YOANI MANONGO v THE PEOPLE (1981) Z.R. 152 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J. AND BRUCE-LYLE, J.S.
10TH JUNE AND 6TH NOVEMBER, 1980
(S.C.Z. JUDGMENT NO. 26 OF 1980)

Flynote
Criminal law and procedure - Identification - Risk of honest mistake - Factors to be taken into account in testing the credibility of witnesses.
Criminal law and procedure - Description of assailants identification parade - Whether failure to do so is a serious dereliction of duty.
Evidence -Recent possession - When used as corroboration - Whether an inference of guilty can be drawn therefrom.

Headnote
This is an appeal against conviction for the offence of aggravated robbery, contrary to sections 294 (1) of the Penal Code, the particulars of the offence being that on May 13th, 1978 at Luanshya, the appellant, jointly and whilst acting together with other persons unknown, robbed Fitzjohn of property valued at K639. Further evidence was adduced by a farm guard-man who on the following day after the incidence, went out to a nearby Fisenge Bar in search of suspects; there he saw the appellant wearing a hat similar to one normally worn by Mr Fitzjohn,

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and one of the items taken away during the robbery. He immediately returned to report what he had seen and in the company of a student and constable Mwanamoonga, went to Fisenge Bar two hours later they returned to the farm with the appellant whom the couple readily identified as being one of the assailants.

The learned counsel for the appellant contended that the learned Commissioner misdirected himself by accepting without question the evidence of identification by P.W.1 and P.W.2 and by failing to consider the possibility of honest mistake and also that the learned Commissioner misdirected himself in holding that the only reasonable inference to be drawn from the appellant's possession of a hat was that he was one of the robbers. On appeal:

Held:

(i) The finding by the trial commissioner that the identity of the appellant did not depend entirely on the evidence of P.W.1 alone, that the evidence of P.W.1 was fully corroborated by the evidence of P.W.2 and that it was also supported by the evidence of P.W.3 and the recovery of P3
(the hat) was sufficient to negative the defence counsel's submission that the trial

commissioner had misdirected himself by accepting without question the evidence of identification by P.W.1 and P.W.2.

(ii) The concept of honest mistake is normally associated with single identifying witness cases, but of course it is not inconceivable that in a case where there are more than one identifying witness, an honest mistake can be made.

(iii) The evidence of all prosecution witnesses should be tested and if it is found to fall short of the required standard in criminal cases, namely, proof beyond reasonable doubt, an acquittal must follow.

(iv) Where the identification of an accused person is, or might be, in issue it is necessary to hold a properly conducted identification parade and failure to do so is a serious dereliction of duty which may in a suitable case result in an acquittal.

(v) Where evidence of recent possession is used as corroboration, it is not necessary to draw therefrom an inference as to the guilt of an accused person; but where it is used simpliciter, the inference to be drawn must be the only inference reasonably possible otherwise an acquittal must follow as a matter of course.

Cases referred to:

(1) Chimbini v The People (1973) Z.R. 191.

(2) Crate v The People (1975) Z.R. 232.

(3) Fanwell v R. (1959) 1 R & N 81.

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(4) Zyambo v The People (1977) Z.R. 153.

For the appellant: S. K. Munthali; Legal Aid Counsel.
For the respondent: L. Nyembele; State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

This is an appeal against conviction for the offence of aggravated robbery, contrary to section 294 (1) of the Penal Code, the particulars of the offence being that on May 13, 1978 at Luanshya, the appellant, jointly and whilst acting together with other persons unknown, robbed Robert Fitzjohn of property valued at K639.

The learned Legal Aid Counsel relies on two additional grounds of appeal, namely, (1) that the learned Commissioner misdirected himself by accepting without question the evidence of identification by P.W.1 and P.W.2 and by failing to consider the possibility of honest mistake; and (2) that the learned Commissioner misdirected himself in holding that the only reasonable inference to be drawn from the appellant's possession of a hat was that he was one of the robbers.

Ground (1) may be subdivided into two parts: first, that the Commissioner misdirected himself by accepting without question the evidence of identification by P.W.1 and P.W.2, and second, that the Commissioner failed to consider the possibility of an honest mistake.

Starting with the first part of ground one, there is no dispute that Mr and Mrs Fitzjohn, P.W.1 and

P.W.2, respectively, were attacked at midday on May 13, 1978 shortly after branching off from the main Ndola/ Luanshya road into a farm road leading to their home, which was nearby; Mr Fitzjohn was so assaulted by attackers who used sticks that he was rendered unconscious and had to be admitted in hospital where he stayed overnight. So much for the uncontested evidence.

Briefly, the evidence of Mr and Mrs Fitzjohn was that having driven some two hundred metres on the farm road, they came to a bamboo road block. Mrs Fitzjohn was driving. When Mr Fitzjohn came out of the car to remove the obstruction from the road, three men suddenly appeared from the bush two of whom were armed with sticks and one with a panga. The appellant was apparently the ringleader, since he was the one who was issuing orders to the others to execute the robbery. Mr Fitzjohn was hit with a stick by one of the attackers, not being the appellant, and, sensing danger, Mrs Fitzjohn put up her window and locked the doors of the car from within. The appellant went to the drivers door, tried without success to open it, then went to Mr Fitzjohn and assaulted him with the stick he was carrying; he ordered the one armed with the panga to attack Mrs Fitzjohn; the armed man then struck the driver's door with the panga and succeeded in getting a wrist-watch from Mrs Fitzjohn. As the three men continued to attack Mr Fitzjohn, his wife quickly drove to the farm house. Upon her return to the scene in the company of farm workers, the attackers were nowhere to be seen.

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Mr Fitzjohn, who was lying on the ground was picked up and conveyed to Luanshya Hospital. Upon Mr Fitzjohn's discharge on the following day, the couple's farm guard-man, Ignatius Nsowa, went out to a nearby Fisenge Bar in search of suspects; there he saw the appellant wearing a hat similar to one normally worn by Mr Fitzjohn, and one of the items taken away during the robbery. He immediately returned to report what he had seen and, in the company of a student and Constable Mwanamoonga, went to Fisenge Bar; two hours later they returned to the farm with the appellant whom the couple readily identified as being one of the assailants.

In his judgment the trial court said that the case depended on the credibility of witnesses and that the crux of the matter was one of identity. In accepting the evidence he went on to say that the identity of the accused (now appellant) did "not depend entirely on the evidence of PW 1 alone. The evidence of PW l is fully corroborated by the evidence of PW 2 and it is also supported by the evidence of PW 3 and by the recovery of P3 (the hat) the day after the incident at the house of the accused..." This quotation alone is sufficient to negative the learned defence counsel's submission that the trial Commissioner had misdirected himself by accepting without question the evidence of identification by PW l and PW 2. It is evident from the quotation that the trial court relied upon supporting evidence which was found in the recovery of the hat, an aspect to which we shall later return. In fact nowhere in the judgment is it said, or can it reasonably be inferred, that the evidence of identification by PW1 and PW 2 without more had been accepted without question. The first part of ground one must, therefore, fail.

This brings us to the second part which alleges failure to consider the possibility of an honest mistake. Here again, it would not be correct to say that there was any misdirection on the part of the trial court. That court's judgment clearly indicates that the possibility of an honest mistake was actually considered and overruled. The concept of honest mistake is normally associated with single

identifying witness cases (see *Chimbini v The People* (1) and *Chate v The People* (22)); but of course it is not inconceivable that in a case where there are more than one identifying witness, an honest mistake can be made. In all cases, the court must be satisfied not only that an offence before it was committed but also that it was actually committed by the accused or by a number of persons, including the accused. In the final analysis, therefore, the evidence of all prosecution witnesses should be tested and if it is found to fall short of the required standard in criminal cases, namely, proof beyond a reasonable doubt, an acquittal must follow. In this particular case, both Mr and Mrs Fitzjohn were found by the trial court to be truthful and reliable witnesses. The robbery which occurred during bright daylight lasted for about ten minutes, during which time the witnesses said they had a good opportunity to observe and recognise the assailants, including the appellant who played a very leading role in the execution of the robbery.

Mrs Fitzjohn testified that she first saw the appellant through the rear view mirror, he then came to her door and tried without success

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to open it and from there he went to where her husband was and joined in attacking him. She said that before she sensed danger she had been cool and calm and was, therefore, able to clearly observe the appellant as well as the other assailants. Mr Fitzjohn also testified that he was able to observe the assailants. His powers of observation have been the subject of attack by the learned defence counsel on the basis that one year later when a defence police witness conducted an identification parade on which was a man called Jackson Musonda-whom the appellant had said was the owner of the hat which was found in his (the appellant's) house-he was identified by Mr Fitzjohn. The learned State Advocate submitted that Mr Fitzjohn was not to be blamed for wrongly identifying Jackson Musonda on the ground that the identification had taken place one year after the event when Mr Fitzjohn's memory ought to have been somewhat blurred. Mrs Fitzjohn did not identify anybody on that occasion. The learned State advocate further argued that in any event, Jackson Musonda was not alleged by the prosecution to have taken part in the robbery and was, therefore, not even a suspect.

It was rather unfortunate that there was no identification parade held after the appellant had been picked up from his home; instead the appellant was taken straight to Mr and Mrs Fitzjohn who, of course, readily identified him. There is force in the learned defence counsel's submission that the identification of the appellant on that occasion by Mr and Mrs Fitzjohn was worthless in that he was the only stranger amongst other persons present, namely, a police officer, a servant and a student, which obviously made it easy for the identifying witness to identify the stranger. We have on a number of occasions previously stressed that where the identification of an accused person is, or might be, in issue it is necessary to hold a properly conducted identification parade, and that failure to do so is a serious dereliction of duty on the part of the police, and may, in a suitable case result in an acquittal.

In the instance case, however, and as the trial court rightly pointed out, the case against the appellant did not rest entirely upon the evidence of Mr and Mrs Fitzjohn alone: it was fully corroborated by the evidence of the farm guard, Ignatius Nsowa, who knew the appellant before, though not by name. Whilst this witness was at Fisenge Bar, he saw the appellant come to the bar

and buy some food; when he observed that a hat the appellant was wearing at the time resembled that of his master - which was one of the items stolen from his master on the previous day - he headed back to the farm and reported this to Mr and Mrs Fitzjohn. He then returned to the bar in the company of Constable Mwanamoonga and the student, only to find that the appellant was nowhere to be seen. At the bar, Ignatius gave a description of the appellant to a council policeman who led them to the appellant's house. The appellant was duly found there and when asked about the hat by Constable Mwanamoonga he replied that he had left it with a friend. But on the persistence of the police officer the appellant produced a different hat; and when his house was searched the hat belonging to Mr Fitzjohn was found beneath a bed whereupon the appellant said it belonged to a

friend of his. The hat was found to have drawings on it and the name 'Buster' inscribed thereon. Mr Fitzjohn's testimony was that before its disappearance, the hat had no writings or name inscribed on it. When the appellant's mother was asked in cross-examination about the name 'Buster', she stated that it was a nickname given to the appellant by his friends, although in re-examination she said that she was hearing the name 'Buster' for the first time.

In his judgment the learned Commissioner found that both Ignatius and Constable Mwanarnoonga had given "convincing evidence" which impressed him and which he had no hesitation in accepting as representing the truth. He was satisfied that the discovery of the hat connected the appellant with the offence charged. We can see no misdirection in this. The submission that the trial court failed to consider the possibility of an honest mistake cannot, therefore, be sustained.

As to ground two, nowhere in the trial court's judgment is it said -either expressly or by implication - that an inference that the appellant was one of the robbers was drawn from his being found in possession of the hat. The case did not here rest on the doctrine of recent possession as enunciated in *Fanwell v R.* (3), and the case of *Dany Zyambo* (4), is not applicable. The discovery of the hat in the possession of the appellant was simply used as evidence corroborative of the testimony of Mr and Mrs Fitzjohn and Ignatius. Where evidence of recent possession is used as corroboration, it is not necessary to draw therefrom an inference as to the guilt of an accused person; but where it is used simpliciter, the inference to be drawn must be the only inference reasonably possible otherwise an acquittal must follow as a matter of course. The appellant cannot succeed on this ground also.

It follows from what we have said above that the appeal must be dismissed.

Appeal dismissed
