SHAWAZA FAWAZ AND PROSPER CHELELWA v THE PEOPLE (1995) S.J. (S.C.)

SUPREME COURT
BWEUPE, D.C.J., GARDNER, AND MUZYAMBA, JJ.S.
18TH NOVEMBER,1994 AND 30TH NOVEMBER, 1995.
S.C.Z./9/49/94

Flynote
Murder - Conviction - Sentence.
Evidence - Expert witness - Unreliability of a witness - Corroboration - Identification - Test for accepting witness's evidence - Beyond Reasonable Doubt - No fingerprint evidence - Dereliction of duty by police.

Headnote
Trial on charge of murder, identity of accused in issue and the identifying witness was shown not to be telling the truth in one most important aspect of his evidence, which gave rise to doubt as to his credibility.

Held:
(i) Cross-examination cannot always shake the evidence of untruthful witnesses in every respect; it is 35 sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.

(ii) In single witness identification, corroboration or something more is required.

(iii) Not sufficient for trial court to find that prosecution witness probably spoke the truth. The evidence of the witness must be accepted beyond reasonable doubt. 40.

(iv) There is no property in a witness and it was not the duty of the prosecution to offer three witnesses whose names were not on the list of prosecution witnesses , for cross-examination by defence counsel.

(v) The question of mistaken identity does not arise unless the identifying witness is an honest witness.

Cases referred to:
1. Chuba v the People (1976) Z.R 272
2. Attorney General v Trollope (1963-64) Z.R 146
3. Banda v The People (1977) Z.R. 169
4. Kunda & Anor v The People (1980) Z.R. 105
5. Phiri and Ors v The People (1978) Z.R. 79

For the 1st appellant: F Chuula SC of C H Chambers, with him G Mhango of Nyangulu and Co.
For the 2nd appellant: E.C. Lungu of Andrea Masiye and Co.
For the respondent: Mukelabai, Senior State Advocate, appeared for the State.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

The appellants were convicted of murder. The particulars of the offence being that, they, on a

date unknown, but between 29th September and 30th September, 1992 at Lusaka, jointly and whilst acting together, did murder Grant Kolala. They were each sentenced to 20 years imprisonment with hard labour and they now appeal against their convictions. The Attorney General has entered a cross-appeal against, sentence.

The facts of the case are that the deceased was discovered dead behind the steering wheel of a fiat motor vehicle, which was in a ditch by the side of the road. the body was examined and a post morterm carried out by Dr Manda who gave as his evidence that there were no bruises or injuries on the body apart from a mark on the right neck which consisted of a sooty substance, which he said had not be analysed but was not the same as the soot from a car exhaust. The witness also said that he found the same substance on the palms of the deceased's hands. As to the internal examination of the body, the witness said that he found that the lungs were full of vomitous, and , as to the cause of death, the witness said as follows: "It was asphyxia due to vomitous aspiration and married with external findings I attributed that to the very high possibility of strangulation." The witness explained 'asphyxia' as being hunger for air. According to the witness a sample of blood taken at the post-morterm examination showed no milligram percentage of alcohol. In cross examination the witness said that, from the mark on the neck and the hands, he formed an opinion that the deceased must have had something on his neck and was struggling to get it off. He agreed that there could be other causes of asphyxia. When asked what injuries would be expected if the choking had been caused by hitting the neck on the steering wheel of the vehicle, the witness said: "It depends on the force which had been exerted. Sometimes you may find that it is only a bruise.." He confirmed that in this case there was no bruise; there was only the mark of a sooty substance. In re-examination the witness, when asked what was the cause of death, said "I am confident that it was asphyxia."

There was evidence from PW2 that he was a work mate of the deceased's father and that he saw the body of the deceased at 6.30 hours in the morning of the 30th September, 1992 in a Fiat 124 which was parked in a ditch. He said that he recognised the vehicle as belonging to the deceased. The evidence of PW3, a police constable, was that he received a report of the finding of the deceased's body and he went to the scene where he said he observed some bruises on the arms and neck of the deceased. The witness said that he took the body to the hospital and was present the following day when the post-mortem was carried out. When cross-examined this witness said he confirmed that he observed bruises on the arms and neck of the body but he did not observe anything else.

PW7, Simon Sande was employed by the first appellant as a driver, and, on the 29th September, 1992, he was with both appellants on the veranda of the first appellant's house at Green Villa, at Fawaz farm. The appellants were talking in English about beating a thief who was supposed to come in the evening. The witness said that these words were spoken by the first appellant. In the evening of the same day when he knocked off he went to the gate of the premises and found someone drinking beer. There he remained with them drinking until 19.00 hours. He then asked the watchman to escort him to the first appellant's house. On the way to the house, dogs belonging to a brother in-law of the first appellant bit the witness; and after that he was taken to the hospital. On the following day both the appellants came to see him and asked about the incident with the first appellant's brother in-law.

They then asked him to report to them at Green Villar which he did. He was then told he was no longer to be employed by the business known as Kasbah but that he would in future be working directly with the first appellant. On the same day the first appellant sent the witness to Livingstone in order to pick up some vehicles which were to arrive from South Africa. He was given K15,000.00 as ration money whilst he was waiting for the vehicles, and the first appellant purchased the ticket for him to travel to Livingstone. The witness said that he stayed in Livingstone for thirty days. No vehicles arrived, so he came back to Lusaka. In cross-

examination the witness said that at the gate of the premises he had been drinking Kachasu which had made him drunk. He said he took Kachasu although it was illegal because he suffered from asthma and the drink relieved his condition. On further questioning the witness revealed that he was at present in police custody because there had been trouble with his father with whom he had quarrelled in Livingstone. On being asked in what language the appellants were speaking when he heard them discussing the beating of the thief, he said they were speaking in English, which the witness did not speak but which he understood. He said they were speaking simple English which he could understand.

The evidence connecting the deceased with two appellants was given by PW5 and 6 and by the two appellants themselves.

PW5 Sofy Harrison said that on the 28th September, 1992 she was living with her family in the Intercontinental Hotel. At approximately 18.00 hours the first appellant telephoned and asked to speak to the deceased. The witness told the first appellant that the deceased was not there and the first appellant then asked her to tell the deceased that the deal was ready and he should know about the deal. Shortly afterwards, the deceased came to the witness's room. The first appellant rang again at about 21.00 hours and again asked to speak to the deceased who was there at the time and who spoke on the telephone to the first appellant. The witness said she knew nothing about the deal referred to by the first appellant except that she was told that it was a five million Kwacha deal. The witness said that the deal was postponed until the next day. In the evening of 29th September, 1992 the deceased came to the witness's room in order to meet the first appellant. The telephone rang and the deceased spoke to the first appellant on the telephone and postponed the meeting until later in the evening. During the evening two boys came to see the deceased in the witness's hotel room and the witness left the room so that they could talk. As the witness was leaving the room she saw a man named David Chalikulima who wanted to see the deceased. At first the deceased did not want to see the man but then changed his mind and agreed to see him. The witness left the roon, and, when she came back after a few minutes, the deceased and Chalikulima were having an argument. At about 23.00 hours the first appellant telephoned again, and, after speaking to him, the deceased left the room having told the witness that he would be back. That was the last that the witness saw of the deceased.

In cross-examination the witness said that the quarrel between the deceased and Chalikulima was about compact discs and she said that she was not aware that deceased owed Chalikulima four hundred thousand Kwacha. The witness said that when the deceased left the room, he left with the two coloured boys and Chalikulima. The witness also said that earlier on that day the deceased's sister called at the hotel and told the deceased that Chalikulima had called to see him. The deceased had told his sister not to tell Chalikulima where he was. At one pint in cross-examination she said she was not sure of the time when the deceased had left her room, but he had said that he would be back at 23.00 hours. The witness confirmed that the first appellant had only spoken on the telephone and had not seen the deceased in the witness's room that evening.

PW Esama Njovu said that on the 29th of September 1992 he was working as a security guard for the first appellant's business. He arrived at the first appellant's Makeni Premises at about 17.00 hours and he saw both appellants leave in a motor vehicle. They came back and after a short while they left again. He did not see them return. The witness then said that at about 02.00hours he saw the two appellants again and was surprised to find vehicles parked within the compound because they had not gone through the gate which he was guarding. He said that he saw two vehicles, one was the Nissan and the other was a black and white Fiat. The witness said that he started to go to the bakery within the compound and as he was going he saw the door to the house opened by the first appellant. The witness then went back a little and came to stand at a corner of the house near some flower. He saw the first appellant come

out of the house and look both ways. The first appellant went back into the house. He came out again and opened the boot of the Fiat motor vehicle. He was followed by the second appellant and a man called Mike who were carrying something with human legs. He saw the whole body of a human being put into a boot of the vehicle. The first appellant then entered the Fiat vehicle and the others went into the Nissan. The witness then went back to the gate and he heard the sound of the vehicles' engines. The witness said he did not see the vehicles come back, but in the morning the Nissan was parked at the house of the first appellant and there was no sign of the Fiat. The witness went on to say that after a few days he was taken from Makeni to work in Town. Subsequently, the witness gave a statement to the police and the police officers asked him whether he would be able to identify the Fiat motor vehicle. The witness said that he was shown a number of vehicles from which he identified the Fiat which he had seen. In cross-examination, the witness said that he started working for the first appellant at Makeni on the 17th of August 1992 but changed that date, when pressed to the 17th of September. He explained that he made a mistake because he was not educated. The witness said that he did not recognise the third person who was with the appellants. When cross-examined about his return to his place of employment after he had stopped working for the first appellant's company, the witness said that at the time when he went to the shop he was given money by a friend of his, a white lady by the name of Dina, and then he was told that the first appellant wanted to see him in the prison. The witness said that he collected a total of K2,000.00 from the lady called Dina, and that when he saw the first appellant in prison the first appellant said; "why should you suffer, we shall keep you up." He received from the first appellant money, the total amount of which he could not remember, but, when asked to estimate, he said "much money my lord." In cross-examination by Mr Chuula, the witness said that when he saw the Fiat and the Nissan parked near the house he was surprised and did not know how they entered the house because they did not come through the gate he was guarding. When asked why he had hidden himself behind some flowers, he said that it was at night and he was afraid as he saw that his employer was inside during that time with vehicles which did not go through the gate where he was. He confirmed that he hid himself because he did not want anyone to know that he was there.

With regard to the identification of the motor vehicle the witness said that he was led to the vehicle at Force Headquarters by someone by the name of Piliot. The witness said that before the night in question he had never seen the Fiat before. The witness also said that he never knew the deceased before. When confronted with the statement which he had made to the police, which he admitted he had made, the witness said that, before the deceased died, he used to come to Makeni and the vehicle identified used to come to Makeni. In attempting to explain these discrepancies the witness said that he had not understood the question when in cross-examination, the witness had said that he had not seed the deceased before and that he had not identified the picture of the deceased as a person he had seed before. In evidence concerning why the vehicles he saw could have entered the premises without going through the gate he was guarding, the witness said that there was another gate which was not usually used but which could be used and could be opened by the owners of the premises. The witness said that the person who used to open the other gate was called Mike, and he went on to say that the third person whom he had seen in company with the appellants was named Nigger. He said that he had not seen this person before but that he was a security guard at Kasbah and he had since died.

PW8, a detective Inspector, gave evidence that, in August, 1992, he was attached to a combined team of investigations to probe a major fraud at Finance Bank. He said that their investigations disclosed that over ninety million Kwacha was embezzled by Mr Samukange at Finance Bank. Further investigations revealed that Mr. Samukange was working with others. The witness said that the object of the investigations was to locate all the vehicles involved in the fraud as well as Samukange's accomplices. In the course of the investigations the first appellant and the deceased came under suspicion. The deceased had one VW Jetter which belonged to Samukange. The deceased was picked up for questioning, as was the first

appellant. As a result of information given by the deceased a number of vehicles were found at the first appellant's property at Green Villar, Makeni. The deceased was released in order to find more of the motor vehicles, but, before he gave any further information, he was found dead.

PW9, a Detective Inspector, said that he was assigned to take over the investigations of the death of the deceased on the 9th October, 1992. On the same day the witness arrested the two appellants. The witness said that he took statements from both appellants and the statements were introduced in evidence without objection.

There was an inspection of the scene at Green Villa by the court together with two appellants and PW6.

The learned trial judge found that the appellants had a case to answer and put them on their defence. Both appellants elected to give evidence on oath. The first appellant said that on the 29th of September, he asked the second appellant to drive him to the Hotel Intercontinental where he was supposed to meet the deceased. At the hotel he telephoned the deceased from the lobby and was told by Sofy Harrison that the deceased was busy at the moment and was asked to come back in about one and half hours. The appellant then went back to Makeni to see his brother. He stayed for about one hour and returned to the hotel at about 21.00 hours. He telephoned from the lobby again and spoke to the deceased who told him that he was still with some people but after he had finished with them he would come to the first appellant's house at Makeni. When asked why he had wanted to get in touch with the deceased, the first appellant said that the previous day, the deceased had come to the first appellant's shop and asked him to go to the hotel to discuss some important business. The appellant went on to say that, on their way home to Makeni, he and the second appellant stopped for a snack and while they were there they saw a black Jetter car pass by on the road. The appellant recognised the car as one that the deceased used to drive. He assumed that the deceased had already started towards the house, so they followed the car and managed to catch up with it at Makeni filling station. When the tinted window of the car was opened the appellant was surprised to see that the deceased was not in the car but that it was occupied by two coloured men who told the appellant that the deceased would be coming to his house later. The appellants then went to the house in Makeni where they arrived at about 21.20 hours. The car, a Nissan van, was parked at the back of the yard near the factory.

The first appellant then entered the factory and the second appellant went to his house situated just behind the factory. After spending about forty minutes in the factory the first appellant remembered that the second appellant still had some orders in his possession. He went to the flat occupied by the second appellant and found him in the company of one, Mubanga, who lived in the same flat. The time was then about 22.10 hours. The first appellant then left and gave orders to the staff in the factory after which he returned to his house in front of his yard. The following day he was told about the death of the deceased.

The first appellant denied that he and others had carried a body to the boot of the vehicle and said that PW6 had fabricated the story. The appellant further denied that he had anything to do with any fraud at Finance Bank. He said that he had some cars at his premises which were offered to him for sale. He pointed out that the vehicles were not in his name and produced documents, in the form of applications for registration, in the names of various other people. The appellant said that he had purchased the vehicles from one Katongo Kasongo who was one of the people mentioned by the police as a suspect in the Finance Bank fraud.

The second appellant gave evidence which substantially corroborated the evidence of the first appellant. He said that he was acting as a driver for the first appellant which he had done many times before and he said he did not know anything about the arrangements between the

first appellant and the deceased. He denied carrying any body to a Fiat car at the Makeni premises and confirmed that, on his return from Intercontinental Hotel for the second time, he had gone to the flat, which he shared with Mubanga, and had stayed there all night.

DW3 Christopher Mubanga Moono gave evidence that he was Senior Manager at Kasbar Food and Bakery. The witness said that he knew PW6 who, after the arrest of the first appellant, had come on a number of occasions to Kasbah. He said that on one occasion PW6 said that he wanted to see the first appellant in prison because he wanted to tell the first appellant something and to give him something. The witness said that when he took PW6 to the Prison for the first time he first appellant refused to see him, but on the second occasion he agreed to see PW6. He said that, when they visited the first accused, he, PW6, Prison Warders and a man called Ron were present. He said that Ron was a friend of PW6 and used to work as a security guard at Kasbah. The witness said that, in his presence, PW6 had told the first appellant that the police had forced PW6 to say something which he did not want to say. He said that PW6 gave some papers to the first appellant and these were produced in court. It transpired that one of the papers produced was a letter from one police officer to another asking him to find food for PW6.

The learned trial judge, in dealing with the evidence of PW7, said that she would have been persuaded to hold that the witness could have been mistaken as to the content of the conversation in English, but, in support of this evidence, she found that the two appellants on the 30th of September, 1992 had gone to the witness's house and asked him whether he observed anything on 29th of September, 1992. There was also evidence that the witness had been sent on an assignment to Livingstone, given a very comfortable allowance and sent on a fruitless mission for more than one month. The learned trial judge state that this evidence reflected the conduct of worried men trying to keep PW7 from Lusaka.

As to PW8, the learned trial judge accepted that his evidence established that the deceased and the first appellant had been picked up by the police for questioning in connection with the Finance Bank case.

With regard to the argument that, as no finger-print test had been taken by the police there was a presumption that the finger prints of the appellants were not on the vehicle in which the deceased was found, the learned trial judge said that she accepted
the evidence of PW6 as rebutting any such presumption.

The learned trial judge, in her final summing up of the evidence, commented that even their own witness DW3 did not support the evidence of the appellants that, after returning from the hotel for the second time, the second accused remained in the flat with the witness. Finally the learned trial judge said that she had held the evidence of PW7 to have been probably true and established that there was a possibility of conspiracy to beat the deceased as a thief. The learned trial judge also found that the evidence of PW8 established a possibility that the deceased was a target because he was suspected of having informed the police about the involvement of the first appellant in the Finance Bank fraud.

Both counsel put forward grounds of appeal, the first of which was that the learned trial judge misdirected herself in holding that the deceased died as a result of asphyxia due to strangulation, in that the expert witness had said only that there was high possibility of strangulation, and in cross-examination whether he was confident of the cause of death, he replied: " am very confident that it was asphyxia."

Secondly it was argued that evidence of PW6 should not have been accepted having regard to the contradictions in his evidence. It was further argued that as PW6 was a single witness, the learned trial judge should have warned herself that his evidence required corroboration and

generally she would have warned herself of the dangers of mistaken identification.

The third ground of appeal was that the learned trial judge misdirected herself in accepting the evidence of PW7 and by giving as a reason for such acceptance the fact that the two appellants on the following day had asked PW7 what had happened on the previous day. It was argued that the evidence of PW7 was that the appellants had questioned him about having been bitten by a dog belonging to the first appellant's brother in-law, it was further argued that PW7 in his own evidence had said that he left Green Villa at 19.00 hours and left the hospital at 24.00 hours so that he could not have seen anything at 02.00 hours when PW6 said he had seen the carrying of a body.

Fourthly, it was argued that the learned trial judge misdirected herself in finding that there was a possibility that the deceased was a target because he was suspected to have informed the police about the first appellant's involvement in the Finance Bank fraud. It was argued that there was no basis for this conclusion.

A further ground of appeal that the learned trial judge, having accepted that the motor vehicles taken from Green Villa had no connection with the first appellant, misdirected herself by holding that such evidence had not reduced the credibility of PW8.

The next ground of appeal was that the learned trial judge erred in law by not addressing herself to the submission by the defence that the prosecution should have called the two coloured boys and Chalikulima to testify as to how and where they parted with the deceased, and how the boys came to be in possession of the car usually driven by the deceased.

The next ground of appeal was that the learned trial judge, having accepted that there was dereliction of duty by the police, in that they did not lift finger prints from the Fiat car in which the body of the deceased was found, misdirected herself by holding that the acceptance of the evidence by PW6 could offset the dereliction of duty.

The next ground of appeal was that the learned trial judge erred in rejecting the evidence of the defence witness Mubanga, in that there was no comment on his demeanour, and there was no evidence that the witness had been in court to hear any of the prosecution evidence relating to what happened when PW6 saw the first accused in prison. It was further argued that the failure by either counsel to question this witness about the second appellant's presence in the flat on the evening in question should not had been used by the learned trial judge as an argument against veracity of the two appellants.

Finally, it was argued that the learned trial judge misdirected herself by failing to consider the document which was handed by PW6 to DW3, written by police headquarters to a subordinate police officer requiring the latte to look for food to feed PW6. It was pointed out that this was inconsistent with the allegation by PW6 that he had been given very large sums of money which the learned trial judge had referred to as being bribes.

In reply, Mr Kukelabai argued that the learned trial judge was entitled to accept the assertion of the expert witness that death had been due to strangulation. With regard to PW6's evidence, Mr Mukelabai argued that the learned trial judge had dealt with this properly and had found that she believed PW6's evidence because it had not been shaken in cross examination. It was argued that, having accepted the evidence of PW6, the learned trial judge properly disbelieved the evidence of the appellants.

With regard to the failure by the learned trial judge to warn herself of the danger of mistaken identification Mr Mukelabai conceded that there had been such a failure bur argued that there

was sufficient evidence to support the conviction in any event and that the proviso to section 15 (1) of the Supreme Court Act should be applied.

With regard to the failure by the police to test for finger prints, Mr Mukelabai argued that the learned trial judge had dealt with this situation properly by saing that she accepted the evidence of PW6 as rebutting any presumption in favour of the appellants.

In reply Mr Chuula argued that to say that PW6 had not been shaken in cross examination completely ifnored the fact that cross examination had proved the witness to be unreliable as to whether had seen the Fiat car or the deceased before the night in question.

We will deal with the arguments on appeal in the order in which they were put before us. It is apparent that the learned trial judge misdirected herself on a question of fact when she said that PW1, the expert witness, had asserted that death was due to strangulation more than once in his evidence. Mr Chuula was correct in pointing out that on one occasion the witness had said that there was a high possibility of strangulation, on another he had said there was a possibility that the death in this case had been caused by something other than strangulation and in re examination, when asked what the cause of death, he had said: "I am very confident that it was asphyxia." The doctor had said in explaining why he though that there had been strangulation that the mark of the sooty substance was a straight mark that bore the mark of strangulation. It was quite clear from the doctor's evidence that he found no bruises or other injuries on the neck of the deceased. He did say in the course of his evidence that the black sooty mark suggested to him that there had been something around the deceased's neck which was strangling him. It was not clear why the witness should have thought that the presence of sooty marks on the palms of the hands of the deceased was an indication that the deceased was trying to remove whatever was around his neck. In such circumstances, one would have expected that the sooty substance would not be on the palms of the hands, but on the fingers. From a common sense point of view, a layman would expect that to strangle a person with sufficient force to cut off the flow of air through the wind pipe would be bound to cause bruising or some other injury. The author of Glaister's Medical Jurisprudence and Toxicology (1966 Edition) says on page 173 that the injuries to be found in homicidal strangulation are usually more extensive than in accidental homicidal cases, due to the fact that an assailant frequently uses more force than is necessary to cause the death of his victim. The author says "It is in such cases that extensive deep seated injury is likely to be found."

The witness in this case did not explain how strangulation could have occurred without injury of any kind whatsoever. The learned trial judge in arriving at her decision to accept the evidence of the medical witness did not give any reasons for accepting that there had been strangulation despite the absence of any signs of injury, but said that she accepted the witness's assertion because he had reached a firm conclusion and he had asserted this more than once in his evidence. In fact as was argued for the appellants, the witness in his evidence in chief said that there was a very high possibility of strangulation, in cross examination he said that asphyxia could be caused by other circumstance other than strangulation, and in re examination he said he was very confident that the cause of death was asphyxia.

When dealing with the evidence of an expert witness a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion bases on the findings of the expert witness. As we said in *Chuba v the People* (1), the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be used as to guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it. The same thing applies to the opinion of other expert witnesses. In this case the evidence before the court was that there were no bruises or other injuries. The witness did not explain how the sooty mark without injury could be evidence of strangulation, and there was therefore insufficient evidence for the learned trial judge to

accept what the witness described as a "very high possibility" as a fact. There was also no analysis of the vomitous matter, which might have given an indication of the cause of the vomiting. In the circumstances the evidence does not support the finding by the learned trial judge as to the cause of death, and the first ground of appeal would succeed.

The matter does not end there. If it is true that the appellants were involved in the carrying of the dead body of the deceased from the flat of the second appellant to the boot of the Fiat car, the circumstantial evidence suggests that the appellants were responsible for whatever caused the deceased to die of asphyxia as a result of swallowing his own vomit. It is necessary therefore, to examine the rest of the evidence linking the appellants with the deceased.

The evidence of PW6 is the only eye witness evidence that the appellants took part in the carrying of the body of the deceased. The discrepancies in this witness's evidence were firstly that he said that he made a mistake as to the date when he was first employed by the first appellant's company. In view of the fact that he was employed a year previously this was a question of the reliability of his memory, and the discrepancy in this evidence cannot possibly affect the reliability of this witness as a witness of truth. The other two discrepancies were more important. When he first gave his evidence he said that he had not seen the fiat motor vehicle, into the boot of which he saw the body put by the appellants, before the night in question. He also said that until he saw a photograph of the deceased, he had never seen the deceased before. In cross examination he admitted that his earlier evidence about these matters was untrue and that he had in fact seen both the Fiat vehicle and the deceased on a number of occasions at Green Villa, Makeni. The importance of his evidence concerning the vehicle was that, if he had not seen the vehicle before, his identification of it amongst other vehicles at the police station corroborated his evidence that he saw the body being put in the boot of the same vehicle. However, in view of the fact that he had seen the deceased in the same vehicle on many occasions before, it was easy for him to identify the vehicle at the police station and such identification was no support of the truth of his story. We have to consider whether the learned trial judge was justified that this important discrepancy did not affect the veracity of the witness in his evidence which incriminated the two appellants. We would not agree that the witness was not shaken in cross examination. We appreciate that the learned trial judge meant by this that the witness was not shaken in his evidence about the participation in the disposal of the body by the two appellants, but cross examination cannot always shake the evidence of untruthful witnesses in every respect, it is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.

With regard to the identification of the appellants by this witness, Mr Mukelabai conceded that the learned trial judge misdirected herself in this respect. In dealing with the visibility at the scene the learned trial judge observed that the place was well lit by light which focused on the area, and she concluded that the witness could not have been mistaken as to his observations of the activities of the first and second appellants. However, the learned trial judge did not refer to the ability of the witness to observe the features of the people concerned nor did she warn herself of the danger of mistaken identification even of persons known to the witness. This was a case of single witness identification and, as this court has said before, in such cases corroboration or something more is required to support an identification. In this case the fact that the first appellant was expecting to meet the deceased at Green Villa that night might be regarded as something more to support the identification of the first appellant as being in company of the deceased, but could hardly support the evidence that the two appellants were engage in putting a body into the boot of a Fiat car. There was evidence that a number of people occupied the premises at Green Villa, the brother in-law of the first appellant, for instance, was one such person, and there was no evidence to suggest that the first and second appellants were the only persons residing or working at the premises who could have taken part in the activities allegedly observed by PW6.

With regard to PW7, we agree that the learned trial judge misdirected herself when said she was persuaded to accept that PW7 had not been mistaken as to a conversation between the two appellants by the fact that the appellants went to PW7's house on the 30th of September, 1992 and asked him whether he observed anything on the 29th September, 1992. The evidence on PW7 in this respect was that on the 30th September 1992 the two appellants had come to his house and asked him what had happened the previous day with Malimu; Malimu was the brother in-law of the first appellant whose dog had bitten the witness on the evening before. the acceptance of this visit by the appellants as supporting the evidence that the appellants had on the 29th of September, 1992 discussed the beating of a thief that evening was therefore a misdirection. Furthermore, in regard to this witness the learned trial judge found that he was probably speaking the truth. This is not a proper test of a witness for the prosecution. The evidence of a witness must be accepted beyond reasonable doubt.

With regard to the fourth ground of appeal, this concerned the finding by the learned trial judge that there was a possibility that the deceased was a target because he was suspected to have informed the police about the first appellant's involvement in the Finance Bank fraud. It was argued that there was no basis for this conclusion. We have considered the evidence of PW8 and we note that this police officer who was investigating the Finance Bank fraud said that the deceased was the first suspect to be picked up and that as a result of what he told them, the police picked up the first appellant. We do not accept therefore that there was no basis for the conclusion of the learned trial judge.

This ground of appeal cannot succeed.

The next ground of appeal was that, having accepted that the motor vehicles taken from Green Villa had no connection with the first appellant, the learned trial judge misdirected herself by holding that such evidence had not reduced the credibility of PW8. the credibility of PW8. The credibility of PW8 was not in question. It was not suggested that there were no vehicles found in the possession of the first appellant. The only evidence in this respect given by PW8 was that some vehicles had been found in the possession of the first appellant at Green Villa. Whether or not these vehicles were involved in the Finance Bank fraud did not in any way affect the credibility of PW8. His evidence was solely that both the deceased and the first appellant were suspects.

This ground of appeal cannot succeed.

The next ground of appeal related to the proposition that the prosecution should have called the two coloured boys and Chalikuma to testify as to how and where they parted with the deceased and how they two boys came to be in possession of the car usually driven by the deceased. In the circumstances of this case, there was no duty on the police to call witnesses who did not support the prosecution case. There are circumstances where, the police being the only people who are in a position to obtain evidence from certain by-standers, it is the duty of the police to obtain such evidence and make it available to the court and the defence. There is, however, no property in a witness and the two coloured boys and Mr Chalikulima could have been interviewed by defence lawyers and, if necessary, called by the defence. *Attorney General v Trollope* (2). As the names of these witnesses were not on the list of the witnesses which the prosecution proposed to call, and as there was no evidence that they would be favourable to the defence, there was no duty on the prosecution to offer the witness or cross examination by defence counsel. This ground of appeal cannot succeed.

The ground of appeal related to the failure by the police to take finger prints. In the case of *Banda (K) v the People* (3), we said at p.175 as follows: "Again , where an article has not been tested in circumstances when it is should have been, and an expert (whom the court should

call if the prosecution has not done so) tells the court that it is one on which he would expect identification finger prints to be left by anyone handling the article without gloves, the court must proceed as if the expert had testified that there were identification prints on the article and that they did not match these of the accused. The further assumption follows that it is unlikely that the accused handled the article, the degree of unlikelihood being determined by the evidence of the expert as to the quality of the surface, but no account may be taken of the possibility of wiping or smudging since evidence thereof could and should have been obtained". In that case, this court took judicial notice of the fact that motor vehicles have many surfaces on which finger prints are likely to be left by persons not wearing gloves. We also commented in that case, at page 174: "In obvious cases - for instance, the man seen emerging from a stolen motor vehicle and thereupon apprehended, or the man caught in the very act of sexual assault- where there are independent eye-witnesses whose evidence can reasonably be regarded as being very strong, it cannot seriously be argued that the failure to take finger prints or to have the complainant medically examined is a dereliction of duty; but usually independent eye-witness evidence of such weight will not exist, and it is then most certainly the duty of the police to search for evidence which will confirm or refute the allegation concerning the identity of the culprit, or the nature of an assault, or an allegation of lack of consent, or an alibi." In dealing with the displacement of the presumption arising in that case, this court said that the greater the probative value of the presumption the stronger will be the evidence necessary to displace it. In this case, there was no evidence that the appellants were wearing gloves, nor was it necessary, the object being a motor vehicles, for questions to be asked as to whether the surface would be likely to show finger prints in accordance with the principle in the case of *Kunda v Anor v The People*(4). Therefore there must be a presumption that their finger prints were not found on the motor vehicle and that, therefore, neither of them drove or handled the vehicle in any way. This is an identification case in which the witness PW6 has been challenged because of the discrepancies in his evidence and about whose evidence no warning as to the possibility of mistaken identification was given by the learned trial judge. The proper course for the trial court to have taken was to take into account the presumption that the appellants did not touch the vehicle when assessing whether or not PW6 was a truthful witness. The learned trial judge in resolving this issue said:. "But in this case there is evidence which I have accepted that the Fiat in whose boot PW6 saw the second accused person and another placing the body on the 30th of September, 1992 was the same which was recognised later at Central Police Station by PW6 and that the same Fiat vehicle was the one recognised by PW2 as the one belonging to the deceased's mother. So I am satisfied that this presumption cannot hold." As we commented earlier, the recognition of the motor vehicle was the subject of one of the discrepancies brought out in cross examination by defence counsel. The witness, contrary to his earlier assertion, had seen the deceased in the motor vehicle a number of times on previous occasions at Green Villa. After he was shown a photograph of the deceased by the police his identification of the Fiat motor vehicle usually driven by the deceased did not support his evidence incriminating the appellants. His identification of the vehicle could have been because he was fully aware from his previous knowledge that that was the motor vehicle which was usually driven by the deceased. The reasons given by the learned trial judge for accepting the evidence of PW6 as rebutting the presumption as to finger prints in favour of the appellants were therefore invalid.

The following ground of appeal was that the learned trial judge erred in rejecting the evidence of defence witness Mubanga when he said that PW6 had asked the first appellant for money and had been refused. We have earlier in this judgment set out the learned trial judge's words used when rejecting the evidence on this witness. There was o evidence that this witness was present in court when PW6 and PW1 gave evidence of what transpired between them when they met at the prison. The fact that the witness Mubanga had been in court on three or four occasions was no ground for finding that he had rehearsed his evidence and was therefore unreliable. The learned trial judge gave no detailed assessment of this witness demeanour in the witness box and gave no valid reason why the evidence should not be accepted. In commenting on this aspect of this case the learned trial judge in her judgment said: "Initially

PW6 was reluctant to give evidence on that, but in cross examination he testified that he was bribed by the accused's family on more than one occasion for him to keep silent." Having regard to the evidence of DW3, that is to say that PW6 was demanding money from the first appellant to persuade him not to say what the police were trying to force him to say, it is not surprising that PW6 was reluctant to give evidence about. PW6 himself said in his evidence that he was given money at the shop by a friend of his, a white lady by the name of Dina. He said that the amount he received was K2,000.00. He did not refer to this as a bribe or give evidence suggesting that he was given the money for an improper reason. Later in his evidence he said he saw the appellant in prison and it was after this that he referred to receiving much money. The evidence relating to this money, which PW6 said was given to him, was considered to be of great importance by the learned trial judge. In her judgment she said that because of the payment of this money, which she regarded as a bribe, "I have therefore accepted the evidence of PW6." The rejection of the evidence of DW3 for the reasons given by the learned trial judge was, therefore, a misdirection which affected the credibility of PW6.

We agree with counsel for the appellants that the comment of the learned trial judge that, because this witness, DW3, was not asked to corroborate the evidence of the second appellant that he remained in the flat, there was cause to doubt the veracity of the appellants, was not justified. If the appellants' counsel saw fit not to ask such questions the witness was still available for cross examination on this issue by counsel for the State. The fact that neither counsel asked questions about this aspect of the evidence could not be used as a reason for not accepting the evidence of the appellants, the learned trial judge's comment was a misdirection.

The final ground of appeal was that the learned trial judge had failed to consider the significance of the documents shown by PW6 to the first appellant and DW3. One of these documents was a letter, written from police headquarters to a subordinate police officer, requiring him to look for food for PW6. It was suggested by the counsel that if PW6 had received very large sums of money from the first appellant and his family there would have been not need for him to go to the police asking for food. The letter in question was written before the witness saw the first appellant in prison and his asking for food from the police does not either support or contradict the evidence as to whether PW6 asked for or was given or refused money by the first appellant. This ground of appeal cannot succeed.

As we have indicated there were a number of misdirections on the facts and as to the law in the judgment of the learned trial judge. We have to consider whether, despite these misdirections, we can apply the proviso to section 15(1) of the Supreme Court Act on the grounds to any reasonable court properly instructed must have convicted in any event, or conversely, that any such court could not have acquitted. (See *Phiri (E) and Ors v The People* (5) at pp 108, 110 & 134)

The misdirection of the court's failure to warn itself of the danger of mistaken identification, which was conceded for the State, can to a certain extent be off-set by the fact that the single witness identification was corroborated, as to the identify of the first appellant, by the fact that both appellants confirmed that they had received a message that the deceased was expected to come to see the first appellant at Green Villa that night. This does not of course answer the argument that the learned trial judge failed to warn herself that the identification of the appellants might be mistaken and instead concerned hereself only with the question of whether or not the witness PW6 would have been able to see the actions of the persons who were putting a body in the motor vehicle, but there was evidence which could have been accepted by any reasonable court that there was no mistaken identification in this case. However, as this court has constantly pointed out in identification cases, the question of mistaken identity does not arise unless the witness making identification is an honest witness, the question of the honesty of PW6 must be considered hereafter.

The other misdirections relate to the acceptance of the truthfulness of the witness PW6 and 7 whose evidence was the only evidence to connect the appellants with the death of the deceased. With regard to PW7 the learned trial judge accepted that he might have been mistaken, because of his lack of knowledge of English, about the discussion between the appellants concerning their intention to beat a thief. The learned trial judge accepted that the reference to a thief must have been a reference to the deceased and that the witness must have understood correctly because the following day both appellants arrived at his house and asked the witness whether he had observed anything on the 29th of September, 1992. As we have said, the witness's evidence was that the two appellants had asked him what had happened the previous day in connection with Malimu, the brother in law of the first appellant, whose dog had bitten the witness on the evening before. The learned trial judge also said that she accepted the evidence of PW7 as having not been mistaken because he was sent on a fruitless journey to Livingstone. We agree that this latter evidence creates some suspicion about the motives of the appellants, but in view of the misdirections as to fact by the learned trial judge, we agree with her comment that the most that could be said about the evidence of this witness was that it was probably true, and this is not the proper test to justify the acceptance of a witness's evidence in a criminal trial. Apart from the mistaken reason given by the learned trial judge there was no other reason to assume that, even if the witness understood what was being said, the reference to the beating of a thief referred to beating the deceased. There was no evidence to suggest that the appellants thought that the deceased was a thief. In considering, therefore, whether despite the other misdirections by the learned trial judge there was evidence upon which this court could apply the proviso, the evidence of PW7 so far as it tended to incriminate the appellants in the mind of the learned trial judge, must be discounted.

We are left therefore, with the evidence of PW6. The misdirection relating to the acceptance of the evidence of this witness must be taken into account when considering whether his evidence was so strong that the proviso should be applied. In this connection this court is bound to consider the factors taken into account by the learned trial judge in assessing the credibility of the witness.

Firstly, we must consider the result of the dereliction of duty by the police in failing to lift fingerprints. The presumption that arises is that the two appellants did not touch or drive the motor vehicle in which the body of the deceased was found. This presumption must be borne in mind when assessing the credibility of PW6. The learned trial judge accepted that PW6 was telling the truth about the actions of the appellants because the vehicle in which the witness said the body was placed was the same as the one which the witness recognised later at Central Police Station. As we have pointed our, if this was the first time that PW6 had seen the motor vehicle his identification of it could have supported his evidence which incriminated the appellants. However, in cross examination the witness was shown not to have told the truth about his having seen the vehicle for the first time that night. This reason given by the learned trial judge for accepting the evidence of the witness was therefore a wrong one. We do not agree with the learned trial judge that because the witness adhered to his story of having seen the appellants engaged in putting the body in the Fiat car, the evidence of this witness was unshaken. The cross examination showed that this witness was not a witness of truth, and this fact, together with the presumption that arose out of the failure to lift fingerprints, raises a doubt as to whether the evidence of this witness can be accepted to support a conviction. The question of the credibility of this witness must be approached in the light of the fact that there appears to be no reason why the witness should not have been telling the truth. In this connection, having regard to the misdirection by the learned trial judge as to the acceptance of the evidence of DW3, the evidence of the first appellant and DW3 must be considered as possibly being true when they said that PW6 asked the first appellant for money, although the refusal by the first appellant to give the witness any money does not appear to be a very strong reason for the witness to tell lies about what happened on the night in question. Further

in support of the evidence of PW6 is the fact that, according to the evidence of both appellants, the deceased was expected to meet the first appellant at Green Villa that night. However, this court has to consider whether the witness can be regarded as having been so reliable in his evidence that any court must have convicted. We are concerned about the absence of a strong reason for the witness to invent a story against the two appellants, but, having regard to the fact that the witness was shown not be telling the truth in one most important aspect of his evidence, there must be a doubt as to his credibility.

This is a case in which a great deal of suspicion attaches to the appellants, but there is a presumption in their favour concerning the fingerprints and a doubt as to the credibility of the only eye witness, PW6, and we have no alternative but to resolve that doubt in favour of the appellants.

The appeals are allowed. The convictions are quashed and the sentences set aside.
Appeal allowed
