. According to Counsel, this was a statement with the objective of establishing as truth what is contained in it, as such the prosecution ought to have called a witness to that effect.

With regard to ground three, Counsel submitted that, the trial court erred when it relied on the evidence of the 1st Appellant as linking the 2nd Appellant to the offence. According to Counsel, the 2nd Appellant was not positively identified and that the court fell in grave error when it considered the evidence of PW8 as corroborating that

of the 2nd Appellant. PW8's evidence cannot corroborate that of the 1st Appellant when his evidence was objected to by the defence and sustained by the trial court.

It was further argued that PW8 testified that the 2nd Appellant requested her to inform him when "the boss" would pass through but it is not clear which boss was being referred to. in addition, it was possible that the 2nd Appellant and PW8 did not want the boss to know about the flour transaction. That there were several inferences that could have been drawn and ought to have been resolved in favour of the accused.

Counsel further submitted that PW1 and PW2 should have been treated as suspects, as they were not security conscious when handling the money. PW1 left the money in the car when they arrived at Mpatamatu, PW2 left the keys in the ignition, money in the car and the doors unlocked and went out. Coupled with the fact that PW1 pursued the robber without the money bag is indicative that they had intentions of letting the robbers with the money bag escape. According to Counsel, the only inference is that they were part and parcel of the robbers, as the money has not been recovered.

With regard to ground four, it is Counsel's argument that while there was no dispute that the call records showed that the numbers 0966513140 and 0963539199 were active and frequently communicated, there was nothing more to show to whom the said numbers belonged and as such, the call records were irrelevant and did not aid in proving the subject offence.

In support of ground five, Counsel submitted that, the trial court did not warn itself on the burden of proof. According to counsel, a criminal charge against a person imputes individual liability and as such the prosecution ought to prove its case against an individual. Counsel opined that, the warning on the burden of proof of the prosecution by the trial court at page 124 of the record was wrong as it is not a collective burden. It was further argued that, the record is incomplete as it does not show when the prosecution closed its case, neither does it show that the Appellant's were put on their defence and their rights explained.

In opposing the 1st Appellant's sole ground of appeal, Mrs. Mulenga, on behalf of the State, relied on her filed heads of argument and

submitted *viva voce* in response to the 1st Appellant's supplementary heads of argument and to the 2nd Appellant's heads of argument.

Mrs. Mulenga, supported the conviction and sentence of the 1st Appellant and submitted that the evidence tendered against him was cogent. She submitted that the evidence linking the 1st Appellant to the offence was that given by PW1. In support of this argument, Counsel led us through the evidence of PW1 and that of the 1st Appellant and submitted that the explanation proffered by the 1st Appellant was not raised at the time the Appellant was apprehended neither was it raised during cross examination. It was submitted that an accused person begins building his case from the moment he is apprehended and right through to cross examination of the first witness.

Counsel contended that an explanation that is only offered at the time the accused takes his defence is clearly an afterthought and must be discounted as not being reasonably possible. In support thereof, we were referred to the cases of **James Mwango Phiri v The People**[20] and **Elias Kunda v The People**[3].

It is Counsel's contention that the 1st Appellant was represented by Counsel in the court below and had every opportunity to instruct his Counsel on his explanation of what occurred on the material day. That, even going by the explanation proffered by the Appellant, it was strange that the 1st Appellant was running in the opposite direction of the bus station.

According to Counsel, she did note that the defence during cross examination of PW10 attempted to raise the issue of mistaken identity as he was apprehended while walking in the vicinity but that this was in contrast with the evidence of PW1 to the effect that the 1st Appellant was running. Counsel submitted that this turns on the issue of credibility and as such the trial court was on firm ground when it discounted the Appellant's explanation. Counsel referred us to the cases of **Wester Kayi Lumbwe v The People**[21], **Director of Public Prosecutions v Risbey**[22] and **Kenmiur v Hattingh**[23] on the point that where questions of credibility are involved, an Appellate Court will not readily interfere with the findings of the trial court which had the advantage of hearing and seeing the witnesses.

In her oral submissions, Mrs. Mulenga submitted that, there was no law requiring more than one witness to be called to testify on a particular issue. According to Counsel, there was direct evidence from PW1 who witnessed the apprehension of the Appellant by members of the public. In support, thereof, we were referred to the case of **Nelson Banda v The People**[24].

In response to the supplementary heads of argument and in particular on the issue of the identification of the 1st Appellant, Mrs. Mulenga submitted that the evidence on record indicated that the robbers were masked when carrying out the attack. However, when the vehicle fell in the ditch, the occupants of the vehicle ran away. When PW4 carried out a search, he discovered 4 masks which confirmed the evidence of PW1 that there were four robbers. It was submitted that the only reasonable inference that could be drawn is that the four robbers had taken off their masks before leaving the car.

Regarding whether the scenario was traumatic, Counsel argued that, PW1 pursued the vehicle very closely until it fell in the ditch and with the help of the members of the public, the 1st Appellant was

apprehended. PW1 never lost sight of the vehicle and as such the issue of mistaken identity does not arise, as the conditions were favourable for a positive identification.

Regarding the authorities cited by Counsel for the Appellant on identification, Mrs. Mulenga opined that the said authorities were not applicable in the present case as the 1st Appellant was apprehended from the scene of incident and that the authorities were applicable where an identification parade was necessary. Reliance was placed on the case of **Mwansa Mushala v The People**[9].

With regard to dereliction of duty on the part of the police to uplift fingerprints, Counsel submitted that, the evidence of identification was so overwhelming that it required no further strengthening. In addition, PW10 testified that he was unable to lift fingerprints from the exhibits owing to the fact the scene was contaminated.

Coming to the 2nd Appellant, Mrs. Mulenga informed us that the State did not support the conviction of the 2nd Appellant. She submitted that a perusal of the record revealed that the trial court relied on the statement of the 1st Appellant which was corroborated by PW8. However, she opined that statements made by an accused

against his co-accused are evidence only against the maker and an exception can only be made if the co-accused adopts or by conduct adopts them. We were referred to the cases of **Shamwana and others v The People**[25] and **Maketo and Others v The People**[26]. According to Counsel, if the evidence of the 1st Appellant was discounted, the only evidence left is that of PW8 which is not sufficient to warrant a conviction.

Mr. Siatwiinda responded by reiterating his position that two members of the public apprehended the 1st Appellant and as such their evidence was crucial and they should have been called to testify. In support, thereof, the case of **Green Nikatisha and Another v The People**[27] was cited.

According to Counsel, the only evidence linking the Appellant to the offence is that of PW1 and it is clear from his evidence that he never disembarked from his vehicle and as such there was no communication between him and those that apprehended the 1st Appellant. The evidence of the two persons that apprehended the 1st Appellant could have given a clearer picture of how they managed to

apprehend the 1st Appellant, without that evidence, it is possible that the wrong person could have been apprehended.

We have carefully considered the evidence that was adduced before the lower court and the Judgment of the court in line with the grounds of appeal and the arguments made thereon by Counsel in their submissions.

We note that the issue for determination is whether the prosecution adduced sufficient evidence to support the offence the Appellants were convicted of to the extent that it discharged its burden of proof beyond reasonable doubt.

Before we proceed to consider the grounds of appeal, we first and foremost must be satisfied that the alleged robbery of which the Appellants are convicted of amounts to an armed robbery as envisaged in section 294(2) (a) of ***The Penal Code***[1]. On this point, we are guided by the Supreme Court in the case of **John Timothy and Feston Mwamba v The People**[28], where it was held as follows:

> *"(i) To establish an offence under section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a*

firearm within the meaning of the Firearms Act, Cap. 111, i.e. that it was a lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.

(ii) The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.

(iii) The finding of a magazine with two live rounds on the path taken by the robbers when they ran away must lead to the irresistible conclusion that the automatic weapon seen by the complainants in the hands of one of the robbers was capable of firing the live rounds found in the magazine."

On the strength of the above authority, it behooves the prosecution to establish that the offensive weapon observed by PW1 and PW2 was a firearm. In addition to proving that it was firearm, the prosecution must prove that it is a firearm within the meaning of **The Firearms Act**[2].

PW1 and PW2 were eye witnesses who deposed that one of the robbers was armed with a firearm which he pointed at them in the commission of the offence. Both PW1 and PW2 gave a description of the gun and identified it in court. There was further evidence from PW3 and PW6 who witnessed the whole ordeal and heard gunshots. PW6, a traffic officer, deposed that when he searched the vehicle at the crush site he discovered amongst other things an AK 47 rifle and after performing the normal safety procedure, a projectile came out from the chamber and in the magazine, was 1 round ammunition. Thereafter, PW6 handed over what he had found to the officer in charge, PW10, who then submitted the items for ballistic examination.

PW9, a ballistic expert confirmed that the said AK47 rifle was a lethal military weapon that was capable of loading and firing, bringing it within the definition of **The Firearms Act**[2]. He further observed the cartridge discharged residue which confirmed that it was recently fired.

From the foregoing, we hold the view that the firearm that was picked at the crush site was similar to the one described and

identified by PW1 and PW2. The firearm produced in the court below was the same one seen by the eye witnesses and the same one subjected to ballistic examination. We are therefore satisfied that the robbery was an armed robbery within the definition of section 294(2) (a) of ***The Penal Code***[1].

We will now consider the sole ground of appeal advanced by the 1st Appellant. The Appellant argues that the trial court erred by rejecting the explanation proffered by the Appellant, which explanation could reasonably be true.

The core of the 1st Appellant's case is that he advanced an alibi defence. He claims that on the material day, he had gone to Zmart Crushers in Luanshya to attend interviews, which did not take place because the person in charge of conducting the interviews had left for Ndola and he was asked to go back the following day. Seeing that he did not have transport money to head back to Kitwe, he decided to run to the bus station so that he could catch a minibus from someone he knew would give him a lift.

The 1st Appellant alleged that, when he reached the bus station he was apprehended by some people who were coming from the

opposite direction. He was then informed that he was in the Corolla that was involved in an accident. He denied the allegation and as he tried to explain his movements, he saw a white Hilux and he was thrown in and taken to the police station where he was put in the cells without being given an opportunity to explain his side of the story.

The question we ask ourselves is whether this explanation by the 1st Appellant is plausible and tenable and whether the trial Judge was entitled to reject it.

It is evident at pages 25 – 27 of the Judgment, that in dismissing the 1st Appellant's defence, the trial Judge analysed the Appellant's defence of an alibi. He was of the view that when the defence of an alibi has been raised, it is the duty of the police to investigate the alibi. However, before such a duty is placed on the police, they must be furnished with sufficient details of the witnesses who could support the said alibi.

The learned trial Judge was of the view that in the absence of sufficient details to guide the police in their investigations of the alibi, coupled with the fact that the story of the Appellant attending

interviews was only raised for the first time in his defence and not at any time during the investigations, the alibi was an afterthought and he dismissed it.

The learned trial Judge preferred the evidence of PW1 as he found him to be a credible witness and disbelieved the evidence of the 1st Appellant on account of his credibility and that he failed to put up a coherent sequence of his movements and directions.

The prosecution's case against the 1st Appellant is primarily based on the evidence of PW1. We have examined the prosecution evidence and the 1st Appellant's defence. The circumstances leading to the apprehension of the 1st Appellant were articulately explained in detail by PW1. He gave a detailed account of how he pursued the gate-away vehicle from Mpatamatu depot where the offence occurred until the Corolla fell in the ditch and he also closely pursued the 1st Appellant from the Corolla until he was apprehended. The incident occurred in broad day light around 10:00 hours in the morning.

We agree with the trial court that PW1 was a credible witness as his evidence was clear and un-impeached. We are of the view that the Appellant gave a deliberate lie and his defence was false. The trial

court was correct in dismissing the Appellant's case as an afterthought. We say so, because firstly, the defence of an alibi was brought in too late in the day. In the case of **Nzala v The People**[29], the court stated that

> *"Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi it is the duty of the police to investigate it..."*

We concur with the trial court that a defence of an alibi must be raised at the earliest possible time and sufficient details of witnesses to support that alibi must be furnished to the police in order to enable them investigate the alibi. It is our view that the evidence of the prosecution on record was sufficient to counteract the alibi raised by the defence in the absence of sufficient details to support the alibi.

Secondly, we note that the 1st Appellant admits having been around Mpatamatu area on the material day and time but claims that it was basically a case of mistaken identity and that he informed his Counsel about his movements that day. However, considering the

seriousness and the magnitude of the charge in the present case and the possible death penalty, we find it strange that the defence Counsel did not raise the issue of the alibi at the earliest possible time. He had not suggested to any of the prosecution witnesses about the Appellant's alibi that material day, neither was there any suggestion that the witnesses lied against the 1st Appellant. Counsel's line of questioning in cross examination was not consistent with the alibi raised.

Thirdly, the Appellant stated in his defence that when he was about to reach the bus station, people calling him from the opposite direction apprehended him. This is in contrast with the evidence of PW1 who was found to be a credible witness by the trial court, who deposed that when the four men scampered in different directions, two of them ran towards the bus station while the other two ran in the opposite direction. We are of the view that it was illogical for the crowd to apprehend someone who was running towards them as opposed to running away from the accident scene. In the case of **Ilunga Kabala and John Masefu v The People**[30] the Supreme Court held as follows:

"(i) In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it.

(ii) It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation."

As earlier alluded to, the prosecution's evidence on record is overwhelming as to offset the alibi raised by the 1st Appellant. The incident occurred around 10:00 hours in the morning and there was sufficient lighting to enable PW1 to see clearly and focus his attention on the 1st Appellant until he was apprehended. We are satisfied that the issue of mistaken identity has been excluded.

The defence put forth by the 1st appellant was inconsistent with his innocence. As stated above, an explanation which cannot reasonably be true is in this connection no explanation. It is therefore our finding that the learned trial Judge's rejection of the 1st Appellant's defence was grounded on solid reasoning.

Mr. Siatwiinda, argues that the prosecution failed to avail crucial witnesses in the case, being the members of the public that assisted in the apprehension of the 1st Appellant. Counsel argues that they should have been called to resolve the issue of how they managed to apprehend the 1st Appellant. Whether indeed he was running towards a minibus or running away from the accident scene.

It is trite, that in criminal cases, the burden of proof lies with the prosecution to prove their case beyond reasonable doubt, which entails that the prosecution has a duty to call witnesses to adduce evidence sufficient to enable the court to know the truth. However, it is not incumbent upon it to call all witnesses. It follows therefore that; a trial court has a duty to make a finding on whether the onus on the prosecution to prove the case beyond reasonable doubt had been discharged. We are fortified by the case of **Jack Maulla and Asukile Mwapuki v The People**[31], where the Supreme Court stated as follows:

> *"(i) There is no rule in the law that the evidence of more than one witness is required to prove a particular fact. However in any given set of circumstances where there is evidence that more*

than one person witnessed a particular event, and in particular the finding of an incriminating object in the possession of an accused, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account in the decision as to whether the onus on the prosecution has been discharged. Nelson Banda v The People (2) followed.

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

Regarding the evidence availed by PW1 on the apprehension of the 1st Appellant, we would say that, it was sufficient to aid the trial court come to a just conclusion. We find that there was nothing in

the evidence of PW1 which could give rise to any doubt as to require supporting evidence to remove the doubt. The Failure to call other witnesses did not affect the prosecution case at all. In the circumstances, we find that there is no justification for this Court to draw an adverse inference against the prosecution as suggested by Counsel. The learned trial Judge was therefore fully entitled to rely on PW1's evidence alone regarding the apprehension of the 1st Appellant.

Counsel, further contends that, there was a contradiction in the evidence of the witnesses and that such contradiction goes to the credibility of the witnesses. We are guided by the Supreme Court's decision in **Dickson Sembauke Changwe and Ifellow Hamuchanje v The People**[32] where it was 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 do not find anything on record or in the evidence of PW1 that would invite doubt as to the reliability on PW1's evidence as alleged by Counsel or that is suggestive of him being untruthful. The contradiction as to whether PW1 was in the rear seat of the car or driving the car is in our view, inconsequential. The robbers were masked and indeed it must have proved difficult to identify who amongst the four was the 1st Appellant. However, as earlier alluded to, we concur with the trial Judge's finding that PW1 was a credible witness and we are inclined to believe his version of events.

We are satisfied that the 1st Appellant was in the vehicle before it fell in the ditch. PW1 saw the 1st Appellant leave the crush site and focused his attention on him and closely pursued him until he was apprehended. The contradiction in the evidence of PW1 and PW10 did not weaken the prosecution's case, as it did not go to the core of the case against the 1st Appellant.

With regard to the failure to uplift fingerprints from the firearm produced into court, we recently had an opportunity to discuss the failure to uplift fingerprints and the effects of such omission in the case of **Kasebya Mwaba v The People**[33]. In that case, we held that

where it has been established that the article or material in question can retain fingerprints and the Police omit to uplift fingerprints, then there is a rebuttable presumption that such fingerprints as they were, did not belong to the accused and an acquittal will result unless the prosecution evidence is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty on the part of the police.

In the present case, it is common cause that the firearm was found by PW6 in the Corolla immediately after the robbery, as such it was easy to connect the particular firearm with the robbery. In addition, PW10, deposed that the scene had been contaminated as a large crowd had gathered around the vehicle that fell in the ditch. We are of the view that there was no prejudice that was occasioned by failure to subject the firearm to fingerprint analysis.

On the whole, we find that the case against the 1st Appellant was proved beyond reasonable doubt and he was positively connected to the offence.

The 1st Appellant's ground of appeal fails.

Coming to the second Appellant, the gist of the argument is that there is insufficient evidence connecting him to the offence. Mrs. Mulenga, on behalf of the State submits that she equally does not support the conviction of the 2nd Appellant and urged us to set aside the conviction.

The trial Court at pages 27 – 29 of the Judgment considered the evidence relating to the 2nd Appellant who opted to remain silent. In inferring guilt of the 2nd Appellant, the lower court took into consideration the surrounding circumstances and considered the following issues; that the 1st Appellant led the police to the 2nd Appellant. That the 1st Appellant's evidence as an accomplice was corroborated by PW8, the 2nd Appellant's girlfriend and the call records admitted into evidence, which indicated communication between the 2nd Appellant and PW8. The trial Judge was satisfied that the possibility of false implication against the 2nd Appellant had been ruled out.

The trial court also considered the fact that the 2nd Appellant was an employee of Antelope Milling and was at one point a money collector. The court was of the view that using PW8, the 2nd Appellant was

privy to the movements of PW1 and PW2 and must have communicated the information to the robbers. As such the 2nd Appellant had common criminal purpose in accordance with section 22 of **The Penal Code**[1].

We have considered the evidence relating to the 2nd Appellant and it is not in dispute that the only substantial piece of evidence against the 2nd Appellant was that from the 1st Appellant, his accomplice, who led PW10 and his team to the 2nd Appellant. It is a well settled principle that before relying on the evidence of an accomplice, that evidence ought to be corroborated by something more. **Christopher Nonde Lushinga v The People**[5] refers.

The trial Judge was alive to this fact and correctly looked for something more to support the 1st Appellant's evidence, which he found in the evidence of PW8 and the call records.

The 2nd Appellant argues that, when the prosecution through PW6 sought to lead evidence of a confession alleged to have been made by the 1st Appellant, defence Counsel objected on account that the statement was not freely and voluntarily made and that the said objection was upheld by the trial court and it ruled that no evidence

in the nature of a confession should be led. Counsel contends that immediately after, PW10 stated that he was led to the 2nd Appellant by the 1st Appellant which evidence according to Counsel amounted to confession and should not have been taken into account as per ruling of the lower court.

We have perused the proceedings of the lower court and we note that indeed the trial court sustained the objection by the defence Counsel at page 77 of the record, however, we also note that when PW10 proceeded to give evidence regarding the leading, there was no objection from defence Counsel and allowed the evidence of leading to grace the record which in turn formed part of the prosecution evidence. The Appellant cannot now claim that such evidence should not have been considered. It is too late in the day. The trial court was therefore entitled to rely on the evidence of PW10 regarding the leading by the 1st Appellant to the 2nd Appellant.

With regard to the evidence of PW8, it is clear from the record that PW8 and the 2nd Appellant were romantically involved and this was confirmed by the call records which indicated constant communication between the two. According to PW8, the 2nd

Appellant called her on the material day and informed her that he had some flour that he wanted to bring to her and he asked her to inform him when PW1 had passed through the depot where she was working from, which she did. PW8 came to learn later on that the 2nd Appellant had been apprehended in connection with the robbery. In addition, the call records admitted into evidence indicated that PW8 and the 2nd Appellant were in constant communication that morning.

It is Counsel's argument that being in a romantic relationship, there were several inferences that could have been drawn why the 2nd Appellant requested to be informed when PW1 had passed the depot.

We do agree with Counsel for the 2nd Appellant that the evidence of PW8 and the call records when considered in isolation, prove nothing unusual about the communication between PW8 and the 2nd Appellant, as they were in a relationship. However, coupled with the odd behavior of the 2nd Appellant after PW8 informed him that the boss had left her depot; he did not deliver the flour and her calls went unanswered, this behavior is what raised suspicion in the lower court's mind and led to the conclusion that he was guilty.

In the case of **Simutende v The People**[35], the Supreme Court held that:

> *"(i)There is no obligation on an accused person to give evidence, but where an accused person does not give evidence the court will not speculate as to possible explanations for the event in question; the court's duty is to draw the proper inference from the evidence it has before it."*

Indeed the 2nd Appellant has a constitutional right to elect to remain silent and the onus is not on him to prove the case. However, in the absence of an explanation regarding; why he wanted to be informed when PW1 left the depot or why his phones went unanswered on the material day, whether the number on the call logs belonged to him and whether or not he knew the 1st Appellant, the court is therefore only left with the evidence it has before it, as the 2nd Appellant who could have given direct answers to these questions opted to remain silent. The court in such circumstances can only draw an inference from the evidence before it, which it did and led to the irresistible conclusion that he was part and parcel of the robbers.

We are satisfied that on a proper analysis of the evidence on record, the learned Judge was fully entitled to arrive at the inescapable conclusion that the 2nd Appellant was guilty.

It was further argued that, the trial court in arriving at its decision, considered the burden of proof as a collective burden instead of individual. The Appellants were in this case jointly charged of aggravated robbery. The evidence indicates that they acting with a common purpose and acting in concert with a joint mission of robbing PW1 of the monies that he had collected from the depots. In our recent decision in **Phillip Phiri and Javas Sakala v The People**[37], we held as follows:

> *"In other words where the case against two or more accused persons is based on their acting in concert then both or all could be found guilty, if the evidence established that they were acting jointly and with a common design. We therefore take the view that it did not matter that they were in an amorphous group. The Deceased was a victim of their mob justice. The action of each of them during the execution of the mandate was the action of all*

others as it was in pursuance of a common purpose as envisaged by Section 22 of ***The Penal Code***[1]*."*

On the strength of the above case, the trial court was on firm ground when it found that the Appellants were acting jointly and with a common design, as the evidence established that the 2nd Appellant provided the necessary information that was required regarding the movement of the monies. The action of each of them during the operation of their mandate was the action of all the others as envisaged by Section 22 of **The Penal Code**[1].

We find that a combination of the chain of events narrated above, when considered as a whole, points irresistibly at the 2nd Appellant as having been part and parcel of the robbers. The above matters justified the inference drawn by the lower court. We are of the view that this is a case in which the court below properly directing itself as it did, could not have reasonably come to any other conclusion than that the 2nd Appellant was guilty of the offence charged.

For these reasons, we dismiss the 2nd Appellant's appeal. For the avoidance of doubt, all five grounds of appeal fail.

The evidence on record unerringly points to the 1st and 2nd Appellants as the persons that robbed PW1 and PW2 of K74,883.50 on that material day. There is no escape for the Appellants from the inevitable conclusion that they were culpable in the commission of the offence. We are satisfied that the prosecution has proved their case beyond reasonable doubt. The conviction was and still remains sound.

The result is that this appeal is hereby dismissed in its entirety.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE