IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 183/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MATHEWS SAMBAULU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd November , 2020 and 10th November 2020

For the Appellant: *Mr. K. Tembo, Legal Aid Counsel*

For the Respondent: *Ms. G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority.*

J U D G M E N T

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

Cases referred to:

1. **Fawaz and Chelelwa v The People (1995-1997) ZR 3**
2. **Kalonga v The People (1988-1989) ZR 90**
3. **Mtonga and Anor v the People (2000) ZR 33**

The appellant appeals against his conviction by the High Court for four counts of aggravated robbery. The appellant, together with a teenage girl named Bwalya Mubanga, appeared before the High Court presided over by Ngulube, J as she then was, on the said four counts. Three of the counts involved the theft of motor vehicles. The duo was alleged to have been involved in a spate of robberies that rocked the mining town of Luanshya, in the Copperbelt Province, in the months of June and July 2012.

The facts of the case were these: The first robbery happened on 16th June, 2012. Around 21:00 hours on that day, Edwin Chembela, PW5, was hired by four people, who included a woman, to take them to a junction of the road known as Luanshya turn-off. Along the way, the woman asked PW5 to stop so that she could answer the call of nature. When he did so, one man came to his door brandishing a knife, while another tied a rope around his neck. The assailants robbed PW5 of K250 cash and a phone. They, however, failed to start the car. They left the scene, taking the car keys with them.

Three days, later, the robbers struck again. This time, on 19th June, 2012, they took from one Olivet Matina a motor vehicle, Toyota Corona registration number ACG 8100. This car belonged to Mulenga Mubanga, PW2. Details of how it was taken were not presented to the court.

On 27th June, 2012, Sandless Lungu, PW8, was the next victim. Between 22:30 hours and 23:00 hours, he was hired by four people, who included a woman, to take them to Roan Township. On the way, he was told to stop. The group, one of whom had a knife, beat him up and took the motor vehicle that he was driving, a Toyota Raum registration number ACP 3795 which belonged to Naomi Banda, PW6.

The last victim was Mutale Malama, PW7. On 7th July, 2012, around 23:00 hours, four people jumped into the taxi that he was driving. The group comprised three women and one man. They were all going to Roan Township. Two women reached their destination first and jumped off the taxi, leaving a man and a woman. When these two reached their destination, they attacked PW7. The man, in particular, stabbed PW7 with a knife. They took

away the taxi, a Toyota Corolla, registration number ACC 2748 which belonged to Placedo Chilomo, PW1, and also PW7's phone.

PW7 was taken to the hospital where he was treated and discharged. This time, the robbers ran out of luck: for, shortly after PW7 was discharged from hospital early in the morning, and was recuperating at home, the taxi was seen passing on the road by PW7's house. Alarm was raised, and some people gave chase. The taxi sped towards Masaiti town and then overturned on the way.

The occupants came out of the overturned vehicle. These were; the appellant, the teenage co-accused and a woman named Mary Chewe. This third person was later released after investigations. A knife was also recovered from the car. The appellant and his co-accused were interrogated. They led the police to Elliot Mweetwa, PW3, in Mpongwe where the Toyota Corona, the subject of the second count and the Toyota Raum, the subject of the third count, were recovered. PW3 told the court that the appellant and the co-accused had sold the two vehicles to him at K8 million (unrebased) each.

The two suspects then led the police to the teenage girl's home where a nokia phone was recovered. PW7 identified the phone as the one that was stolen from him during the robbery. PW7 also told the court that the appellant was the one that had attacked him with the knife.

The two suspects again led the police to a person named Pinala Zulu, PW4, in Roan township, where another nokia phone was recovered. Edwin Chembela, PW5, the victim in the first count identified the phone as the one that was stolen from him. He also identified the teenage girl as the woman who was among the robbers.

PW4, told the court that the appellant had gone to him, in the company of someone named Nelson and had borrowed a sum of K200. As security, the appellant had left the phone.

In court, Sandless Lungu, PW8, the victim in the third count also identified both the appellant and the teenage girl as having been part of the group that robbed him of the motor vehicle, that is, the Toyota Raum.

In his defence, the appellant denied participating in any of the robberies. Regarding his possession of the phone belonging to the victim in the first count, the appellant explained that he had borrowed that phone from a friend named Nelson.

As regards the allegation that he sold the motor vehicles in the second and third counts to PW3, the appellant denied that allegation and said that the vehicles belonged to PW3 and that the latter had merely asked him to find buyers for the vehicles.

As regards the allegation in the fourth count, the appellant explained that, on the morning of 8th July, 2012, he had jumped on to a Toyota Corolla driven by a friend of his named Charles, who had driven at high speed when he noticed that another vehicle was following them. The appellant said that that was how he was found in the vehicle after it overturned.

The appellant's co-accused also denied participating in any robbery. She confirmed having hired a taxi at Caesar's palace in the town centre but denied participating in any robbery thereafter. She denied any knowledge of PW3. She confirmed being in the car

that overturned, but said that it had been in the hands of the first appellant's friend.

In the first count, the trial court convicted the appellant because of his possession of the phone belonging to the victim, PW5. The co-accused was convicted because she was identified by PW5.

In the second count, the appellant and his co-accused were found guilty on the ground that they were in recent possession of the Toyota Corona which they sold to PW3.

In the third count, the learned judge found; first, that the appellant and his co-accused were identified by the victim, PW8. She also found that the two were in possession of the Toyota Raum that was stolen from PW8 and that they sold it to PW3. They were found guilty on that evidence.

In the fourth count, the learned judge found that the appellant and his co-accused were identified by the victim, PW7, and also that they were found in possession of the stolen vehicle which overturned a few hours after the robbery.

The appellant's co-accused was treated as a juvenile and was punished in accordance with the Juvenile's Act. The appellant was imprisoned.

With respect to the first, third and fourth counts, the appellant contends that he was convicted solely on the evidence of single identifying witnesses. His first ground is therefore on that point.

Regarding the second count, he contends that his conviction was based on circumstantial evidence which was not supported by corroborative evidence.

The argument on behalf of the appellant with respect to the first ground of appeal is that the learned judge erred in convicting the appellant of the three counts on the basis of single identifying witnesses, in the absence of corroboration. In the heads of argument filed by learned Counsel Mr. Tembo, we have been referred to several of our decisions on the subject of single identifying witnesses; notable among them is the case of **Fawaz and Chelelwa v The People**[1] where we held *inter-alia*:

"In single identifying witness identification, corroboration or something more is required."

Mrs Nyalugwe, the learned Deputy Chief State Advocate has argued, on the other hand, that in all these counts there was "*something more*" which rendered a mistaken identification too much of a co-incidence. She points out that, in the first count, there was evidence that the appellant led the police to PW4 from whom the phone belonging to PW5, the victim in that count, was recovered; and that PW4 confirmed that it was the appellant who brought it to him as security for the money that he lent to the appellant.

In the third count, Counsel points out that the connecting link was the evidence of PW3 who said that the appellant sold him the motor vehicle which was the subject of that count.

In the fourth count, Ms. Nyalugwe submits that the connecting link was the possession by the appellant of the motor vehicle hours after it was stolen the previous night, and also that in the motor vehicle a knife was found which PW7 said to be the knife that the appellant stabbed him with.

We begin by stating that there was no evidence to show that the appellant and his co-accused were put on identification parades at which the witnesses identified them. Therefore, the identification in this case was courtroom identification. In **Kalonga v The People**[2] we said that such evidence of identification was poor. However, we also said that, in such a case, a trial judge can look for corroborating evidence. We emphasized that once the corroborative evidence is found, the conviction is not on the corroborative evidence but on the identification which has been corroborated.

We maintained the same approach in **Mtonga and Anor v the People**[3] when we held:

> **"(iii) If the identification is weakened then, of course, all it would need is something more, some connecting link in order to remove any possibility of a mistaken identity.**
>
> **(iv) It is not always necessary that the doctrine of recent possession must be invoked especially where there is evidence of identification which if adequate on its own will be sufficient to sustain a conviction or which if requiring to be supported will then be supported by the possession of stolen goods."**

In this case, we agree with the argument by the State that in all the three counts in issue, there was something more that supported the identification evidence. We agree that in the first

count the supporting evidence was the appellant's possession of the victim's phone, which the appellant had left with PW4. We also agree that in the third count, the evidence by PW3 that the appellant sold to him the motor vehicle that was stolen in that count was evidence which supported the identification by PW8. We again, finally, agree that the evidence that the appellant came out of the overturned vehicle which was stolen in the fourth count supported the evidence of identification by PW7 in the fourth count.

We therefore find that the appellant was properly convicted in the first, third and fourth counts.

In the second ground of appeal which deals only with the second count, Counsel for the appellant has pointed out that the vehicle was alleged to have been driven by a person called Olivet Mutina, who was not called as a witness. Counsel suggests that the vehicle could have been stolen by Olivet Mutina. Counsel faults the trial judge for accepting PW3's testimony that the appellant sold the motor vehicle in that count to him. Counsel again suggests that PW3 could have stolen the vehicle himself.

On behalf of the State, it is submitted that the learned judge properly attributed possession to the appellant because it was not possible that the vehicle could have changed hands in such a short time.

We agree, in part, with the appellant in his ground. First, the part that we do not agree with him on is the contention that the judge was at fault when she accepted PW3's testimony that the appellant sold him the vehicle. The testimony, taken as a whole, showed that the appellant sold two motor vehicles to PW3 in a short space of time. The evidence showed that, in the case of the motor vehicle in the third count, the appellant was identified by the victim as the one who robbed him. This, therefore, went to support PW3's testimony that the appellant is the one who took the vehicle to him for sale. The court could not, in the circumstance, disbelieve PW3 when he said that the motor vehicle in the second count was also sold to him by the appellant.

We agree with the appellant, however, with his argument regarding the manner in which it was stolen. The only witness that the prosecution called for the 2nd count was the owner of the motor

vehicle, PW2. His testimony was that he was merely informed by his driver that the vehicle had been stolen, and that, at the material time, it had been driven by a third person known as Olivet Mutina. No evidence was led as to how Olivet Mutina relinquished possession of the motor vehicle. Consequently, there was no evidence to prove aggravated robbery. What could only be established from the testimony of PW2 was the fact that the motor vehicle was taken without his consent. The court below was, therefore, wrong to convict the appellant for the offence of aggravated robbery in this count. A conviction for theft of motor vehicle would have been most appropriate.

We therefore find some merit in this ground. We set aside the conviction for aggravated robbery in the second count, together with its particular sentence. Instead, we substitute a conviction for theft of motor vehicle and a sentence of 5 years imprisonment with hard labour, with effect from the date of his arrest; and to run concurrently with the sentences in the first, third and fourth counts.

Otherwise the rest of the 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