IN THE SUPREME COURT OF ZAMBIA APPEAL NO.138 OF 1993

HOLDEN AT NDOLA
(Criminal Jurisdiction)

STANLEY SILUNGWE Appellant

Vs

THE PEOPLE Respondent

Coram: Sakala, Chirwa and Muzyamba JJJ.S
8th March and 18th April .....1994.

Appellant in person.
Mr. R.O. Okafor, Principal State Advocate, for the State.

J U D G M E N T

Sakala JS. delivered the Judgment of the court.

The appellant was convicted of armed robbery contrary to Section 294(1)(2) of the Penal Code Cap 146 of the laws of Zambia and sentenced to death.

The particulars of the offence were that, the appellant, on 7th September 1992 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with another person unknown and while being armed with a pistol, stole one motor vehicle namely, Toyota Hilux Vanette Registration NO. ACC 1395 valued at K8,000,000 and K430,000 cash all together valued at K8,430,000 the property of Kitwe District Council and used violence to Fred Nyirenda at the time of the robbery.

The case for the prosecution was that, PW1, a Cashier, and PW2, a Driver, were on the 7th of September 1992 assigned, by their employers, Kitwe District Council, to collect sales of beer from various Council tarvens. They set out on their assignment at about 08.00 hours using a Council Vanette Registration No. ACC 1395 fleet No. 505. They drove to various tarvens and collected a total amount of K366,630. After leaving the last tarven, they joined the main road. On account of pot holes on the road they drove slowly. AT

Kazembe road the vehicle slowed down further because of more pot holes and a hump ahead. At this point PW2's attention was drawn to two men standing at a distance of five meters away and one of them called him by name three times and asked for a lift to the robbot lights at Buchi. PW2 refused to give them a lift. According to PW2, he looked at the man who called for his name very closely to ascertain whether he knew him but he could not recognise him. The two men despite being refused a lift, jumped at the back of the vanette while PW2 continued driving the vehicle. After a distance he slowed down again to avoid more pot holes and while slowing down further one of the two men behind the vehicle on his side pointed a gun at him through the driver's open window and ordered him to stop and threatened to shoot if he did not. PW2 then tried to wrestle the gunman but in the process lost control of the vehicle. The vehicle stopped; PW1 ran for his safety at a nearby bouse while PW2 got out of the vehicle and turned towards the gunman at a distance of about one meter apart and stood face to face with him. The gunman shot at PW2 through the chest; the bullet went through. According to PW2 the gunman got into the driver's seat while the other man got into the passenger's seat. The vehicle was then driven off together with the K366,630. The vehicle was recovered the same day. On 22nd December 1992, an identification parade was conducted by the late detective sub inspector Sakala, who died before the trial of the case but whose identification parade report was produdced by PW4 another police officer, the defence having initially objected to its production.

The appellant in his defence confirmed being identified by PWs 1 and 2 but contended that they had seen him before the identification parade at the police station. He denied being involved in the robbery and raised a defence of alibi. The learned trial Commissioner rejected the defence of alibi on the ground that it lacked details to enable the police to investigate. The learned trial Commissioner identified the issue for determination as being the identity of the pepertrators of the armed robbery. He considered the possibility of an honest mistake in the identification by PWs 1 and 2. He

accepted the evidence at the identification parade by PWs 1 and 2. He ruled out the possibility of an honest mistaken identification on the ground that there existed three distinct opportunities for the recognition of the appellant by PWs 1 and 2. These opportunities being:

> first at Kazembe road when the appellant asked for a lift and then jumped on to the vehicle with another person;
> secondly, when the appellant threatened PW1 and the vehicle hit into an ant hill and stopped;
> thirdly, when PW2 faced the appellant and the appellant fired at him and then drove off.

The learned trial Commissioner concluded that there was ample opportunity for the recognition and identification and found the appellant guilty as charged and convicted him accordingly.

In arguing the appeal in person the appellant relied on three sets of grounds. The first being the one he filed together with the notice of intention to appeal; the second being those filed by the Directorate of Legal Aid and the third being the additional grounds he filed in person.

We have very carefully considered all the appellant's several grounds of appeal. These grounds most of which were repetitions can be summarised as follows:-

(i) the production and admission of the police report of the identification parade at the police station produced by PW4 in the absence of the author denied the defence the opportunity to cross examine the author and therefore improper.

(ii) the evidence of identification by PWs 1 and 2 should have been corroborated by an independent witness as they did not have ample opportunity to observe their attackers.

It must be mentioned that the appellant also complained that the police did not lift finger prints from the recovered motor vehicle and did not find any

stolen money as well as the alleged pistol on the appellant. He also pointed out that the police failed in their duty by not calling as a witness the person who informed PW4 that the appellant was in Kitwe Central Hospital. He abandoned arguments based on these grounds when it was pointed out that the matters were not raised in the court below.

As regards the production and admission of the police report of the identification parade the appellant adopted the written heads of argument filed by the Directorate of Legal Aid. According to those arguments the admission of the report was improper in the absence of the author or in the absence of an officer who witnessed the parade as the report was not a dying declaration and its admission denied the defence the opportunity of cross examining the witness.

As regards the evidence of PWs 1 and 2 the submission was that these witnesses should have been corroborated by an independent witness found at the scene of the incident because of the two witnesses conflicting stories. It was also submitted that the time of observation by PWs 1 and 2 was inadequate and that a possibility of fabricating evidence as regards the time of observation by the two witnesses existed and the trial Commissioner did infact express apprehension of this fact. According to this submission PWs 1 and 2 briefly met their attackers in a state of confusion for the first time. PW2 was driving on a very bad road full of potholes and a hump. PW2 first saw appellant while negotiating potholes and a hump on Kazembe road. According to the submission PW2 spent much of the time that he talked to the man who called for his name negotiating potholes and therefore the possibility of honestly mistaking his attackers was very high. It was further argued that at the time PW2 was face to face with his attacker he was confused and scared that his evidence of recognition should not have been relied upon. As regards PW1 it was pointed out that his position was worse as he had no proper view and ran away as he was too scared.

On behalf of the State Mr. Okafor supported the conviction and pointed out that the appellant was convicted mainly on the identification evidence of PWs

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1 and 2 as to what happened at 0930 hours in the morning when there was more than ample light to see. Counsel submitted that the appellant was seen not by one witness but two who gave the same identical evidence of the clothes. Counsel pointed out that the appellant was first seen at Kazembe road at a place full of potholes where the vehicle was moving at a walking speed; the man with a gun called Mr. Nyirenda three times and Mr. Nyirenda who was the driver naturally reacted by turning to see the man calling him. He did not know the man, but the man asked for a lift. Nyirenda refused. This, it was submitted, was the first opportunity of observation. Counsel further pointed out that the two people jumped onto the vanette; when the vehicle approached a hump the man with a gun said "hands up", PW2 looked in the mirror, saw the man for a second time and a struggle over the gun ensued. Counsel pointed out that the third occasion of observation was when the vehicle went off the road and PW2 looked at the man before he fired. Counsel submitted that these where three distinct occasions of observation not affected by any discrepancy in the evidence of PWs 1 and 2. According to Counsel upon PW2 being shot he did not die; he saw the man drive the vehicle away. The witness was alert that he stopped a passing vehicle which took him to the police where he reported the incident. Counsel submitted that PW1 corroborated PW2 on all the material points that PW2 was called three times; that there were two men, one wearing a black bomber "while one was wearing a T-shirt". Mr. Okafor submitted that the issue was whether there was anything in the evidence of PWs 1 and 2 to cast a possibility of a mistake. He submitted that it was a material factor that the witnesses gave evidence on two different dates.

On the production of the identification report counsel pointed out that the arresting officer identified the signature of the author of the report, the deceased and that the report of the identification parade did not affect the judgment and it was not intended to prove the offence but that a parade was conducted. Counsel invited court, in the event the report was wrongly admitted, to apply the proviso.

We have considered the evidence on record; the judgment of the learned trial Commissioner and the submissions by the appellant in person and those in

writing as well as the submissions by the learned Principal State Advocate. We propose to deal first with the ground based on the admission of the parade report. It was common ground that at the time of the trial the author of the parade report had since died. The prosecution case was that PW4 was the investigating and arresting officer in this case. He was the one who asked the deceased officer to conduct the identification parade. After the parade, a report signed by the deceased officer was handed to him. PW4 was familiar with the signature of the deceased officer. When PW4 wanted to produce the report the defence objected as follows:-

> "I object to the production of the report. There is no provision in the Criminal Procedure Code for the acceptance of a written report concerning the conduct of an identification parade. The reason being that there is no way in which the writer of the report may be cross-examined."

We note that in substance two grounds were advanced for the objection namely, there being no provision in the Criminal Procedure Code for acceptance of such report and for lack of possibility to cross-examine the writer. The court admitted the report. We take note that the case for the prosecution centred on the evidence of identification by PWs 1 and 2. When being cross examined on the question of identification PW1 had this to say:-

> "I was next called on the 23rd December. The accused was in black wearing a blue T. shirt at the identification Parade. The trousers I do not recall. The parade took about 2½ minutes to identify the accused. I did not go straight from the office to the accused person. The police did not tell me of the person they had arrested. I did not see the parade before I was taken to it. The other suspect was wearing a black T. shirt. There was no other description."

And PW2 had this to say:-

> "I told the police then that when I see the gunman I would

know him. The next statement was given after the identification parade. I do not know of the circumstances leading to the arrest of the accused. At the parade - the people were different in appearance. I did not go from the room to the accused on the parade. I identified the accused after passing along the line."

The cross examination of PWs 1 and 2 seems to us to have been aimed at suggesting that these witnesses must have been shown the appellant before they identified him at the parade. They denied this suggestion. The appellant in his evidence on oath had this to say:-

"Sgt. Sahetu left me there and the officer who conducted the parade came - He told us that there are groups of people in the office. The first group were robbed at gunpoint at Riverside. The second was robbed of their van and money. He said these people would come one by one. I told the parade officer that I would like the parade to take place in front of my lawyer or an independent witness. I did not like the way the parade was conducted. I had a lawyer when I was in the cells. Miss Nachula was my lawyer. She was not present. The others were dressed differently from me and I was the shortest.

The first person to come and identifiy me was a woman. She went down the line. She touched me on the left shoulder. The lady was asked by the parade officer who I was. PW1 came then - I had seen him earlier in the office of the arresting officer. He came straight and touched me. I was surprised by this. The parade officer reprimanded him. I protested. He was told to touch me again if he identified me. A photograph was taken. Next came PW2 who also came straight from the office. He was also in the office. He slapped me. I wanted to hit back but the parade officer refused. He then touched me and a photograph was taken."

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The issues raised by the appellant that the parade officer reprimanded PW1: that PW1 was told to touch the appellant again were never put to PW1 in cross examination. Equally the issues that PW2 slapped the appellant and that the parade officer refused the appellant to hit back were also not put to PW2 in cross examination. To complete the observations on the identification parade it is relevant to observe that the learned trial Commissioner in his ruling at the close of the prosecution case had this to say:-

> "On the matter of identification I do not rely upon the identification parades but on the evidence given by PWs 1 and 2."

In the final judgment the learned trial Commissioner had this to say:-

> "The defence consists mainly in an attack on the manner in which the police conducted the identification parades. The only direct evidence of the parades comes from the identifying witnesses PWs 1 and 2 and from the accused person himself. I am able to find nothing wrong in the manner in which the parades were conducted. There is also thefurther identification of the accused at the parades by PWs 1 and 2 as the person who robbed them of the vehicle and the money and also who shot PW2 with a pistol.
>
> Although in this case the evidence of identification reached by PWs 1 and 2 after the identification parades were held I warn myself of the possibility of honest mistake on the part of the two witnesses in recognising the accused as the person who robbed them of the vehicle and the money. PWs 1 and 2 gave evidence of the manner in which the identification parades were conducted from the time they arrived at the police station on the 23rd December, 1992 through the parades and the identification of the accused. I am satisfied that the identification of the parades was

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properly done and that the identification of the accused there from can be relied upon by the court."

We are satisfied that although the evidence of the parade was carefully reviewed the learned trial Commissioner did not address the issues of the admission of the report in the absence of the author. This was the complaint of the appellant before us. We are however satisfied that the learned trial Commissioner relied on the evidence of PWs 1 and 2 as well as the appellant on the question of identification. He made no reference to the parade report. IN these circumstances we are unable to say that he relied on the contents of the report. But on the question whether the admission of the parade report was proper or not, the only way a document may be received in evidence, other than by production by its maker, is under the Evidence Act Cap 170. Section 4 of the Evidence Act Cap 170 provides as follows:-

4(i) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

(a) the document is, or forms part of, a record relating to any trade or business or profession and compiled, in the course of that trade or business or profession, from information supplied (whether direct or indirectly) by persons who have, or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to

the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

2. For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a fully registered medical practitioner."

In the instant case the author of the report was dead. The report was therefore in the circumstances of this case properly admitted but even if not properly admitted we are invited to apply the proviso. In our view the report must have been admitted only to establish the fact that an identification parade had been conducted. On the facts of the case before us the ground of appeal based on the admission of the parade report in the absence of the author cannot assist the appellant. This takes us to the summary of the second ground.

The second ground was that the evidence of PWs 1 and 2 should have been corroborated by an independent witness. We have carefully considered the evidence on record. We find no evidence that there was an independent witness at the scene of the offence. However that is not the issue. In the instant case the learned trial Commissioner was very alive to the fact that the case against the appellant depended wholly on the correctness of the identification of the appellant. He carefully considered the evidence of PWs 1 and 2. He ruled out the possibility of a mistake. He examined the circumstances and quality of the identification. He found that the witnesses had three different opportunities at which they identified the appellant. This was during broad day light. We are satisfied that this was not a case of a fleeting glance. The findings of the learned trial Commissioner cannot therefore be faulted. The evidence of identification was satisfactory. The appeal against conviction is dismissed. No appeal lies against the mandatory death penalty for armed robbery.

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E.L. Sakala,
SUPREME COURT JUDGE.

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D.K. Chirwa,
SUPREME COURT JUDGE.

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W.M. Muzyamba,
SUPREME COURT JUDGE.