IN THE HIGH COURT OF ZAMBIA **HP/64/2011**
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

V

LUPUPA MUSONGO
MISHECK PHIRI

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 20th day of November, 2012.

For the People: *Ms. Bah, Senior State Advocate in the Director of Public Prosecutions chambers.*
For the Accused: *S. Dzekedzeke of MessrsDzekedzeke and Company.*

JUDGMENT

Cases referred to:

English cases:

1. *R v Lushington Ex-Parte Otto [1894] Q.B. 420.*
2. *Hocking v Ahlquist Brothers Limited [1944] K.B. 120.*
3. *R v Turnbull and Another [1976] ALL E.R. 546.*
4. *R v Uxbridge Justices Ex-Parte Sofaer and Another [1987] 85 Crim. 368 APPR.*
5. *R v Lambeth Metropolitan Stipendiary Magistrate Ex-Parte McComb [1983] 1 Q.B. 551.*

East African case:

1. *Andreas Chongo [1962] E.A.L.R. 542.*

Zambian cases:

1. *Dahl v R (1952) N.R.L.R. 159.*
2. *Banda v The People Judgment No. 27 of 1966 (unreported).*
3. *Chisha v The People (1968) Z.R. 26.*
4. *Musonda v The People (1968) Z.R. 98.*
5. *Lungu v The People (1972) Z.R. 24.*
6. *People v Kamwandi (1972) Z.R. 131.*
7. *Chimbini v The People (1972) Z.R. 191.*
8. *Kampafwile v The People (1972) Z.R. 242.*
9. *Tiki and Others v The People (1975) Z.R. 194.*
10. *Toko v The People (1975) Z.R. 196.*
11. *Bwalya v The People (1975) Z.R. 227.*
12. *Nachitumbi and Another v The People (1975) Z.R. 785.*
13. *Mwape v The People (1976) Z.R. 160.*
14. *Chileshe v The People (1977) Z.R. 176.*
15. *Kape v The People (1977) Z.R. 192.*
16. *The People v Shamwama and Others (1982) Z.R. 122.*
17. *Lukolongo and Others v The People (1986) Z.R. 115.*
18. *Mtonga and Another v The People (2000) Z.R. 33.*
19. *Kambilima and Others v The People SCZ Judgment Number 14 of 2003. (unreported).*

Legislation referred to:

1. *Penal Code cap 87, ss 16, 17, 200, 294(1), and 397.*

Works referred to:

1. *P. J. Richardson Archibold, Criminal Pleading, Evidence and Practice, 2012 (Thomas Reuters (Professional) U.K. Limited, 2012)*
2. *Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited 2010)*
2. Steve Uglow, Evidence: Text and Materials, Second Edition, (London, Sweet and Maxwell, 2006).

The accused persons;LupangaMusongo, and MisheckPhiri; (and I will continue to refer to them as 1st and 2nd accused respectively), stand charged of the offence of aggravated robbery contrary to section 294(1) of the Penal Code.The particulars of the offence are that on 28th October, 2010, whilst acting together, and with other persons unknown, the accused persons armed with knives and pangas did steal: 1 television set (Philips); a DVD; a handbag; assorted clothes; a purse; a school bag; 1 Samsung cell phone;1 pouch; and K100, 000.00 cash, altogether valued K 1, 733, 000=00, the property of Mary Lungu. And at or immediately after the time of such stealing did use or threaten to use actual violence to the said Mary Lungu in order to obtain, retain, prevent, or overcome resistance.

The prosecution called five witnesses. The first witness was Mary Lungu. And I will continue to refer to her as PW1. PW1 testified that on 31st October, 2011, she retired to sleep at around 21:00 hours. Later, at around 23:00 hours, she heard a knock on the door. PW1 asked who was knocking. A person replied in Nyanja that;*“ndine”*, *(“it’s me”)*. PW2 asked the same question for the second time. This time round there was no response. Shortly thereafter, PW1 heard a loud bang. And the intruders broke the door. And forcibly entered her premises. They were six of them.

One of them immediately proceeded to pick the TV decoder. And the other asked for money from her. Yet another got her bag containing K 100, 000=00 cash.And one of the intruders held her by her hand, and led her outside the house.PW1 offered some resistance,and asked the intruder where she was being dragged. The intruder told her to shut up; else she would be killed. She was taken from her home in Garden Site 3, to a bush offKasangula road, in Roma. Whilst in the bush, she was hurled to the ground. Her underwear were pulled down. And later raped by the five men in succession. After the five men completed their heinous acts, she found her way back home around 03:00 hours.

When she returned home, she called on Vincent Mwango, her landlord's grandson, who also lives in Garden Site 3.She narrated her ordeal to VincentMwango. She was in turn informed by Vincent Mwango that one of her assailants had justbeen apprehended.And was therefore requested toimmediately proceed to the police station in Garden Site 3.PW1 was accompanied to the police station by Vincent Mwango, and his grandmother. Whilst at the police station, she deposed to a statement. And was given a police medical report form to enable her to be attended to at the University Teaching Hospital (UTH).

At UTH,PW1 was given some medicine which she took for a period of one month. Upon completing the treatment at UTH, she returned the medical report form to the police station. Whilst also at the police station,PW1 was informed that the police had apprehended one of her assailants. And recovered the following items: the pouch for her phone;the television set (Philips); the DVD; a handbag; and assorted clothes. PW1 identified all the items. The items were later stored at the police station in Garden. However, in due course, the police station was gutted. And all the items recovered were engulfed and destroyed in the inferno. PW1 recalled in her testimony that during the ordeal, she was able to see the assailants, albeit, she had not seen them prior to the attack.

A fortnight after the ordeal, PW1 was called by the Arresting Officer to an identification parade at Emmasdale police station. Between 8 and 10 male persons were assembled and paraded.PW1 was able to identify the person who stole her phone, and the other,who stole the television. PW1 was also able to identify the 1st and 2nd accused persons in Court; as the persons who stole the phone and television respectively.

The second prosecution witness was Vincent Mwango. And I will continue to refer to him as PW2. PW2 recalled that on 21st October, 2010, he retired to bed at about 19:30 hours. Around 23:00 hours of the same evening,he heard some loud bang, suggesting that a door had been broken. At the same time, PW2 heard PW1 state that;*"here is my phone"*. PW2 immediately woke up his younger brother Alex Mwango, and intimated to him that they were some thieves outside. When the duo stepped outside, they heard another loud bang on the door. And immediately shouted for help.

When PW2 shouted for help, he was still in the bedroom. And the bedroom windows do not have any burglar bars. Thus, one of the assailants entered into his bedroom, and struck him with a plank on his back. PW2 with the aid of his younger brother got hold of the assailant by the arm, and kicked him. The assailant fell to the ground. After they felled him to the ground, PW2 and his younger brother shouted for help from the neighbours. With the help of the neighbours, the assailant was held in captive, and they started beating him. In the process, PW2 recovered the pouch for PW1's phone. The assailant was apprehended,and taken to the police station in Garden Site 3.

At the police station, the police officers suggested that the premises should immediately be searched. PW2 led the police officers to the premises at about midnight. In the course of the search, PW2 together with the officers, recovered: the television set; the DVD; a handbag; and some clothes from the flower bed. Upon recovering the items, they were transferred to the police station in Garden Site 3. During the trial, PW2 identified the 1st accused as the person they had apprehended.

The third prosecution witness was JosephatPhiri. And I will continue to refer to him as PW3. PW3 recalls that on 17th November, 2010, he was assigned to conduct an identification parade,in a case of aggravated robbery. The victim of the aggravated robbery was PW1. PW3 assembled and paraded nine

suspects. And amongst the suspects was the 1st and 2nd accused persons. On the parade, the 1st accused was the first on the line. And the 2nd accused took the fourth position.Before the parade was conducted, PW3 counselled the accused persons about their rights. And during that brief, they were given an opportunity to ask questions about the parade. After the accused persons were briefed, PW1 was summoned to the identification parade. Andshe identified the 1st and 2nd accused persons as being the perpetrators of the crime under investigation. At the end of the identification parade, PW3 testified that the accused persons were asked if they had any complaints about the process. They replied that they had none. And the parade was accordingly dismissed. Later, PW3 identified the accused persons in Court.

The fourth prosecution witness was Sergeant John Chisanga. He is based at Emmasdale Police Station. And I will continue to refer to him as PW4. PW4 recalled that on 31st October, 2010, he reported for work at Garden Police Station at around 18:00 hours. He was the in a second shift which runs between 18:00 hours, to 08:00 hours the following morning.

Whilst on duty, PW4 recalls that a certain man whom, he later came to know as Vincent Mwango, accompanied by his friends, brought a suspected thief; whom he also later came to know as LupupaMusongo; the 1st accused. Vincent Mwango and his friends handed over the 1st accused to PW4,as well as a*Samsung* mobile phone pouch. PW4 proceeded to detain the 1st accused. And in the company of Vincent Mwango,went to visit the scene of the crime. At the scene, PW4 recovered: a television set; a DVD; a bag containing some assorted clothes; and a purse. PW4 immediately transferred all these items to Garden Police Station.

On the same day, 1st November, 2010, at around 04:00 hours, PW4 received a report from a lady he later came to know as Mary Lungu; PW1, that thieves

had broken into her house; stolen some goods; and in the end raped her. PW4 gave PW1 a police medical report form to take to UTH.However, before PW1, left for UTH, she identified the television set; the DVD; a bag containing some clothes; a *Samsung* mobile phone pouch; and a purse. PW4 testified that the approximate value of all the items referred to above, was K 1, 733, 000=00. PW4 handed over the matter to the Criminal Investigations Department for further investigations. PW4 also testified that when PW1 came to the police station to identify the stolen items, she had no opportunity to identify the 1st accused person.

The fifth prosecution witness was Detective Constable Boyd Mwanza. I will continue to refer to him as PW5. PW5 recalls that on 1st November, 2010, he was operating from Garden police station; which falls under Emmasdale Policestation. PW5 reported for work at 08:00 hours. Whilst on duty, PW5 opened a docket for aggravated robbery. The complainantwas PW1. And her complaint was that some criminals, armed with machetes had attacked and robbed her.

PW5 later learnt from PW4, that a suspect by the name of LupupaMusongo: the 1st accused, had in fact been apprehendedAnd was in police custody. Further, PW4 received some recovered items. Namely, a television set; DVD player; a bag containing clothes; a purse; and a *Samsung* mobile phone pouch. Furthermore, PW5 was informed that PW1, the victim of the aggravated robbery had since positively identified the property recovered. PW5 also testified that he had the opportunity to interview PW1.And in the course of that interview, PW1 revealed to him that she was able to identify the persons who attacked her, because there was sufficient light in the house during the robbery. And was therefore able to observe the physical appearances of her assailants.

During the course of the investigations, PW5 was led by a source to MisheckPhiri, the 2nd accused person. Upon apprehending the 2nd accused, PW5 interviewed both the 1st and 2nd accused persons. The accused persons confirmed during the interview that they were acting together on the material night. However, they were not able to lead PW5 to the other participants of the crime. Further,PW5 testified that on 17th November, 2010, an identification parade was conducted by PW3. During the identification parade, PW1 positively identified the accused persons.At the conclusion ofthe identification parade, PW5 administered a warn and caution statement in which the accused persons denied committing the robbery. PW5nonetheless proceeded to charge the accused persons of the offence of aggravated robbery.

PW5 also recalled that on 12th November, 2010, the residents of Garden Site3 rioted. In the course of that riot, they gutted the Police Station, and looted all the property found within the precincts of the police station. Thus, all the exhibits in this case were destroyed in the inferno.PW5 maintained that to the best of his knowledge, PW1 did not see or meet the accused persons before the identification parade.

At the close of the prosecution case, I formed the opinion that the prosecution had established a *prima facie* case against the accused persons. And I accordingly put both accused persons on their defence. Both accused persons elected to give evidence on oath.

The 1st accused testified as follows: On 28th October, 2010,he was at home.And therefore denied attacking anybody that night as alleged by the prosecution witnesses. And on 31st October, 2010, at around 21:00 hours as he was returning home from a drinking spree in Chipata compound, he was approached by three police officers, and asked why he was loitering at night. He informed the officers that he was headed home.The police officers

however decided to arrest him. And took him to Garden Police station where he was detained for a night.

The following morning, three persons comprising one female, and two males, came to the police station. According to the accused, the trio were informed that he was the person that had been apprehended the previous night. Later in the evening, the 1st accused was informed that he was going to be charged of the offence of aggravated robbery. And the following day he was removed from the police cell at Garden Police Station, and transferred to Emmasdale police Station.

Whilst at Emmasdale Police station, the 1st accused testified that he was shown a photograph, and asked whether he knew the person on the photograph. In the process, he was beaten by four police officers. The following day,he went through the same ordeal. And continued denying the allegation.After eight days of detention, the 1st accused testified that the 2nd accused was brought to Emmasdale Police Station. And he was asked whether or not he knew the 2nd accused. The 1st accused informed the police that he did not know the 2nd accused. Eventually, the 1st accused recalled that he was paraded with other men. And he did not know why he was paraded. After the parade, he was taken back to the police cell. In the end, the 1st accused recalled that he was requested to sign a statement. And was not given any opportunity to read the statement.

The 2nd accused testified that he did not recall his whereabouts on 31st October, 2010, because he is a polygamist. But he still recalled that on 8th November, 2010, he was scheduled for a review at UTH, and was at home waiting for his wife to escort him to UTH. Whilst he was waiting for his wife, the 2nd accused was approached by three police officers. The officers asked him whether his name was Misheck. He replied in the affirmative. The police officers requested him to accompany them to the police station. The 2nd

accused was taken to Emmasdale police station. At the police station, the 2nd accused was requested to undress.And was later handcuffed.Thereafter, the police officers started beating him.

The 2nd accusedquestioned the police officers why they were beating him. They replied thathimself, in concert with his friends, had committed an offence in Garden Site 3. Thus in the course of the interrogation, he was shown the 1st accused,and asked if he knew him. The 1st accused denied that he knew the 2nd accused.

Eventually both accused persons were taken for interrogation. During the course of the interrogation, the 2nd accused met PW1. And was beaten in the presence of PW1.A few days later, the 2nd accused testified that an identification parade was conducted. During the identification parade, PW1 identified him and the 1st accused. The 2nd accused confirmed that both accused persons were given an opportunity to complain about the process; identification parade. And were informed that whatever the complaints they had would be recorded.

In this regard, the 2nd accused recalled that he had earlier on asked the police officers if PW1 was the complainant. The police officers replied in the affirmative. The 2nd accused reminded the police officers that he had met PW1 prior to the identification parade, and in the presence of the officers. The police officers assured the 2nd accused that his complaint would be recorded. And was further advised that at any rate he was still at liberty to complain to the Courts of law about the identification parade.

On 25th July, 2011, Ms Bah filed into Court the submissions. Ms Bah submitted that the accused persons are charged with the offence of aggravated robbery contrary to section 294 (1) of the Penal Code. Section 294 (1) enacts as follows:

"Any person who being armed with an offensive weapon or instrument, or being together with one person or more, steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and notwithstanding subsection (2) of section twenty six, shall be sentenced to imprisonment for a period of not less than fifteen years."

Ms Bah analysed the ingredients that need to be proved beyond reasonable doubt to be as follows:

a) a felonious intent or*animusfurandi*;
b) some degree of violence or putting fear;
c) use of an offensive weapon and or whether there are more than one assailant; and
d) a taking from another.

Ms Bah submitted that in this case the preceding elements have been proved.

Ms Bah argued that the evidence adduced by the prosecution proves or shows that the offence was committed on 31st October, 2010. And not on 28th October, 2010, as disclosed in the Information. Thus, the date of offence was established in evidence and was consistent with the testimony of all the prosecution witnesses.Ms Bah drew my attention to the case of *The People v Shamwana and Others (1982) Z.R. 112,* where it was held *inter alia*, that:

"The High Court has the power to itself amend an Information to fit the evidence given without application by or consultation with the parties involved provided no injustice is caused to the accused such as may result when the substantive charge is altered even at the no case to answer stage. And reference to the wrong section as the source of power for the Court to amend the Information does not nullify the power so existing."

In view of the foregoing, Ms Bah submitted that the Information should be amended to 31st October, 2010, instead of 28th October, 2010, to fit the evidence given. And that no prejudice would be occasioned to the accused persons. I accept this submission. And I accordingly amend the Information.

As regards the substantive issue, Ms Bah submitted as follows: that what is in dispute in this matter is whether the accused persons attacked PW1; stole her property; and raped her. Ms Bah submitted that PW1 was able to identify the 2nd accused when she was attacked because the room was lit.And in any event her room is so small that she was able to identify the six men at the same time. Ms Bah also pressed that the 2nd accused was so near her that she managed to recognise his face. She also submitted that it is competent to convict on the basis of a single identifying witness. In aid of this submission, Ms Bah drew my attention to the case of *Kambilima and Others v The People SCZ judgment number 14 of 2003*, (unreported) where it was stated as follows:

"It is settled law that a Court is competent to convict on a single identifying witness provided that the possibility of an honest mistake is eliminated."

Ms Bah argued that in this case the possibility of an honest mistake has been eliminated by the quality of opportunity to observe. And in any event, she submitted that the 2nd accused person was not masked.

As regards the 1st accused, Ms Bah submitted that there is sufficient evidence of identification by PW2. That is, PW2, together with other personsapprehended the 1st accused at the scene of the crime. And when the 1st accused was apprehended, she submitted, he was found in possession of a black Samsung pouch which he had just stolen from PW1. The pouch was later identified by PW1 at the police station.

In addition, Ms Bah submitted as follows:first, the 1st accused was identified, at an identification parade as the person she recognisedas being one of her assailants.Second, testified that the 1st accused is the same person that stole her *Samsung* M620, contained in a black pouch. Third, the 1st accused did not in his defence provide any explanation about how he was found in possession of recently stolen property.Lastly,the 1st accused was

apprehended at the scene of the crime And not because he was suspected to be loitering as he alleged in his defence.

In relation to the doctrine of recent possession, Ms Bah drew my attention to the case of *Kampafwile v The People (1972) Z.R. 242,* where it was observed as follows:

"The Court is entitled to draw the inference, if the facts proved so warrant, that the person in whose possession recently stolen property is found is the thief or the guilty one thereof. It is therefore vital that the Court should be satisfied beyond reasonable doubt that the property identified by the complainant is that which was stolen."

Ms Bah argued that the pouch was identified as the property of PW1. And it was recovered from the 1st accused before he left the scene of the crime. In any event, Ms Bah submitted, the 1st accused did not provide any explanation as to how he was found in possession of a recently stolen property.

Ms Bah also urged me to take judicial notice of the fact that the recovered exhibits were gutted in an inferno at Garden Police Station. In the end, Ms Bah submitted that the accused persons robbed PW1. And should in terms of section 294 (1) of the Penal Code be convicted of aggravated robbery.

On 23rd August, 2011, Mr. Dzekedzeke filed submissions on behalf of the accused persons. Mr. Dzekedzeke submitted as follows: the accused persons have not pleaded guilty to the offence of aggravated robbery. And the only evidence suggesting that the accused may have committed the offence, MrDzekedzeke submitted, is the testimony of PW1, when she testified that she was able to identify the accused persons.And in fact indentifiedthe accused persons at an identification parade.Albeit,PW1 confirmed in evidence that the identification parade was conducted several weeks after PW1 was assailed.

Mr. Dzekedzeke also submitted that the accused persons testified that PW1 had on earlier occasions seen the accused persons in one of the offices at Emmasdale Police Station. In fact, MrDzekedzeke noted that the 2nd accused person when granted the opportunity, complained about the manner the identification parade was conducted.In this regard, Mr. Dzekedzeke drew my attention to the case of *The People v Kamwandi (1972) Z.R. 131,* where it was held that when an identification parade is conducted, it must be shown by the prosecution that it was conducted properly and fairly.Further, it was also held that the burden of proof regarding the identity of an accused person lies upon the prosecution. And must be discharged beyond reasonable doubt.Furthermore, Mr. Dzekedzeke reiterated that in this case, the accused persons not only did they plead not guilty to the offence charged, but also complained about the manner the identification parade was conducted.

Lastly, Mr. Dzekedzeke, submitted that even though there is no rule of law that requires the prosecution to produce real evidence in support of their case, it was important for the prosecution to produce evidence to show that there was an aggravated robbery committed.In this case, there was no real evidence addressed to show that the accused committed the offence in question. In the end, Mr. Dzekedzeke, pressed that the prosecution has failed to prove beyond reasonable doubt that the accused are guilty of the offence of aggravated robbery.

I am indebted to counsel for their spirited submissions, and arguments in this matter. The resolution of this matter imports or involves discussion of the law relating to corroboration, identification parade, doctrine of recent possession and real evidence. Before I consider the evidence in this case, I will therefore briefly discuss the subjects referred to above.

CORROBORATION

According to Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited, 2010), in paragraph 14 – 01, at page 403, states that as general rule, Courts may act on the testimony of a single witness, even where there is no other evidence which supports it. Similarly, as a general, Courts may act upon duly proved documentary evidence without such testimony at all; or upon a single admissible out of Court assertion.

SINGLE WITNESS TESTIMONY

Where a case against an accused person rests entirely on the evidence of a complainant, it is always competent to convict on the evidence of a single witness, if that evidence is clear and satisfactory in every respect. *(See Chimbini v The People (1972) Z.R. 191).*It is also important to stress from the outset that it is not enough for a trial Court to be satisfied as to the truth of the complainants evidence on the premises that he appeared honest and trustworthy. A trial Court must be satisfied as to the reliability of the witnesses observation so that the possibility of honest mistake is ruled out. *(seeNathitumbi and Another v The People (1975) Z.R. 285).*

In assessing the observation of a witness, many factors must be taken into account, such as whether it was daytime or nighttime. And if the latter, the state of the light, the opportunity of the witness to observe the accused, the circumstances in which the observation was alleged to have been made, i.e. whether there was a confused fight or scuffle, or whether the parties were comparatively stationary. *(seeChimbini v The People (1972) Z.R. 191 at 192 Per Baron, J.P.).*Thus the Court must be satisfied not only as to the honesty of the witness, but also as to his reliability. Namely, that the possibility of the honest mistake has been ruled out. To do this, it is necessary to have something more than simply the witnesse's assertion that the accused committed the offence. *(seeTiki and Others v The People (1975) Z.R. 194 at 195 Per Baron, D.C.J.).*

IDENTIFICATION PARADE

When an identification parade is conducted, it must be fairly and properly done. Showing an accused person to the witness before the formal parade, is improper and unfair. *(see The People v Kamwandi (1972) Z.R. 131)*. Further, evidence of such a parade must always be led by the prosecution whether an identification was made or not. *(see Dahl v R (1952) N.R.L.R. 159).* Failure to observe this principle, may in cases where such evidence is the only evidence implicating an accused person result in a conviction been quashed on appeal. *(seeToko v The People (1975) Z.R. 196; and Lukolongo v The People (1986) Z.R. 115).*Thus evidence of identification ought to be treated with caution before it can be relied on as founding a criminal conviction. (see R v Tunbull and Another [1976] ALL E.R. 549).Where the identification is weak, it is counsel of prudence that a trial Court would need something more; some connecting link in order to remove the possibility of mistaken identification or honest mistake.

To illustrate, in *Mtonga and Another v The People (2000) Z.R. 33*, it was alleged by the appellant that he found the identifying witness in the reception room at the Police Station looking at his passport, as well as some passport size photographs of himself which the Police had put in the room, as the submission went, with the obvious intention of assisting the witnesses to identify the appellant.The Supreme Court held that although the identification was questionable, it was however amply supported by the finding of the appellant in possession of the stolen vehicle. Thus the stolen vehicle was a connecting link between the accused and the offence. And thereby rendered a mistaken identification too much of a coincidence. *(seeBwalya v The People (1975) Z.R. 227).*

It must also be noticed that whenever identification parades are conducted, it is of the essence that witnesses are asked to identify suspected person(s);

and not items of clothing. Thus in *Lungu v The People (1972) Z.R. 24*, an appeal was allowed by the High Court, because the appellants were apparently dressed up in a completely different fashion from the rest on that parade.In passing judgment, Scott, J. noted at page 26, that it might have been another matter if all those on the parade had been dressed in hats of one sort and other, and either lumberjackets or skippers. Alternatively, Scott J, when on, it would have been equally fair if the two appellants and the rest on the parade had been dressed in similar non-descript clothing.

To sum up, I will advert to the judgment delivered by Chomba, J.S., inLukolongo and Others v The People (Supra). The Supreme Court held at page 128 that: first the practice of allowing identifying witnesses to see the accused persons at a police station before the identification parade was conducted was deprecated in the case of *Musonda v The People (1968) Z.R. 98*. Second, the practice of allowing suspects in an identification to be manifestly, and conspicuously different from others as regards dress was equally condemned in the case of *Chisha v The People (1968) Z.R. 26*. Third, to these unfair practices, was added the practice of allowing suspects to be barefooted, while others were not. Lastly, it is crucial that Police officers conducting identification parades ought to exhibit the highest standard of fairness, and impartiality.

DOCTRINE OF RECENT POSSESSION

I will now pass to consider the doctrine of recent possession. Under the doctrine, the Court is entitled to draw the inference, if the facts warrant, that the person whose possession recently stolen property is found is the thief, and therefore, guilty. It is crucial that the Court should be satisfied beyond reasonable doubt that the property so found is the property identified by the complainant as that which was stolen. *(seeKampafwile v The People (1972) Z.R. 242, perChomba, J.).*

To the general principle adumbrated above, I think I must add this as an addendum: when a Court purports to draw an inference of guilty in a case of recent possession of stolen property, it is necessary to consider that other inferences may be drawn. *(See Kape v The People (1977) Z.R. 192).*In this regard, in *Chileshe v The People (1977) Z.R. 176,* the Supreme Court referred to the necessity to consider the possibility of the true explanation being that of receiving stolen property, and in particular cases there may be other inferences which must be considered.

Thus the *Chileshe* case adopted the general principle laid down in East African case of *Andreas Obongo (1962) E.A. L.R. 542*, that: it is the dutyof the trial Court in cases where in recent possession of stolen property may lead to the conviction of the accused to consider whether such recent possession may be the result of the receiving of stolen property, as opposed to guilt of the major crime during which the stolen property was obtained.Earlier on, the preceding principle had been, in any event, set out by the Court of Appeal in *Banda v the People Judgment Number 27 of 1966*, whenBladgen C.J., said:

"When in a case involving theft, the evidence against the accused is that he was found shortly after the theft in possession of some of the stolen property, the magistrate should give some indication in the judgment that he has given consideration to the possibility that the accused, might have come into possession of the stolen property otherwise than by stealing it. In some circumstances – as for instance, where the time elapsing between the theft and the discovery of the property in the accused's possession is extremely short – there is hardly any need to make any reference to this since the inference that the accused is the actual thief may be quite inescapable. Nevertheless, the magistrate should take care in these cases of "recent possession" to show in their judgment that they have understood and correctly applied what is commonly called the doctrine of recent possession".

REAL EVIDENCE

I will now move on to consider the subject of real evidence. It is often not appreciated that exhibits constitute evidence just as oral testimony of a witness. According to Steve Uglow, in Evidence: Text and Materials, 2nd

Edition (London, Sweet and Maxwell, 2006), at page 210, information can be presented to the Court in different forms: through the oral evidence of a physically present witness; through documents or through real evidence such as material objects produced in Court. The learned author adds that real evidence is not restricted to physical objects, but also encompasses facts such as the demeanour of witnesses or visits to the site of an occurrence.

Elementary cases of evidence state that material objects produced as exhibits amount to real evidence. The learned author of Evidence: Text and Materials, (supra) points out at page 211 that an object [or exhibit] is admissible under general conditions of admissibility. That is, if it is relevant, possesses sufficient probative weight, and its admission would not be prejudicial. A proper foundation would need to be laid to establish that relevance.Therefore, the same standard of proof applied to oral testimony should be applied to real evidence.This means that if the identification of an article is in issue, as it must be when the doctrine of recent possession is applicable, such identification should be beyond reasonable doubt. *(seeKampafwile v The People (supra) at page 243).*

In order to fully appreciate the law relating to real evidence, I will consider a line of cases on this subject.The first is the caseof *R v Lushingston Ex-parte Otto [1894] Q.B. 420*, where Wright J. observed at page 423 – 424, that it is undoubted law that it is within the power and is the duty of the constables to retain for use in Court things which may be evidence of crime, and which have come into possession of the constables without wrong on their part. Wright, J., went on to state that it is also the undoubted law that when articles have once been produced in Court by witnesses, it is right and necessary for the Court or the constable in whose charge they are placed (as is generally the case), to preserve and retain them so that that may be always available for the purposes of justice until the trial is concluded.

In the second case of *Hockings v Ahlquist Brothers Limited [1944] K.B. 120*, the facts of the case were that restrictions on the manufacture of civilian clothing with regard to the number of pockets in jackets, the number of buttons on waist coats and the width of trousers were imposed by the Making of Civilian Clothing (Restrictions) Order, 1942, proceedings were instituted against manufacturers of civilian clothing for non-compliance with the restrictions. Parole evidence was given by a witness that he had visited the manufacturer'spremises, and inspected a number of articles of civilian clothing which did not comply with the Order. But the articles of clothing were not produced in Court.The magistrate dismissed the information on the ground that the prosecution had not given the best evidence available regarding the condition of the articles of clothing as they had not been produced in Court.

On appeal, this is what Viscount Caldecote, C.J., said at page 133:

"In my judgment it is much too late, even if it was ever possible, to suppose that evidence of the nature of chattels cannot be given by witnesses who have seen them and speak to their condition. To suppose that all the articles about which issues are raised in a great variety of cases ought to be produced in Court would lead to consequences which would show how impossible the suggested rule would be in practice."

In a word, the Court held that the evidence of the witness who had seen the articles of clothing and spoke as to their condition was admissible, and ought to have been considered by the magistrate without the production of the articles in Court.

The third case to be considered is *R v Lambeth Metropolitan Stipendiary Magistrate Ex-parte Mc Comb [1983] 1 Q.B. 551*. The facts of the case were that T was committed in custody to await trial in England for offences arising out of bomb incidents in London. He escaped from custody. He was

subsequently arrested in the Republic of Ireland, and appeared for trial there charged with offences in respect of the London explosions.

The English Director of Public Prosecutions sent exhibits produced at the English committal proceedings to the Irish Court for use at the trial.T was convicted, and pending his appeal, the Irish Court of Criminal Appeal released the exhibits to the Director of Public Prosecutions who required them for use in committal proceedings in England against the applicant. The Director of Public Prosecutions undertook to return the exhibits to the Irish Court on the termination of those proceedings.The applicant sought a declaration to the effect that upon his committal, the Director of Public Prosecutions could not without the leave of the Crown Court or the High Court, remove the exhibits from the jurisdiction of the Crown Court. The Divisional Court refused the application.

On appeal by the applicant, dismissing the appeal, the Court of Appeal held that once an article became an exhibit, the Court had a responsibility to preserve and retain it for the purposes of justice and fair trial; that the responsibility included taking all proper care to preserve the exhibits safe from loss or damage, co-operating with the defence in order to allow them reasonable access to the exhibits for the purpose of inspection and examination and producing the exhibits at the trial.Further, the Court of Appeal held that the Court could entrust exhibits to the Police or the Director of Public Prosecutions by imposing such restrictions as were proper in the circumstances. And if none were imposed, it was for the recipients to deal with them in the best interest of justice; that the same principles applied were the same exhibits were needed for separate trials before different Courts in England or abroad; and that in the circumstances, the applicant failed to show that the Director of Public Prosecutions had acted otherwise in accordance with this duty and he was, therefore, not entitled to the declaration sought.

The fourth case to be considered in this line of cases is *R v Uxbridge Justices, Ex parte Sofaer and Another [1987] 85 Cr App. R 368.* This was an application for judicial review. The relief sought was for an order of certiorari to quash committal orders made in respect of which the applicants were committed for trial.The grounds upon which the order was sought were that first the prosecution was guilty of unconscionable delay leading to serious prejudice to the applicants in the preparation and conduct of their defence by reason of the destruction or disposal by the prosecution of material exhibits. Second, that the prosecutors, the Customs and Excise misused the procedure for forfeiture allowed under the Customs and Excise Management Act 1997,and third breaches of natural justice.

In delivering judgment,Croom-Johnson, L.J., had the following to say at page 376:

"There is an overriding obligation on the part of the prosecuting authorities to preserve evidence and reliance has been placed upon Lushington ex-part Otto [1894] 1 Q.B. 420."
(Quoted Wright J. as shown above.)

Croom Johnson, L.J., went to observe as follows at page 377:

"That indeed is a general and very desirable standard which should be maintained and almost always is maintained. Unfortunately, it is not always possible to apply it. Exhibits which are part of the evidence do go astray. Sometimes they are tested to destruction. In some cases it is only the testing them to destruction that you obtain the evidence in the first place and the modern scientific techniques which we read about nowadays are examples of that, but where you cannot produce the original you rely upon secondary evidence and here there are photographs which are good photographs and fairly detailed."

In sum, there is no overriding duty on the prosecution to preserve evidence although that is a desirable standard.Exhibits sometimes go astray. In those circumstances, it is customary to rely on secondary evidence such as photographs. *(see P.J. Richardson, Archbold Criminal Pleading, Evidence and Practice, 2012(Thomson Reuters (Professional) U.K. Limited, 2012,) paragraph 9-117, at page 1356.)*

JUDICIAL NOTICE

Before I consider the evidence in this case , there is another matter that was brought to my attention that I need to discuss. And this is judicial notice. According to the learned author of Archbold Criminal Pleading, Evidence and Practice 2012, (supra), in paragraph 10-11, at page 1388, judicial notice is explained in these words:

"Courts may take judicial notice of matters which are so notorious; or clearly established or susceptible to demonstration by reference to the readily obtainable or authoritative source that evidence of their existence is unnecessary and local Courts are not merely permitted to use their local knowledge but are to be regarded as fulfilling a constitutional function if they do so. When a Court takes judicial notice of a fact it finds that the fact exists although its existence has not been established by the evidence."

The erstwhile Chief Justice Silungwe explained judicial notice in *Mwape v the People (1976) Z.R. 160 at page 163,* in these words:

"...A Court may and in some cases must, take judicial notice of various matters. It will for instance take judicial notice of matters of common knowledge which are so notorious that to lead evidence in order to establish their existence may be unnecessary and could ... be an insult to the intelligence to require evidence."

The learned author of Archbold Criminal Pleadings, Evidence and Practice 2012 goes on to state in pagraph 10-12, at page 1388, as follows:

"Although judges may in arriving at the decisions use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not act on their own private knowledge or belief regarding the facts of the particular case."

In sum, there is no need to adduce evidence where the fact is generally known or is capable of accurate determination so that it is beyond dispute. (see Steve Uglow, Evidence Text and Materials Second Edition, (London, Sweet and Maxwell, 2006).

The resolution of this matter rests to a very large extent on first, the testimony of PW1. I have already stated elsewhere in this judgment that as

a general rule, it is competent to convict on the testimony of one witness. Second, on the conduct of the identification parade.I warn myself at the outset that in evaluating the testimony of PW1, I must bear in mind a myriad of factors. These include whether the observation by PW1 was made during daytime, or nighttime; the state of the light; the opportunity of the witness to observe the accused persons, and generally the circumstances in which the observation was alleged to have been made.

In this case, I accept the submissions by Ms Bah that: first, there was sufficient evidence of identification of the 1st accused person because he was arrested at the scene of the crime. Second, when the1st accused was apprehended, he was found in possession of a black *Samsung* pouch which had just been stolen from PW1. The 1st accused failed to provide any explanation as to how he was found in possession of the pouch. In any event, the time that elapsed between the attack of PW1 by the 1st accused, and the discovery of the pouch, was so short that the only inference that could be made in the circumstances was that it is the 1st accused that stole the pouch.Third, PW1, was able to identify the 1st accused because at the time PW1 was attacked, the room was lit. And I accept the testimony of PW1 that the room is also quite small.

In addition to the observation of PW1, Ms Bah submitted that the accused persons were in any case identified by PW1 at the identification parade.However, MrDzekedzeke countered this submission and argued that when the 2nd accused person was granted the opportunity, he complained about the manner the identification parade was conducted. MrDzekedzeke further submitted, and I agree that when an identification parade is conducted, it must be shown by the prosecution that it was conducted properly, and fairly.

I must also hasten to add that the Courts have in a line of cases referred to above, deprecated the practice of allowing identifying witnesses to see

accused persons at police stations before the identification parades are conducted. Because of the allegation by the 2nd accused person that they may have been something unfair in the manner in which the parade had been conducted, and combined with the fact that the testimony of PW2 went unchallenged on this vital point, I feel unsafe to rest the convictions on the identification parade.

But the matter does not end here. On one hand, MrDzekedzeke argued that even though there is no rule of law that requires the prosecution to produce real evidence in support of their cases, it was crucial during the trial to show that there was an aggravated robbery committed by adducing real evidence. On the other, Ms Bah urged me to take judicial notice of the fact that the recovered exhibits were gutted in an inferno at Garden Police Station.

While it is the duty of prosecutors and Courts to retain for use in Court exhibits which may be evidence of a crime, exhibits which are part of the evidence do go astray, or as in this case, do get destroyed. In some cases, ironically, it is only by testing them to destruction that you obtain the evidence in the first place.The upshot of all this, is that there is no overriding duty on the prosecution or the Courts to preserve evidence, albeit, it is a desirable standard. In circumstances where exhibits go astray or are destroyed, the prosecution can rely on secondary evidence. Therefore, the failure to produce real evidence in this matter is not fatal.

Be that as it may, although I am personally aware from press reports that the Garden Police Station was gutted, I am not prepared to take judicial notice of that fact for the following reasons. First, I cannot say that the burning of the Garden Police Station is a notorious matter. Second, I am constrained from basing the decision in this matter on my own private knowledge.

The net result is that I find that the 1st accused was sufficiently identified by PW1 soon after the commission of crime and connected or linked to the crime because not only was he apprehended at the scene of the crime, but was found in possession of a recently stolen property. Namely, the *Samsung* pouch. I accordingly convict him of the offence of aggravated robbery contrary to section 294(4) of the Penal Code.

As regards, the 2nd accused person, I am unable on the basis of the identification parade to convict him of the subject offence, because the identification parade was not properly and fairly conducted. I accordingly acquit him.

_____

Dr. P. Matibini, SC.

HIGH COURT JUDGE