LUNGU v THE PEOPLE (1968) ZR 24 (HC)

HIGH COURT
SCOTT AGJ
9th MAY 1968

Flynote and Headnote

[1] **Evidence - Identification parade - Fairness - Person identified by clothing.** 5

An identification parade is not satisfactory, and the result is not admissible as evidence, if there is any possibility that the suspected person was identified by reference to the clothes he was wearing.

[2] **Evidence - Document - Maker, necessity to call as witness.**

If documentary evidence against a defendant is introduced by the prosecution, it is inadmissible unless the maker of the document is called to testify that what he wrote in the document is two.

Case cited:

(1) *R v Gillespie and Simpson* (1967) 111 S.J. 92.

Haley, Director of Legal Aid, for the Appellant
Chandran, State Advocate, for the respondent

Judgment

Scott Ag J: The two appellants were charged before the subordinate court of the first class at Lusaka on one count of store-breaking and one count of burglary and theft. They were found guilty, convicted, and each sentenced to two years' hard labour on each count to be served concurrently.

Raphael Lungu, appellant 1, appeals against conviction because he claims that on the 29th December, the night in question, he did not reach the place where the store was broken, and he was identified only because of his clothes which surely, he claims, could not be properly seen in the night.

Elias Mwale, appellant 2, appeals against conviction and sentence on the grounds that the complainant did not identify him as a man who broke into his store until the police officer forced him to pick out the appellant because he had a new shirt on.

Both pointed out that none of the stolen property was found in their possession, and indeed it is quite true that none has been recovered from anywhere.

Additional grounds were filed by the Director of Legal Aid, who advances a submission that the identification of the appellants was unsatisfactory and the identification parade not fairly and properly conducted. He also submits that there was a gap in the evidence connecting the appellants with the crime and that, in any event, the learned magistrate drew an unreasonable inference in concluding that the appellants were party to the breakings.

The essence of this case is that five men, four posing as police officers and one as a thief, tricked the complainant and his wife into leaving their house and store and accompanying them in a car on the pretext that they were going to Chilanga Police Station. In the middle of the bush the complainant and his wife were persuded to get out, whereupon these men departed in the car. On their eventual return home on foot the complainant found his store broken into and ransacked and his house burgled. As a result of descriptions provided, the two appellants were apprehended the same day and were identified by the complainant and his wife the following day.

The learned senior resident magistrate in his judgment said:

"In order for the prosecution to succeed there must be strong evidence of the two accused having been correctly identified by the complainants. On this issue the couple testified that on being taken into the motor vehicle the interior of the car was illuminated when the car doors were open when the party was boarding it and that it was because of this light that they both clearly observed, in particular, the two men who were sitting in the back seat with them - the two accused - and they were located as a result of the description furnished of them by the complainants. When put on the identification parade at the Chilanga Police Station the complainants had no difficulty in identifying the two accused having been with the party that posed as 'police officers' the previous night. Clothing of the description they were seen wearing the night of the robbery was found in the possession of the two accused. Both Mr and Mrs Kuseni denied that they had known the two accused before although the

first accused claims to be known by the wife of Mr Kuseni. The Kusenis struck me as being reliable witnesses. Both appeared to be highly intelligent and honest."

The complainant, I see from the record, testified that the first appellant was wearing a hat and garment, more specifically described by his wife as a bush hat with a skin band and a coffee - coloured lumber - jacket. He was, they say, on their right in the car. The other man wore a long - sleeved skipper with white and red stripes and a hat. These items were described to the police and when Detective Sub - Inspector Mwangombe went to the second appellant's house, he found "a black, long - sleeved skipper with red and white stripes to the front and a grey hat which he was wearing". He then proceeded to the house of the first appellant, where he saw one hat with a leopard skin around it and a coffee - coloured lumberjacket. This appellant was also noticed to have what I take to be a gold filling in one of his teeth, a fact given in the description provided by the complainant to the police.

The appellants do not appear to have been asked by the police if these articles of clothing belonged to them, and it is not positively clear whether the second appellant was wearing both the skipper and the hat or just the hat.

[1] I in no way question the learned magistrate's conclusion that the complainants were reliable witnesses, intelligent and honest, but the identification of suspects must also be fairly and properly conducted when a parade is resorted to. There are, I believe, excellent instructions laid down by the police authorities to cover such circumstances, and it is of the essence that the witnesses are being asked to identify suspected persons and not items of clothing. It seems to me that this parade was virtually useless; and it was certainly unfair in that the two appellants were apparently dressed up in a completely different fashion from the rest of those on parade. It might have been another matter if all those on the parade had been dressed in hats of one sort and another and either lumberjackets or skippers, but this does not appear to have been done.

Alternatively, it would have been equally fair if the two appellants and the rest on the parade had been dressed in similar nondescript clothing. On the evidence as I read it, it was inevitable that two persons, dressed as had been described to the police, would be picked out by the complainants. Without the evidence of this identification parade before him, it is doubtful whether the magistrate would have been satisfied that the accused persons in the dock before him were those who had been seen on the night in question.

Because of the unsatisfactory nature of this identification parade I consider that this appeal should be allowed, more particularly as there is nothing else with which to connect the accused persons with the crime.

[2] Although not raised by counsel, I have noted that the prosecution sought to prove two thefts in this case by inadmissible evidence. The complainant testified that. as he could not write, the list of property stolen was completed for him by his sister - in - law Jennifer, and this was put in evidence as Exhibit D. Jennifer was not called as a witness. It is not competent, however, for the prosecution to prove a fact against a defendant by producing a document in which that fact is recorded, without calling the maker of the document to say that what he wrote in the document represented a true statement of fact (*R v Gillespie and Simpson* [1], as noted in Archbold *Criminal Pleading Evidence and Practice,* 36th ed., para. 1071).

The appeals of both men are allowed, and they are acquitted.

Appeal allowed.