ILUNGA KABALA AND JOHN MASEFU v THE PEOPLE (1981) Z.R. 102 (S.C.)

SUPREME COURT
SILUNGWE, C.J., CULLINAN, J.S. AND MUWO AG. J.S.
10TH MARCH AND 8TH OCTOBER, 1981
(S.C.Z. JUDGMENT NO. 19 OF 1981)

Flynote
Criminal law and procedure - Identification parade - Suspects with visible injuries put on identification parade with persons without injuries - Propriety of.
Criminal law and procedure - Identification parade - Suspects of different heights placed among persons of comparable heights - General standard of appearance and dress - Fairness - Test to be applied.
Criminal law and procedure - Identification parade - Firearm - Contention that failure to hold firearm identification parade was a direliction of duty - Whether necessary to hold identification parade.
Evidence - Alibi - Onus of proof - Odd coincidences - When said to be supporting evidence.

Headnote
The appellants jointly and whilst acting together and being armed with a firearm were alleged to have robbed one Maganbhai Patel of various specified items of property, including cash, altogether valued at K1,394.00. Whilst together, the appellants visited Twatasha bar less than twenty-four hours after the commission of the robbery at Maganbhai's residence. At the bar the first appellant carried a pistol which resembled that seen by Maganbhai, his wife and his servant. The appellants travelled to and from the bar by means of the Cortina with a black top. The appellant was driving the car which answered the description

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given by Maganbhai's servant of the get-away car used by two robbers immediately after leaving the scene of the crime. While an identification parade of suspects was held, no identification parade for the firearms was held which came up as a ground of appeal. During the said identification parade suspects of different heights and with visible injuries were placed among persons of comparable heights. The appellants had put up a defence of alibi which their counsel contended had not been disproved. The counsel also contended that the evidence of identification at the parade was off poor quality.

Held:
(i) To put suspects with visible injuries on their bodies on an identification parade consisting of other persons having no such injuries is tantamount to providing identifying witnesses with a clue.
(ii) It is enough if suspects of different heights are placed among other persons of comparable heights and that the general standard of dress, let alone general appearance of participants at

the parade is more or less similar. The test is always whether a given identification parade is capable of being described as fair to the accused. Emphasis ought to be placed on fairness and not necessarily on the number of parades conducted.

(iii) The sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion. To achieve that object, those charged with the duty of conducting indentification parades must ensure that such parades are free from unfairness.

(iv) There is no rule of evidence or practice in Zambia which calls for the holding of a firearm's identification parade.

(v) While it is necessary for an identifying witness to positively pick out a person at a parade, a witness cannot be expected to say any more than that a firearm which he sees on a firearm's identification parade is similar to the one which he saw previously on a specified occasion.

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

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

Cases referred to:

(1) Toko v The People (1975) Z.R. 196.
(2) Bwalya v The People (1975) Z.R. 227.
(3) Nzala v The People (1976) Z.R. 221.
(4) Mkandawire & Ors v The People (1978) Z.R. 46.

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(5) R. v Turnbull [1976] 3 All E.R. 549.
(6) Timothy & Mwamba v The People (1977) Z.R. 394.

For the appellants: J.R. Matsiko, Legal Aid Counsel.
For the responded: R.G. Patel, State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court. The appellants were convicted of aggravated robbery and given capital punishment. It was alleged that on November 16, 1977, at Kitwe, they jointly and whilst acting together and being armed with a firearm, robbed Maganbhai Patel of various specified items of property including cash, altogether valued at K1,394.00n.

The circumstances of the case were that in the evening of November 16, 1977, at about 1845 hours two armed men, one carrying a pistol and the other a machine gun, gained access to the house of a businessman called Maganbhai Patel, through a closed but unlocked kitchen door. Mrs Patel and Alfred Kachenge, a domestic servant, who were preparing supper in the kitchen at the time were threatened to be shot if they shouted or moved. When Maganbhai went to the kitchen to investigate what was going on there, he was confronted by the armed intruders whom he identified as the first and second appellants. The first appellant carried a pistol with a piece of string tied to it and the second appellant a machine gun.

The second appellant then demanded K3,000.00 from Maganbhai who replied that he had a lesser amount in his bedroom. Maganbhai and his wife took the armed men to the bedroom and there produced a bag containing K650 in cash which was counted and handed over to the first appellant. In addition to this, the first appellant obtained a wrist watch from Mrs Patel. The second appellant also obtained a wrist watch plus the sum of K150 from Maganldhai. The first appellant then picked up a Bernina sewing machine and the second appellant took a pair of shoes before they withdrew from the bedroom. The couple and Maganbhai's mother then locked themselves up in the bedroom.

Alfred, who had in the meantime gone out to alert neighbours, saw the assailants emerge from the house carrying the sewing machine and an electric fan. They went to a packed yellow Ford Cortina car with a black top and drove away. Two of the witnesses heard a gunshot as the robbers got away.

A little later, when Maganbhai and his wife came out of their bedroom they discovered that an electric fan had disappeared from the lounge. Electric lights were on throughout the time the assailants spent in the house. They were in the house for at least ten minutes.

On the following day, April 17th, at about 1720 hours, Lemmie Mulenga was standing outside his Twatasha Bar in Kitwe's Chimwemwe Township when he saw a yellow Ford Cortina car (hereinafter referred to as the Cortina) with a black top cause a dent to a stationary Belmont car.

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Inside the Cortina were two men whom he identified as the first and second appellants. As the appellants came out of the Cortina, Lemmie asked them why they had caused damage to the Belmont car, to which the first appellant replied: "It matters not. What do you want?" At that point in time, Misheck Shabisha, a Zambia Railways Police Inspector who had parked the Belmont car there, arrived and suggested that compromise be reached. The first appellant said there was nothing to compromise about. When Misheck took possession of the ignition key to the Cortina the first appellant produced a pistol from his jacket and demanded the return of the ignition key; Although Misheck immediately threw the key at the first appellant, this did not stop the latter from firing a warning shot. As the second appellant shouted: "Kill him, kill him", the first appellant picked up the key and, on becoming aware of the presence at the Bar of Detective Constable Phiri, immediately drove the Cortina away, in the company of the second appellant.

At once, Roman Kangwa, agreed to drive his friend, Detective Constable Phiri, in pursuit of the appellants. After driving a distance of about one hundred metres from the Bar, the Cortina skidded off the road and ended up in a ditch within the township's residential area. As Detective Constable Phiri and Roman drew near, the appellants emerged from the Cortina and started to run away. The Detective Constable and Roman also came out of Roman's car and shouted for assistance as they continued to pursue the appellants. The first appellant, fired two shots at his pursuers before he fell down and was apprehended shortly thereafter. The second appellant was also apprehended. Both appellants were then beaten up so severely by an "instant justice mob" that the first appellant was rendered unconscious and the second appellant almost unconscious. Throughout the chase, Detective Constable Phiri and Roman did not lose sight of the appellants. The Detective Constable had known the second appellant since 1972 as Jan Marie, from Zaire.

Detective Constable Phiri searched the first appellant and found on him a pistol, the keys of the Cortina and K52.20n in cash; when the boot of the Cortina was opened, one Bernina sewing machine and one electric fan belonging to Maganbhai were found inside it. He took possession of these items as well as of the pistol.

Shortly after their apprehension, the appellants were taken to Kitwe Central Hospital where they were admitted for a couple of days. Thereafter Maganbhai picked them out set an identification parade. Alfred, was however, able to identify only the first appellant who had confronted him at the time of the robbery. Mrs Patel did not participate in the identification exercise as she had not recovered from the shock she experienced during the evening of the robbery.

It transpired that the Cortina was a stolen vehicle belonging to medical doctor in Kitwe and that it was being sought by the police.

Both appellants pleaded alibi in their defence and denied having visited or committed any robbery at Maganbhai's house. They further denied having had anything to do with the Cortina.

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The first appellant conceded in his evidence that at about 1600 hours on November 17th, 1977, he was drinking beer - unaccompanied - at Lemmie's Twatasha Bar and said that whilst there, he was approached by Detective Constable Phiri asked for his name and handcuffed. According to his evidence, he was then so badly beaten up by the police that it became necessary for him to be admitted in Kitwe Central Hospital. He came to know the second appellant for the first time when both were discharged from the hospital.

The second appellant testified that he visited Twatasha at about 1000 hours on November 17th, but for the purpose of buying meat. When he found that butcheries were closed, he went to a bus stop and there saw a police Land - Rover pull up; out of the Land - Rover came Detective Constable Phiri with whom he was at loggerheads and who "was always apprehending (him) on suspicion". After saying that he wanted to ask him a few questions, the Detective Constable took him to a police station where the police beat him up to such an extent that it became necessary for him too to be admitted at Kitwe Central Hospital.

The only issue to be considered and decided upon is whether there was before the trial court sufficient evidence to connect the appellants with the offence committed at Maganbhai Patel's house.

Mr Matsiko, the learned Legal Aid Counsel, submits that the evidence of identification of the appellants was of poor quality and so also was that of the pistol carried, and of the car used, at the time the offence was committed. He further submits that there was a misdirection, vis-a-vis the second appellant's defence of alibi.

It is common ground that the appellants are somewhat different in height; that at the parade, they wore different clothes and that their faces were slightly swollen. Mr Matsiko contends that all these

are factors that weakened the identification of the appellants by Maganbhai (both appellants) and Alfred (first appellant). He argues that as the appellants were not of the same height and wore different clothes, two separate parades should have been conducted in accordance with paragraph 1352 of Archbold, 40th edition.

There is force in the argument that Maganbhai's and Alfred's identification of the appellants was weakened by the fact that when the appellants were placed on the parade, their faces were slightly swollen. To put suspects with visible injuries on their bodies on an identification parade consisting of other persons having no such injuries, as was the case here, is tantamount to providing identifying witnesses with a clue. In this case, the fact that everyone on the parade (including the appellants) had his head wrapped up with bandages, was not enough, for in spite of the bandages, certain injuries on the appellant's faces remained uncovered.

As to the submission that two identifications parade should have been conducted in accordance with paragraph 1352 of the 40th edition of Archbold, it is to be noted that what is contained in the paragraph

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aforesaid is simply a reproduction of A British Home Office Circular for the guidance of the Police in England and Wales; and that although it may be of persuasive value here, the procedures described therein have not been adopted by our police. In our opinion, however, it is enough if suspects of different heights are placed among other persons of comparable heights and that the general standard of dress (let alone the general appearance) of participants at the parade is more or less similar. The test is always one whether a given identification parade is capable of being described as fair to the accused. Emphasis ought to be placed on fairness and not necessarily on the number of parades conducted. If, however, the circumstances of a particular case are such that fairness can only be achieved by the holding of more than one parade, then, of course, it is necessary to conduct more than a single parade. The present case is not such a case because, as we have said, it would have been enough to have on the parade persons of comparable heights. In any event, more than one parade would have made no improvement in the situation in view of the visible injuries on the appellants' faces.

Although we have time and again drawn attention to the necessity of conducting proper and fair identification parades, *see*, for instance, the case of *Toko v The People*, (1), at page 198, the matter does not appear to have been fully appreciated. Let it be stressed that the sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion, and that to achieve that object, those charged with the duty of conducting identification parades must ensure that such parades are free from unfairness.

As we have said, the evidence of identification of the appellants by Maganbhai and Alfred was of poor quality. But this does not necessarily mean that the identification, as such, was worthless; all that it means is that, standing alone, that evidence is not sufficient to connect the appellants with the offence committed at Maganbhai Patel's house. We shall later consider whether that evidence does, or does not, stand alone.

Still on the subject of identification, Mr Matsiko relies on the case of *Bwalya v The people*, (2), and contends that failure by the police to hold what may conveniently be termed a "firearms' identification parade" was a dereliction of duty. A proper reading of *Bwalya* (2), will, however, show that the case says nothing of the sort. We are satisfied that what was there said, at page 231 line 14 and 15, about an identification parade of a firearm being very similar to an identification parade (of human beings), was obiter. That too was an aggravated robbery case but one in which the critical issue was not whether a firearms' identification parade had been conducted, for such a parade had in fact been held at which the complainant's wife picked out a revolver allegedly carried at the time of the robbery and one which was later found on the appellant's person when he was apprehended. Although the complainant, his wife and a servant, were all eye-witnesses to the aggravated robbery, the wife was the sole witness who was able to identify the appellant at an identification

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parade; her husband, as well as the servant, failed to identify anyone at the parade. As this then became a "case of identification by a single witness", the critical issue was whether there was evidence of a connecting link between the appellant and the offence which would render a mistaken identity of the appellant by the complainant's wife too much of a coincidence. In the circumstances of that case the revolver was the only item that could have provided such a connecting link, but it could not do so owing to the fact that the testimony of the complainant clearly showed that the handle of the firearm carried at the time of the robbery was "significantly" different from that of the firearm identified by his wife, and one that was in the appellant's possession at the time of his apprehension. The conflict in the evidence of the complainant and of his wife, was naturally resolved in favour of the appellant and this meant that evidence of a connecting link had not been established. The absence of such evidence then provided a basis for the appeal to succeed.

Returning to Mr Matsiko's submission, we know of no rule of evidence or practice in Zambia which calls for the holding of a firearm's identification parade. We would, however, hasten to say that in a proper case - and the present is such a case - it is preferable that a "suspected" firearm (or property) be placed among other firearms (or items of property) of similar nature so as to test the ability of an identifying witness either to pick it out or to point to its similarity with a firearm (or an item of property) seen on a previous specified occasion. But failure to hold a firearms' parade does not, in our view, constitute a dereliction of duty as such.

It major be helpful to clarify the position concerning the identification parades of persons, on the one hand, and of firearms, on the other. While it is necessary for an identifying witness to positively pick out a person at a parade, a witness cannot be expected to say any more than that a firearm which he sees on a firearms' identification parade is similar to the one which he saw previously on a specified occasion: firearms are no doubt mass produced and only sight of the serial number of the firearm or of a distinguishing mark thereon or feature thereof, will enable the witness to identify the weapon with certainty.

Coming now to the question whether the motor car used at the time of the robbery was the same one that both appellants were seen using on the following day, the trial judge found that there was present circumstantial evidence to point to the conclusion that it was one and the same car. We think

that the trial court was entitled to come to that conclusion on the basis that Maganbhai's servant had seen two robbers taking a sewing machine and an electric fan from his master's house into a yellow Ford Cortina car with a black top, and that within less than twenty-four hours, his master's sewing machine and the electric fan were found inside the boot of the car which was being driven by the first appellant with the second appellant as his passenger, and which answered in all material respects the description given by the servant.

Mr Matsiko concludes his submission by arguing that the learned trial judge misdirected himself by holding that the alibi advanced by the

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second appellant had been negatived by the prosecution in spite of the prosecution's failure to adduce evidence from a girl called Mary who had been interviewed by Detective Inspector Mundia, but who, according to the Detective Inspector, denied any knowledge of the second appellant.

Relevant to the submission is the case of *Nzala v The People* (3), wherein this court said at pages 223 and 224:

> "Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi it is the duty of the police to investigate it. That duty is certainly not discharged by the 10 investigating officer simply interviewing people, . . . If in fact the various witnesses mentioned by the appellant had given information which was no support to the appellant's case this was obviously very important evidence in support of the prosecution case and should have been led by the prosecution."

The accent there is really on the onus of proof. In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the *alibi*. The prosecution take in serious risk if they do not adduce evidence from witnesses who can discount the alibi, unless the remainder of the evidence is itself sufficient to counteract it.

In the appeal under consideration, the learned trial judge was satisfied that the remainder of the evidence was overwhelming against the second appellant (and the first appellant). Whether he was entitled to be so satisfied will now be discussed as we consider again the issue of poor quality identification.

Finally, we must return to the question whether the poor quality evidence of identification given by Maganbhai and his servant stands alone. In considering this question, it is important to look at the evidence as a whole and in particular at that of the eye-witnesses to the events that occurred at Twatasha Bar and which led to the apprehension and the arrest of the appellants. There can be no doubt that whilst together, the appellants visited Twatasha Bar less than twenty-four hours after the commission of the robbery at Maganbhai's residence; that at the bar, the first appellant carried a pistol which is now an exhibit in this case and which resembles that seen by Maganbhai, his wife and his servant; that the appellants travelled to and from the bar by means of the Cortina with a black top and that that car answered the description given by Maganbhai's servant of the get-away

car which two robbers used immediately after leaving the scene of the crime; that the first appellant was driving the car; and that Maganbhai's sewing machine and electric fan removed from his house during the robbery were recovered from the boot of the car. All these were instances of the kind of "odd coincidences" to which we referred in *Mkandawire and Ors v The People* (4), at page 53, following *R. v Turnbull* (5). It is trite law that odd coincidences, if unexplained, may be supporting evidence. In our view, an explanation which cannot reasonably be true is, in this connection, no explanation. The explanation given by the

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appellants was that they were not in any way connected with, and knew nothing of, the Cortina or Maganbhai's sewing machine and electric fan which were found lying in the boot of the car and which had been removed from Maganbhai's house less than twenty-four hours previously. This explanation was rejected by the trial court and could, indeed, not reasonably be true in view of the evidence of the four prosecution witnesses which was believed (by the trial court) and which indicated that the appellants were in each other's company at the bar and that they were "caught redhanded" driving the Cortina which contained Maganbhai's items of stolen property and that the now exhibited pistol was seen being carried and fired by the first appellant in whose possession it was at the time of his apprehension. In these circumstances, therefore, the appellants' explanation (which was rejected) amounted to no explanation. Consequently, the evidence of the odd coincidences in this case provided support for the evidence of poor quality identification. It was this that constituted the remainder of the evidence upon which the learned trial judge was satisfied that the second appellant's alibi had been counteracted.

In any event, the appellants were liable to be convicted on the basis of the doctrine of recent possession as there was an absence of any explanation that might be true, with the result that the inference of guilt became irresistible.

In so far as the firearms are concerned Mr Matsiko argues that the prosecution failed to prove that the pistol carried at the time of the robbery was the same one that was found on the appellant when apprehended. Evidence was given by a ballistics expert that the lather pistol was a firearm in good working order. Mr Matsiko's submission poses the question highlighted in *Timothy & Mwamba v The People* (6), at page 397, that is:

> ". . . not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable."

Maganbhai Patel testified that the first appellant "while pointing a pistol at them was playing with a bullet in the other hand" and that the bullet was similar, that is in calibre, to an empty .45 cartridge case produced in court proved to have been fired from the pistol found in the possession of the first appellant. Maganbhai Patel also testified that after the robbers led his house he "heard one shot fired front direction of the front of the house". Alfred Kachange testified indeed that as the robbers drove out through the gate of the house the first appellant fired a shot in the air, another shot being fired when the vehicle rounded a nearby corner.

All three prosecution witnesses subjected to the robbery testified that the pistol found in the first

appellant's possession, a .45 service pistol, and produced in court was similar to the one which he bore on the night of the robbery. Maganbhai Patel testified that the latter pistol

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"had a string attached to it". The pistol produced in court, which we have examined, also has a 'string' or thin lanyard attached to the butt thereof. In all the circumstances we consider that the only reasonable inference to be drawn is that the pistol found in the first appellant's possession, less than a day after the robbery, was the same pistol which he bore and fired on the night of the robbery. Further, the learned trial judge was in all the circumstances of the case fully justified in finding that the second appellant was aware that the first appellant was armed with the pistol and that he made no attempt to dissociate himself from the offence.

In the final analysis, we are satisfied that there was here sufficient evidence to connect the appellants with the commission on the crime charged and that the verdict of guilty was inevitable. As no injustices was occasioned by the trial court's misdirection in regard to the indentification of the appellants by Maganbhai and his servant, we apply the proviso to section 15 (1) of the Supreme Court Act and dismiss the appeals against conviction.

Appeal against conviction dismissed
