Appeal No. 41 & 42/2017

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

JOSEPH BANDA	**1ST APPELLANT**
ASHANTI TONGA	**2ND APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJJS
On the 5th December, 2017 and 11th December, 2017

For the Appellant: Mr. P. Chavula, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. M. H. Kayombo, Senior State Advocate, National Prosecutions Authority

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chimbini vs. The People (1973) Z.R. 191**
2. **Dorothy Mutale and Richard Phiri vs. The People (1995/1997) Z.R. 227**
3. **Chimbo and Others vs. The People (1982) Z.R. 20**
4. **Mwansa Mushala and Others vs. The People (1978) Z.R. 58**

5. **Muvuma Kambanja Situna vs. The People (1982) Z.R. 115**
6. **Khupe Kafunda vs. The People (2005) Z.R. 31).**
7. **George Nswana vs. The People (1988/89) Z.R. 174**
8. **Robertson Kalonga vs. The People (1988/89) Z.R. 90**

The appellants were jointly tried and convicted on a charge of **Murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.** The particulars alleged that on 13th January, 2015 at Lundazi they murdered Armstrong Nyirongo. They were sentenced to death. They both appealed against conviction and sentenced.

The facts that were not in contention were that the deceased was a Director of Mugwazo Mine from which a semi-precious mineral (stones) known as aquamarine was extracted. The two appellants were part of the deceased's workforce. They all lived in camps within the area of the mine pit located in a mine area which covered 200 hectares of remote land within Lundazi District.

On the material day all the workers completed their work schedule under the supervision of the deceased around 12.00 hours. After preparations, the deceased carried the stones and proceeded to the local market known as Chanyalugwe to sell the stones. He promised to pay the workers after selling the stones.

PW1 and the appellants followed the deceased to the market. Thereafter, PW1 and the appellants as well as four other workers were paid. They all purchased some items from the market. Thereafter the deceased left the market in the company of the two appellants to go back to their camps at the Mine. The deceased and the appellants were seen by PW1 and PW2 walking to their camps. According to PW1 and PW2, it took about 20 minutes to one hour 25 minutes to walk to the camps.

PW1 and PW2 returned to their camp site during the night. There is evidence from PW1 and PW2 that early the next morning they learnt from their co-workers that the deceased did not return to his camp. PW1 and PW2 and other co-workers mounted a search for the deceased. PW1 and PW2 went to look for the appellants at their camp site because they were with the deceased, but found them gone. They observed that the appellants' personal items were taken and the rest of the camp items were scattered around.

Thereafter, PW1, PW2 and other workers began to search the mine area. They followed a trail of shoe prints made by pairs of

shoes owned by the two appellants. They were familiar with those particular shoes and their prints. The shoe prints led them to a place where they recovered a buckle of a belt which PW1 and PW2 recognized to belong to the deceased. Its belt was missing. They continued their search by following the shoeprints which led them to a village where they found PW3. They asked PW3 whether she had seen the deceased the previous day. Her response was affirmative.

PW3 narrated to them that she had seen the deceased in the company of the appellants who she recognized. PW3's evidence was that she met the deceased along the road in the company of the two appellants who she recognized. She saw them as they headed to their campsites and later saw them again, going in the opposite direction still with the deceased. PW1 reported the events to PW4 in Lundazi by mobile phone. PW4 was known to be related to the deceased. PW4 later arrived in a motor vehicle in the company of police officers and joined PW1.

In the meantime PW2 and the other members of the search party continued to follow the shoeprints which led them to a

disused mine pit which was flooded with water. They observed drag marks leading into the mine pit. When they examined the flooded mine pit, they observed unusual bubbles of air coming out of the water. They suspected that the deceased had been thrown in the flooded pit. PW1 and PW4 in the company of police officers from Lundazi joined the search party at the flooded mine pit. Two days later, members of the Fire and Rescue Brigade from Lundazi joined the search party and they retrieved the deceased's body from the flooded pit. The body was kept submerged under water by some brown stones which were inserted in the clothes and tied to the body. The deceased's legs were tied together with fiber. Postmortem examination results established that the cause of death was drowning. Other significant abnormal findings observed by the doctor were that there was a rope made from tree bark around the waist, bruised skin on the elbows, ankles and wrists and the lungs were filled with water. The appellants were arrested in Chipata while they tried to sell aquamarine stones similar to those mined at the deceased's mine.

When the appellants were put on their defence, they testified on oath and gave similar stories. They both claimed that they left the mine area soon after they were paid by the deceased at Chanyalugwe market; that they had earlier planned to leave the area soon after they raised transport money. They denied that they were seen in the mine area after they left the market. Both appellants denied the assertion by PW3 that they were seen near the mine area in the company of the deceased after 18.00 hours on the fateful day. They also denied the assertion by PW1, PW2 and PW3 that they were the last people seen with the deceased alive. They both claimed that they left for Chipata immediately they collected their payment from the deceased at Chanyalugwe market; that they had planned for their trip to Chipata before they met the deceased at the market, and that was the reason they had packed and carried away their personal items from their mine campsite. They also claimed that by the time the deceased was said to have disappeared they were already in Chipata where they were apprehended by the police two days later while trying to sell their aquamarine at the market. They denied killing the deceased.

The learned trial Judge considered and analyzed the evidence received and based his conviction on strong and compelling circumstantial evidence received from PW1, PW2 and PW3 who saw and recognized both appellants as the last persons seen with the deceased alive during the evening when the deceased returned from Chanyalugwe market and disappeared from the mine area. The learned trial Judge also found that the appellants were found in possession of the aquamarine stones which were mined from Mugwazo mine owned by the deceased.

The learned trial Judge also accepted the evidence from PW1 and PW2 regarding their tracking of the appellants' shoeprints which led them to PW3's village and to the disused flooded mine pit where the deceased's body was recovered in the state that it was - tied up and submerged in water with stones. The learned trial Judge also accepted the evidence of identification by PW3 who knew the deceased and had known the appellants for at least a month and had seen all the three on various occasions on their way to and from Chanyalugwe market.

The trial Court found that although it was dark during the crucial period of identification, identification by PW3 was good because of her familiarity with the trio, making the need to test PW3's evidence by way of an identification parade unnecessary. The learned trial Judge concluded that when all the evidence was taken into consideration, it all linked together and led him to the inescapable conclusion that both appellants killed the deceased. The learned trial Judge held that although the evidence was circumstantial, it had taken the case out of the realm of conjecture and it attained a degree of cogency permitting only an inference of the appellants' guilt. The appellants were thus found guilty and convicted as charged.

Dissatisfied with the verdict, both appellants appealed to us against conviction, advancing two grounds of appeal. The first ground was that the learned trial Judge erred both in law and fact when he convicted the appellants based on circumstantial evidence which raised other inferences other than an inference of guilt. The second ground was that the learned trial Judge erred both in law

and fact when he relied on the evidence of PW3 when her alleged recognition was unsatisfactory and unreliable.

In support of the two grounds of the appeal, the learned Senior Legal Aid Counsel filed written heads of argument which he orally augmented. In support of ground one, it was submitted that although the appellants conceded, in their evidence, that they were with the deceased at Chanyalugwe market around 14.30 hours, their evidence was that they left Lundazi for Chipata after the deceased paid them, and there was no witness who saw the appellants and the deceased walking in the same direction towards Mugwazo mine apart from the weak and unreliable evidence of recognition by PW3.

It was argued that there were other workers within the mine area who had the opportunity and time to commit the offence such as the deceased's cook named Sakala; and therefore the circumstantial evidence on the record did not permit only an inference of guilty on the part of the appellants, particularly that PW1 and PW2 who worked for the deceased may have had an interest of their own to serve.

It was further argued that the evidence of PW1 that he saw the appellants and the deceased at Chanyalugwe market around 18.00 hours was not corroborated by independent evidence, and it contradicted the evidence given by PW3 who stated that at 18.00 hours the deceased was heading towards Mugwazo mine. Counsel stated that since the exact time when the deceased died was not indicated on the postmortem report, it followed that other workers who were within the mine area on the fateful night had the opportunity and time to commit the offence. In support of this proposition, Counsel cited our decision in the case of **Chimbini vs. The People**[1] in which we held that:

> **"Where the evidence is purely circumstantial and his guilt entirely a matter of inference, it is trite that an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts".**

The case of **Dorothy Mutale and Richard Phiri vs. The People**[2], was also cited in which we stated that:

> **"Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one that is more favourable or less favourable to an accused if there is**

nothing to exclude that inference. Where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused".

It was further submitted, with regard to the aquamarine stones found in possession of the appellants, that the doctrine of recent possession had no application in this case because there was no evidence proving beyond all reasonable doubt that the said aquamarine stones were recently stolen.

In ground two, Mr. Chavula submitted that PW3's evidence of identification and recognition was unsatisfactory and unreliable for the reason that she did not describe any distinctive features or marks which helped her to recognize the two appellants. It was contended that the prosecuting Counsel failed to subject PW3 to searching questions for purposes of testing the reliability of her recognition in view of the dark conditions which prevailed at the time as it was about to rain around 18.00 hours when she allegedly saw the appellants in the company of the deceased. In aid of this proposition, Mr. Chavula cited the case of **Chimbo and Others vs. The People**[3] where we held that:

"Although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the Court to warn itself of the need to exclude the possibility of an honest mistake".

Counsel also cited the *ratio decidendi* in the case of **Mwansa Mushala and Others vs. The People**[4] and **Muvuma Kambanja Situna vs. The People**[5]**.** The latter case stated that:

"Where the evidence in question relates to identification, there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient: the Court must be satisfied that he is reliable in his observations. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made (i.e. whether there was a confused fight or scuffle or whether the parties were comparatively stationary)".

It was argued that the factors to be considered in testing the evidence of PW3, as guided in the afore-quoted cases, were not fully canvassed by the prosecuting Counsel in the present case.

Ms. Kayombo equally filed written heads of argument which she orally augmented on behalf of the respondent. In the first ground, Ms. Kayombo submitted that the circumstantial evidence adduced by the prosecution's witnesses in the Court below was overwhelming and established seven vital findings of fact which formed the basis of the trial Court's conclusion that the appellants were guilty as charged. She submitted that the learned trial Judge properly considered the totality of the evidence, including the odd coincidences which were established by the witnesses; in particular PW1, PW2 and PW3.

Regarding ground two, Ms. Kayombo submitted that the evidence of PW3 as regards the recognition of the two appellants was adequate and satisfactory because PW3 properly set the stage and the basis for her recognition of the two appellants. She knew them before and it was unnecessary to subject her to an identification parade in order to test her evidence further; and that the learned trial Judge believed PW3 with reasons for doing so; and that the possibility of an honest mistake was clearly ruled out by

the learned trial Judge. Ms. Kayombo urged us to uphold the conviction.

We have examined the evidence on record and the judgment of the Court below. We have also considered the submissions made by both sides in respect of the two grounds of the appeal.

The fact that the appellants' conviction was based on circumstantial evidence is not in question. The issue to be decided is whether the circumstantial evidence was strong and compelling and in keeping with the guidance found in a plethora of previously decided cases, some of which the submissions and arguments have properly quoted from. The specific issue to be decided in relation to ground one, as we understand it, is whether the prosecution's evidence produced facts which suggested any other inference besides the appellants' guilt, in order to stall the conclusion arrived at by the learned trial Judge.

On behalf of the appellants, it has been specifically suggested that the evidence of PW1 and PW2 who worked for the deceased's mine revealed the possibility that other co-workers at the deceased's mine could have had the opportunity to commit the

offence; and, therefore, that this provided the basis for another inference detached from the appellants. It was specifically suggested that Sakala the deceased's cook who reported to PW1 and PW2 that the deceased had not returned to his camp by the morning of the following day, had the opportunity to commit the offence.

It is trite law that in the absence of direct evidence, circumstantial evidence is capable of supporting and sustaining a conviction if it is of such cogency that it takes the case out of the realm of conjecture, leaving only the inference of guilt. **(see Khupe Kafunda vs. The People[6]).** Our reading of the judgment of the lower Court satisfies us that the learned trial Judge was very alive to the principle of law with regard to circumstantial evidence and fully addressed his mind to it before reaching his conclusion. More importantly, the learned trial Judge also considered the totality of the evidence received by the lower Court.

It is important to note that the circumstantial evidence in this case was multifaceted. First, the evidence was laced with uncontested coincidences. These were; first, that the appellants

were the last persons to be seen in the company of the deceased before he disappeared on the road between the mine area and Chanyalugwe market where he went to sell some of his aquamarine stones. Second, when PW1 and PW2 visited the appellants' camp site within the mine area early the next morning to search, they found that both appellants had disappeared as well. Third, some of the items the deceased bought the previous afternoon at Chanyalugwe market were found scattered on the ground at the appellant's camp. These items were Kapenta fish, groundnuts, tomatoes and onions. Fourth, the appellants took away all their personal items without notifying any of their co-workers. Fifth, when PW1 and PW2 found the appellants' shoeprints, which they were familiar with, they were led to PW3's village where PW3 confirmed that she saw the appellants with the deceased. The shoeprints eventually led them to the flooded pit where the deceased's body was later recovered.

Lastly, when the appellants were apprehended in Chipata, they were found in possession of some aquamarine stones which

were similar to those mined at the deceased's mine which the deceased had gone to sell at the market; but did not sell all of them.

Of all the odd coincidences, the learned Counsel for the appellants, while accepting that the appellants were found with the stones, assailed the alleged use of the doctrine of recent possession by the trial Judge.

We do not think that the learned trial Judge used the doctrine of recent possession to conclusively find the appellants guilty. In our considered view, the learned trial Judge considered all available evidence and found support in the evidence of recent possession to buttress the evidence of identification of the appellants. The learned trial Judge rejected the appellants' explanation that they were allowed to prospect and collect stones from his mine at a fee of K60.00. This explanation was both illogical and unreasonable because the appellants were employed by the deceased for which they were paid; and they were paid together with the other workers including PW1 and PW2 who saw them receive their wages at the market. They could not have been innocent receivers. In the case of **George Nswana vs. The People**[7], we stated that:

"The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer".

Recent possession can also be used as corroboration of the evidence of identification. This is what we meant in the case of **Robertson Kalonga vs. The People**[8] when we said that:

"(ii) Poor identification evidence requires corroboration such as a finding of recent possession of stolen property".

Considering what we have said, we cannot fault the learned trial Judge for treating the evidence of the aquamarine stones found in the appellants' possession after their abrupt disappearance from the deceased's mine area in the manner he did. That evidence supported and corroborated the evidence given by PW1 and PW2.

With regard to the possibility that the offence could have been committed by any other worker, particularly Sakala the cook, we reject this proposal in view of the overwhelming evidence implicating the appellants. It is important to note in this regard, that all the other workers including Sakala the cook, took part in searching for the deceased. In fact, Sakala was the first to notice the disappearance and immediately reported to PW1 and PW2, and he took part in the search while the appellants disappeared from their camp altogether. We find no merit in ground one of the appeal and we dismiss it.

With regard to ground two, there can be no doubt that the evidence established that PW3 was not only an independent witness, but she is someone who knew the deceased and the two appellants very well, and named them in Court. She was cross-examined and remained consistent. The prosecution bore no further duty to test the veracity of her evidence. In any case, as an independent witness, her evidence provided additional corroboration to the evidence of PW1 and PW2.

The learned trial Judge properly found that PW3's evidence of identification was very credible in view of her familiarity with the appellants and the deceased. In our considered view, there was no basis for discounting PW3's evidence and the learned trial Judge properly considered it as strengthening the circumstantial evidence against the appellants. This was a proper step to take because her evidence of recognition was factual. We note that learned Counsel for the appellants cited cases that dealt with evidence of a single witness identification of a stranger. We do not find much value in those authorities because the appellants were not strangers to PW3. We equally find no merit in the second ground of the appeal. The net result is that we dismiss the appeal and uphold the lower Court's conviction and sentence.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE