IN THE SUPREME COURT OF ZAMBIA **Appeal No. 77a, b/2000**

HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

B E T W E E N:

BERNARD MWANZA	1st Appellant
ACKIM NYANGU	2nd Appellant
VS	
THE PEOPLE	Respondent

Coram: Sakala, CJ, Mambilima and Chitengi, JJS
on 4th December, 2002 and 1st June, 2004

For the Appellants : Mr. D. B. Mupeta - Legal Aid Counsel

For the Respondent : Mr. C.R.F. Mchenga - Chief State Advocate

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JUDGMENT

Chitengi, JS, delivered the judgment of the court

Cases referred to: -

1. ***John Mkandawire & Others Vs The People 1978 ZR 46***
2. ***Zulu & Others Vs The People 1978 ZR 227***
3. ***R V Fanwell 1959(1) R & N81***
4. ***Maseka Vs The People 1972 ZR 9***
5. ***Chate Vs The People 1975 ZR 233***
6. ***Chimbini Vs The People 1973 ZR 191***
7. ***Bwalya Vs The People 1975 ZR 125***

We wish to apologize for the delay in delivering this Judgment. The year 2003 had been unusually busy for this court.

The two Appellants, who were originally charged with three others who were acquitted, were convicted of Aggravated Robbery contrary to ***Section 294(1) of the Penal Code Cap 87 of the Laws of Zambia*** instead of the original charge of Aggravated Robbery contrary to ***Section 294(2)*** which carries a death sentence. The particulars of the offence, in so far as they relate to the two Appellants, were that Bernard Mwanza and Ackim Nyangu, on the 7th day of February 1997 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together and whilst armed with an AK 47 Rifle, did rob Lubinda Ilukena of one Video Recorder, one Television set and one three-in-one musical system all valued at K2 Million the property of So-Jae-Ok and at or immediately before or immediately after the time of such robbery did threaten to use actual violence to the said Lubinda Ilukena in order to retain the said property or prevent resistance to its being stolen.

On the evidence that was before the learned trial Judge, the fact that the robbery was committed was not in dispute and indeed the learned trial Judge so found.

As the learned trial Judge quite properly observed, the critical issue was the identity of the persons who committed this offence. It is, therefore, necessary to recount the evidence that tended to link the Appellants to this offence.

Mr. Lubinda Ilukena, (PW1), who was robbed of the property, gave evidence that the robbery took place at 09:30 hours. He said he and his workmate were confronted by the second Appellant, who was in para-

military uniform and another man as they were going out of the house through the kitchen door and were forced back into the house. After the second Appellant and the other man had attempted, but failed, to open the master bedroom door they locked up PW1 and his workmate in the pantry. PW1 and his workmate came out later only to find the intruders gone and the property particularized in the information and a pair of shoes missing. PW1 could not remember how long the intruders were in the house during the robbery. PW1 was frightened because the second Appellant had a gun. However, PW1 was able to identify the second Appellant because he was with the second Appellant when the latter forced him back into the house, when he, (PW1), was going out of the house through the kitchen door. Before the robbery was staged the second Appellant and the other man spoke with PW1 and his workmate pretending that they were Police Officers who had come to search the house.

On 10th May, 1997, PW1 identified the second Appellant at an identification parade at Chelston Police Station conducted by S/Insp. James Muzyamba (PW3).

The first Appellant was not identified at the scene of the robbery. The evidence that tended to link the first Appellant was that given by Mr. Kingsley Mubanga, (PW6) and Mr. David Chama, (PW7).

According to PW6, while he was trading his wares along Freedom way on 7th February, 1997 around 14:00 hours, he saw a friend of his called Zambia, who called him to a parked white Toyota Corona car. When PW6 went to the car, he found three people in the car. Zambia introduced PW6 to the first Appellant and another person whom Zambia said was his cousin. In the car was also one Reuben. The first Appellant was in the driver's seat. After the introductions, Reuben said his uncle

who runs bars and minibuses had sent him to sell the VCR and the radio cassette which were in the car in order to raise money to buy spares for one of the mini buses which had broken down. PW6 bought the VCR and gave the money to Reuben. On 15th February, 1997 the Police went to PW6 with the first Appellant and the first Appellant told the Police that PW6 was the person who bought the VCR. Thereafter, they went to his house with the Police and recovered the VCR. The evidence of PW7 was that on information he got from Stephen Mwanza (since acquitted) apprehended the first Appellant from a place he did not name. The first Appellant later led him to PW6 where he recovered the VCR.

The first Appellant gave an explanation to the effect that on 7th February, 1997, his daughter fell ill and was referred to the UTH by Chelston Clinic. He borrowed a motor vehicle from his brother Brian Mwanza (since acquitted) in order to take his daughter to the clinic. Brian Mwanza was operating the motor vehicle, a Toyota Corolla, as a pirate Taxi on behalf of somebody else. After his daughter was attended to, he took her back home. On his way to Ng'ombe Compound, where Brian Mwanza, lived he found two persons at Chainama Bus Stop carrying two big boxes. These people booked him to take them to the town center, which he did and he charged them K5,000. The property these people had was a Television set, a VCR and a stereo system. When they reached town, the people removed the items from the car and put them in a makeshift shop. After that he left and took the car to Brian Mwanza at 15:00 hours and thereafter went to the farm where he was staying. On 14th February, he was apprehended at Ng'ombe Police Post where he had gone to inquire about Brian Mwanza who had been apprehended. He was told of investigations into aggravated robbery involving a radio, television set and video. He then told the Police about two people who hired him and the place he took them to and the property they had. Thereafter, the Police asked him to lead them to the place where the

items were taken. On 15th February, he led the Police to PW6 in town. PW6 in turn led the Police to his house where the VCR was recovered.

In his evidence in defence, Brian Mwanza agreed lending the car to his brother, the first Appellant, to take his sick daughter to the hospital. The motor vehicle belonged to PW5. Brian Mwanza also testified that when the first Appellant brought the car back he gave him K5,000 which he said was from a customer.

The second Appellant's evidence was that on 7th February, 1997, he was at his shop from 06:00 hours to 22:00 hours. On 2nd May he was apprehended at Kamanga compound and kept in Police cells until 10th May 1997 when he was taken to the back of the Police Station and put on an identification parade. A black man then came and touched him on the shoulder. According to this Appellant, he was identified because the black man who identified him had earlier seen him when the black man came to the Police Station with a white man.

On this evidence learned trial Judge convicted both Appellants of Aggravated Robbery.

In respect of the first Appellant, the learned trial Judge disbelieved his explanation and found that this Appellant drove to PW6's selling point and sold the stolen VCR to PW6. According to the learned trial Judge, that was the only explanation why the first Appellant was positively identified by PW6 and, seven days later, was able to lead the Police to PW6. Further, the learned trial Judge found that the evidence of recent possession established that the first Appellant was one of the robbers in this case. The learned trial Judge found that the first Appellant was in the possession of the stolen VCR within hours of the robbery, a period

where there is no opportunity for the property to change hands to an innocent buyer.

With regard to the second Appellant, the learned trial Judge found the evidence of identity at the scene of the robbery and at the identification parade satisfactory. The learned trial Judge found that the robbery took place in broad daylight at about 09:30 hours and PW1 had ample time to observe the robbers and talk to them. The learned trial Judge rejected the second Appellant's complaints that PW1 identified him because PW1 saw him before the parade.

The Appellants now appeal to this court against their convictions and sentences.

The first Appellant filed heads of argument with one ground of appeal. He also augmented his written submissions with oral submissions.

As far as we are able to glean from the written heads of argument the ground of appeal appears to be that the learned trial Judge misdirected himself in fact when he found that the first Appellant sold the stolen VCR to PW6.

In arguing the ground of appeal, the first Appellant submitted that the evidence of PW6 and PW7 did not even link him to the transaction of sale of the VCR. He submitted that PW6 did not even positively identify him as the person who sold him the VCR as the learned trial Judge found. He said PW6 only said he (first Appellant) was in the driver's seat. He added that Reuben did the sale of the VCR. It was the first Appellant's submission that he demonstrated his innocence. He submitted that he is not a taxi driver who took other people apart from the two persons who booked him and, therefore, could not forget the place where he dropped

the two persons who hired him. He submitted that he led the Police to PW6 because that is where he left the two persons who hired him and not because he sold the VCR to PW6.
It was the first Appellant's submission that Reuben who sold the VCR got the money and not himself. He contended that if it was him who sold the VCR he would have received the money.

Finally, the first Appellant submitted that the fact that he did not know the owner of the car he drove cannot be the basis for convicting him. He contended that the car in question was not identified at the scene and was not exhibited in this case.

Mr. Mupeta, learned Counsel for the second Appellant, submitted that the second Appellant was both in law and fact improperly convicted. Mr. Mupeta submitted that the period the robbery took place was not stated. Mr. Mupeta submitted that PW1 said that one of the ways through which he identified the second Appellant was the manner he spoke but, neither the prosecution nor the court discussed the manner in which the second Appellant spoke as a matter of identity.

It was Mr. Mupeta's submission that three months after the robbery the second Appellant found himself in the cells but, there is no explanation from the arresting officer (PW7) as to how the second Appellant found himself in the cells. Mr. Mupeta then observed that the next thing to hear was an identification parade at which PW1 identified the second Appellant.

Mr. Mupeta then referred us to the cases of ***John Mkandawire Vs The People***[1] and ***Zulu and Others Vs The People***[2] on identification by single witness and submitted that the court must take great caution when relying on the identification of a single witness because of the

danger of an honest mistake. It was Mr. Mupeta's submission that in this case the second Appellant was a total stranger to, and not known by, PW1 before the robbery. Mr. Mupeta also pointed out that in this case there was a robbery situation causing fear.

Mr. Mupeta then submitted that while the second Appellant was alleged to have been in paramilitary uniform at the material time, he was not in paramilitary uniform at the identification parade. Mupeta pointed out that PW1 did not even give description of the second Appellant to the Police.

Mr. Mupeta then attacked the fairness of the identification parade. He pointed out that while the second Appellant was at Chelston Police, a white man and a black man visited the Police Station more than once. Further, Mr. Mupeta pointed out that whereas there were four robbery suspects at the Police Station, PW3 only picked the second Appellant and put him on the identification parade when the robbery was staged by at least two people who entered the house. It was Mr. Mupeta's submission that a fair identification Parade should at least have included two suspects. According to Mr. Mupeta, this lapse was a serious dereliction of duty by the Police, confirming the defence given by the second Appellant that when the Complainant, a white man, and PW1, a black man, were invited to the identification parade, the black man touched his shoulder. According to Mr. Mupeta, the parade was fixed by the Police in order to use the second Appellant as a scapegoat.

Finally, Mr. Mupeta submitted that the danger of an honest mistake was not excluded and the second Appellant should be given the benefit of the doubt. He said it as better to acquit ten guilty persons than to convict one innocent person.

In reply Mr. Mchenga supported the convictions of both Appellants. Mr. Mchenga submitted that it is common cause that the first Appellant drove the motor vehicle where the stolen property was found. It was Mr. Mchenga's submission that if the first Appellant was only a driver he would not be introduced as the evidence of PW6 shows. Further, Mr. Mchenga submitted that the explanation given by the first Appellant was not reasonably true. On the first Appellant, Mr. Mchenga ended by submitting that the fact that the money was given to somebody else does not change anything.

With regard to the second Appellant, Mr. Mchenga submitted that the robbery took place during the day and there was ample time for PW1 to identify the second Appellant. Finally, Mr. Mchenga submitted that both appeals have no merit and should be dismissed.

We have carefully considered the evidence, the submissions by the first Appellant, Mr. Mupeta, learned counsel for the second Appellant and Mr. Mchenga the Chief State Advocate and we have also considered the Judgment of the learned trial Judge.

We shall deal with the Appellants seriatim.

As we understand the learned trial Judge's judgment, he convicted the first Appellant because the first Appellant's explanation as to how he came to drive the car whose owner and registration number he did not know and in which the stolen goods were taken to PW6's selling point was untrue; and the possession of the VCR by the first Appellant within hours of the robbery pointed to the conclusion that the first Appellant was involved in the robbery.

In our view, how the first Appellant came to drive a motor vehicle whose owner and registration number he did not know was not the critical issue. It is common for one to borrow a car from a friend and drive it without knowing the cars registration number. In any case, as the first Appellant rightly submitted, the car in question was never seen at the scene of the crime.

Therefore, as far as the first Appellant's involvement in the robbery was concerned, the critical issue was the possession of the stolen property. It was common cause that the first Appellant drove the property stolen during robbery to PW6's selling point and that with the first Appellant in the car two other persons.

The issue that the learned trial Judge was to resolve, therefore, was whether on the evidence the only reasonable possible explanation as to how the first Appellant came to be in possession of the property was that he stole them during the robbery at PW2's house.

On the facts that were proved before the learned trial Judge, we must interfere with the learned trial Judge's finding that the first Appellant was one of the robbers. It seems to us that the learned trial Judge misapprehended the proper approach where the Accused Person is proved to have been in possession of property recently stolen. As it was stated in ***R V Fanwell***[3], which the Court of Appeal quoted with approval in ***Maseka Vs The People***[4], where the Accused is found in possession of property recently stolen the inference that he was the thief or broke and stole may, but not must, be drawn. However, since guilt is a matter of inference, the inference may only be drawn in the absence of any reasonably possible explanation by the Accused as to how he came about the property and the inference is the only reasonably possible explanation. And, as we said in ***Maseka Vs The People***[4], if there is an

explanation which might reasonably be true it entitles the Accused to an acquittal even if the court does not believe it; the Accused is not required to satisfy the Court as to his innocence, but simply to raise a reasonable doubt as to his guilt.

The facts of this case, in so far as they relate to the first Appellant, are clear. The first Appellant and two others drove the stolen property to PW6's selling place. A person called Zambia then called PW6 to the car where one Reuben told PW6 that he was selling the property because his uncle who runs bars and minibuses had sent him to sell the property to raise money to buy spare parts for a minibus which had broken down. The first Appellant who was sitting in the driver's seat took no part in the sale transaction. Reuben took the money from PW6.

On this evidence, it cannot be said, as the learned trial Judge found, that it was the first Appellant who sold the VCR to PW1. As the first Appellant submitted, it is clear to us that the learned trial Judge misdirected himself on the facts relating to the sale of the VCR. The learned trial Judge also placed heavy reliance on the fact that the first Appellant led the Police to PW6. In the circumstances of this case, we find that the fact that the first Appellant knew where to find PW6 to whom Reuben sold the VCR is of consequence.

On the evidence, we also find that the learned trial Judge in assessing the evidence in order to find whether the first Appellant's explanation was one which might reasonably be true ignored some relevant evidence which was on record. Although PW7 said he picked the first Appellant, the truth of the matter is that the first Appellant went to Ng'ombe Police to inquire why his brother Stephen Mwanza, since acquitted, was being held. When the first Appellant was told of investigations into aggravated robbery involving a radio, television set and video he revealed the two

people who booked him and the place he took these people to and the property they had. Although the learned trial Judge looked at this evidence in dim light, there was no credible evidence from the prosecution as to how the first Appellant came to be apprehended. PW7 merely said I picked Bernard Mwanza without saying where he picked him.

The evidence by the first Appellant and his brother Brian Mwanza, since acquitted, that the first Appellant borrowed a car from Brian Mwanza, in order to take his daughter to hospital and that in fact the first Appellant brought to Brian Mwanza K5,000.00 which the first Appellant charged the people who hired him was not considered. In cases where an inference of guilt is to be drawn the court should not only concern itself with what the Accused says to court but also with what the Accused said to the Police and other witnesses etc. In the instant case, we find no basis upon which the learned trial Judge could ignore the evidence of Brian Mwanza when considering whether the first Appellant was involved in the robbery.

Taking and considering all the evidence we have referred to, it cannot be said that the only reasonably possible explanation as to how the first Appellant was found with the property recently stolen was that he stole it during the robbery under inquiry. This inference is not irresistible. The first Appellant's explanation of being hired by the two people, one of whom actually sold the VCR to PW6, was also one which might reasonably be true. We do not accept Mr. Mchenga's submissions that the first Appellant by simply being introduced, if he was introduced at all, makes him party to the robbery. In any case, the first Appellant was introduced by the man called Zambia who was not one of those in the car or one of the Accused jointly charged with the first Appellant.

For these reasons we allow the first Appellant's appeal. We quash his conviction and sentence and direct that he now be set at liberty.

We now deal with the second Appellant.

In convicting the second Appellant, the learned trial Judge said he accepted the evidence of PW1 because the robbery took place in broad day light; that PW1 had ample opportunity to observe the robbers and had the opportunity to talk to them; that the second Appellant was dressed in para military uniform and carrying a gun; that PW1 observed the manner the second Appellant spoke; that, therefore, the second Appellant was positively identified.

Mr. Mupeta attacked the finding by the learned trial Judge that the second Appellant was positively identified on the ground that the period the robbery took place was not stated. It was Mr. Mupeta's submission that although PW1 said that one of the ways through which he identified the second Appellant was his manner of speaking, neither the prosecution nor the court discussed the manner in which the second Appellant spoke as a matter of identity. Mr. Mupeta drew our attention to the cases of ***Zulu and Others*** and ***Mkandawire and Others*** on the dangers of identification by a single witness and submitted that the Court must take great caution when relying on identification of a single witness because of the danger of an honest mistake.

Mr. Mchenga's reaction to these submissions was that the robbery took place during the day and there was ample time for PW1 to identify the second Appellant.

We must say here that the case of ***Zulu and Others*** is not applicable here. That case dealt with a witness recognizing two of the accused

persons in a car that was passing. In this case, the issue is one of identification because PW1 did not say he knew the second Appellant before as the Police Officer did in ***Zulu and Others***. The relevant case is, therefore, ***Mkandawire and Others***.

We have dealt with the question of single witness identification and here we only refer to the cases of ***Chate Vs The People***[5] ***Chimbini Vs The People***[6] and ***Bwalya Vs The People***[7].

We have said in these cases that the honesty of the witness is not the issue. The issue is the reliability of the identification. In other words, the Court must be satisfied that the witness was reliable in his observation and that the possibility of an honest mistake has been ruled out.

In the instant case, it is not in dispute that the robbery took place during the day at 09:30 hours. But, as Mr. Mupeta submitted, there is no evidence as to how long this robbery took. However, on the evidence, it is clear to us that this was not a situation of a passing glimpse, as was the case in the ***Bwalya case***. It took sometime.

The question arises whether in the circumstances of this case the possibility of an honest mistake has been excluded. While we agree with Mr. Mupeta's submissions that PW1 did not give description of the second Appellant to the Police and that there was nothing said about the second Appellant's manner of speech by which he could be identified and that PW1 met his assailant for the first time and was under fear, we are not prepared to accept the submission that the identification by PW1 was unreliable. As we have stated above, the situation was not one of a passing glimpse. The evidence clearly shows that the robbery took sometime and that the robbery took place in broad daylight. And as the

learned trial Judge observed, PW1 even talked with the second Appellant. In these circumstances, we find it difficult to come to the conclusion that PW1 could have made an honesty mistake in his identification. Indeed, PW1 was able to pick the second Appellant at an identification parade some three months later.

Mr. Mupeta attacked the fairness of the identification parade. Mr. Mupeta referred us to an incident of a white man and a black man described by the second Appellant. He also said since two men had entered the complainant's house two suspects should have been put on the parade. It was Mr. Mupeta's submission that the identification parade was fixed by the Police to make the second Appellant a scapegoat. But Mr. Mupeta did not say who it was that the Police wanted to save. Indeed, even the second Appellant himself did not say that he was being sacrificed for another person.

We find no force in these submissions. The story of the white man and black man was clearly an after thought by the second Appellant. PW7 who conducted the identification parade was extensively cross examined by the two counsel who conducted the defence and we find nothing in their cross examination touching on the white man and black man. Consequently, we are bound to say that in his instructions the second Appellant did not tell counsel about the white man and the black man's story because these people did not exist and behave as the second Appellant said in his evidence in court. Though for different reasons, the learned trial Judge was, therefore, right to reject the story of the white man and black man.

The submission relating to the second Appellant being used as a scapegoat is not supported by evidence and cannot stand. As regards a second suspect being put on the identification parade with the second

Appellant, the simple answer is that the evidence of PW3 is that the other persons on the identification parade with the second Appellant were suspects but not in this robbery. If Mr. Mupeta was referring to suspects involved in this robbery, the evidence is that the other four persons allegedly involved in this robbery had already been apprehended and were in fact later jointly prosecuted with the second Appellant and PW1 did not identify any of them in court and were acquitted.

All in all, we are satisfied that the second Appellant was reliably identified by PW1 and that the danger of an honest mistake in identification did not exist. The robbery, as the evidence reveals and as Mr. Mchenga rightly submitted, took place in broad daylight. Accordingly, we affirm the conviction in respect of the second Appellant.

The result of our Judgment is that the appeal by the first Appellant succeeds and his conviction and sentence are quashed and set aside but the appeal by the second Appellant is dismissed.

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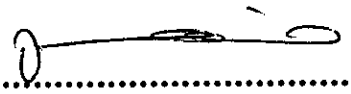
E. L. SAKALA
CHIEF JUSTICE



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I. C. MAMBILIMA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE