IN THE SUPREME COURT OF ZAMBIA APPEAL No.155 of 2018
HOLDEN AT NDOLA
(*Criminal Jurisdiction*)

BETWEEN:

MINYOI MUNDIA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd December, 2019 and on ..., 2019.

For the Appellant: *Mrs. M.K. Liswaniso, Legal Aid Board.*

For the Respondent: *Mrs. A. Kennedy-Mwanza, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **Isaa Mwasombe v The People (1978) ZR 354**
2. **Li Shu Ling v R (1989) AC 145-281**
3. **Chigowe v. The People (1977) ZR 21**
4. **Patrick Kunda and Robertson Muleba Chisenga v. The People (1980) ZR 105**
5. **Chabala v The People (1976) ZR 14**
6. **Steven Mushoke v The People SCZ Judgment No. 31 of 2014**
7. **Machipisa Kombe v. The People (2009) ZR 282**
8. **Ilunga Kabala and John Masefu v the People (1981) ZR 102**
9. **Boniface Chanda and Others v The People (1988-1989) ZR 163**

Statutes referred to:

1. **Penal Code, Chapter 87, Laws of Zambia, section 294 (1).**

Introduction

The appellant was convicted in the High Court by Justice P. C. M. Ngulube, as she then was, at Ndola on one count of Aggravated Robbery contrary to section 294(1) of the Penal Code. The particulars of offence were that the appellant, on 30th May, 2013, at Ndola jointly and whilst acting together with others unknown, did rob Steven Nkuwa of one motor vehicle, namely, a Toyota Fun Cargo registration number ACT 8972, the property of Cornelius Chinoya of Ndola and K400 cash, the property of Steven Nkuwa and that immediately before or immediately after the time of such robbery did use or threatened to use actual violence to the said Steven Nkuwa in order to obtain or retain the said property. He was sentenced to 20 years imprisonment with hard labour.

The prosecution's case

The evidence given by the prosecution witnesses was that on 30th May, 2013, a man in the company of a woman booked Stephen Nkhuwa (PW4) from Ndeke Township in Ndola to take the couple to a place called 21 Miles along the Ndola-Mufulira Road. The time was around 19:00 hours in the night. On the way they stopped at a filling station for some fuel during which the appellant got out of the vehicle and started smoking. The agreed fare was K300 and the appellant paid an initial sum of K150 which PW4 used to pay for the fuel. While at the filling station PW4 had an opportunity to look at the man from the lighting there and he described him as being medium built and height and dark in complexion.

When they reached 21 Miles the man told PW4 to stop the vehicle so that he could answer the call of nature. PW4 went to stop near some shops but there were no lights and it was dark. PW4 switched on the light in the car. The man got out and when he returned he went to the driver's side and opened the door. He ordered PW4 not to shout while pointing what the witness described as a dark/silver coloured pistol at him. He was ordered to empty his pockets which he did producing the K400 that he had. The man took

the money. The woman was just sitted in the car. The man pulled PW4 out of the vehicle who managed to run off into the bush. The man drove off the vehicle back in the direction of Ndola. PW4 was rescued by police and others after he had called for help using his cell phone

The prosecution's further evidence was that the appellant took the same motor vehicle to Masala Police where he handed it over claiming that it had been abandoned by a taxi driver whom he had booked to take him home to Mushili One Commando Unit Camp. The explanation went on to state that the driver had charged him K50 and when he gave him K100 the driver went to look for change but never returned. He instead drove the vehicle into the camp and parked it.

It was also the prosecution's evidence that police did detain PW4 for at least three days to "*assist with investigations*" before requesting him to attend an identification parade on 12th June, 2013 conducted by Inspector Hamambo, PW3 at Ndola Central Police Station. PW3 stated that PW4 picked out the appellant from among nine people paraded as being the man that had booked him and eventually

robbed him of the car and his money. He also stated that he did not receive any complaint from any of the suspects. When asked in cross examination whether PW4 was in custody together with the other suspects on the identification parade, PW3 responded that PW4 was in police custody with several suspects. When asked whether he was in the same cell as the appellant, PW3 replied that PW4 was not a suspect; that he was a witness and he was not in custody.

The prosecution also secured the admission of a confession statement made by the appellant after a trial within a trial on the basis that he gave it freely and voluntarily to PW6.

The defence case

The appellant's defence was that on 31st May, 2013 (not 30th May, 2013), he had booked a taxi to take him to his home at Mushili One Command Unit Camp within Ndola from Masala. The fare charged was K60. When they reached his destination, he gave the driver K100 from which to get the K60. The driver went to look for change and did not come back. He drove the vehicle into the camp to his friend DW2's home. The intention was to get his friend to

escort him to take the vehicle to the police station at Masala. DW2 declined because he was not feeling well and it was late.

The next day on 2nd June, 2013 the appellant drove the vehicle and handed it over to police at Masala Police Station. He left his home address and phone number with the police.

On 5th June, 2019 the appellant was apprehended. The appellant complained that PW4 was able to pick him out at the identification parade because PW4 had been in custody with all the other people he lined up with at the identification parade excluding only himself. He stated that he had never seen PW4 before. He also pointed out that he did not fit the description of the man that had booked PW4 and that that incident happened on 30 May, 2013 and not 31st May 2013 when he booked the taxi to take him home.

The judgment of the High Court

In her judgment the learned trial judge approached the evidence of PW4 as that of a single identifying witness requiring a connecting link between the accused and the offence to rule out the possibility

of a honest mistake and render a mistaken identification too much of a coincidence as stated in the case of **Issa Mwasombe v The People[1].** The learned judge also regarded PW4 as a witness with a possible interest of his own to serve based on the fact that he had been detained by police after he reported the robbery on suspicion that he was involved in it. The learned judge, therefore, looked for a connecting link or support for PW4's identification evidence which she regarded as being of good quality. She found it in the evidence that the appellant led police to the scene of the crime where he, according to the learned judge, demonstrated how he committed the crime. Reliance was placed on the case of **Li Shu Ling v R[2]**. The learned judge also took into account the appellants' explanation how he came into possession of the vehicle and discounted it on the ground that the appellant did not inform the sentries at the gate to the camp; that he instead kept the vehicle until he took it to the police station the following day at 15:00 hours. The learned judge found the appellant's possession of the vehicle to be an odd coincidence which further strengthened PW4's evidence of identification, therefore, ruling out the possibility of an honest mistake. She found that the appellant's explanation could not be reasonably true in view of the

evidence led in the matter. She did not accept that a taxi driver could abandon a motor vehicle worth so much money and go away with only a K100. The learned judge was satisfied with the evidence presented by the prosecution and convicted him.

The Appeal.

The appellant has appealed against the judgment of the trial court on two grounds as follows:

1. **The trial judge erred in law and fact when she admitted into evidence the confession statement made by the appellant to the police after a trial within a trial.**
2. **The trial judge erred in law and fact when she found that the explanation by the appellant how he came to be in possession of the motor vehicle was not reasonably true in view of the evidence that was led by the prosecution.**

Mrs. Liswaniso's ire in the first ground of appeal is that the warn and caution statement administered on the appellant prior to his alleged confession was not done in accordance with the law because he was not warned that anything he would say, would be used against him in the courts of law should the matter proceed to trial; that the prosecution did not negative beyond reasonable doubt the

inducements which caused him to make the confession statement. Further that the trial judge did not set out in detail the reasons why she did not believe that the appellant was induced when he gave his statement to the police under warn and caution on the date in issue. Mrs. Liswaniso relied for these submissions on two cases. The first is that of **Chigowe v. The People**[3] where it was held that-

> **(i) At a trial-within-a-trial to determine the voluntariness of a confession the prosecution must negative beyond reasonable doubt any form of inducement which might have caused the accused to make the statement.**

The second is that of **Patrick Kunda and Robertson Muleba Chisenga v. The People**[4] where it was held that-

> **(i) The result of such brevity is that there is no judgment on the trial within the trial and the appellants are deprived of their opportunity to appeal against it.**
>
> **(ii) It would be unsafe to allow the admission of statements to stand, the appeal would be dealt with on the basis that the statements have been excluded.**

It was submitted that the admission of the confession statement into evidence by the trial judge was unsafe, that we should deal with the appeal with the exclusion of the confession statement.

In ground two the argument is simply that the explanation given by the appellant how he came to be in possession of the vehicle which he later handed over to police at Masala was reasonably true. Mrs. Liswaniso relied on the case of **Chabala v The People**[5] in which we held that:

> **(ii) If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.**

Mrs. Liswaniso's prayer was that we allow the appeal and set the appellant at liberty.

In response to the first ground of appeal it was submitted by Mrs. Kennedy-Mwanza to the effect that the evidence shows that the appellant was warned and cautioned prior to his statement in conformity with the Judge's Rules and he was informed of his rights prior to the recording of his statement. It was contended that the prosecution's evidence showed that the appellant was not forced to give a statement. Mrs. Kennedy-Mwanza went on to argue that the record shows that the trial court fully analysed the evidence in the trial within a trial upon which she ruled that the

statement was made voluntarily before it was admitted in evidence. It was argued that the cases of **Chigowe**[3] and **Patrick Kunda**[4] cited by Mrs. Liswaniso were inapplicable to the case. Instead, it was submitted that the court complied with the direction in the case of **Steven Mushoke v The People**[6] in which this court held that:

> **The prosecution must prove the voluntariness of the alleged confession beyond reasonable doubt. At the close of the trial within trial and the submissions made by both parties the court is obliged to deliver a ruling.**

It was also submitted that having appropriately admitted the confession statement, the court correctly relied on the evidence of leading which put the appellant at the scene of crime at 21 miles as per guidance in the case of **Li Shun Ling v R**[2].

Turning to the second ground of appeal, the submission was that the explanation by the appellant was not a reasonable one as there was no evidence on record to show that the appellant reported the matter to police as soon as the vehicle was abandoned. It was argued that as a reasonable man the appellant should have reported the matter immediately. Further, that there was nothing on record

to show that the vehicle could have exchanged hands. It was noted that it was odd that the appellant reported the abandoned vehicle to police on 1st June, 2013 barely hours after PW4 had reported it stolen. It was pointed out that if indeed the appellant did not steal the motor vehicle he would have at least alerted the army officers who manned the gate at Mushili One Commando Unit Camp about the abandoned vehicle. Taking into account that odd coincidences can constitute supporting evidence of something more, it was submitted that the appellant's explanation was one which could not reasonably be true and, therefore, no explanation at all. We were implored to uphold the conviction and dismiss the appeal.

We have considered the submissions together with the evidence deployed in the court below as well as the judgment in that court. With regard to the first ground, we do not agree that the appellant was not warned and cautioned in the manner contended by Mrs Liswaniso. A perusal of the statement which was exhibited as "P2" at the trial shows that the appellant was duly warned and cautioned in the following terms-

> **You are hereby warned that the police are carrying out investigations into the alleged offence of Aggravated Robbery c/sec 294 Cap 87 of**

the Laws of Zambia. It is alleged that you Minyoi Mundia whilst acting together with others unknown on the 30th May 2013 at 00:26 hours along Mufulira road at 21 miles you robbed M' Nkuwa Steven of his m/v Fun Cargo Registration no. ACT 8972 silver in colour valued at KR27,000 the property of M' Conerious Chinoya of Hse no. 5898A Mushili Bonano plus the KR400 cash whilst armed with a pistol ...

You are further warned that you are not obliged to say anything in answer to the allegation unless you wish to do so but anything that you shall say shall be taken in writing and be given in evidence in court ... (Underlining supplied for emphasis)

The argument on the point was therefore, misplaced.

We, however, agree with Mrs Liswaniso that the confession statement should be excluded from consideration in this appeal. This is on the ground that the record of appeal does not contain a reasoned ruling following the trial within a trial. What Mrs Kennedy-Mwanza referred to as a full analysis of the evidence in the trial within a trial is in fact a review of that evidence in the main judgment which culminated in the following brief ruling-

Having heard the evidence led by (the) prosecution and the accused's version of events in this matter, I am satisfied that the accused was not induced when he gave his statement to the police under warn and caution on the date in issue.

I therefore find that the statement was made freely and voluntarily.

This ruling does not give reasons for the decision. In the light of our decision in the case of **Patrick Kunda**[3], cited by Mrs Liswaniso, we agree that the ruling on the trial within a trial amounted to no ruling at all and we cannot remedy it by attempting to give reasons whether or not the confession statement was voluntary now.

It is, in any case, our view that the learned trial judge did not rely on the confession statement in his judgment. We had in fact put this matter to Mrs Liswaniso at the hearing of the appeal and she insisted that the confession statement was part of the decision because, according to counsel, that was how the trial court came to the conclusion that the appellant led police to Mufulira road where the alleged aggravated robbery took place. We scoured the judgment and it is evident that the learned trial judge's reasoning leading to the decision at pages J16 to J21 is devoid of any reference to the confession statement. The conclusion that the appellant led police to the scene of the crime was made, in our view, independent of the confession statement. The clearly legible handwritten warn and caution statement, exhibit "P2", does not talk about the appellant leading police to Mufulira road. The evidence that the appellant led

police to the scene of crime was given by the arresting officer, PW6, in the course of his evidence in chief and the court accepted that evidence in its judgment not on account of the confession but on the basis of the credibility of PW6. In fact this came after the court had satisfied itself that PW4 had a reliable opportunity to observe the appellant during their journey unaffected by any pressure since he did not know that his passenger would turn out to be a robber. As we have stated it is not correct for Mrs Liswaniso to assert that the decision of the court was influenced by the confession statement. Learned counsel's argument notwithstanding, we will, as already stated, exclude the confession statement from consideration in this appeal. We find merit in ground one.

Regarding the second ground of appeal, we note that the trial court gave reasons why it accepted PW4's evidence and rejected the appellant's explanation as noted in the preceding paragraph dealing with ground one. In the case of **Isaa Mwasumbe v The People**[8] it was held that-

> **(i) Usually in the case of an identification by a single witness the possibility of an honest mistake cannot be ruled out unless there is some connecting link between the accused and the offence which**

would render a mistaken identification too much of a coincidence, or evidence such as distinctive features or an accurately fitting description on which a court might properly decide that it is safe to rely on the identification (Bwalya v The People (3)); but where there is good quality identification evidence from a reliable single identifying witness it is competent for a court to convict even in the absence of other evidence to support it.

In this case the trial court found that the evidence of identification given by PW4 was of good quality. The learned judge also found a connecting link in the fact that the appellant led police to the scene of crime and the suspicious circumstances in which the appellant came to be in possession of the vehicle. Apart from the evidence of leading which we think the learned judge should not have relied on as we will shortly explain, we are of the view that she was quite entitled to reject the appellant's explanation.

The appellant had stated that PW4 was able to identify him because the witness had been in custody with all the others lined up with him excluding the appellant. We find the assertion to be a shot in the appellant's own foot, so to speak. If indeed PW4 identified the appellant because he was the only one who was not known to him, then how does he explain the fact that he ended up being the person in possession of the vehicle that PW4 had reported to have been

stolen. This is an odd coincidence which supports the identification evidence of PW4 that the appellant is the person who had robbed him of his motor vehicle and the K400. It also provides support for PW4 whose evidence was suspect being a witness with a possible interest of his own to serve after being detained in police custody.

Returning to the issue of the court relying on the alleged leading of the appellant to the scene of crime, the case of **Li Shu Ling**[1] cited in support was discussed in the case of **Boniface Chanda and Others v The People**[9] to establish that where there is video footage of an accused demonstrating what they had done in executing a crime it would be difficult for them to claim that they had not participated in the crime. The case of **Boniface Chanda**[9], however, settled the principle that evidence of mere leading of police to the scene of crime where they had already been by the accused where nothing new is discovered is worthless. In this case, there was nothing new discovered at the scene of the crime where they went with the appellant, which they had earlier visited. That evidence could not support PW4's evidence identifying the appellant. What implicated the appellant, however, is that he was found in possession

of the vehicle which PW4 had reported stolen. Thereafter, PW4 identified him at a police identification parade. This strengthened PW4's suspect evidence and excludes the danger that the appellant is being falsely implicated. We cannot blame the learned trial judge for rejecting the appellant's explanation. A reasonable person, particularly one of the appellant's standing as a soldier would be expected to have exercised appropriate prudence by immediately alerting the sentries at the gates of the camp rather than drive the strange vehicle into the camp which was itself a security risk.

We also share the learned trial judge's disbelief that the taxi driver could abandon his vehicle just like that in exchange for a mere K100. We see no merit in the second ground of appeal. Ultimately, we uphold the appellant's conviction and dismiss the entire appeal.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE