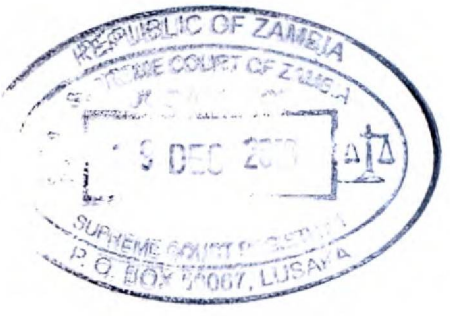
APPEAL NO.148, 149/2018

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

GIDEON KABESHA **APPELLANT**



V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 3rd December, 2019 and 9th December, 2019

For the Appellant : Ms M.C. Marebesa, Senior Legal Aid Counsel
For the Respondent : Mrs M. Kennedy – Mwanza, Acting Principal State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chipango & Others v The people (1978) ZR 304**
2. **Choka v The People (1978) ZR 243**
3. **Emmanuel Phiri & Others v The People (1978) ZR 79**
4. **Mweemba & Another v The People (1973) ZR (reprint) 169**
5. **Mwambona v The People (1973) ZR (reprint) 38**
6. **Nsofu v The People (1973) ZR (reprint) 380**

Legislation referred to:
The Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia

The appellant appeals against his conviction for the offence of murder. On 3rd September, 2012 the appellant appeared before the High Court at Kitwe, together with a co-accused named Chomba Mulenga John, on an allegation that the two had murdered Jack Manengu (the deceased) on 28th April, 2012.

The prosecutions case, presented through three witnesses, was this: The deceased used to live on the same premises with his mother Charity Musonda (PW2) in Kapoto compound in Kitwe, although he occupied a house at the back of the premises, together with his wife Pricilla Manengu. On 28th April, 2012, the deceased was seen leaving the yard around 17:00 hours by his mother. He did not return home that night, although the mother was unaware of that fact.

The following morning the deceased's mother went to join other women to clean their Church. Whilst she was there, news filtered through that the police had picked up the body of a person who had been killed near a tavern which was close to their church. She joined other women to go and have a look. When they got to the police pick-up van in which the body was, she immediately recognized the clothes of her son, Jack Manengu. She accompanied

the police to take the body to the mortuary; and also to give a statement to the police.

Rumours started going round that Brenda Mwape, (PW1), the deceased's girlfriend, might know something about his death. James Manengu, a relative of the deceased, together with members of the neighbourhood crime prevention unit launched a manhunt for Brenda Mwape, who had disappeared from her house. They apprehended and handed her over to the police on 1st May, 2012.

Brenda Mwape implicated the appellant and told the police that she had fled her house because the appellant had threatened to kill her if she ever revealed that he was the one who killed the deceased. With that information, the police picked up the appellant on the same day. In turn, the appellant, upon being questioned about the death of the deceased, took or led the police to the houses of his friends, one was named Chomba Mulenga John while the other was only named Robert. The police did find Chomba Mulenga John and apprehended him. Robert could not be found. Chomba Mulenga John was jointly charged with the appellant for this offence.

At the trial, presided over by Kamwendo, J, Brenda Mwape told the court that she had been with her boyfriend, the deceased, in her house when the appellant, her former boyfriend, forcibly entered the house and started beating the deceased. She said that the appellant then dragged the deceased outside where he continued beating him until he was unconscious, whereupon he dumped him on some path between houses.

Because Brenda Mwape's testimony did not in any way implicate Chomba Mulenga John, the learned judge found him with no case to answer.

In his defence, the appellant opted to remain silent: and called no witness.

Notwithstanding that the facts presented to the court clearly showed that Brenda Mwape was a suspect witness in the case, the learned judge approached the matter as a straightforward issue of credibility; the learned judge appeared not to have been alive to the possibility that, being a suspect witness, Brenda Mwape might not be impartial. And so, the learned judge did not direct himself at all as to the proper approach in such cases. Proceeding on the issue of credibility, the judge found the eye-witness account by Brenda

Mwape regarding what happened on the fateful night to be credible and consistent with that of the other two witnesses, that is the deceased's mother (PW2) and the arresting officer (PW3). He convicted the appellant for the offence of murder. Finding no extenuating circumstances, the learned judge sentenced the appellant to death. Hence this appeal.

Unsurprisingly, the appellant's sole ground of appeal attacks the learned judge for convicting the appellant on the testimony of the suspect witness, Brenda Mwape. Citing a number of authorities on the subject, the appellant, through his counsel Ms Marebesa, argued at the hearing of this appeal that there was need for the testimony of Brenda Mwape to be corroborated by independent evidence, or *"something more"*, that would have excluded the danger that Brenda Mwape was falsely implicating the appellant. Ms Marebesa submitted that such corroborative evidence was absent in this case; and that to that extent, the conviction was wrong.

We cite here some of the holdings or passages quoted by counsel to support the above argument. We find them to be clearly on point on the subject. From the case of **Chipango & Others v The people**[1] the appellant relied on the following holding:

> **"(ii) where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded."**

From the case of **Choka v The People**[2] the appellant quoted this holding:

> **"A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and the plausibility of his evidence. That 'something more' must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness"**

From the case of **Emmanuel Phiri & Others v The People**[3] the appellant extracted a portion from one of our holdings in that case. The following is what the appellant extracted:

> **"The 'something more' must be circumstances which though not constituting corroboration as a matter if strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded."**

We shall quote this holding in full later.

The State's submission was this: that Brenda Mwape was not a suspect witness; that she was merely arrested to help the police with investigations in her capacity as the deceased's girlfriend; and that she was later turned into a State witness who assisted the police with investigations that led to the arrest of the appellant.

We can say right away that this submission by the State does not hold water. It was very clear that before the appellant came into the picture, Brenda Mwape was the prime and only suspect, having fled or disappeared from her home after the deceased was killed. The evidence even went on to show that, for a while after the appellant was apprehended, Brenda Mwape remained in custody as a co-suspect with the appellant. Clearly, she was a suspect witness who fell to be treated as an accomplice. And so we agree with the appellant's argument that Brenda Mwape's testimony could not be relied on to convict the appellant unless it was corroborated or supported by *"something more"* that satisfied the court that the danger that Brenda Mwape was falsely implicating the appellant had been excluded.

In **Mweemba & Another v The People**[4] the predecessor of this court, the Court of Appeal, held:

> **"Where corroboration is required as a matter of practice it is a misdirection simply to say that the court accepts the evidence of the complainant. The court must say whether it finds corroboration, and if so, what evidence it regards as such, or whether on the other hand there is no corroboration, but that it is safe to convict without it."**

The same court in the case of **Mwambona v The People**[5] held:

> **"(3) The failure to regard as such a witness with possibly a purpose of his own to serve and another with a possible bias, is a misdirection which will result in the conviction being quashed unless the appellate court can apply the proviso"**

The proviso referred to is that which is found in **Section 15** of the **Supreme Court of Zambia Act, Chapter 25** of the **Laws of Zambia** which states:

> **"Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."**

In this case, the failure by the learned judge to recognize the fact that Brenda Mwape was a suspect witness; and the resulting

failure to warn himself as regards the proper approach to adopt concerning Brenda Mwape's testimony was a misdirection which could result in the conviction being quashed.

However, we find a lot of significance in the evidence that, when he was apprehended and questioned about the death of the deceased, the appellant led the police to the houses of his two friends. We have deliberately chosen to ignore the other evidence from the arresting officer (PW3) about the admissions which the appellant is said to have made. We have settled only on the evidence of leading and this evidence was undisputed.

When this evidence was brought to Ms. Marebesa's attention, her response was that such evidence could not amount to corroboration or *"something more"* because the arresting officer did not tell the court why the appellant was leading the police to his two friends; and that in any event, he still denied the charge.

We do not agree with that argument. First, it is not a requirement that a police witness who introduces evidence of leading should disclose the content of his discussion with an accused which gave rise to the leading. In fact that would amount to improperly introducing a confession statement on the record. It is

normal for such witness to simply adduce the fact of the leading and leave the court to draw its inferences from it. In this case, it is the context that was important: the appellant was apprehended and questioned over the death of the deceased. It goes without saying that his leading of the police to his two friends was in connection with that. This is supported by the fact that one of those friend, Chomba Mulenga John was later jointly charged with him. As for the fact that the appellant eventually denied the charge, such conduct is common. Even accused persons that have given detailed confession statements have been known to deny the charge.

Coming back to that evidence, the significance we find in it is that it tends to show that the appellant knew something about the death of the deceased.

At this juncture we will quote in full the holding in the case of **Emmanuel Phiri & Others v The People**[3], which the appellant only quoted in part. The holding is as follows:

> **"(v) The 'something more' must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and <u>that it is safe to rely on the evidence of the accomplice implicating the accused</u>. This is what is meant by 'special and compelling**

grounds' as used in Machobane." *(underlining ours for emphasis)*

What comes out clearly from that holding is that the circumstances, evidence or whatever it is that constitutes the *"something more"* is not what is relied on to convict an accused. So it need not be evidence that on its own can secure a conviction. It is just relied on to assure the court that the suspect witness is not falsely implicating the accused. Otherwise, once that assurance is secured it is the testimony of the suspect witness which is believed and relied on to convict the accused. Indeed this point was very clearly made by the Court of Appeal (the predecessor of this court) in the case of **Nsofu v The People**[6].

Now, because the evidence of leading tended to show that the appellant had perhaps some not so innocent knowledge about the death of the deceased, its purpose was not to secure a conviction but to assure the court that it was safe to rely on Brenda Mwape's testimony. That evidence was, therefore, *"something more"*.

Therefore, had the learned judge followed the proper approach and looked for *"something more"* to assure him that Brenda Mwape was not falsely implicating the appellant, he would have found

"something more" in the form of the evidence of leading. He would then have been perfectly correct to rely on Brenda Mwape's testimony, as he did

In the circumstances, our view is that the learned judge would still have convicted the appellant. For that reason, notwithstanding that there was a misdirection on his part, we will apply the proviso to **Section 15** and dismiss the appeal because no miscarriage of justice was occasioned to the appellant.

This appeal stands dismissed.

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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