LOVE CHIPULU v THE PEOPLE (1986) Z.R. 73 (S.C.)

SUPREME COURT
SILUNGWE, C.J., CHOMBA AND GARDNER, JJ.S.
12TH AUGUST, 1986
(S.C.Z. JUDGMENT NO. 19 OF 1986)

Flynote

Evidence - Identification - Single (identifying) witness - Opportunity to observe - Fleeting glimpse - Reliability.

Headnote

The appellant was convicted of aggravated robbery contrary to section 294 (1) of the Penal Code. It was alleged that he and a person unknown attacked and robbed the sole prosecution witness. The witness who during the attack briefly saw and claimed to have known the appellant previously, searched for and found the appellant at his home and identified him to the police. At the trial the appellant elected to remain silent and called no witness.

Held:

Where the circumstances of an attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had been patronising the same bar as an accused for the past nine months does not render an identification safe.

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Cases cited:

(1) Chimbini v The People (1973) Z.R. 191
(2) Champion Manex Mukwakwa v The People (1978) Z.R. 347
(3) R. v Turnbull and Others [1976] 3 All E.R. 549

Legislation referred to:

Penal Code, Cap. 146, s. 294 (1)
Supreme Court of Zambia Act, Cap. 52 s. 15 (1)

For the Appellant: W. L. Henriques, Assistant Senior Legal Counsel,
For the Respondent: R. R. Balachandran, Senior State Advocate

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Judgment

SILUNGWE, C.J.: delivered the judgment of the court. The appellant was convicted on one count of aggravated robbery, contrary to section 294(1) of the Penal Code, Cap. 146, the allegation being that on January 1st, 1984, at Chingola, the appellant, jointly and whilst acting together with another person unknown, stole one pair of gents shoes, one pair of long trousers, one skipper, one belt, one identity card and K3.50n in cash, altogether valued at K109.75n, from Henry Nkole, and that immediately before or immediately after the time of such theft did use or threaten to use actual violence to the said Henry Nkole.

The principal issue that arises in this case is one of identification. Evidence was given at the trial by the complainant, Henry Nkole, in which it was stated that on January 1st, 1984, at about 23.30 hours as he was returning home from a bar, he heard footsteps, looked in the direction of the footsteps, saw two people and as soon as he did so they attacked him with an iron bar and a hose pipe. They continued to attack him until he became unconscious.

When he regained consciousness, he discovered that all the clothes as well as shoes had been taken from him. He went to the police station and made a report. Thereafter, he was taken to hospital for treatment and then driven to his home. He continued to attend hospital as an outpatient.

On the 16th January, he started to look for his assailants whom, according to the evidence, he had previously known for nine months as he and they had been patronising the same bars. He found the appellant sitting outside a house is Kapisha compound, went back to the police station and informed the police about him. On the following day, the police went and picked up the appellant and charged him with the present offence, which he denied.

The appellant, having had his rights explained to him at the close of the case for the prosecution, elected to remain silent and to call no witnesses as he was entitled to do.

In his judgment, the learned trial judge held that the appellant had been correctly identified by the complainant as he had previously been known to him.

On behalf of the appellant, Miss Henriques has argued before us that there is no evidence as to the state of light at the time of the robbery and that, as such, it is not possible to say whether the light was strong or dull; that if it was strong, the complainant, who was walking towards it, may have been dazzled and, therefore, unable to see his assailants properly. If, on the other hand, the light was dull, he could not have recognised his assailants, especially as the light was some thirty yards away from the spot where he was attacked. She has argued that the evidence on record shows that, as soon as the complainant saw the assailants, he was set upon, that as the attack was sudden, there was no opportunity for the complainant to identify his assailants.

In his judgment, the learned trial judge gave the impression that the complainant had seen the assailants, identified them and thereafter been attacked. He went on to say that, in the circumstances of the case he was satisfied that the complainant had had "ample opportunity" to see his assailants and that the question of mistaken identity was ruled out. In *Chimbini v The People* (1), the forerunner to this court - the Court of Appeal - said as follows in relating to single identifying witness cases:

> "It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors

> must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made . . ."

And in *Champion Manex Mukwakwa v The People* (2), we said this at page 348, lines 39 to 41:

> "The circumstances in which the offence was committed were undoubtedly traumatic and the opportunities for observation of the culprits were poor. . ."

In the present case, there can be no doubt that the circumstances in which the robbery was committed were traumatic. There was, in the words of the complainant himself, a "sudden attack" upon him: as soon as he heard footsteps on his left had side, he looked in that direction and was then suddenly attacked by two assailants. In our view, the circumstances in which the attack took place were traumatic and such that the complainant could not have had a good opportunity to observe his assailants, regard being had to the fact that it was night time. The prosecution evidence is deficient in that it does not shed light on whether or not the state of the light was good or bad, strong or dull. Quite clearly, there was a misdirection on the facts on the part of the trial court when it found that there had been "ample opportunity" for the complainant to

identify his assailants. The complainant undoubtedly had a fleeting glimpse of the assailants and the attack was sudden. Although the complainant testified that he had known his assailants for about nine months prior to the robbery, this does not help the prosecution's case be cause the offence was committed in traumatic circumstances and the opportunities for observation were poor. As it was pointed out in *R v Turnbull and Others* (3) at page 552, letter d:

> "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Much, therefore, depends on the quality of the identification evidence. As we have pointed out in this case, the quality of the identification evidence was poor.

In the circumstances of this case, we are unable to apply the proviso to 15(1) of the Supreme Court Act as it would be unsafe, for the reasons given, to allow the conviction to stand. The appeal against conviction is allowed; accordingly, the conviction is quashed and the sentence is set aside.

Appeal allowed.
