

**CAUSE NO. HP/003/2010**

**IN THE HIGH COURT FOR ZAMBIA**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN:**

**THE PEOPLE**

**VS**

- 1. MATHEW MOHAN**
- 2. IDRIS SULEMAN PATEL**
- 3. SHABIR SULEMAN PATEL**

***For the People:***

***Mr. B. Mpalo  
State Advocate***

***Mr. S. K. Nkandu  
State Advocate***

***Mr. R. M. Simeza  
Of Messrs Simeza Sangwa***

***Associates***

***- Amicus Curia***

***Mr. S. Lungu )Amicus Curie on  
Mr. M. Mwenye )behalf of the Law  
Mr. Nzonzo )Association of  
Zambia***

***From 20/10/2010***

***For the 1<sup>st</sup> Accused:***

***Mr. B. Mutale, SC  
Mr. L. Kalaluka***

***Of Messrs Ellis & Co.***

***For the 2<sup>nd</sup> & 3<sup>rd</sup>  
Accused  
Advocates***

***Mr. M. Kapumpa  
Of Messrs Mumba Kapumpa***

***Mr. K. Bwalya  
Of Messrs KBF and Partners***

***Mr. M. Katolo  
Of Lukona Chambers***

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## ***JUDGMENT***

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***Cases referred to:***

- 1. Mwape vs. The People (1976) ZR 160**
- 2. Machobane vs. The People (1972) ZR 110.**
- 3. Khupe Kafunda vs. The People (2005) ZR 31 (SC)**
- 4. David Zulu vs. The People (1977) ZR 151 (SC).**
- 5. Emmanuel Phiri and Others vs. The People (1978) ZR 79**
- 6. Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula (1988-1989) ZR 163**
- 7. Everisto Bunda, Zebron Mumba and Everine Kamwata (1990/92) ZR 194.**
- 8. Patrick Sakala vs. The People (1980) ZR 205.**

The three accused persons stand jointly charged on an information containing one account of the offence of ***Murder contrary to Section 200 of the Penal Code Chapter 87 of***

***the Laws of Zambia.*** The particulars of the offence are that the three on the 21<sup>st</sup> day of July, 2009 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, did murder **Sajid Mohammed Itowala.** Each of them pleaded not guilty.

The first prosecution witness **(PW1) was Chileshe Shikabenga.** This witness gave evidence on oath that on the 15<sup>th</sup> of July, 2009 between 07.00 and 08.00 hours in the morning, he received a phone call from one Mathew Mohan who was well known to him. Mathew Mohan is the first accused. At 14.00 hours, they met at BP Filling Station along Great East Road. At that meeting, A1 requested him to recruit four (4) boys who would abduct a wanted person who owed some people some money which he was avoiding to pay. In their discussion, they had agreed on 10% commission on the sum of K600 million, which, according to A1, that person owed. The commission was payable after the abduction of the deceased.

Three days later, A1 called him to discuss the progress made. On the 20<sup>th</sup> of July, 2009 PW1 recruited David Zulu, his

former Gardener. He paid David Zulu K100,000 out of the K200,000 that was given to him by A1 for his fuel needs. David Zulu was paid in order to be able to book a Taxi to the scene where the abduction would be carried out. David Zulu recruited his friend whose name was not known to PW1; PW1 also recruited his young brother named Chutu Shikabenga (PW2).

At 08.00 hours on the 21<sup>st</sup> of July, 2009, they all proceeded to House No. 1 Ngulube Road, Woodlands as arranged by the first accused. At House No. 1, Ngulube Road, they found the House Keeper, A1 and a coloured boy named Sean. PW1 left the recruited boys at that house. Forty five minutes later, PW1 repeatedly tried to call A1 and Chutu (PW2) but their phones were off. He drove back to House No. 1 Ngulube Road and saw the House Keeper (PW3) emerging from the opposite direction of the gate. According to PW1, the House Keeper (PW3) informed him that there had been a fight at that house involving A1 and his group and the debtor (deceased). The House Keeper (PW3) also informed him that he was returning from throwing away the deceased's wallet and papers which dropped during the fight. He had thrown those things in a fire at the UTH wall fence.

He later received a mobile phone call from A1 that the “boys” were on their way back. PW1 later saw the boys and noticed that Chutu Shikabenga (PW2) was bleeding on the left finger. He drove Chutu Shikabenga to UTH where he was treated at the Theatre. Chitu explained to him that he had been bitten on the finger by the abducted person. PW1 learnt from PW2 that the person they abducted had been killed. PW1 then phoned A1 who refused to discuss the issues on the phone. A1 later told PW1 that the deceased had been ‘plugged’ by Sean following new instructions that were received.

PW1 later met A1 at an agreed Car Park in Long Acres where A1 gave him US\$1,000 and promised to call again later. In turn, PW1 paid K2 million to David Zulu and his friend for the job. PW1 later went back to UTH where he found Chutu (PW2) who had been discharged with an amputated finger.

The next day, on the 22<sup>nd</sup> of July, A1 phoned PW1 to find out if the boys had left Town. PW1 later met A1 behind Italian School in Rhodes Park. A1 gave him K200,000 cash for fuel. The next day, A1 called to inform him of the arrest of Rathi’s father. In the

next two weeks, PW1 and A1 did not communicate. He later learnt that A1 had been arrested by the Police.

He again later learnt that A1 had escaped from Prison. During A1's escape he met him at Mabvuto Nyirenda's office between 07.00 and 08.00 hours and gave him a lift to PW1's home, for his safety. The two stayed together for the next five days during which time A1 narrated to him how he was involved in the matter. Specifically, A1 told PW1 that he had been contracted by his two Asian friends and one lawyer to kill Sajid (deceased). According to PW1, during that stay, A1 communicated with the named lawyer using his mobile phone on loudspeaker mode.

Later, on A1's instructions, PW1 went to Cholwe's office to collect US\$1,500; but Cholwe only gave him US\$500. On further instructions from A1, PW1 used the US\$500 to buy two mobile phones. Both A1 and PW1 continued to make arrangements to collect the money involved, through a number of other named individuals who, according to A1, were part and parcel of the contract to kill Sajid (deceased). During their stay together, A1

further informed PW1 that the murder weapons had been thrown away in the bush along Great East Road, towards Chongwe.

PW1 further testified that he realized that the Police were looking for A1 through Mabvuto Nyirenda. Due to this development, he asked A1 to leave his house and stay elsewhere before the Police arrived. PW1 then drove A1 to the Mass Media Complex area, where he dropped him off, at his request. PW1 later learnt that the Police were also looking for him. He fled the country and went to the Republic of South Africa where eventually the Police found him and brought him back to Zambia. He gave a statement to the Police and identified the Land Rover Discovery 3 which A1 used at No. 1 Ngulube Road, Woodlands on the 21<sup>st</sup> of July, 2009. This motor vehicle was later exhibited as exhibit **'P1'** (ABJ 9752),

On being cross-examined, PW1 told the Court that he had known Mathew Mohan (A1) for over a year since being introduced to him by someone at the Ministry of Education. He agreed to do A1 a favour for which he expected to be paid. When A1 approached him with a request to abduct a person, he knew that

the arrangement was illegal, but he did not know that the arrangement would involve the murder of a human being. He conceded that he and A1 were hired to undertake illegal activities which ended up with the death of the deceased. He also conceded that he harboured A1; a fugitive, at his house against the law.

He further conceded that he did not report any of the activities to the Police, and explained that he also felt threatened and feared an arrest. PW1 further told the Court that upon his return from the Republic of South Africa, he was kept in safe custody by Zambia Police and continued to be in their safe custody at the time of testifying in this Court.

**PW2 was Steven Chutu Shikabenga;** PW1's younger brother. This witness testified that sometime in July 2009, he was recruited at Chelston Water Tank by PW1 to join others to abduct the deceased on behalf of PW1's Indian friend who was owed some money by the deceased. He joined PW1 and two other men in PW1's car from Chelston and proceeded to House No. 1



Ngulube Road, Woodlands. PW1 drove the car which had no Number plates.

Upon reaching the house in Woodlands, an Indian man came out of the gate and held a discussion with PW1 who in turn told PW2 and the other two men to come out of the car and enter the yard. PW1 left the scene while PW2 and the other two men entered the yard, and were later joined by the Indian man. PW2 identified the Indian man as A1.

When PW2 and the others entered the yard, they found two other men; one coloured man and a black man. The man who received them at the gate instructed the coloured man to brief them on what to do. They were informed that their target was a heavyweight and had phones with sensors and that they needed to be very careful with him. Their instructions were that immediately the man came out of his motor vehicle, they were to apprehend him and put him in the motor vehicle; and drive him to the Police Station.

They were all asked to pretend to be workers cleaning the yard. PW2 and the others commenced their pretence as workers

and 15 minutes later, a car hooted at the gate and the Indian man (who he identified as A1) came down stairs to inform them that their target had arrived. The Housekeeper (PW3), opened the gate and the visitor's motor vehicle entered the yard. A1 came down stairs again to chat with the visitor. The visitor drove a Toyota VX silver in colour which was later identified and admitted in evidence as exhibit '**P8**' (ABP 4606). A1 then pushed the visitor and ordered them to apprehend him. The man fell to the ground and the other two men held him by the legs.

A1 ordered PW2 to cover the man's mouth so that he did not scream. As PW2 attempted to close the man's mouth using his left hand, the man bit into his left forefinger which was eventually amputated at UTH later the same night. They tied the man's legs together, while the man was at gunpoint. The man cooperated and offered his hands for them to be tied. They tied his hands with a sisal rope and a neck tie which were later identified and produced as exhibits '**P5**', '**P6**' and '**P7**'. On instructions from Mathew Mohan (A1), they lifted the captured man and put him at the back of the same motor vehicle he came with. On instructions from A1, PW2 blindfolded the captured man with a

dirty pair of shorts which was found lying in the yard. Mathew Mohan (A1) got in the driver's seat, ordered the Gardener (PW3) to open the gate and drove out of the yard into Independence Avenue.

As A1 drove, the deceased's vehicle, he spoke to the deceased. A1 said he was going to take the deceased to his bosses to apologize. As the two conversed, the captive, now the deceased, pleaded for mercy and begged not to be killed for the sake of his children. A1 promised not to kill him. The deceased commenced his prayers while being driven in the vehicle. A1 drove the car on Lumumba road up to Matero Traffic lights and turned into the Lusaka West road, in the direction of Zingalume Compound. A1 drove further until they reached a Police Check Point. A1 slowed the car down and greeted the Police Officers who were on duty. A1 boasted that he passed freely where Police Officers operate roadblocks. In the vehicle were: A1 who was driving, PW2, the captured man and the other two men who were at the scene of the abduction.

As A1 drove on, another vehicle, a Land Rover Discovery 3 (identified as exhibit **'P1'** was following behind. A1 stopped the Land Cruiser and the coloured man came out of the Land Rover (exhibit **'P1'**), which he had been driving while trailing them. This coloured man was the same one who had put the captive at gunpoint earlier on at House No. 1 Ngulube Road, Woodlands.

The coloured man joined the rest in the Toyota Land Cruiser and sat in the front passenger's seat. A1 drove further on for a short distance and turned the Toyota Land Cruiser to face the direction where they had come from. A1 gave orders to the coloured man to shoot the captive dead. The instructions were given in the Nyanja language. At that point, the coloured man had already produced a firearm and A1 shouted at him "mufake". PW2 was in the Toyota Land Cruiser all this time. PW2 then asked A1 whether they were going to take the captive to the people he owed money. A1 did not utter a word in response; he just shook his head to indicate negative response. A1 then said things had changed. At that point, a Minibus approached on the road and A1 moved the VX on the side of the road and instructed the coloured

gunman to wait for the bus to pass. After the bus passed, the gunman pulled the trigger but the gun jammed and failed to fire.

A1 retrieved a second gun from the deceased's motor vehicle and ordered the gunman to use it; saying "**mufake na yake**". A1 got the jammed gun from the coloured man. Using the deceased's own gun, the coloured man pointed at the deceased's left side of his chest and shot him three times at very close range, while the deceased lay on the floor of his motor vehicle with both hands and legs tied together and his face blindfolded. PW2 was still in the motor vehicle at the time of the shooting. Another bus passed them soon after the shooting.

A1 ordered everyone in the deceased's Land Cruiser to leave the Land Cruiser and board the Land Rover Discovery 3 (exhibit '**P1**'). A1 locked the deceased's motor vehicle (exhibit '**P8**'), while the coloured man picked the empty cartridges. The deceased's body was left locked in his own motor vehicle (exhibit '**P8**'). From the scene, A1 drove his own vehicle (exhibit '**P1**') back to town, and as he did so, his gunman threw the cartridges

away into the bush through the window. He also threw away the deceased's phones into the bush.

As A1 drove them back into town, two of the occupants opened the door of the moving motor vehicle and attempted to escape; they were threatened to be shot in the same way the deceased was shot. At that point, A1 made a phone call on his mobile phone in which he also said the following: **“The mission has been accomplished and we shall meet in hell”**.

Thereafter A1 drove everybody else to Pamodzi Hotel. A1 parked his vehicle next to another car which was already occupied by one other person; A1 got into the next blue car after which he produced K100,000 which he gave to the gunman and ordered him to distribute the money to PW2 and the others. PW2 and the others left A1 at Pamodzi Hotel Car Park and booked a Taxi cab back to No. 1 Ngulube Road, Woodlands where PW1 was waiting for them outside the yard. At that point in time, PW2 was with other two men including the gunman. PW1 gave them a lift and drove PW2 to UTH where his finger that was bitten off by the deceased, was amputated and the wound treated.

At his home, PW2 experienced sleepless nights and nightmares in the days that followed and later went to his village for four days. When he came back he was taken to Zambia Police Headquarters where he was interviewed about the murder of the deceased and a statement was recorded from him.

Here in Court, PW2 identified the Revolver used by the coloured man at No. 1 Ngulube Road, Woodlands. This gun was later admitted in evidence for the prosecution as exhibit **'P2'**. He also identified a Pistol that was retrieved by A1 from the deceased's vehicle and used by the coloured man to shoot and kill the deceased at close range, while he was forced to lie down in his own car; after the first gun jammed. The Pistol was later produced and admitted in evidence as exhibit **'P3'** for the prosecution. PW2 further identified the cable; the sisal ropes and the necktie which were used to tie up the deceased on his legs and hands. All these items were later admitted as part of the prosecution's evidence as exhibits **'P4', 'P5', 'P6'** and **'P7'**.

Further, PW2 identified the Toyota VX which the deceased used and in which the deceased was shot dead after being

kidnapped (exhibit **'P8'**). He also identified the Land Rover Discovery 3 which A1 used (exhibit **'P1'**). PW2 further identified the dirty khaki pair of shorts which he used to blindfold the deceased on instructions from A1. PW2 identified A1, Mathew Mohan as the person who gave instructions at No. 1 Ngulube Road, Woodlands and at the scene of murder in the deceased's motor vehicle along Lusaka West road. He told the Court that he had been with Mathew Mohan from 08.30 hours up to the time in between 11.00 hours and 12.00 hours on the day the murder was committed.

When cross-examined, PW2 informed the Court that when they were taken by PW1 to No. 1 Ngulube Road, it was only A1 who came to meet them outside the small gate; PW1 did not enter the yard; A1 gave them instructions through the coloured man after PW1 had left. He further testified that when the deceased drove into the yard, the coloured man pointed the Revolver at him. The deceased attempted to go back into his motor vehicle, but A1 switched off its engine, closed its door and pushed the deceased to the ground. The deceased was not



violent from the time he was kidnapped up to the time he was shot dead.

PW2 further testified that he sat next to the deceased from the time they kidnapped him to the time he was shot dead along Lusaka West Road. PW2 denied that he ran away from town to the village. He stated that he was asked to go to the village by his relatives and that he took himself to the Police in the company of his relatives on the 4<sup>th</sup> of November, 2009 after returning from his village. He informed the Police that the people who ordered the kidnapping and murder of the deceased did not want any of the participants to inform the Police. PW2 insisted that he felt in danger of being killed, and that he did not know that such things could happen in this country.

**PW3 was Emmanuel Mwiya**, a Caretaker at House No. 1 Ngulube Road, Woodlands, owned by Nicholas Chizyuka. PW3 used to stay at this property together with Sydney Simangolwa (PW10), his elder brother. He also accommodated three sub-tenants at this property; namely, Jade Chanda (PW8), Kasompe Mwaba (PW6) and Zilole Mwenda (PW7). According to PW3, A1

was a regular visitor at House No. 1 Ngulube Road and often used the house to entertain his girlfriends overnight. A1 had a male coloured friend and the two visited the house on 20<sup>th</sup> of July, 2009 around 14.00 hours using A1's Land Rover. They were later joined by an Indian Man who drove in a Toyota VX (deceased). A1 and the deceased chatted and the deceased was made to view the house after which he left. A1 and his coloured friend also drove away; promising to come back the next morning, and that all the sub tenants at the house should be kept away as there would be a meeting at the house. PW3 informed everyone at the house.

On the morning of the 21<sup>st</sup> July, 2009, all the sub-tenants left the premises. A1 arrived around 08.00 hours in the company of his coloured friend. They used A1's Land Rover which PW3 was familiar with. A1 made a call and a short while later three black men drove by the gate and walked into the yard. A1 made another phone call and a short while later, the same Indian man who came to view the house the previous day returned to the house.

PW3 opened the gate for him and he drove into the yard. A1 instructed PW3 to go to the Servants Quarters, which he did. While at the servant's quarters, he later heard noises of a struggle. He shifted positions to view the scene and saw the coloured man holding a gun while the Indian man (now deceased) was lying down; while his legs and hands were being tied up. PW3 noticed that one of the black men had an injury on his finger which was bleeding; while A1 stood by the man on the ground with his arms folded. PW3 was called by the coloured man to help in place of the injured man.

PW3 approached the scene and held the deceased by his feet and helped to tie him up. The deceased was placed in his own motor vehicle behind the three black men. A1 got the gun from the coloured man and took charge of the deceased's motor vehicle and drove away. PW3 opened the gate for them. A1's coloured friend followed while driving A1's Land Rover; trailing the deceased's motor vehicle on Independence Avenue. Under A1's instructions issued to him through his cell phone, PW3 cleaned the place where the deceased was kidnapped and tied. He washed off the blood and picked up the deceased's wallet,

Passport photos and business cards which he threw over the UTH fence. He phoned A1 using his mobile phone to tell him what he had picked at the scene.

Later that afternoon, a Security Guard from the next house (PW5), came over and informed him that he had witnessed all the events of that morning at House No. 1, Ngulube Road. He had been peeping over the fence. Later in the evening, A1 came and picked him in his Land Rover. They drove around up to Ndeke Motel Car Park where he instructed him to shut his mouth and gave him K1 million to share with other people in the neighbourhood who had seen the two motor vehicles; i.e. A1's Land Rover and the deceased's Toyota VX.

Later in the Car Park, A1 was met by someone who came from inside the Motel and later still A1 took some money to another person who had just driven in the Motel Car Park. Thereafter, A1 drove PW3 to a road going to the Zambia Air Force (ZAF) Base in the Long Acres area where he parked the motor vehicle and produced some more money which he gave another

man who came to A1's car. A1 later dropped PW3 at No. 1 Ngulube Road.

The next morning, PW3 gave K20,000 to the Security Guard next door whom he knew as Michael (PW5) to share with the Painter (PW4), who had also witnessed the kidnapping of the deceased from the next house. PW3 also gave out K10,000 each to all other people who lived near the scene and might have seen the two vehicles being driven out of House No. 1 Ngulube Road.

Later, A1 phoned him, using his mobile phone to inform him that some Police Officers would be coming to House No. 1, Ngulube Road. The next morning, four Police Officers came to the house and requested to check for items which had dropped within the yard. The officers made a search around the house but found nothing. The next morning, A1 called PW3 to meet him at Interland along Burma Road, Libala. PW3 sought the company of his friend Mushoke (PW9). A1 drove them in his car to Kabulonga Filling Station, where he gave PW3 another K1 million for the wonderful job he had done. After giving PW3 K1 million, A1 got PW3's cell phone and destroyed it in order to conceal any traces

between the two of them. A1 then left PW3 and PW9 to book a Taxi cab back to where they lived.

The next day, another set of Police Officers arrived at House No. 1 Ngulube Road with a Search Warrant. The Officers questioned him but he did not tell them the truth; on instructions from A1. PW3 later narrated the true story to the Police Officers after learning that a person had been killed. PW3 recognized the sisal ropes, the cable and the necktie which were used in tying the deceased after his capture. He also recognized A1's Land Rover and the deceased's Land Cruiser VX which were all produced during trial. He also identified A1 as Mathew Mohan. There was a site visit undertaken by the Court to the scene of kidnapping at House No. 1, Ngulube Road. PW3 explained to the Court, in presence of Counsel and the accused persons what he witnessed at the scene of the kidnapping. He also explained the position where he picked up the wallet and where he disposed it off in the UTH yard.

When cross-examined, PW3 testified that he did not tell the neighbours everything that happened. He lied to his neighbours

that the coloured man was a policeman who had come to apprehend the deceased who owed money to some friends of A1. He only spoke to the Guard and the Painter; (PW5) and (PW4). He knew Mathew Mohan (A1) before the 21<sup>st</sup> of July, 2009. A1 destroyed PW3's Sim card the following day on the 22<sup>nd</sup> of July.

When the Police came to the house, his sense of feeling was that they were sent by Mohan (A1) because he earlier on phoned to tell him that the Police were coming, and he should know what to tell them. When the real Police came to the house, he realized that the four Police Officers who came earlier were fake. He had earlier believed that the coloured man was also a Policeman. He disposed off the deceased's wallet upon instructions from A1. He was also instructed to clean the bloodstains at the scene, which he did.

He narrated the whole story to the real Police Officers on the 24<sup>th</sup> of July when he was picked and kept at a safe place. He identified Mohan (A1) at the Police Identification Parade conducted around 12<sup>th</sup> August. Initially he was a suspect and a warn and caution statement had been recorded from him. On

instructions from A1, he gave money to somewhere between seven to nine people after the kidnapping incidence on the 21<sup>st</sup> of July. His instructions were for them to say they never saw the Toyota VX and the Land Rover (exhibits **'P1'** and **'P8'**).

**PW4 was Kennedy Mwansa** who testified that on the 20<sup>th</sup> July, 2009 around 08.00 hours, he was assigned by his Company to paint House No. 2320/3 which shared a wall fence with House No. 1 Ngulube Road, Woodlands. Around 14.15 hours he heard some noise in the next yard. He climbed on a ladder and saw two Indian men; one of whom was darker than the other. They came in two different motor vehicles, a Land Rover and a Toyota VX. This witness identified exhibits **'P1'** and **'P8'** as the vehicles he saw. The two Indian men were engaged in a violent argument; one of them was hitting on the bonnet of the Toyota VX; Michael (PW5) who also climbed the ladder; saw what was happening. Both of them continued with their work and knocked off at 15.30 hours.

The next day on the 21<sup>st</sup> of July, 2009, he reported for work at 08.00 hours. The work involved painting the wall fence in



between the two houses. He climbed the ladder on the wall fence and peeped into the next yard. He saw one of the same Indian men on the ground being tied up. He also saw the people who were tying him up. He was tied in both legs and in his hands, while the other Indian man was supervising the black men who were tying the other Indian man. In his imagination, PW4 thought the Indian man who was being tied up was epileptic; he saw a person carrying a gun. He got down the ladder and went to inform Michael, the Guard (PW5). PW5 climbed the ladder and saw those people. Five minutes later, he saw the Toyota Land Cruiser VX being driven along the road outside their wall fence. He saw two vehicles: a Land Rover and Toyota VX. This witness identified exhibits **'P1'** and **'P8'** as the motor vehicles he saw. As the vehicles passed, one of the people in the Toyota Land Cruiser VX tossed a blue and white/black striped T-Shirt, out of the vehicle. Here in Court, this witness identified exhibit **'P11'** as the T-Shirt which was tossed out of the Land Cruiser.

After the two motor vehicles left, PW4 and PW5 talked to the Caretaker at No. 1 Ngulube Road (PW3). PW3 informed them that the person who had been kidnapped was taken by the Police to

Lusaka Central Police Station because he owed some people K3 billion. The next day when PW4 reported for work, he found a K10,000 note that had been left with the Guard (PW5). He was told not to say anything about the events that had occurred in the next yard.

In August 2009, he was summoned by the Police and interviewed about the events of the 20<sup>th</sup> and 21<sup>st</sup> of July. He explained what he observed and the Police recorded a statement. Later, he was summoned by the Police to attend a Police Identification Parade where he identified Mathew Mohan (A1) as one of the people he had seen in the yard.

In cross-examination, PW4 stated that he was scared after observing the events in the next yard. He did not tell the Police that the Toyota Land Cruiser VX was driven by a black man. He did not tell the Police that the Range Rover was driven by a slim Indian man. When shown the statement he made to the Police, PW4 stated that he saw the drivers of the two motor vehicles, but was scared to clearly look at them because he had seen them armed with a gun. He did not know that what was happening was

a crime and believed that the kidnapped man was taken to the Police Station for an offence he had committed. He accepted the K10,000 and used it.

**PW5 was Michael Silungwe**, an Armcor Security Guard who was based at House No. 2320/3 Manenekela Road, Woodlands. He was on duty on 20<sup>th</sup> and 21<sup>st</sup> July, 2009, together with PW4. On the 20<sup>th</sup> of July between 13.00 hours and 14.00 hours, he witnessed two Indian men quarrelling within the yard of House No. 1, Ngulube Road; the next yard. He also climbed the ladder and saw the two Indian men quarrelling and recognized one of the Indian men who used to stay in the same area.

The following day, in the morning, PW5 was back on duty between 07.00 hours and 08.00 hours. He was joined by PW4. PW4 informed him of the events in the next yard. He also climbed the ladder on the wall fence. He witnessed one of the two Indian men being tied in the hands while kneeling down. He also saw the Land Cruiser VX and a Land Rover within the premises. He briefly went away to attend to his food that was cooking. When he returned, he found the two motor vehicles and

the people gone. He identified exhibit '**P11**' (a T-Shirt). He later called the Caretaker at No. 1 Ngulube Road who he knew as Emmanuel (PW3). He asked about the events that had taken place. He was informed that the Police had come to apprehend the Indian man who was tied up because of a debt.

The next day, he was given K20,000 and told to share it with PW4, which he did. He was asked by PW3 not to reveal the events that happened in the next yard.

The next day, more Police officers came with a Search Warrant. They later recorded a statement from him. On the 12<sup>th</sup> August, 2009, he was summoned at Lusaka Central Police Station where he was requested to identify the Indian man whom he saw during the abduction at No. 1 Ngulube Road. He was taken to a Police Identification Parade where he identified Mathew Mohan (A1) out of a parade consisting of twelve or thirteen similar men. PW5 also identified A1's Land Rover Discovery 3 (exhibit '**P1**') and the Toyota VX which he had seen (exhibit '**P8**').

When cross-examined, PW5 stated that he did see something wrong in the events at House No. 1 Ngulube Road. He

did not report to his Control Room via his mobile radio; he did not know what had happened. He conceded that he later received K20,000 from PW3 (Emmanuel) in order not to disclose the events to anyone. He believed what PW3 told him, although he did not record the events in the Occurrence Book.

**PW6 was Kasompe Mwaba**, a sub tenant at House No. 1 Ngulube Road through the Caretaker (PW3). His evidence was that on the 25<sup>th</sup> of July, 2009, he was interviewed by the Police about the events which occurred at No. 1 Ngulube Road on the 21<sup>st</sup> of July, 2009. He identified an electric cable (exhibit '**P4**') and a necktie (exhibit '**P7**') which Police recovered from the deceased's dead body. He confirmed being asked to stay away from the house by PW3.

**PW7 was Zilole Mwenda**, another sub tenant at House No. 1 Ngulube Road who lived with PW6 and PW8. PW7's evidence is similar to that of PW6. On the 21<sup>st</sup> of July, 2009, PW3 told him not to return to the house until he was told to do so by PW3. PW3 called him between 16.00 hours and 17.00 hours and requested him not to return to the house; which he did. On Saturday 25<sup>th</sup>

July, 2009, he was interviewed by the Police who also executed a Search Warrant on the premises.

**PW8 was Jade Chanda**, another sub tenant at No. 1 Ngulube Road, Woodlands. His evidence was similar to that of PW6 and PW7. This witness saw A1 and his Land Rover Discovery (exhibit '**P1**') on the 21<sup>st</sup> of July, 2009 at about 08.00 hours. PW8 was at the gate. A1 was with a coloured passenger. The two men asked for Emmanuel (PW3). He told those men to check inside the gate after which he proceeded to his workplace at the Ministry of Finance. The next Saturday, he was interviewed by the Police and a statement was recorded from him.

**PW9 was Mushoke Nyambe**, a friend of Emmanuel Mwiya (PW3). His evidence was that on the 22<sup>nd</sup> of July, 2009, PW3 requested for his company to meet Mathew Mohan (A1) at Inter Land, along Burma Road opposite Arrakan Barracks in Libala Stage 4. He knew Mathew Mohan before and they were neighbours in Woodlands along the same road. PW9 and PW3 both got into A1's motor vehicle which he knew very well and identified as exhibit '**P1**'. A1 drove the car around and eventually

parked at Total Filling Station near Melissa Supermarket in Kabulonga. A1 produced K1 million cash which he gave to PW3 and in turn A1 took away PW3's mobile phone. A1 then copied PW9's mobile phone number in order to facilitate future communication between A1 and PW3. Thereafter, PW3 and PW9 returned to No. 1 Ngulube Road, Woodlands.

Later, A1 called PW9's mobile phone number in order to speak with Emmanuel (PW3). Emmanuel later gave K300,000 each to PW9 and his brother PW10.

The following day on the 23<sup>rd</sup> of July, 2009, Mathew Mohan (A1) called PW9's number. PW9 in turn went to visit Emmanuel's place and paged (A1). The two i.e. Emmanuel and Mathew Mohan (A1) talked on the phone and this type of communication between A1 and Emmanuel using PW9's phone continued until on the 25<sup>th</sup> of July, 2009 when PW9 learnt that PW3 and other occupants of House No. 1 Ngulube Road had been taken away by the Police.

A1 continued calling PW9's number to find out where the Police were keeping Emmanuel (PW3). Mathew Mohan (A1)

assigned PW9 to gather information from Police about Emmanuel, but PW9 found it impossible to do so. The two of them continued talking on the phone until PW9 was apprehended by the Police. Thereafter, A1 continued to call PW9's phone number while PW9 was in Police custody. PW9's phone was kept by the Police. They gave it to him to answer incoming calls while the Police listened in to each conversation PW9 had with A1. PW9 recorded his conversations on the mobile phone system and this went on for two days until the phone's battery ran out. The Police later recorded a statement from him.

When cross-examined, PW9 stated that he was sent by A1 to find out what sort of information PW3 was giving to the Police. He did not know where the Police kept PW3 and he had not known about the murder before he was apprehended by the Police.

**PW10 was Sydney Simangolwa.** This witness lived with Emmanuel at House No. 1 Ngulube Road. He knew A1 very well and previously worked as a Taxi Cab driver for A1's mother. On the 21<sup>st</sup> of July, 2009, A1 came to No. 1 Ngulube Road to visit PW3 around 06.00 hours. PW10 left the premises for other business



and returned around 16.00 hours. Later that evening, PW3 explained to him what had happened at No. 1 Ngulube Road. PW3 produced K300,000 which he gave to PW10 so that PW10 kept quiet about the events. PW10 was later questioned by the Police who recorded a statement. When cross-examined, PW10 learnt from PW3 that someone had been killed. He did not return the money he took and did not report the deal to the Police. He was interviewed by the Police and taken into Police custody.

**PW11 was Lazarus Mwila.** This witness worked as a general worker at Tyre Kings Farm off Great East Road towards Chongwe. On 14<sup>th</sup> November, 2009, he was in the company of Kennedy Siamungwa (PW12). They were stopped by two Police Officers who were in the company of a third person (PW17). These people requested PW11 and his colleague to help them retrieve two guns from the surrounding area. They searched the bush until PW11 discovered the first gun stuck up in a tree. He surrendered that gun to one of the Police Officers at the scene; it was a Revolver with three rounds of ammunition in its rusty chamber. It had a rusty barrel. The Police Officers urged them to

continue with the search. PW12 later discovered another gun, partly buried in the soil in a dense thicket.

Thereafter, the Police recorded statements from both PW11 and PW12. Here in Court, PW11 identified the exhibited Revolver (exhibit '**P2**') and the three bullets (exhibit '**P12**'). This witness was not cross-examined.

**PW12 was Kennedy Siamunguwa.** His evidence was similar to that of PW11. They were together when the Police requested them to render help in retrieving guns which were lost in the bush off the Great East Road. This was on the 14<sup>th</sup> of November, 2009. During the search, PW11 first recovered the Revolver with three rounds of ammunition. Later, PW12 recovered a Pistol partly buried in the soil in a dense thicket. PW12 surrendered the Pistol to a Police Officer at the scene. The Police Officer checked the Pistol and discovered one bullet in it. PW12 also described PW17 as being present. Here in Court, PW12 identified the exhibited Pistol and the bullet which he picked in the bush. These items were admitted in evidence as exhibits '**P3**' and '**P13**', respectively.

**PW13 was Harunabdullah Patel**, a co-Director of Cyclone Hardware. This witness stated that the deceased was the other Director of Cyclone Hardware. On the 21<sup>st</sup> of July, 2009, around 09.53 hours, he was at his shop in Kamwala when he received a text message from the deceased's mobile phone, which was known to him as 097 6786363. The text message indicated the following: **“I am at near Brazil Embassy, House No. 1 Ngulube Road”**.

PW13 called the deceased's number, ten minutes after receiving the text message. The phone was off the network. Later as the day progressed, he received many calls from people who could not communicate with the deceased. These included the deceased's wife who reported that the deceased had not reported for lunch and had never ignored her before.

PW13 drove to House No. 1 Ngulube Road, Woodlands, as indicated in the deceased's text message. He found a man cutting grass outside the fence. That person claimed that no one lived at that house. He peeped in the yard and saw some people upstairs and at the Servant's Quarters. He knocked at the gate

and inquired about the deceased. One of the people from the yard informed him that the deceased was not known and no one lived at that house. He drove away and returned to the same house five minutes later; but found it deserted. PW13 later received information about the deceased, and proceeded to the University Teaching Hospital (UTH). An hour after arriving at UTH, the deceased's body was driven to the Mortuary by the Police. The Police recorded a statement from him. He indicated that he was too shocked to view the deceased's body. This witness was not cross-examined.

**PW14 was Abdlugani Patel, Managing Director, Decotex Paints.** His evidence was that on the 21<sup>st</sup> of July, 2009, he learnt from the 19.00 hours News that Sajid Itowala, referred to in this Judgment as the deceased, had been killed. The deceased was his younger brother. He proceeded to UTH and confirmed that his younger brother, Sajid Itowala, had been murdered. He observed that his hands and legs were tied up with sisal ropes, a cable wire and a necktie. He observed what appeared to him like bullet wounds on the body; one on the chin, and two or three on the chest. He also observed that the wounds

were bleeding. He was too shocked to witness the postmortem examination performed on the deceased's body by the Doctor. Later, the Police recorded a statement from him. This witness was not cross-examined.

**PW15 was No. 8448 Detective/Inspector David Siloka,** based at Lusaka Division in the Scenes of Crime Department. His evidence was that on the 21<sup>st</sup> of July, 2009, he visited the scene of the murder of Sajid Itowala in Lusaka West, along Mungwi Road. He paid his visit at about 18.00 hours. He observed that the body was placed in the rear seat of the deceased's own motor vehicle Toyota Land Cruiser VX (exhibit '**P8**'). The body's legs and hands were tied together. This witness identified the twelve (12) Police photographs taken at the scene of crime and the Police Photographic Album of those photographs.

He described each of the scenes in each of the twelve photographs. The photographs clearly show how the deceased's hands and legs were tied up and how the body of the deceased lay in the back seat of his car; and more importantly, the photographs show the bullet holes, the bleeding wounds, the

pools of blood and the nature of the damage done to the interior of the car, which he also examined. The Police Photographic Album was produced as part of the prosecution's evidence and marked exhibit '**P14**' without objection.

He first examined the deceased's motor vehicle (exhibit P8) and later examined the scene of crime along Mungwi Road. He searched a perimeter of 100 meters on both sides of the road at the scene of crime; since the deceased's body suffered wounds which clearly showed foul play and the possibility of the use of sharp instruments. Nothing of interest was recovered during the search. He interviewed the deceased's close associates and family members, and friends as well as workmates and employees. He found interest in the text message received by PW13 at 09.53 hours.

On the 25<sup>th</sup> of July, 2009, he led a search party on the premises and interviewed Emmanuel Mwiya (PW3) and the other people who were squatting on those premises. The other people included PW6, PW7 and PW8 as well as PW3's elder brother Sydney Simangolwa (PW10). All the concerned persons were

taken into Police custody and interviewed. Each one of them cooperated and narrated their stories. PW6 Kasompe Mwaba identified the sisal ropes, the electric cable and the necktie, which were used to tie the deceased at House No. 1 Ngulube Road before the deceased was driven away to an unknown place.

From the evidence gathered, he concluded that the deceased was first lured to No. 1 Ngulube Road, Woodlands, captured and tied up with sisal ropes, the electric cable and necktie before he was driven to his death. This Officer produced all the items he identified as part of the prosecution's case without objection. The items are shown as exhibits **'P4'**, **'P5'**, **'P6'** and **'P7'**.

PW15 narrated the stories which the cooperating witnesses narrated to him. When he learnt that Mathew Mohan had taken down the phone number of Mushoke Nyambwe (PW9), he kept PW9 at the Police Station in order to listen to the mobile phone conversations which were taking place between PW9 and Mathew Mohan. During the time of detention, A1 made a number of calls to PW9. PW9 recorded some of the conversations instantly. The

phone was put on the loudspeaker and PW15 listened in. He identified the voice of Mathew Mohan who constantly asked about the Caretaker, Emmanuel (PW3). This witness identified PW9's cell phone used to record A1's conversations with PW9. This mobile cell phone was admitted in evidence as exhibit **'P15'** without objection. The contents of the conversations in exhibit **'P15'** were played in Court and heard for what they are.

PW15 also interviewed PW4 (Kennedy Mwansa - the Painter) and PW5 (Michael Silungwe - the Security Guard). These two gave him descriptions of the exhibited motor vehicles which they had seen at No. 1 Ngulube Road on the fateful day. Following the information gathered, PW15 launched a manhunt for Mathew Mohan (A1) until he apprehended him on the 3<sup>rd</sup> of August, 2009.

Thereafter PW15 began to look for Osman Musa Ugradar and the brothers Shabir Suleman Patel (A3) and Idris Suleman Patel (A2) who employed Osman Musa Ugradar at Crown Paint Limited. According to PW15, he was looking for those three persons in connection to monies allegedly given by A1 and A2 to the persons involved in the deceased's murder through the said Osman Musa



Ugradar. PW15 later apprehended A2 and A3 and interviewed them about their money transactions with Mathew Mohan (A1).

Later a Police Identification Parade was conducted at which A1, A2 and A3 participated. PW3, PW4 and PW5 identified Mathew Mohan as the person who took part in the abduction of the deceased from No. 1 Ngulube Road, Woodlands. PW15 was not satisfied with the explanations given by the three accused persons and made up his mind to arrest and jointly charged them with the present offence. They were taken into Police custody and later remanded at the Lusaka Remand Prison.

PW15 later learnt that Mathew Mohan (A1) had escaped from lawful custody. He identified the two exhibited guns and ammunition recovered during the investigation. These items were admitted in evidence, without objection and marked exhibits **'P2', 'P3', 'P12' and 'P13'**. He also identified and produced the dirty pair of shorts which was used to cover the deceased's face (exhibit **'P9'**), the T-Shirt (exhibit **'P11'**), the deceased's motor vehicle (exhibit **'P8'**) and the first accused's motor vehicle (exhibit **'P1'**). Exhibit **'P1'** was admitted over an objection that

was overruled. PW15 also produced the deceased's postmortem examination report compiled by the late Dr. J. Banda, Police Forensic Pathologist at UTH Mortuary. The deceased's cause of death was indicated as multiple wounds due to gunshot injuries (exhibit '**P16**').

When cross-examined, PW15 testified that according to PW4, the deceased's motor vehicle was driven out of No. 1 Ngulube Road by Mathew Mohan (A1), and it carried the deceased who was abducted while gagged and tied up. PW15 later inspected the deceased's motor vehicle and saw the pool of blood in it. He learnt from PW3 that all instructions issued at No. 1 Ngulube Road came from A1. He also learnt from the postmortem report that the gunshot exit wounds were not seen; that the bullets were not recovered from the body, as no internal examination was done by the State Forensic Pathologist due to religious beliefs; and that no spent cartridges were recovered at the scene.

**PW16 was No. 5567 Detective Chief Inspector Killian Meele Muleya** of Zambia Police, Lusaka Division, Scenes of Crime. This witness testified that on the 21<sup>st</sup> of July, 2009, he

received a report of a dead body inside an abandoned car along Mungwi Road, Lusaka. He visited the scene and found a VX Land Cruiser registration No. ABP 4606 (exhibit '**P8**') with the deceased's body gagged and tied up below the back seat. He took photographs showing various positions of the scene. He later processed the photographs and compiled a Police Photographic Album, which he produced as exhibit '**P14**', without objection.

PW16 further testified that he observed that the body had the hands and legs tied together and the head was covered with a pair of dirty shorts. There were five suspected bullet wounds on the body; two on the chin, one on the left upper chest around the breast, and another two on the right chest lower ribs. PW16 also discovered some documents in the motor vehicle which indicated the name of Sajid Muhammad Itowala. He also recovered 22 rounds of 9mm caliber Pistol ammunitions which were in the pocket of the driver's door. He further recovered five live ammunitions of caliber .423. He handed over all the recovered items to the Investigating Officer. Here in Court, PW16 explained each photograph contained in the Police Photographic Album.

PW16 also identified all the items recovered from the deceased's motor vehicle. When cross-examined, PW16 testified that he searched for fingerprints but found none from the deceased's motor vehicle.

**PW17 was Frank Tembo, a Legal Practitioner.** This witness testified that he knew A1 and A2 before but had seen A3 in Court for the first time. He dealt with A1 and A2 in his capacity as a Lawyer in the year 2009. He further testified that on the 21<sup>st</sup> of July, 2009, at about 10.00 hours, Mathew Mohan (A1) called him and the two later met at Pamodzi Hotel. He gave A1 a ride in his car and they drove to three different places until around 11.00 hours when A1 asked to be driven to the Airport Turnoff where he wanted to meet someone.

PW17 drove to the Airport Turnoff but A1 asked him to drive along the Great East Road. They drove on this highway until at a certain point where A1 asked him to park the car so that he could relieve himself. A1 got out of the car and walked a distance of about 10 meters away, off the Great East Road. Later, A1 came back to the car and asked to be driven back to Pamodzi Hotel,

which PW17 did. According to this witness, the drive with A1 took about two hours. PW17 then left Zambia for the Republic of South Africa where he stayed for a week.

Upon his return, he learnt from A1's mother that A1 (Mathew Mohan) had been arrested. PW17 visited A1 in custody. He later learnt that A1 had escaped from lawful custody. A1 called him by mobile phone and informed him that he had escaped from Prison with assistance from some people who rescued and drove him away from the Courts. PW17 then reported the escape to a Police Officer at Lusaka Division.

On Friday 13<sup>th</sup> November, 2009, he was interviewed by Police Officers from the Zambia Police Headquarters. The Police Officers requested him to show them the place where he had driven A1 along the Great East Road where they believed A1 had disposed off the firearms used in committing the crime. This was a period of five months after he had driven A1 along Great East Road. He led the Police Officers to the place along the Great East Road where he had parked his car. The Police searched the area with the help of some villagers and two firearms were recovered.

When cross-examined, PW17 told the Court that he drove Mathew Mohan (A1) for a distance of over 10 kilometers along the Great East Road after the Barn Motel. He did not see A1 when he came out to urinate, and he did not see him throw the firearms away into the bush. He stated that the Police recorded a statement from him on the 13<sup>th</sup> of November, 2009 at about 19.30 hours at Zambia Police Headquarters.

PW17 conceded that his statement to the Police mentioned that Idris (A2) was not happy that Toffik (PW19) had acquired a new Work Permit. PW17 conceded that not all the information in his statement to the Police was correct; but that the Police also added their own words. He denied being consulted by Idris (A2) regarding the Immigration issue relating to Toffik (PW19). He denied that Idris (A2) confessed to him about being involved in the murder. He conceded that he was paid K10 million to visit A2 in Police custody at Woodlands Police Station. He conceded that the Police took several statements from him, which included the Warn and Caution statement which he signed; but whose contents were not entirely true.

He further conceded that he visited A1 and A2 in Prison and held privileged conversations with them. PW17's Warn and Caution statement was exhibited as part of the evidence for the defence and marked exhibit '**D2**'. This statement indicated, among many other things, that Idris (A2) confessed to him; but PW17 claimed that the confession was added to his statement by the Police.

PW17 further testified that he could not remember how many statements were recorded from him by the Police; but recalled that he appended his signature and initialed every page. He also stated that he was neither tortured nor harassed by the Police when they were recording his statements.

**PW18 was Mohamed Suleman Itowala**, the deceased's uncle. This witness testified that he met Mr. Yusuf Yakub Musa (PW24) during the deceased's funeral, at the funeral house. PW24, a former senior Police Officer pledged to help in the investigation into the murder of the deceased who was a nephew. According to PW18, PW24 arranged the surrender of Idris (A2) to the Police. PW18 later met Idris at Zambia Police Headquarters,

in the presence of Police Officers. Idris (A2) explained to him how Mathew Mohan (A1) and Mr. Frank Tembo (PW17) confronted him at his office at Crown Paint demanding money at gunpoint. A2 explained that he was confronted by A1 and Mr. Frank Tembo the Lawyer, that his fate would be the same as that of Sajid (deceased). A2 further narrated that Mathew Mohan (A1) told him that he would take everybody with him, now that he was in it. This was at the time before A1 was apprehended. When PW18 asked Idris (A2) why he did not report the murder to the Police on the same day it occurred, A2 informed him that he was stopped from doing so by his lawyer.

When cross-examined, PW18 stated that he made his statement to the Police about his meeting with Mr. Musa (PW24) and Idris (A2) in January 2010. He conceded that he did not mention about his meeting with Idris (A2) at Zambia Police headquarters in his statement to the Police because Idris made the statement in the presence of the Police.

**PW19 was Toffik Mohammed Hassan Ali Dhanga** who came to Zambia in 2003 from Kenya where he was recruited by



A2 and A3 as a paint expert/Production Manager with a promise of higher salary and conditions of service. They established a Paint Company known as Crown Paints and he assisted them to acquire machinery from India. He was not paid a salary after one and half years of production. His Passport and Work Permit were detained by A3. He resigned and demanded for his Passport and Work Permit. He then left Zambia and went back to Kenya. In Kenya, A2 had him arrested by Interpol at Jomo Kenyatta International Airport and prevented him from returning to India. A2 forcibly arranged for his return to Zambia on allegations that he had stolen. He was then taken by A2 to Lusaka Central Police Station where A2 organized a Police Bond and forced him to return to work at Crown Paint.

A2 presented him with new written conditions of service purporting that he was to work for A2 and A3 for 30 months without any salary or wages; he would not work anywhere else; he would not use his phone and would not communicate with anybody either in Zambia or in India; etc. PW19 rejected these conditions and threatened to report to the Police; but was informed by A2 and A3 that Police at Lusaka Central Police Station

were in their hands and the elders in the Indian Community would not listen to him because he was poor, and they had the money and were very influential. A2 then produced a gun and asked him to sign the new conditions or else he would be put into a lot of difficulties. PW19 then cried continuously and signed the conditions of service under duress.

Thereafter, A2 took him to his room of residence and addressed the neighbours to ensure that he neither left the room nor communicated with anybody. PW19 then resumed working under the stressful conditions. Later, his father contacted a senior member of the Indian Community but PW19 was rebuked for this; and A2's brother named Irfan frequently visited his room and physically assaulted him.

PW19 complained of the beatings to A2, but A2 continued to threaten him. News of his mental and physical torture spread around the Indian Community in Zambia until one day he sat behind Mr. Sajid Itowala (deceased) at the Mosque and offered a prayer to him, and requested him for assistance. He later hired a

taxi and went to see the deceased who took him to Mr. Musa (PW24).

As soon as he returned, A3 came and severely beat him up with his belt. PW19 did not reveal where he had been and A3 later locked him in the house and took the keys away. PW19 then escaped through the bathroom window, booked a taxi and went to see the deceased who advised him to report A2 and A3 to the Police. PW19 proceeded and reported to Police at Lusaka Central Police Station and was issued with a Police Medical Report. He proceeded to UTH for treatment and the Doctor issued him with a Medical Report which he took back to the Police and gave a statement.

Thereafter PW19 began to reside with the deceased. A2 and A3 avoided arrest and went to India. Upon their return, they asked the deceased to refrain from assisting PW19. The deceased then took him to Mr. Musa's office where a meeting was convened at which PW19, the deceased, PW24 and A2 attended. The meeting resolved that PW19 be paid nine months salary and sent to India; and that he could not take up any employment in

Zambia until the expiry of his Work Permit with Crown Paints. PW19 then left for India.

The deceased came to India and visited him. He offered him a job back in Zambia. PW19 came back to Zambia on the 2<sup>nd</sup> of June, 2009 after one and half years of stay in India. The deceased came to the International Airport to negotiate his stay with the Immigration Department and took him to Cyclone Paints in the Industrial area. The next day, the deceased took him to Immigration Headquarters to obtain a Work Permit. As PW19 was about to sign on the Permit in the present of the deceased, Idris (A2) came into the office and handed the Immigration Officer a letter and told him not to issue PW19 with a Permit. This notwithstanding, PW19 began to work for Cyclone Hardware and Paint belonging to the deceased after the deceased obtained a Work Permit from the Immigration Department.

A2 met the deceased and PW19 at Interpol office at Police Headquarters where the deceased advised A2 not to harass PW19, a poor boy. Twenty five days after the Interpol meeting, PW19 came to learn that Mr. Sajid Itowala had been murdered.

In cross-examination, PW19 stated that he was Chief Chemist and Paint Technician and that he learnt his trade from his family who were in paint business for generations. He gave a statement to the Police on 10<sup>th</sup> March, 2010 in Gujarat which was translated to English. A2 and A3 used to order their chemicals from India through PW19's father. PW19 provided some of the contact addresses of chemical suppliers. A2 paid him US\$10,500 in PW24's office and remitted US\$1,500 as salary arrears. He worked for A2 and A3 from 2004 to 2006.

**PW20 was Yonus Issa.** This witness testified that on 14<sup>th</sup> August, 2009 he was summoned by the Police at Lusaka Division to conduct a translation of Gujarati and English at a meeting attended by A2 and A3 at which the Police recorded a statement from Osman Ugradar. PW20 produced Ugradar's statement (ID18). The said Osman Ugradar was a listed witness but absconded after the trial began.

**PW21 was No. 6264 Chief Inspector Luke Banda** based in the Forensic Services Department at Zambia Police Headquarters. He testified that on 24<sup>th</sup> November, 2009 he was

assigned to reconstruct a scene at a point along Great East Road, 20.1 kilometers from the International Airport Roundabout. He was in the company of Mr. Frank Tembo (PW17), A1 and other Police Officers. The reconstruction team was led by Mr. Frank Tembo (PW17).

At the scene, a systematic analysis and reconstruction was conducted and he took photographs after which he processed them and compiled a Photographic Album which he produced as exhibit '**P19**'. He explained each of the eight photographs in the Police Album. The photographs showed the general view of the scene; where A1 and PW17 were standing during the reconstruction and where the firearms were thrown by A1 and where they were recovered from. PW21 also identified the two exhibited firearms as the firearms which were earlier recovered at the scene which he reconstructed in the presence and with assistance of A1 and Frank Tembo (PW17).

In cross-examination, PW21 told the Court that he was led to the scene by PW17 and A1, after a Warn and Caution statement was administered to A1; and PW17 showed the points which they

visited while he took pictures. A1 did not point at any position during the scene reconstruction; he had both his hands folded; but did not deny his positions at the scene as narrated by Frank Tembo (PW17).

**PW22 was No. 6551 Detective/Inspector Justin Mulenga** based at Lusaka Central Police Station as Crime Investigations Officer (CIO). His evidence was that on 12<sup>th</sup> August, 2009, he conducted a Police Identification Parade consisting of ten Asian male persons at which A1 and A2 were present. He informed them of their rights and their lawyers were present. The first witness was Kennedy Mwansa (PW4) who identified Mathew Mohan (A1) at position No. 3 from the right. The second witness was Michael Silungwe (PW5) who identified Mathew Mohan (A1). The next witness was Emmanuel Mwiya (PW3) who identified Mathew Mohan (A1). A1 neither complained nor opted to change his position. His general complaint was that all the three witnesses were known to him in the area.

In cross-examination, PW22 testified that he did not assemble the Parade but was called from his Base at Woodlands

Police Station to conduct it. He took steps to ensure that the Police Identification Parade was not compromised, and, he did not know where the witnesses came from, and none of the three identifying witnesses identified A2.

**PW23 was No. 8504 Detective/Inspector Paul Mulenga** based at Lusaka Division Headquarters. His evidence was that on 22<sup>nd</sup> July, 2009, he was one of the officers assigned to investigate this case. He inspected the victim's motor vehicle (exhibit '**P8**') in which the body was found, and revisited the scene where the motor vehicle and the body were abandoned. He interviewed several people in the area including the deceased's friends and relatives. He recorded a statement from Haroom Abdullah (PW13) who had received the last SMS from the deceased's mobile phone indicating that he was at No. 1 Ngulube Road opposite the Brazilian Embassy.

He prepared Search Warrants and on 25<sup>th</sup> July, 2009 he took part in searching House No. 1 Ngulube Road, Woodlands, and spoke to Emmanuel Mwiya (PW3) and found PW6 and PW8 and other occupants who were all taken to the Police Station for



interviews. PW3 was the first to cooperate and he narrated all the events that took place on 20<sup>th</sup> July, 2009 at House No. 1 Ngulube Road, Woodlands; including how the Asian man (A1) in company of four (4) black men and a coloured man grabbed another Asian man, tied him up and drove off in two cars; with A1's motor vehicle being driven by a coloured man while A1 drove the deceased's motor vehicle. A1 was apprehended on 2<sup>nd</sup> August, 2009 and interviewed under warn and caution. A1's mobile phone was recovered from him (exhibit '**P20**') and he led the Police team to Ngumbo Road, Woodlands where A1's motor vehicle (exhibit '**P1**') was recovered.

The registered owner of exhibit '**P1**' was Chambala Farm of Chilanga. He prepared further Search Warrants and obtained Call records from A1's mobile phone which were all admitted in evidence, without objection and marked exhibits '**P21**' and '**P22**'; exhibit '**P22A**' and exhibit '**P22B**'. He learnt from the call records that the deceased sent his SMS to PW14 on 21<sup>st</sup> July, 2009 at 09.32 hours and that earlier on 20<sup>th</sup> July, 2009 A1 had phoned the deceased on his mobile phone on 20<sup>th</sup> July, 2009 at 09.26; 17.58 hours and 18.05 hours and at 20.03 hours he sent the

deceased a text message and called PW3 eight (8) times between 07.40 hours and 17.52 hours. On 21<sup>st</sup> July, 2009 A1 called the deceased two times at 06.21 hours and at 09.44 hours. A1 also made eleven (11) calls to PW3 (Emmanuel Mwiya) between 07.34 hours and 17.11 hours. He also called Frank Tembo (PW17) four times between 10.43 hours and 19.51 hours. On 22<sup>nd</sup> July, 2009, A1 made nineteen (19) calls to PW3 between 07.00 hours and 16.43 hours.

On 23<sup>rd</sup> July, 2009 A1 made calls to Frank Tembo between 08.08 hours and 16.19 hours and on 25<sup>th</sup> July, 2009 A1 called A2 Idris under a number saved as **0977 844832 “Crown Paints”**. Frank Tembo’s number was also saved as **097 7784345 “Frank Tembo”**. On 25<sup>th</sup> July, 2009, which was the day a search was carried out, A1 called Mushoke Nyambe (PW9) three times on phone number **0969 243104** between 08.49 hours and 17.58 hours.

Later PW23 came across Mr. Osman Musa Ugradar, an employee of Idris Suleman Patel (A2) who was interviewed and cooperated with the Police and gave his phone number as 0955

814457 in his translated statement produced by PW20 **(ID18)**. PW23 prepared a Search Warrant and obtained official call records of cell phone number 0955 814457. Those call records were excluded from the prosecution's evidence on the ground of insufficient foundation.

**PW24 was Yusuf Musa**, an Asian Community Counselor. His evidence was that he knew IDRIS (A2) and Sajid, the deceased. He had never met A1 and A3. On a date he could not remember, the late Sajid came with Toffik (PW19) who he did not know before. Sajid requested him to mediate in a complaint by Toffik against A2. PW19 had not been paid a salary for some months and he wanted an Air ticket to go back to India as he did not want to continue working for A2. The deceased gave PW24 A2's phone number, which he called and introduced himself. A2 came to his office and A2 agreed to pay Toffik (PW19) his dues and to give him an Air ticket back to India.

Both the deceased and A2 as well as Toffik (PW19) came back to PW24's office and A2 paid Toffik's money and the issue was happily resolved. Sometime later, he learnt of the

deceased's murder and attended the funeral. He later learnt that the Police were looking for IDRIS (A2). PW24, with the assistance of Yunus Issa (PW20) arranged A2's surrender to the Police at PW24's office. He later contacted Mohammed Itowala (PW18) and met him to brief him on the issue of Toffik, Sajid (deceased) and Idris (A2). He knew the deceased very well and had counseled him in his marriage. On a day he could not recall, A2 phoned him to find out whether Toffik (PW19) had returned to Zambia or not, because Toffik had made an undertaking not to come back to Zambia. His response was that he was not aware.

In cross-examination, PW24 denied implicating A2 to PW18 (Mohammad Suleman Itowala). He noticed that Toffik had bruises on his body and claimed to have been beaten and he denied that he had lunch with A2 on the day the Police came to apprehend him at the office.

**PW25 was No. 8290 Detective/Inspector Matilda Busiku** of the Forensic Sciences Department of the Zambia Police based at Zambia Police Headquarters. She is a Forensic Ballistics Expert with the necessary training and more than ten years of

experience. Her evidence was that she examined the exhibited firearms (exhibits **'P2'** and **'P3'**) and the ammunitions submitted to her by PW28 on 30<sup>th</sup> December, 2009. She identified exhibit **'P2'** as a Wembley Revolver a .38 Smith and Wesson and exhibit **'P3'** as Baikal Pistol .380 ACP (Automatic Colt Pistol) 9mm Browning Shot; she also identified the recovered ammunition. Both guns were capable of loading and discharging bullets of similar caliber and were capable of causing fear, harm, injury or death. PW25 also identified the ammunition (exhibits **'P12'** and **'P13'**) as well as her formal Ballistic Report (exhibit **'P25'**).

**PW26 was No. 34268 Detective/Constable Henry Mulenga;** based at Lusaka Division, Scenes of Crime Office. He is a trained Crime Technician with over six years of experience. On 15<sup>th</sup> August, 2009, he was assigned to attend an identification Parade at Lusaka Central Police Station. His task was to take Police photographs of the proceedings on the Parade. The Parade consisted of ten male persons, amongst whom were A1 and A2. Three (3) witnesses were called to the Parade at different intervals; these were PW3; PW4 and PW5. All these witnesses identified A1 at position No. 3 from the right to the left. He took

photographs showing different views and later processed the photographic album, which he identified and produced here in Court. The Album was admitted as exhibit '**P26**'.

**PW27 was No. 32281 Detective/Sergeant Simon Kwesa**, based at Lusaka Division headquarters. His evidence was that he was one of those Police Officers assigned to investigate this case. On 14<sup>th</sup> of August, 2009 he recorded a statement, through an interpreter (PW20). Unfortunately the said Osman Ugradar absconded after being listed as a witness for the prosecution.

**PW28 was No. 31253 Detective Chief Inspector Mabvuto Ng'uni** based at Zambia Police Headquarters. His evidence was that on the 2<sup>nd</sup> of September, 2009, he was assigned to carry out further investigations into this case; because A1 who was one of the suspects had escaped from lawful custody. He apprehended A1 along Alick Nkhata Road near the UN office building. PW28 interviewed A1 in connection with this offence. He also interviewed Chileshe Shikabenga (PW1) and his younger brother Chutu Shikabenga (PW2).

Thereafter PW28 interviewed Frank Tembo (PW17) on 13<sup>th</sup> November, 2009 around 23.30 hours. Frank Tembo (PW17) led the Police to the recovery of the exhibited firearms along Great East Road, towards Chongwe. This was on 14<sup>th</sup> November, 2009; and the guns were recovered with the assistance of PW11 and PW12. No fingerprints were lifted from both guns because they were exposed for over four months and had become rusty. Following the recovery of the guns, he again interviewed A1 and took him and Frank Tembo to the scene along Great East Road, which scene was constructed with the aid of answers from Frank Tembo (PW17). He then surrendered the two guns and ammunition to Detective/Woman/Inspector Busiku (PW25) for Forensic Ballistics examination.

He later handed over the exhibited guns and ammunition to Detective/Inspector Siloka (PW15). Here in Court, PW28 identified all these items which were produced as part of the evidence for the prosecution. He also identified A1 as the person he apprehended after his earlier escape from lawful custody.

When cross-examined, PW28 stated that the first search for the guns was conducted on the 13<sup>th</sup> November, 2009 after 23.30 hours; after Mr. Frank Tembo implicated Mathew Mohan (A1) in the interview. Metal detectors and torches were used. The guns were recovered the next day on the 24<sup>th</sup> of November.

PW28 testified that when he joined the investigation, he found that all the three (3) Accused persons had already been charged with the Murder of Sajid Itowala. The investigation had been done by Officers from Lusaka Division who did not do a good job. He retrieved the docket of case from the Office of the Director of Public Prosecutions and conducted a docket analysis in order to determine the way forward. In the process, he came across a number of issues and concluded that the initial investigation by Zambia Police, Lusaka Division had been poorly handled and that there were unresolved angles as well as interest groups.

PW28 further testified that he decided to relook at the investigation. As a result, he found it imperative to seek and interview Chileshe Shikabenga (PW1), Chutu Shikabenga (PW2)



and Frank Tembo (PW17). PW28 was a member of staff of the Crime Intelligence Department at Zambia Police Headquarters. He re-interviewed all the witnesses concerned with this case. The investigation was transferred to Police headquarters because there was something lacking in the investigation by Zambia Police, Lusaka Division.

PW28 brought Chileshe Shikabenga (PW1) from the Republic of South Africa; this person had not been interviewed by any officer; he also brought in Chutu Shikabenga and Frank Tembo from within Lusaka. These witnesses had not yet been talked to by the Officers who were initially investigating the case from Lusaka Division. The Officers from Lusaka Division did not even know where the two exhibited guns had been disposed of; yet the investigating officers submitted the docket to the DPP with all these deficiencies in the investigation. The other officers could not have known where to recover the exhibited guns because they had omitted to interview Frank Tembo (PW17). This was the case for the prosecution.

**DW1 was Mathew Mohan**, the first accused (A1); a businessman in real estate and manufacturing. He denied committing the felony of Murder. He testified that he never had a relationship with Sajid Itowala until in 2008 when he was introduced to him in different circumstances. A1 narrated, at length, about his relationship with Mr. Robert Simeza, Mr. Sajid Itowala (the deceased) and Anuji Kumar Rathi. None of the statements made altered A1's denial that he, acting jointly with other persons, did murder Sajid Itowala on the 21<sup>st</sup> day of July, 2009, at Lusaka. The full text of A1's lengthy narration is on the record of this case. There is, therefore, no need to repeat what he said on oath. Suffice it to say that A1 said many things that were in his mind and made allegations and insinuations against many other people; some of whom he named. He claimed to have attended a meeting at Pamodzi Hotel between 10<sup>th</sup> and 15<sup>th</sup> May, 2009 at which Mr. Simeza, Mr. G. K. Rathi and Mr. Sajid Itowala (deceased) were present.

According to A1, **Sajid Itowala** (deceased) was introduced as "a well-to-do man, extremely connected to the Police and the Judiciary"; that at the meeting in May 2009 held at Pamodzi Hotel

at which Rathi Kumar's father G. K. Kumar was in attendance; Sajid Itowala claimed to be very connected and all that was required were solid finances to secure the release of Anuj Kumar from prison. They held another joint meeting with G. K. Kumar at Pamodzi Hotel on 20<sup>th</sup> May, 2009 at which the deceased attended; that the deceased proposed a package of USD750,000 to bribe two Judicial Officers who would facilitate the release of Rathi Kumar, on bail; that on 30<sup>th</sup> May, 2009 the deceased collected the USD750,000 from G. K. Rathi to facilitate Anuj Rathi Kumar's release on bail; they met the deceased again around 10<sup>th</sup> June, 2009 at Pamodzi Hotel, and after Anuj Kumar's bail was rejected on the 16<sup>th</sup> and 17<sup>th</sup> of June, 2009. He met the deceased on 20<sup>th</sup> July, 2009 between 13.15 hours and 13.50 hours at Mr. Simeza's house along Ngulube Road, Woodlands to discuss a bribe which had failed to produce results.

A1 then drove in his motor vehicle (exhibit '**P1**') to No. 1 Ngulube Road in the company of Sean (Shaun); while Mr. Chileshe (PW1) walked there. A1 then told the Caretaker (PW3) to ensure that the house remained clear of everyone. The deceased phoned him, and he (A1) gave him directions to No. 1 Ngulube

Road. The deceased arrived and the two discussed at length in what A1 described as a good conversation with the deceased. The deceased left after an hour long discussion and the two agreed to meet at the same venue the next day, being 21<sup>st</sup> July, 2009. According to A1, he was to receive a refund of bribe money from the deceased in the presence of witnesses who included PW1 at No. 1 Ngulube Road.

On 21<sup>st</sup> July, 2009 A1 proceeded to No. 1 Ngulube Road using his motor vehicle (exhibit '**P1**'); he met Sean (Shaun) and PW1 at the gate and Sean boarded the car; PW3 opened the gate and he entered the premises; told PW3 to remain at the gate while PW1 walked in the premises. The deceased called him between 09.00 hours and 09.30 hours and arrived a few minutes later. PW3 opened the gate and two other men walked in behind the deceased's car. The deceased parked his car facing the northern direction and made a two to three minutes call, while A1, Sean (Shaun), PW1 and two other men waited to receive the money from him. When the deceased came out of his motor vehicle, A1 greeted him; but as the deceased was sliding out of his motor vehicle and reaching for an envelope at the front driver's seat,

Sean (Shaun) pulled out a Revolver from the back of his waist and pointed at him (i.e. Mathew Mohan A1). A1 was ordered to move out of the way. The deceased tried to move forward, but PW1 kicked him to the ground and the deceased had a very bad fall to the ground. In the process of falling down, the deceased pulled out his Pistol which fell off his hand. When PW1 kicked the deceased to the ground, the two other men who he described, brutally hit and kicked the deceased for messing up with a very senior Lawyer. A1 tried to intervene without success. The deceased broke down begging for mercy. A1 then decided just to fold his hands and moved back.

According to A1, he was totally shocked at the beating of the deceased and the use of logs of trees that were cut within the yard of No. 1 Ngulube Road, Woodlands. Thereafter, Sean (or Shaun) told A1 to drive to Pamodzi Hotel and assure Mr. Rathi that the money was coming. Before he could drive off, he observed that PW2 (Chutu Shikabenga) and his friends used a big rope and cables to tie up the deceased.

According to A1, the deceased gave them a good fight and tried to punch them as he was a huge character who none of them could physically match. He was overpowered by three men who lifted him and placed him in the back seat of his motor vehicle while he (A1), was watching. PW1 jumped into the driver's seat of the deceased's motor vehicle, a Toyota Land Cruiser VX while Sean (Shaun) gave him the deceased's Pistol which dropped. A1 then drove his Land Rover Discovery 3 and followed the deceased's vehicle while Sean (Shaun) got into PW1's Toyota Vitz which followed A1's vehicle. The three vehicles entered Independence Avenue from Ngulube Road. The deceased's motor vehicle turned right while A1 proceeded straight to Pamodzi Hotel where he met Mr. Rathi and waited for the money.

An hour later, Frank Tembo (PW17) brought USD150,000 which he gave Mr. Rathi, claiming that it was from a Judge; and that the balance would be brought in a few days. A1 and Frank Tembo retreated to the Car Park where Frank Tembo gave K100,000 to Sean (Shaun) who was waiting in PW1's car. A1 then went back to No. 1 Ngulube Road and paid PW3 K50,000 for using

the premises; since PW3 persistently called him demanding the usual hourly charge of K50,000. A1 then proceeded home.

He later met Mr. Simeza, Sean (Shaun) and PW3 at Mr. Simeza's home. They had a conversation about the USD150,000. According to A1, it was at that meeting that it came to his attention that Mr. Sajid Itowala was no longer alive. He became totally disturbed and requested to know why he was killed and what happened. PW1 and Sean (Shaun) explained their story. A1 then contacted PW3 by mobile phone and went to see him. PW3 demanded for more money in order to cover up the killing. A1 met PW3 the next morning along Yotam Muleya Road. PW3 told him about the Painter (PW4) and the Security Guard (PW5) next door who had witnessed the fight; and that these needed to be paid. A1 gave him K200,000 and promised to get back to him.

On 22<sup>nd</sup> July, 2009 A1 called Emmanuel Mwiya (PW3) and gave him K1 million. Thereafter, A1 maintained a low profile until Mr. Rathi was apprehended from Pamodzi Hotel and detained. A1 took part in arranging Mr. Rathi's release with Mr. Rathi's lawyer.

They secured Mr. Rathi's release on 30<sup>th</sup> July, 2009 and assisted him to immediately leave Zambia for India.

A1 further testified that he was apprehended by the Police on or about 3<sup>rd</sup> August, 2009. When asked who killed Sajid Itowala on 21<sup>st</sup> July, 2009, A1 stated that he was not sure who exactly did the killing. All he recalled was that PW1, PW2 and Sean (Shaun) went with the deceased's vehicle from No. 1 Ngulube Road on 21<sup>st</sup> July, 2009. Sean carried the Revolver while PW1 carried the Pistol. He denied that he was with PW2 in the deceased's vehicle on 21<sup>st</sup> July. He also denied being driven by PW17 (Frank Tembo) in his vehicle on 21<sup>st</sup> July, 2009.

He further stated that when he was taken to the place along Great East Road, he was ushered to certain positions while a Police Officer took photographs of Frank Tembo (PW17) and himself. Finally, A1 claimed that he was wrongfully charged for something he did not commit while those who committed the crime were enjoying their freedom. He felt used as a pawn in this case. He further stated that he was interviewed eleven (11) times by the then Inspector-General of Police while in Police custody.



When cross-examined, A1 stated that he was not too sure who exactly murdered the deceased; and was not blaming anyone for it, but to state the facts both before and after the murder. He conceded that he said nothing about Mr. Robert Simeza in his warn and caution statement recorded by the Police on 3<sup>rd</sup> of August, 2009. He denied making or signing another statement to the Police on 28<sup>th</sup> November, 2009.

He conceded that he did not instruct his lawyers fully; even when he was aware that he was facing a murder charge. He conceded that he had been to No. 1 Ngulube Road on the morning of 21<sup>st</sup> July, 2009 but denied that he knew that the deceased was killed along Mungwi Road.

He further conceded that he knew Emmanuel (PW3) and was with him at No. 1 Ngulube Road. He conceded that he drove exhibit '**P1**' on that day. He also conceded that in the second statement which he totally denied making, A2 (IDRIS) and his men are implicated in the murder of **Sajid Itowala**.

He also conceded that he never told his lawyers that PW1 took part in capturing the deceased. He had no proof that any

bribe was given to any Magistrate or Judge; and conceded that he paid the Caretaker (PW3) in order to silence those who had witnessed the capture of the deceased at No. 1 Ngulube Road. He conceded that he was present when the firearms were recovered; and that the recovered Revolver was similar to the one he saw at House No. 1 Ngulube Road which was pointed at the deceased by Sean (Shaun). When pressed to state whether he was an innocent man, he stated as follows:

**“I was not innocent because I got Sajid to that house; that is why I had to pay money to the Caretaker”.**

A1 further told the Court that he was the only person exposed to the Caretaker (PW3), the Painter (PW4) and the Security Guard (PW5) because he had lived in the same area for over 18 years and that they were right to say he was present when the deceased was abducted; and that was the reason he gave Mwiya (PW3) K1 million in the evening.

He also narrated that the eleven (11) interviews he was subjected to by the Inspector-General of Police and other Officers were about the details of his escape from lawful custody; who

aided him to escape; the activities he was engaged in during the time of his escape and the people he used to call during the time he was a fugitive.

The second and third Accused elected to remain silent in their defence. **DW2 was Shezipe Phiri.** She testified that she knew Sean Nazir since 2008 and that she was his girlfriend. She confirmed that Sean Nazir was wanted by the Police in connection with this case; but she did not know where he was as they used to communicate through e-mail until October, 2009 when he called her from the Republic of South Africa in the presence of Police Officers.

**DW3 was Isaac Musadabwe Banda,** a Subscriber Information Executive. This witness received and processed the Defence request for Call records and produced the exhibited call records which he surrendered to the Court on behalf of the Mobile Service provider, Zain Zambia Limited; under restricted access passwords; in alpha numeric and Fingerprints. The requests were for the following numbers: **097 8 290411; 097 6 986904** and **097 7 491528.** These numbers were mentioned by DW2 during

her evidence-in-chief, in relation to the fugitive named Sean Nazir.

**DW4 was No. 8296 Detective/Chief Inspector Pottipher Steke Banda** formerly Officer-in-Charge of a Police Unit called SCORPION. His evidence was that he was assigned to investigate this case on 21<sup>st</sup> of July, 2009 together with a group of other officers he constituted from the Scorpion Unit; whose mandate was to investigate sophisticated crimes like Murder and Aggravated Robbery. He and his group first visited the house of Sajid Itowala and interviewed the members of the deceased's family and later proceeded to Kamwala Remand Prison to verify certain information and later on 29<sup>th</sup> July, 2009 apprehended a Mr. Gopal Rathi Christian and caused his detention at Benny Mwiinga Police Station.

He later received a phone call from the Divisional Crime Investigations Officer Mr. Mchekeni Zulu who instructed him to release Mr. Rathi because the officers had apprehended other suspects linked to the murder of Sajid Itowala. He proceeded to

release Mr. Rathi after a warn and caution had already been administered to him.

In cross-examination, DW4 stated that he recorded Mr. Rathi's release in the Occurrence Book and in the PPB Book on 29<sup>th</sup> July, 2009 with the comments: "released on insufficient evidence". He denied that Rathi was released because his lawyer negotiated for the release. He did not see Mohan (A1) either at Benny Mwiinga Police Station or inside a motor vehicle parked near there.

**DW5 was Rev. Happy Chileshe** formerly Officer-in-Charge at Lusaka Remand Prison also known as Kamwala Remand Prison. His evidence was in connection with Anuj Rathi who was detained at the Prison and later by order of Court, detained at Chainama Hospital. He confirmed that there was an attempt to rescue the said Anuj Rathi from Chainama Prison on 29<sup>th</sup> July, 2009 and gunfire was heard and that the chains and locks had been cut while officers were watching the Africa Football Championship final game with other inmates in one of the cell wards. The attempt was discovered when the officers went on a routine

inspection of the Chainama Prison around 24.00 hours. He rushed to pick the said Anuj Rathi and notified the Security Task Force who transferred Anuj Rathi back to Kamwala Remand Prison.

In cross-examination, DW5 stated that the breaking of the locks and the removal of the chains at Chainama Prison during the night of 29<sup>th</sup> July, 2009 had never happened before and remained a mystery because only Security Officers had the keys for those locks and chains.

**DW6 was Darlington Levy Tanda**, brother of the fugitive Sean Nasir Kaseke. He was detained by the Police in connection with Sean Nasir Kaseke. He led the Police to the Republic of South Africa where, in collaboration with the South Africa Police they looked for this fugitive at their uncle's home where Sean lived and elsewhere, without success until the Police brought him back to Zambia. He confirmed that mobile phone number 097 8 290411 was used by Sean before he left the country. He also stated that Sean Nasir Kaseke worked as a Mail Runner for the Law Firm Simeza Sangwa & Company at Woodgate House. In cross-examination, DW6 stated that Sean was not known as

Victor; a name under which the cell phone number was saved in Mathew Mohan's mobile phone. He did not know Mathew Mohan.

This was the nature of the evidence for the Accused in defence.

The prosecution called three witnesses in rebuttal, with no objection from all Learned Defence Counsel. These are shown as PW29, PW30 and PW31 on the record.

**PW29 was Joseph Simule Kasonde**, Acting Senior Clerk of Court at the Lusaka Subordinate Court. She produced the Record of Proceedings in the case of **THE PEOPLE VS ANUJ KUMAR RATHI - CAUSE NO. SPB/86/2004 (EX. P27)**. This case record had been extensively referred to in cross-examination and re-examination of DW1 Mathew Mohan. The record showed how Anuj Rathi's Bail application was refused by the Subordinate Court. It also showed how he ended up at Chainama Hospital for medical examination and mental assessment for four days, after which a Hospital Medical Report was issued to the trial Magistrate.

**PW30 was Mwansa Lydia Mfula**, PW1's wife. This witness narrated how her car, Toyota Vitz (unregistered) was taken away

from her by the Police in November, 2009, in connection with the investigation of the murder in this case. This car was also used by PW1. PW30 produced two (2) photographs of herself and the car (exhibit **'P28'**). She further testified that she knew A1 (Mathew Mohan) as PW1's friend.

In cross-examination, PW30 narrated that PW1 bought the car in January, 2009 and she used it for eight months before the Police impounded it during the investigation. She did not know why PW1 had not registered the car for eight months after purchasing it. PW1 was in Police custody at the time the car was impounded.

**PW31 was Phillip Foloshi Fumbwe**, Director, African Gases Limited since 2003. His evidence was that one of the three Directors is Mrs. Jeshry Rathi, wife of Anuj Rathi who had been Director until 2004 when he resigned. This witness denied A1's assertion that a cheque for K100 million was drawn on Indo Zambia Bank for cash Bail payment for Anuj Rathi at the Subordinate Court. PW31 produced a record of all payments made by African Gases from January 2009 to July, 2009; and all



the payments were made towards the purchase of a Staff Bus for African Gases employees. All the cheques were signed by authorized panels of signatories on behalf of the management chaired by the late Major Phiri. Mr. Rathi was not one of the panelists.

PW31 knew Mr. Mathew Mohan (A1) as the son of Mr. J. C. Mohan from whom the Staff Bus was being purchased. According to PW31, A1 had no business relationship with African Gases Limited whatsoever and there was no Company record of a payment of K150 million to Mr. Mathew Mohan. PW31's cross-examination yielded nothing new.

The foregoing is a summary of all the admissible evidence received by the Court from both sides.

For reasons that will become apparent, it is important to mention that in addition to A1's sworn evidence in open Court, there was a lot more that happened later on. After the defence concluded its case, A1 requested for special audience with the Court at Chambers.

He claimed to have had sensitive and restricted information whose disclosure endangered his life while at Prison. At Chambers, in the presence of one of his advocates, and Police Officers based at the Judiciary, he spoke at length about a prosecution witness, Osman Ugradar, who had absconded from the prosecution. In particular, A1 alleged that he knew where this witness was being hidden in the Republic of South Africa; and he alleged that there had been a defence conspiracy by some senior Police Officers and Judicial Officers to conceal that witness on behalf of Idris Suleman and Shabir Suleman Patel, the second and third accused, respectively.

A1 made a number of very serious allegations bordering on further crimes and, at the same time, pleaded for total confidentiality for his own safety while in the State Prison where he was lodged. These allegations were not placed on record. However, an order was made for a further formal investigation by the Police. In the process to that investigation by the Police, this Court did receive a Confidential Report compiled by **No. 1925 Senior Superintendent Sikota** the Copperbelt Divisional Investigations Officer.

According to the report rendered, A1's allegations were not found factual; but a further and continuous investigation was recommended on condition that A1 cooperated further. Superintendent Sikota's report has since been placed on the record of this case, for what it is. This report has no relevance or bearing on any of the findings of fact against the second and third accused persons; and it does not constitute any material evidence in relation to the allegations made by A1. This report was placed on record for purposes of showing that there was a post-trial Police investigation into allegations of further crimes associated with this case.

The other aspect worth mentioning is that there were several interested parties to this case. As the Police investigation reveals on this record, PW3 as well as PW4 and PW5 all referred to the first team of Police Officers who visited the scene where the deceased was abducted at No. 1 Ngulube Road, Woodlands as "false" or "fake" Police Officers. The observation made by those witnesses was highlighted by formal Police evidence in both examination-in-chief and cross-examination of Police Officers from Zambia Police Headquarters. It was their common contention

that Officers from Lusaka Division had performed a shoddy investigation.

I have taken quite sometime to study Police conduct in this case and I am satisfied that the initial investigation was deliberately made shoddy and inconclusive both in terms of the suspects for the murder and the evidence itself. By the time they submitted their Docket to the DPP, the lawyer Frank Tembo (PW17) was not interviewed; PW1 and PW2 who were key witnesses were neither traced nor interviewed; so too were PW4 and PW5 (the Painter and the Security Guard next door). A1 was neither traced nor interviewed either, and yet both the identity of his car and his identity were clearly given by PW1, PW2, PW3, PW4 and PW5; and the fact that A1 lived at a house only a short distance away from the house where the abduction took place; and where the exhibited motor vehicle, commonly associated with A1, was seen at No. 1 Ngulube Road, a day before the abduction and on the day of the abduction.

Further, the exhibited guns were not sought by the Police and had not been recovered; no crime scene reconstruction had

been done and there was no attempt to trace the coloured man referred to as Sean either in Zambia or in the Republic of South Africa. Frank Tembo, PW17 and Kennedy Shikabenga, PW1, easily went on holiday to the Republic of South Africa. These too, were not sought by the Police Officers who initially visited the scene.

Clearly, by the time the Docket was hastily referred to the Office of the DPP, there was no evidence recovered to suggest that any of the Accused persons now before Court were connected to this gruesome murder which occurred in broad daylight on an urban public road; where the gagged body and the car belonging to the deceased were abandoned; having deliberately been driven from No. 1 Ngulube Road to the scene of murder and having been made to face in the direction of town.

In my considered view, the failure by the Police Officers who initially attended to the scene of abduction, to properly investigate this case by interviewing all the persons within the vicinity, including PW4 and PW5 who were independent observers from the next yard, amounted to deliberate dereliction of duty driven by ulterior motives. This dereliction of duty was

compounded by the submission, of an inconclusive docket of case to the Director of Public Prosecutions with Anuj Kumar Rathi as a suspect long before any of the relevant witnesses were interviewed. As the record shows, some of the key witnesses like PW1 and PW17 were interviewed several months after the murder had occurred. The exhibited firearms were also recovered several months after the murder had occurred; and this was after the initial officers who were assigned to investigate this case were replaced by officers from Zambia Police Headquarters.

I need not remind Police Officers that **Section 26(a) of the Criminal Procedure Code** gives every Police Officer power to arrest, with or without Warrant, any person suspected of having committed consignable offence. It is this order, together with the powers under the **Zambia Police Act, Cap 107 of the Laws of Zambia**, and the Rules and Regulations made thereunder, that enable Police to effectively fight crime and criminals.

By failing to obtain the evidence that was readily available within the vicinity of the abduction which occurred on the same Street where A1 lived, the Officers who initially attended to this

crime aided and abated its commission and failed to observe the law which obliges them to professionally investigate crimes and bring perpetrators to book. As it were, PW4 and PW5 were not talked to; PW17 was not interviewed until several months later; PW1 and PW17 were able to take their holidays to the Republic of South Africa; and A1 was free and began to spy on the Police themselves in order to find out how far they were in their investigation of the murder.

Even after Police took A1 into Police custody and the Remand Prison, A1 was able to walk away and become a fugitive in broad daylight until he was rearrested by Police Officers from Zambia Police Headquarters. These events show that there were too many interested parties in the investigation of this case.

Indeed, the Court itself was not spared. After the conclusion of the trial and as the various issues concerned with this case were being considered, there was a break-in at one of our rooms within the Court premises; and a number of items were either stolen or interfered with. Among the stolen items were, used shorthand notebooks, a flash disk and the Filing Cabinets were

broken into and searched. These events are subject of a separate investigation. Luckily our officials were ahead of these events and the original record was saved from the prowlers.

Be that as it may, the initial dereliction of duty did not affect the final outcome of the Police investigation because the officers from Zambia Police Headquarters, who were assigned to take over the case, did their job with professionalism. The Police evidence on record clearly speaks for itself. I must also add that the initial dereliction of duty did not affect the trial in anyway and was effectively addressed by the officers on record who were reassigned to investigate this case.

As for A2 and A3, both elected to remain silent, and did not call any witnesses. A2 and A3 had the right to remain silent as they did, and to call no witnesses. This is so, because the burden of proof lies and remains with the prosecution to prove the guilty beyond reasonable doubt.

The Defence filed written submissions and arguments; which they also exchanged with the Prosecution. The thrust of the submissions made on behalf of A1 is that the prosecution failed to



adduce evidence to prove that A1 pulled the trigger of the gun which killed the deceased, or to prove that he was involved in the murder.

It was Counsel's contention that A1 did not share a common purpose, unlawful enterprise, or common design or joint venture with anyone else in order to invoke the doctrine of common purpose as established by **Section 22 of the Penal Code Cap 87 of the Laws of Zambia**. Specifically, it was argued that A1 did not participate in tying up the deceased and killing; and that A1 explained both the reason and the circumstances by which he found himself at House No. 1 Ngulube Road where the deceased came to.

It was further argued that A1 met the deceased to discuss a refund of US\$150,000.00 arising from their failed bribery deal to secure the release of Anuji Kumar Rathi; and that when the events changed, A1 stood back and folded his arms across his chest; that A1 did not go to Mumbwa Road, but instead went to Pamodzi Hotel, after the deceased had been seized and gagged; that he went to the Hotel to meet one Mr. Rathi senior and one

Frank Tembo (PW17) who brought a refund of a failed bribe to Mr. Rathi senior. Learned Counsel referred the Court to the decision in the case of **Mwape vs. The People**<sup>(1)</sup> in which **Section 22 of the Penal Code** was analyzed as follows:

**“.....according to Section 22, the essential ingredient to a joint unlawful enterprise is a shared common purpose, or shared common intention and each one of the parties knows that the other members intend the same thing.....”.**

It was further argued that the murder of the deceased was not the probable consequence of the common purpose to which A1 was a party and as such A1's conviction cannot stand; that the evidence of PW1 and PW2 to the effect that A1 was the mastermind should be disregarded as unreliable because they are accomplices, whose evidence remains uncorroborated; that A1 did not act or omit to act for the purpose of enabling or aiding another to commit the offence; that A1 did not have the necessary *mens rea*.

It was further submitted that PW1, by his own admission, organized PW2 and three other people to abduct the deceased and led him to his death. Therefore, that PW1 and PW2 were witnesses with their own interest to serve; that PW3 was equally an accomplice and a person with an interest to serve and further that Frank Tembo (PW17) was an accomplice and a person with an interest to serve. PW1 was Chileshe Shikabenga who implicated A1 in the planned abduction of the deceased. PW2 was Steven Chutu Shikabenga, an eyewitness to both the abduction and murder while PW17 was Frank Tembo who implicated A1 in the discovery of the two exhibited murder weapons along Great East Road several weeks after the murder was committed. According to Learned Counsel, the evidence from all these witnesses required corroboration in order to support a conviction.

Counsel referred this Court to the case of **Machobane vs. The People**<sup>(2)</sup> where the Supreme Court held as follows:

**“While a conviction on the uncorroborated evidence of an accomplice is incompetent as a strict matter of**

**law, the danger of such conviction is a rule of practice which has become virtually equivalent to a rule of law and an accused should not be convicted on an uncorroborated testimony of a witness with a possible interest unless there are special circumstances”.**

It was further submitted that independent medical evidence on PW2's amputated finger should have been brought to Court by the prosecution so that the Court did not rely on its own opinion; that there was inconsistency in the evidence of PW2, PW16 and PW30 on whether or not the deceased was killed inside the deceased's car or in the Toyota Vitz belonging to PW1, which was not produced; that the Police failed to lift finger prints from the deceased's car and were in dereliction of duty; that it was impossible to show or establish who drove the deceased's motor vehicle (exhibit P8) or who rode in it up to the scene of murder.

It was Counsel's further argument, on behalf of A1, that there had been a miscarriage of justice and mistrial in this case to the extent that had the Director of Public Prosecutions been informed of the relationship allegedly between A1 and Mr. Robert

Simeza, he would not have accepted Mr. Simeza's application to co-prosecute this case with State Prosecutors.

I find no need to repeat some of the submissions presented because I find them to be speculative in nature and based on subjective assumptions arising from statements made by A1 during his testimony. Learned Counsel concluded A1's submissions by urging the Court to acquit him on grounds that the prosecution failed to prove the case beyond reasonable doubt that A1 is criminally liable for the murder of the deceased, and in the alternative should be acquitted because there had been a miscarriage of justice requiring that he be so acquitted.

On behalf of A2 and A3, the thrust of the submissions and arguments was that the prosecution evidence did not point in any way or at all that A2 and A3 were responsible for the planning, capture and murder of the deceased; that there was no direct evidence linking this murder to A2 and A3; that although circumstantial evidence that is strong and overwhelming can sufficiently connect an accused person to the commission of an offence, there was no such strong and overwhelming evidence in

the present case; that the circumstantial evidence against A2 and A3 was not of such a high degree of cogency as to link A2 and A3 to this murder.

In support of this argument, Learned Counsel relied on the Supreme Court decision in the case of ***Khupe Kafunda vs. The People***<sup>(3)</sup> and in the case of ***David Zulu vs. The People***<sup>(4)</sup>. In the latter case, the Supreme Court held as follows:

**“(i) It is a weakness peculiar to circumstantial evidence that by its nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.**

**(ii) It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so**

**that it attains such a degree of cogency which can permit only an inference of guilt”.**

It was submitted further that the only incriminating evidence against A2 and A3 was the evidence by PW19, Toffik Mohammed Hassan Ali Dhanga, and the test of that evidence was whether it attained a degree of cogency that only an inference of guilt can be drawn. It was argued that the evidence of PW28 and the sworn evidence of A1 pointed to a different motive for the murder of the deceased, which motive had nothing to do with A2 and A3.

According to PW28 and A1, the motive for the murder was the failed bribery and refund of US\$750,000.00 from G. K. Rathi meant as bribe money in connection with the criminal case of his son Anuj Kumar Rathi; which failed bribe had absolutely nothing to do with the employment and/or dismissal of PW19 by A2 and A3; that the evidence of PW19 stands completely alone, uncorroborated but with an inference that his dismissal by A2 and A3 and subsequent employment of PW19 by the deceased two years later, was enough cause as a motive for A2 and A3 to commit the offence.

It was further submitted that according to PW24 and PW19, the differences between the deceased on one hand, and A2 and A3 on the other, over PW19 had been resolved amicably at a meeting at Zambia Police Headquarters where the parties hugged and shook hands as brothers; that this resolve between the three never changed until the deceased's death; that the circumstantial evidence from PW18 Mohamed Suleman Itowala and PW19 Toffik Dhanga was itself shaky and insufficient to warrant a conviction; that PW18 was the deceased's uncle who offered to give evidence in March 2010 after trial had already commenced; purportedly, because PW17 (Frank Tembo) had given evidence which was different from the story which he had given to the Police in his statement during the investigations. For these reasons, Learned Counsel prayed that A2 and A3 be acquitted on grounds of insufficient evidence.

I am indebted to all Counsel for their industrious submissions and the authorities cited. I have carefully considered the evidence on record and the submissions exchanged and filed. I have also had occasion to observe the demeanour of each witness, including A1 who testified in his defence. I must state



that A1 displayed a tendency to seize as much time and space during trial to address so many issues. He did this while on trial at Court or anywhere else including the Remand Prison in which he was lodged. He was able to link up with the free world outside his Prison; and at times, as shown by the record, he would request to address the Court in Chambers on what he termed “burning issues”.

A1 was allowed to go to the full root of his case, so that he did not feel fettered in his defence, in accordance with the dictates of a fair trial. In the process, A1 issued some statements which, as already shown in the record, had the tendency to mislead and malign other people. Indeed, he had the tendency to raise several issues and allegations. These issues and allegations were not matters of evidence; but were matters that clearly went against his own credibility. As a matter of fact therefore, I find A1’s credibility to be very low.

The submissions on behalf of A1 raise some issues that must be addressed before any analysis of the evidence can be made. Firstly, the Police were criticized for failing to bring to Court,

independent medical evidence on PW2's amputated finger. The prosecution's evidence from PW1 and PW2 was that PW2 lost his finger after it was bitten off by the deceased as the hired gang, to which PW2 belonged, was in the process of overpowering the deceased. PW1 saw the injury and drove him to the UTH where the finger was amputated as part of the treatment. The amputation was displayed here in Court by PW2 and the defence did not raise any issue about it. In the circumstances, medical evidence about this finger was completely valueless to the Court. It is not all injuries suffered by witnesses during crime that must be proved by medical evidence. The majority of these injuries are proved by being talked about and shown to the Court and noted on the record.

The defence also alleged dereliction of duty by the Police in their failure to bring to Court fingerprints from the deceased's motor vehicle and to exhibit the unregistered Toyota Vitz which Police impounded from PW1 in connection with this case. It was suggested that the absence of such evidence was favourable to the defence because 1) it was impossible to tell the persons who rode in the deceased's motor vehicle from No 1 Ngulube Road to

the scene of murder, and 2) that it was impossible to state exactly where the murder was committed; i.e. whether it was in the Toyota Vitz or in the deceased's motor vehicle. These are questions of fact to be proved or disproved by the evidence on record. On the absence of fingerprints from the deceased's motor vehicle, PW16 provided an answer; namely, that no fingerprints were found. The prosecution did not have a duty to prove this fact.

The other issue raised was a suggestion that a miscarriage of justice or mistrial had occurred by the involvement of Mr. Simeza in the prosecution of this case. The record shows that Mr. Simeza joined the prosecution team with authority of the DPP. When that authorization ceased, Mr. Simeza continued as *amicus curiae*, on instructions from the deceased's family and with the consent of the Court. Later, in view of the many side issues raised by A1, representatives of the Law Association of Zambia joined the proceedings as professional observers in a "watching brief"; and Mr. Simeza withdrew from the case. At no time was Mr. Simeza's role objected to at the commencement of the trial. I therefore find that Mr. Simeza's relationship with Mr. Rathi, or

indeed anyone else outside these proceedings was irrelevant to this case and a diversion from the focus of this case; being, the trial of the Accused persons. I therefore do not see any legal basis for the allegation of a mistrial or miscarriage of justice. In addition, Learned Counsel for A1 did not cite any authority in support of his proposition of mistrial.

Earlier in this judgment I did state that A1 made several statements and allegations against a number of people. An independent Police investigation found those allegations to be inconclusive, without evidence; and intended to divert the Court's focus and attention in the trial; to matters of drama. The record shows that A1's own legal Counsel did caution him against discussing his "burning issues" that were outside their brief. All those burning issues were found to be irrelevant to this case.

Coming back to the evidence on record, which I have already narrated, I entirely agree with Learned Counsel for A1 that PW1; PW2; PW3 and PW17 Frank Tembo were accomplices with their own interests to serve. The requirement of the Law is that such evidence must be corroborated by some other independent

evidence from an independent source in order to eliminate the danger of false implication. The question is whether the prosecution did adduce evidence that corroborates the evidence of the accomplices who were paraded as witnesses.

The prosecution has overwhelmingly established that the deceased's murder was preceded by a very violent armed abduction that took place at No. 1 Ngulube Road, Woodlands. PW4, Kennedy Mwansa the Painter, and PW5 Michael Silungwe the Armcor Security Guard were performing their duties in the next Yard when they coincidentally observed the events that preceded the murder at No. 1 Ngulube Road.

PW4 the Painter, was painting the Wall Fence when he noticed the unusual events at No. 1 Ngulube Road, and alerted PW5. They made their observations over the wall fence in the next Yard long before the Police or anyone else approached them. These two witnesses had no pre-event connection with A1 or indeed PW1; PW2; PW3 and PW17.

The abduction occurred in broad daylight; in the morning. These two witnesses had also observed the events at No. 1

Ngulube Road on the previous day when a person they recognized as A1 who lived in the same area, quarreled with another Indian man who drove in the exhibited Toyota Land Cruiser VX (**exhibit 'P8'**). These two witnesses gave their evidence with graphic details.

They described the scene of the abduction and the roles played by each conspirator at the scene; until the abducted man was driven away. They also identified the exhibited Land Rover which they associated with A1 who lived in the same area. Indeed, A1 was known to them. According to these two witnesses, the abduction and movements at the scene were directed by A1. In his evidence, A1 denied this; but admitted being at No. 1 Ngulube Road when the abduction occurred and claimed to have watched with his arms folded on his chest. He also stated that he knew Sean who was also present.

In addition to the evidence of PW4, PW5 and A1 himself, there is the evidence of PW2 who witnessed both the abduction and the murder. PW2, despite being an accomplice squarely implicated A1 in both the abduction and the murder and PW2's

story fits into the observations made by PW4 and PW5's the Painter and the Security Guard next door.

Therefore, it is an inescapable finding of fact that the prosecution established that A1 did not only put himself at the scene of the crime of abduction that preceded the felony of murder, but that he was an active participant who was seen, firstly on the day before the murder, quarreling with the deceased and on the day of the murder; directing the capture and abduction of the deceased. If indeed A1 was an innocent bystander as he claimed, he should have reported the events to the Police. His failure to report the abduction to the Police made him not only guilty of compounding a felony; but also reveals his involvement in the whole criminal enterprise ending with the brutal murder of the deceased.

In view of the corroborating evidence given by PW4 and PW5, the eyewitness account given by PW2 must be given all its due credit. PW2 was present during the capture and abduction of the deceased and during his murder and abandonment of his body and his car on a public road.

According to PW2, A1 was the mastermind and gave all the necessary orders in the entire criminal enterprise. PW2 heard A1 tell the deceased and everyone else that the instructions had changed, that instead of being abducted and taken to the people who demanded for him, he would be shot dead. The deceased repeatedly said his prayers and pleaded for mercy, but A1 directed that he be shot and provided the second gun which he retrieved from the deceased's own car. A1's specific instructions to Sean were to shoot the deceased repeatedly in order to ensure that he was completely dead. Medical evidence proved PW2's story that the deceased was shot several times and his bullet ridden body was abandoned, locked up in his own car. A1, by his own admission, knew Sean very well and they were together at No. 1 Ngulube Road during the abduction. Their association at No. 1 Ngulube Road could not have been an ordinary coincidental occurrence. It amounts to an odd coincidence that provides further corroboration of the evidence given by PW2.

Further still, there is the Police evidence of how the two exhibited guns and their ammunition (exhibits **'P2'**, **'P3'**, **'P12'** and **'P13'**) were recovered several months after the murder had



taken place. The Police evidence of leading to the discovery was supported by photographic evidence (exhibit '**P19**') which clearly shows A1 and PW17 playing their roles during the leading to the area along Great East Road where the incriminating discoveries were made. This Police discovery clearly implicates A1 and PW17; as for PW17, he was an accomplice and part of the criminal enterprise because he drove A1 from Pamodzi Hotel to the place where the guns and ammunition were thrown away and later discovered. As for A1, this discovery is clearly an odd coincidence which provides further corroboration to the evidence of PW2 who was present during the shooting.

Further, PW17's evidence that he had given a lift to A1 from Pamodzi Hotel up to the point where the guns were later discovered along Great East Road, must be substantially believed notwithstanding that he is an accomplice and crime participant. PW17 must be believed for two reasons; firstly, A1 in his own evidence, stated that he knew PW17 very well and that after he left No. 1 Ngulube Road where he witnessed the deceased's capture and abduction, he drove to Pamodzi Hotel to meet with

PW17 about their failed bribery scheme related to Anuj Kumar Rathi.

A1 therefore, squarely placed himself at Pamodzi Hotel soon after the murder was committed. He also placed himself with PW17 within two hours of the murder. A1 can therefore not deny that he met PW17 (Frank Tembo) soon after the murder was committed and proceeded with PW17 on a drive along the Great East Road.

The meeting between A1 and PW17 consolidates and supports the evidence given by Police Officers on their discovery of the exhibited guns and ammunition; in which both A1 and PW17 are implicated as having led the Police to the discoveries of the incriminating guns and ammunition. I find that the Police evidence, considered with what PW17 and A1 told the Court, establishes their connection as a fact.

Further, Emmanuel Mwiya (PW3), the Caretaker at No. 1 Ngulube Road gave graphic details of both his physical contacts and cell phone contacts with A1 both before and after the murder. This witness knew A1 very well as a client who frequently used

rooms at No. 1 Ngulube Road, to entertain some girls. PW3 witnessed the abduction, and received bribes from A1 in order to share with others to “keep quiet”. PW3 was also used by A1 to spy on the Police Officers who were investigating the murder; A1 demanded briefs from PW3 on every move made by the Police. PW3 connected A1 and the coloured man known as Sean to the abduction and murder.

In his own evidence, A1 stated that he knew the cell phone numbers belonging to PW3 and to Sean, and that he regularly communicated with both of them before and after the murder. A1 did not suggest any plausible reason why PW3 could lie about his involvement in the crimes.

The defence argument, that the prosecution should have investigated all other cell phone numbers that were in contact with PW3 was both superfluous and irrelevant because it was A1’s phone contacts with PW3 that were relevant to PW3’s evidence; and these contacts as well as the contacts between A1 and Sean have been sufficiently proved by the prosecution; through A1’s own admission of the contacts.

Therefore, although I accept that PW1; PW2; PW3 and PW17 were accomplices, I have found their evidence very well corroborated by the evidence of not only PW4 (the Painter) and PW5 (the Security Guard); but also by A1's own admissions of his contacts with PW3 both before and after the murder.

A1 therefore placed himself at the scenes of crime with PW3 and Sean. His identity and the commanding roles he played have been established; and the chain of accomplices he used in order to complete the crimes and disguise his criminal enterprise has been established by the prosecution; and more importantly, the evidence from the accomplices has been very well corroborated by the evidence of PW4 and PW5 as well as A1's own admissions contained in the chain of half truths which his story tells; and the evidence of his having led the Police to the place along the Great East Road where the incriminating guns and ammunition were recovered several months after the abduction and murder.

The evidence of PW4 and PW5 establishes complete corroboration as these two witnesses do not and cannot be taken to fall in the category of accomplices or witnesses with a possible

interest of their own to serve; they were not familiar with any of the incriminating circumstances of the offences; to warrant being categorized as accomplices in accordance with the principles laid out by the Supreme Court in the famous case of **Emmanuel Phiri and Others vs. The People**<sup>(5)</sup>.

The net result is that I have found the evidence adduced by the prosecution to be overwhelming in every respect. I find him guilty of the murder of **Sajid Itowala** and I convict him as charged.

Turning to A2 and A3, these two were apprehended by PW15 Inspector David Siloka long after he visited the scene where the deceased and his car were abandoned; and after he interviewed PW3; PW6; PW7; PW8; PW9; and PW10, and listening to cell phone conversations between A1 and PW9.

According to PW15, he sought A2 and A3 and their employee at Crown Paint Limited, named Osman Musa Ugradar. PW15 arrested A2 and A3 after he was not satisfied with their explanations. The other evidence against A2 and A3 was from Frank Tembo (PW17) in his warn and caution statement to the

Police which he denied making or signing. This statement was admitted in evidence as a general issue (exhibit **'D2'**). The next incriminating evidence was from PW18 Mohamed Suleman Itowala, the deceased's uncle, who met A2 at Zambia Police Headquarters after PW24, Mr. Yusuf Musa, an Indian Community leader arranged A2's surrender to the Police.

According to PW18, A2 explained to him how A1 (Mathew Mohan) and PW17 (Frank Tembo) confronted him and demanded money at gunpoint whilst at his office at Crown Paint Limited. PW18 made his statement to the Police in January, 2010 and conceded that he did not mention his meeting with A2 at Zambia Police Headquarters.

The next incriminating evidence came from PW19 Toffik Mohammed Hassan Ali Dhanga the Indian Paint Expert who narrated how he was recruited by A2 and A3; how he was made into a slave, working without wages and ex-communicated from his family and to the outside world.

This witness also narrated at length, how he was constantly tortured and beaten by A2 and A3; how A2 arranged a false

Interpol Warrant of Arrest from Kenya and a false extradition back to Zambia and forced back to work for Crown Paint Limited on slave conditions; threatened with a gun, imprisoned in a private room until he was rescued by **Sajid Itowala**, the deceased who took him to PW24 and later assisted to report the assaults and torture to the Police.

PW19 also narrated how he began to reside with the deceased while A2 and A3 avoided arrest for his assault and finally how the deceased recruited him to work at his Paint Factory known as Cyclone Hardware and Paints after obtaining a Work Permit contrary to instructions from A2 and A3 to the Immigration Department and to the deceased. PW19 gave his statement to the Police on 10<sup>th</sup> March, 2010 long after all three Accused persons had been jointly arrested and charged for the present offence.

The next witness to mention A2 was PW24 who, as a Community leader, mediated the complaint by PW19 against A2 in the presence of the deceased. PW28 No. 31253 Detective Chief Inspector Ng'uni took over the investigation of this case

after all three Accused persons had been taken into custody and the Docket submitted to the DPP for consideration. This was at a time when PW1 Chileshe Shikabenga, PW2 Chutu Shikabenga and PW17 Frank Tembo had not yet been interviewed by Police Officers from Lusaka Division; and the guns and ammunition had not yet been recovered.

As can be seen from the foregoing analysis, the witnesses who mentioned A2 and A3 were PW15; PW17; PW18; PW19; PW24; and to a very hideous extent; A1 in his explanation of his “burning issues” which was not given in Open Court and tested; and therefore does not amount to evidence at all. I indicated earlier that witnesses of substance in this case included PW1; PW2; PW3; PW4; PW5; PW9; PW11; PW12; PW17, and all the Police witnesses who testified. Apart from PW17, none of the other key prosecution witnesses connected A2 and A3 in any material way.

PW17, Frank Tembo, proved that he knew A1 and A2 and dealt with both of them. He visited A1 and A2 in Prison before he was questioned by the Police, about his own role in the matter;



which he had not previously reported to the Police. PW17 was earlier paid K10 million for visiting A2 at Woodlands Police Station. PW17 also admitted that he drove A1 to the place where the Police recovered the exhibited guns and ammunition along Great East Road. According to the evidence of time given, PW17 drove A1 to that place within two hours of the murder of the deceased. PW17 was more than an accomplice in this case. He could easily have been jointly charged for murder with A1 under Sections 21 and 22 of the Penal Code which permits the charging of every person who actually does, or omits to do or aids or abates or indeed any person who counsels or procures another to commit the offence as principal offender or as joint offender in prosecution of a common purpose.

It is apparent from the evidence of PW17 that it falls short of implicating A2 and A3 in the murder. There was an attempt by the prosecution to bring into evidence the statement of Osman Ugradar **(ID18)**. That statement was disallowed from the evidence and cannot be considered evidence at law, even if it touched on A2 and A3 in relation to A1 because Osman Ugradar absconded from the trial and whatever statement he gave to the

Police amounted to inadmissible hearsay evidence, that could not be tested by cross-examination.

There was also the statement made by A1 to the Police (which he denied making). That statement was admitted as a general issue which, on its own, does not amount to evidence incriminating A2 and A3. It is settled law that an admission made by one of the accused cannot be evidence against the accused who remained silent. This was settled by the Supreme Court in the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula vs. The People**<sup>(6)</sup> in which it was held as follows:

**“Mere silence in the face of an accusation cannot amount to an acknowledgment of the truth of someone else’s admission. The evidence has to show some positive conduct, account or demeanour as to accept the truth of the admission”.**

There was also an attempt by the prosecution to provide circumstantial evidence against A2 and A3 through PW15, PW18, PW19 and PW24. It was also the prosecution’s attempt to

establish motive in the manner A2 and A3 mistreated and enslaved Toffik Mohammed Ali Dhanga (PW19) and in the manner they shadowed him. Indeed it was established that A2 and A3 met the deceased at PW24's office; at Immigration Headquarters, and at Zambia Police Headquarters where they repeatedly warned the deceased not to assist PW19 in any way including in his return to Zambia and his employment. The two sides were running competitive Paint manufacturing businesses.

It is also established by the prosecution's evidence that A2 and A3 were very unhappy with the deceased. They filed a false criminal complaint against PW19, during the time the deceased was helping him. They also facilitated a false extradition of PW19 between Kenya Police and Zambia Police to forcibly bring PW19 back to Zambia to answer false criminal charges whose trial never took place. PW19 with the assistance of the deceased filed a criminal complaint against A2 and A3 for assault occasioning actual bodily harm, for which a Medical Report was provided. There is no evidence that A2 and A3 were prosecuted for that offence or to show that the criminal charge was withdrawn.

The question before me regarding A2 and A3 is in two parts; namely, whether their poor relationship with the deceased as a result of the assistance to PW19 amounted to the motive for their connection to the murder, and secondly whether the State had established sufficient circumstantial evidence against A2 and A3.

Indeed, in appropriate cases, where the facts establish the existence of motive, as proof of malice aforethought, and the killing of the deceased as part of a common design, a conviction can properly lie for all accused persons jointly charged. ***(See the case of The People vs. Everisto Bunda, Zebron Mumba and Everine Kamwata (1990/92) ZR 194).***

I have already indicated my finding that the deceased was brutally murdered by conspirators instructed by A1 and PW17 who were rewarded. There is evidence from PW1 and PW2 as well as A1 himself establishing the fact that soon after the deceased's murder, A1 either drove or was driven to a number of places which included Pamodzi Hotel Car Park, Ndeke Hotel Car Park, ZAF Road and Great East Road. There is also evidence that

in those various places, A1 either received money from unknown people or delivered money to unknown people.

There is also evidence from PW1 and PW2 that A1 constantly claimed to have received instructions through his cell phones; including the instruction to abduct the deceased and bring him over, and the instruction to change the route from surrendering the deceased to killing him. Unfortunately for the prosecution, the Police investigation never went further to unearth the source or sources of those instructions. A2 and A3 were not connected by any credible evidence to those instructions.

The judicial guidelines on the sufficiency or otherwise of circumstantial evidence have over the years been given in a number of decided cases. One of these cases is that of **David Zulu vs. The People**<sup>(4)</sup> where the Supreme Court held that:

**“The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt”.**

The foregoing qualification of circumstantial evidence was put in much simpler context in the case of **Patrick Sakala vs. The People<sup>(8)</sup>**, where it was held:

**“That circumstantial evidence was so cogent and compelling that no rational hypothesis other than murder could the facts in this case be accounted for”.**

In the present case, the prosecution fell short of establishing facts which connected A2 and A3’s possible motive, to A1’s criminal activities or to A1’s instructions in the killing of the deceased. I therefore hold that the circumstantial evidence in the present case falls short of the required standard to sufficiently connect A2 and A3 to the murder. I find them not guilty and I acquit them.

**DATED AT LUSAKA THIS.....DAY OF NOVEMBER, 2013.**

**G. S. PHIRI  
JUDGE**