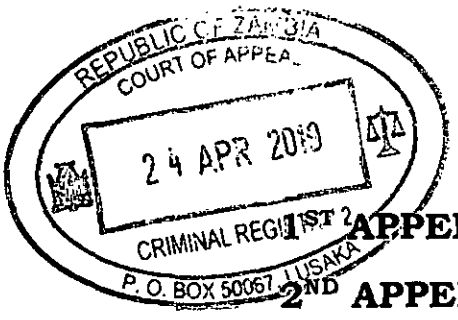
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 118,119,120/2018

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

ADAM SIMFUKWE **1ST APPELLANT**

SAMUEL CHOMBA SIINGWA **2ND APPELLANT**

ISAAC SIWAKWI **3RD APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: ***MAKUNGU, SICHINGA AND NGULUBE, JJA.***
On 22nd January and 24th April, 2019.

For the Appellants: *H.M. Mweemba, Principal Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *C. Soko, Deputy Chief State Advocate, National Prosecution Authority.*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Kateka vs The People (1977) ZR 35.*
2. *Saluwema vs The People (1965) ZR 4*
3. *Chabala vs The People (1976) ZR 4.*
4. *Dorothy Mutale and Richard Phiri vs The People (1977) S.J. 1.*
5. *Machipisa Kombe vs The People (2009) ZR 282.*
6. *Ilunga Kabala and John Masefu vs The People (1981) ZR 102.*
7. *Ninkutisha and Another vs The People (1979) ZR 262.*
8. *Roberson Kalonga v The People (1988-1989) ZR 90.*
9. *Bwalya vs The People (1975) ZR 125.*

10. Mhango and Others vs The People (1975) ZR 275.
11. Chimbini vs The People (1973) Z.R.191
12. James Kape vs The People (1977) ZR 192.

Legislation referred to:

1. Penal Code, Chapter 87 of the Laws of Zambia.

This is an appeal against conviction and sentence arising from a Judgment of the High Court delivered on 21st December, 2016. The three appellants, namely Adam Simfukwe, the first appellant, Samuel Chomba Siingwa, the second appellant and Isaac Siwakwi, the third appellant, were charged with four counts of aggravated robbery and one count of murder. In count one, they were charged with the offence of aggravated robbery, contrary to Section 294(2) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars were that the three appellants, on 9th of June 2015 at Chibombo, in the Chibombo District of the Central Province of the Republic of Zambia, jointly and whilst acting together, and whilst armed with a firearm, stole one motor bike, registration number AG200, valued at K36,000 from *Aulerino Ndhlovu*, which belonged to the said Aulerino Ndhlovu and at or immediately before

appellants, on the 20th August, 2015 at Chibombo in the Chibombo District of the Central Province of the Republic of Zambia, jointly and whilst acting together and whilst armed with a firearm stole from *Manas Elias Mbiliti*, one unregistered motor bike, one camera and two bags containing assorted goods altogether valued at K26,890=00, the property of Manas Elias Mbiliti, and at or immediately before or immediately after the time of such stealing used or threatened to use actual violence to the said Manas Elias Mbiliti to obtain, prevent or overcome resistance to the property being stolen.

The fourth count was that of Murder, contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars were that the three appellants, on 11th September, 2015 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together, murdered Jonathan Sensele.

in August, 2015 whilst in Choma at his garage, the third appellant called him on his phone and they subsequently met. He requested PW1 to find a customer to purchase a motor bike, "kinglion" by make, red in colour, valued at K11,000=00. The third appellant left the motor bike with PW1 and four days later, he sent the witness his bank account details so that money that would be realized from the sale of the motor bike would be deposited into his account.

PW1 eventually sold the motor bike to Caleb Mazuba, who paid in kind by giving him four cows. He assured Mazuba that documentation relating to the motor bike would be availed to him at a later stage because when the third appellant gave the motor bike to PW1, it had none. He further stated that he sold three of the cows and deposited the money into the third appellant's account. He intended to buy the fourth cow but before he could do so, sometime in October, 2015 he was visited by police officers from Kabwe who demanded to know the whereabouts of the

Kinglion motor bike and he led them to its recovery. He identified the motorbike in Court as exhibit P1.

PW2, *Manas Elias Mbiliti's* testimony was that on 20th August, 2015, he was at his village in Ten miles at about 10:00hrs. He parked his motor bike at a shop to have some tea and soon thereafter, he walked to the motor bike and switched it on. Two men approached him and one of them pointed a gun at him while the other man slapped him and ordered him to get off the motor bike. His sister-in-law who was near him had an exchange of words with the men and while this happened, PW2 ran away. When he returned to the shop, he found that his motor bike had been stolen by the two men. After sometime, PW2 was called to identify a motor bike "Kinglion" by make, at the police station in Kabwe. He identified the bike as the one that was stolen from him at Ten miles on the fateful day. The witness described one of the men who robbed him as having had a missing front tooth and he identified him in Court as the first appellant, Adam Simfukwe.

PW4, *Aulerino Ndhlovu* testified that on 9th June, 2015 at 09:00 hours, he was at home in Chibombo when he heard a knock at his door. Upon opening, he found two men one of who was tall and wore a head sock, while the other was short and wore a cap. The short man pointed a pistol at him and forced his way into the house. The men pushed him to his bedroom where they made him lie down and in the process, they demanded for the keys of the motor bike that he had parked outside his house. The tall man grabbed the keys and the men got away with the motor bike and left. PW4 identified the first appellant as the man who wore the head sock during the attack and further identified the second appellant as the man who wielded the pistol. He however stated that no identification parade was conducted by the police when the first and second appellant were apprehended.

PW5, *George Luvula* testified that on 9th June, 2015, he received a call from Aulerino Ndhlovu, the fourth prosecution witness who was his workmate. He informed him that he was attacked by armed

robbers at his house. George Luvula reported the matter to Chibombo Police Station where he was assigned a police officer who accompanied him to Aulerino Ndhlovu's house. Upon being shown the tyre marks of the motor bike that was stolen, they trailed them until they located the robbers on the motor bike a distance away. The police fired warning shots which made the robbers abandon the motor bike and they ran away. The motor bike, which bore the registration number AG 200 was then recovered. The witness identified ID10 as the motor bike as well as the first and second appellants as the robbers who abandoned the motor bike, although on the material day, he saw them at a distance of about fifteen metres away. In cross-examination, the witness stated that he saw the robbers for the first time that day.

PW6, *Given Chingaipe* of Makululu, Kabwe testified that on 19th July, 2015 at 22:00hrs she left her bar and returned home and that as soon as she entered her house, she heard a knock at the door. She peeped though the window and saw that her daughter

was held by some people. One of the young men who was with PW6 in the house went out to see what was happening but the men attacked and beat him up. Upon seeing this, PW6 ran to her bedroom and shortly thereafter, the robbers followed her there and ordered her to lie down, as they wielded a gun. She refused to do so and the men then demanded for money. One of them got the keys for the bar from PW6 and went away while the other man kept watch. The man who went to the bar got K3,120=00 cash, a memory flash, one LG mobile phone, a bottle opener, one brick of cigarettes and a chain. The robbers then left.

Later, when the robbers were apprehended, the Police took them to PW6's house. She identified the second appellant in Court as the one who wielded the gun and further identified the first appellant as the robber who wore a blue work suit. In cross examination, PW6 stated that she saw the two robbers for the first time on the material night.

PW7, *Doreen Matabishi* was PW6's daughter. Her testimony was essentially the same as that of PW6. She confirmed that she and her mother were robbed on the night of 19th July, 2015 at about 22:00hours. In cross-examination, PW7 stated that the police took the first and second appellant to their house and she identified them as the two robbers who attacked them on the material night. No identification parade was conducted.

PW8, *Patricia Chiinda* of Makululu, Kabwe testified that on 11th September, 2015, at about 22:00hours, she left her shop with her husband Jonathan Sensele and they drove home in their motor vehicle, Toyota Spacio registration number ABL 3672. Upon arrival, while they were still in the motor vehicle, she saw a man jump from a mango tree and he knocked at her side of the vehicle and then knocked at the driver's door, but they did not open the doors of the vehicle. The man then went to the driver side of the vehicle and shot her husband.

Thereafter, he ordered the witness to open the door and when she did, he demanded for money from her at gun point. She gave him K600=00 cash and he grabbed her MTN phone as well as that of her husband, which was worth K1,400,00. The robber then left. PW7 testified that her son, Evans Kunda took his father to the hospital but upon arrival there, he died. The robbery lasted for about thirty minutes and PW7 described her assailant as having been of medium built, light in complexion with black lips.

On 14th of September, 2015, the Police conducted an identification parade at Kabwe Central Police Station on which twelve men were lined up. PW7 identified the first appellant on the line up, as the man who shot her husband and robbed her on the material night.

PW9, *Evans Kunda's* testimony was that on 11th September, 2015, he was informed that his father had been shot. He rushed to the scene where he found his father lying in his motor vehicle and drove him to Kabwe General Hospital but upon arrival he was informed that his father was already dead.

PW10, Detective Inspector *Zacks Ngala* testified that on 29th September, 2015, he conducted an identification parade in a case of murder. The witness, Patricia Chiinda identified the first appellant on a lineup of ten men as the man who robbed her and shot her husband dead on the material night. Photographs of the parade were then taken.

PW11, Detective Chief Inspector *Victor Shawa's* testimony was that when he took over as officer-in-charge of the Anti-Robbery Unit on 18th May, 2016, he received one motor bike, one memory flash, one blue spacio motor vehicle as well as a postmortem report in the name of Jonathan Sensele as exhibits in this matter which he tendered in Court in support of the prosecution's case.

PW12, *Nicholas Mshanga*, testified that on 15th October, 2015 he received a complaint from Elias Manas Mbiliti, PW2 who stated that he was robbed of his motor bike, kinglion and other goods valued at K26,830=00. Investigations were instituted which led to the arrest of the second appellant Samuel Chomba Siingwa. He in

turn led the Police to Chipata Overspill Compound where the third appellant Isaac Siwakwi was apprehended and the Police recovered a blue book for a firearm in the name of Isaac Siwakwi as well as 28 rounds of ammunition. The third appellant then led PW12 and other Police officers to Kasama where they apprehended the first appellant and recovered a pistol whose serial number was "Z0047" with 13 rounds of ammunition. PW12 also recovered a flash from the first appellant's house. The third appellant also led the Police to Choma where a "Kinglion" motor bike was recovered.

PW13, Detective Chief Inspector *Vincent Ricky Chibesa*, a forensic ballistic expert's testimony was that on 8th November, 2015, Mr. Siabanyati, the Officer-in-Charge, Scenes of Crime Central Division submitted a pistol bearing the serial number Z0047 as well as 41 cartridges and one cartridge case to the forensic science laboratory for examination. He also submitted one projectile that was extracted from a dead body during a postmortem examination.

Detective Chief Inspector Chibesa examined the exhibits and found that the pistol, a Girson, calibre 9mm was in perfect working condition and that the submitted cartridges were of 9mm calibre, capable of being loaded and discharged from the said pistol. He concluded that the cartridge case that was picked from the scene of crime as well as the projectile extracted from the body were loaded and discharged from the Girson pistol that he examined. PW3 produced a forensic ballistic report as well as a photographic album of ballistic images. The Girson pistol, projectile and cartridges were admitted into evidence.

The first appellant, *Adam Simfukwe*, in giving his Defence testified that on 24th September, 2015, while he was in Kasama, he received a call from Isaac Siwakwi, the third appellant who was a relative through marriage and he requested that they meet at Bata within Kasama Central Business District. The first appellant met Isaac while in the company of people he did not know and they apprehended him and remanded him in custody at Kasama Police

Station. He was subsequently taken to Chowa Police Station in Kabwe where he was questioned regarding some offences. He denied the charges and told the Police that he was in Kasama on the dates when the offences were allegedly committed.

An identification parade was conducted at Kabwe Central Police Station at which Patricia Chiinda, the eighth prosecution witness identified him although he did not know her. He denied having been found with a pistol at his house.

The second appellant, Samuel Chomba Siingwa testified in his Defence that on 23rd September, 2016, while at home in Kabwe, he was visited by police officers who asked him if he knew the third appellant. He led the police to Isaac Siwakwi, the third appellant's residence in Chipata Overspill Compound, Lusaka.

The third appellant, Isaac Siwakwi testified in his Defence that he was a businessman who dealt in maize and the sale of motor bikes. On the 24th September, 2015, the Police went to his house and asked him if he owned a firearm. He agreed and told them that his

firearm was stolen when he was buying maize in Choma, whilst in the company of the first appellant. He led the police to Kasama where the first appellant was apprehended. He further stated that he bought the motor bike that was recovered in Choma from John Banda for K5,000=00 and took it to his friend PW1, for sale. He denied giving the firearm to his co-accused persons for them to use in staging robberies, but admitted that the firearm that was produced in Court was his.

Upon analysing the evidence before it, the Court found the first appellant guilty on counts one, two, three, four and five, and convicted him accordingly.

The Court further found the second appellant guilty as charged on counts one and two and convicted him accordingly. The Court then found the third appellant guilty on counts three, four and five and convicted him accordingly. The Court acquitted the second appellant on the third, fourth and fifth counts and further acquitted the third appellant on counts one and two. The Court

sentenced the first appellant to death in counts one, two, three, four and five and sentenced the second appellant to death in count one and two while the third appellant was sentenced to death in counts three, four and five.

The appellants appealed against their respective convictions and sentences and filed three grounds of appeal couched as follows-

1. The learned trial Judge erred both in law and fact when he convicted the first and second appellants on count one and two on the basis of identification by PW4, Aulerino Ndhlovu in the first count and PW6 and PW7 in count two.
2. The learned trial Judge erred both in law and fact when he convicted the first and third appellants of the offence of aggravated robbery in count three, on the identification of the first appellant by PW2 Manas Elias Mbiliti.
3. The learned trial Judge erred in law and fact when he convicted the 1st and the 3rd appellant on counts three and four in the

absence of proof beyond all reasonable doubt as is required in criminal matters.

In arguing ground one Mr. Mweemba, Principal Legal Aid Counsel submitted that the conviction of the first and second appellants in Court one was based solely on the evidence of identification that was given by PW4, who gave a general description of his assailants by referring to their heights. It was submitted that one of the attackers wore a head sock while the other wore a cap and that the ordeal lasted for a few minutes.

Counsel argued that due to the traumatic conditions, PW4 was not able to identify his attackers and that the possibility of an honest and mistaken identification of the appellants was not ruled out as the attackers were strangers to PW4. Further, when the appellants were apprehended, they were taken to PW4 by the Police and no identification parade was conducted.

We were referred to the case of **Kateka Vs The People,**[1] where the Court held that –

> ***"In these cases which rest on the identification of a person who is not previously known to the witness, it is most important that the features or description by which the alleged culprit is identified should be canvassed"***

We were urged to allow the appeal on ground one and quash the convictions and sentences.

Referring to count two, Mr. Mweemba contended that the first and second appellants were convicted on the evidence of PW6 and PW7 who were attacked at night by two assailants that they saw for the first time under stressful conditions. It was contended that the witnesses did not describe the physical features of their attackers and that the Police took the first and second appellants to the home of PW6 and PW7 when they were apprehended but did not conduct an identification parade. Counsel argued that the flash that was recovered from the first appellant's house did not contain anything and could not connect the two accused persons to the offence nor could it corroborate the weak evidence of identification.

We were urged to allow ground two of the appeal and quash the convictions and sentences.

On ground three, it was argued that the evidence connecting the third appellant to the offence was that of the motor bike that he sold to the first prosecution witness. It was submitted that the third appellant explained that he bought the motor bike from John Banda. Counsel contended that mere possession of the motor bike did not necessarily mean that the third appellant participated in the commission of the offence. We were referred to the case of **Saluwema v The People,**[2] and Counsel submitted that the explanation that was given by the third appellant showed that the motor bike in issue exchanged hands before he was found in possession of it. It was contended that the inference of guilt was not the only reasonable reference in the circumstances and that the identification by the complainant was weak as no identification parade was conducted. We were urged to allow the appeal on ground three and quash the convictions and sentences.

Counsel further submitted that the first and third appellants were convicted on counts four and five for the offences of murder and aggravated robbery, and that the Court found that the third appellant gave his firearm to the first appellant for it to be used to commit crimes.

It was argued that the third appellant testified in his defence that his firearm went missing in June, 2015, and that he reported the matter to Emmasdale Police Station. We were referred to the case of **Chabala v The People,**[3] where the Supreme Court stated that-

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

In light of the foregoing, Counsel submitted that when an accused person gives an explanation which can possibly be true, he is entitled to an acquittal unless the state negates the Defence. He

further submitted that the explanation that was given by the third appellant was reasonably possible.

It was contended that the third appellant should not have been convicted of murder and aggravated robbery in counts four and five, as no evidence was led to show that he was aware that his gun was used for mischief and had no knowledge of the commission of the said offences.

Referring to the case of **Dorothy Mutale and Richard Phiri v The People,**[4] Counsel argued that there is nothing to exclude an inference that is favourable to the third appellant. We were urged to set aside the convictions and sentences on counts four and five and set the appellants at liberty.

In reply, Ms Soko, Deputy Chief State Advocate submitted that the appellants' modus operandi was similar in all the counts. She submitted that the first appellant was properly identified in counts four and five and was identified as the person who wielded the lethal weapon used to kill Jonathan Sensele.

It was contended that the link was established through the ballistic report as well as the recovery of the firearm and that the third appellant's defence was not probable, as he reported his firearm missing at Emmasdale Police when the said firearm allegedly went missing in Choma, which was absurd.

Counsel stated that the third appellant bought a motor bike from a total stranger he referred to as John but failed to lead the police to the said "*John*". We were referred to the case of **Machipisa Kombe v The People,**[5] where it was held that odd coincidences if unexplained amount to corroboration. We were further referred to the case of **Ilunga Kabala and John Masefu v The People,**[6] where it was held that an explanation which cannot reasonably be possible is not an explanation.

Regarding the possibility of honest mistake, Counsel argued the identification of the 1st and 2nd appellants was not under circumstances which one can call mistaken identification because of the conditions that existed when the robberies were carried out.

She prayed that the third appellant be found guilty on all the five counts and that the convictions and sentences for all the appellants be upheld.

We have considered the grounds of appeal, the submissions by Counsel, the evidence in the Court below and the Judgment appealed against. We shall proceed by addressing the grounds of appeal in the order in which they were argued by the appellants' Counsel.

In ground one, the appellant's contention is that the learned trial Judge erred both in law and fact when he convicted the first and second appellants on count one and two on the basis of identification by PW4, Aulerino Ndhlovu in count one and PW6 and PW7 in count two.

In count one, the evidence against the first and second appellants is that of Aulerino Ndhlovu, whose testimony was that on 9th June, 2015, at 09:00hours, two men whom he described, robbed him of a motor bike at gun point at his house. He stated that he saw the

robbers for the first time on the material day. In the case of **Ninkutisha and another v The People**,[7] it was held that-

> ***"There is need for caution in identification cases, and where the quality of evidence is not good, there is need for supporting evidence to rule out the possibility of an honest mistake."***

In count one, the first and second appellants were not placed on an identification parade for PW4, Aulerino Ndhlovu to identify them. Further, although the incident happened at 09:00hhours, the witness saw the two robbers for the first time that day. In the case of **Roberson Kalonga v The People,**[8] the Supreme Court held that-

> ***"Poor identification evidence requires corroboration such as finding of recent possession of stolen property."***

The evidence of George Luvula, the fifth prosecution witness was that he gave chase after Aulerino Ndhlovu was robbed of his motor bike until the robbers abandoned it. He identified the first and

second appellants in Court as the robbers whom he saw at a distance on the material day.

From the evidence highlighted above, we are not satisfied that Aulerino Ndhlovu observed his attackers, whom he saw for the first time and was able to identify them positively days later. Further, his colleague, PW5 saw the robbers who abandoned the motor bike at a distance. Clearly, the evidence of identification in count one was weak and was not corroborated by any other evidence. Further, no identification parade was conducted. As such, we are of the view that the learned trial Judge misdirected himself when he convicted the first and second appellant on count one as the evidence of identification was weak. We find merit in ground one and we accordingly allow it. We therefore acquit the first and second appellants and quash the sentences.

We turn our focus on the second count, that the evidence of identification by PW6 was weak and should not have resulted in the convictions of the first and second appellants. The evidence of

the PW6 was that she was robbed of K3,120=00 a memory flash, a phone and a bottle opener at her house on the night of 19th July, 2015. The evidence of her daughter, the PW7 was essentially the same as that of the sixth prosecution witness. PW6 testified that after the robbers were apprehended, they were taken to her house for scene reconstruction and that no identification parade was conducted but she and her daughter, identified the first and second appellant as the robbers who attacked them on the material night.

In the case of **Bwalya v The People,**[9] the Court held that it is not sufficient to be satisfied that a witness is honest. The Court must be satisfied that the possibility of honest mistake has been ruled out.

In the case of **Mhango and others v The People,**[10] the Court held that-

> ***"If an identification parade is not held in circumstances in which the failure to hold it is a***

dereliction of duty, then the Court is bound to infer that had it been held, the witness would not have been able to identify the suspects."

We observed that in the second count, the Police did not hold an identification parade when the first and second appellant were apprehended but rather, they took them to PW6's house for scene reconstruction. Clearly, there was a dereliction of duty on the part of the Police. Further, we are not satisfied with the evidence of identification by PW6 and PW7. We are of the view that the possibility of honest mistake was not ruled out. In the circumstances, we conclude that the trial Court erred in law and fact when it convicted the first and second appellants on the weak evidence of identification in count two. We find merit in this ground of appeal and accordingly allow it. Consequently, the first and second appellant are acquitted on count two.

In ground two, the first and third appellants have challenged their conviction for armed aggravated robbery on the evidence of PW2, Manas Elias Mbiliti.

The evidence of PW2 was that he was robbed of his motor bike, kinglion, on 20th August, 2015 at Ten miles where he lived. It was recovered in Choma two months later after the first appellant led the police to its recovery. He identified the first appellant as one of the robbers whom he described as having had a missing front tooth. Notably, no identification parade was conducted by the Police. The Court accordingly convicted the first appellant on count three, based on the identification by the second prosecution witness as well as the fact that the first appellant led the police to the recovery of the motor bike in Choma.

This was a case of a single identifying witness and the case of **Chimbini vs The People,**[11] refers. In such a case, the Court must be satisfied that the witness is reliable in his observation and that the possibility of an honest mistake has been ruled out.

PW2 testified that when the robbers attacked him, he was filled with fear and ran away. We are therefore of the view that the opportunity that the witness had to observe his assailants was not

favourable as he was afraid and even ran away. The evidence of identification is therefore weak and we are not satisfied that the second prosecution witness' identification of the first appellant was sufficient to rule out the possibility of honest mistake.

The other piece of evidence against the first appellant is that he led the Police to Choma where the "Kinglion" motor bike was recovered. The evidence of PW2 was that the motor bike was stolen from him in June, 2015. The evidence of PW1 was that the first appellant took the motor bike to Choma for sale in August, 2015. In the case of **James Kape v The People,**[12] the court held that-

> ***"Where the Court purports to draw an inference of guilt in a case of recent possession of stolen property, it is necessary to consider what other inferences might be drawn."***

The first appellant, who took the motor bike to Choma in August, 2015, two months after the aggravated robbery stated that he got the motor bike from one John. The trial Court should have taken care to show that it had given consideration of the possibility that

the first appellant might have come into possession of the motor bike otherwise than by stealing it. The first appellant offered an explanation of how he came to be in possession of the motor bike. In our view, the two months which lapsed make it reasonable to infer that the first appellant was a mere recipient of the motor bike. We conclude that the first appellant was a guilty receiver of the motor bike and accordingly find that the trial Court misdirected itself when it convicted the appellant of armed aggravated robbery on count three. We accordingly set aside the first appellant's conviction and sentence and in its place, we find the first appellant guilty of the lesser offence of receiving stolen property, contrary to Section 318 of the Penal Code. We find no evidence against the third appellant on count three and he is accordingly acquitted.

We finally turn to ground three which attacks the finding that the first and third appellants were guilty of murder and armed aggravated robbery in count four and five in the absence of proof beyond all reasonable doubt.

The evidence against the 1st and 3rd appellants on count four is that of the eighth prosecution witness who testified that on the material night, her husband was shot dead by a robber who attacked her and her husband while they sat in their motor vehicle. The robber got away with their phones and K600 cash. She identified the 1st appellant at an identification parade as the robber who shot her husband on the fateful night. She further testified that the robbery lasted for about thirty minutes.

The evidence of the PW12 was that the second appellant led the police to Chipata Overspill in Lusaka where the third appellant, Isaac Siwakwi was apprehended. The Police recovered 28 rounds of ammunition as well as blue book from the third appellant. The third appellant led the Police to Kasama where the 1st appellant was apprehended.

The evidence of the eleventh prosecution witness was that he picked up an empty cartridge from the scene where John Sensele was shot. He also confirmed that he was present at the

identification parade where the eighth prosecution witness identified the 1st appellant as the robber who shot her husband. Further, a pistol was recovered from the 1st appellant in Kasama, with 13 rounds of ammunition. The Police also recovered a memory flash disc from the 1st appellant in Kasama.

The third prosecution witness, the ballistic expert examined 41 cartridges, one cartridge case that was picked at the scene of murder and a projectile that was extracted from the body of John Sensele during the postmortem examination.

He concluded that the projectile that was extracted from the body of John Sensele and the cartridge that was picked at the scene were discharged from the Girson pistol that was found with the 1st appellant in Kasama. The blue book that was found with the third appellant was for the Girson pistol.

We have no difficulty in concluding that the 1st appellant who was identified by the eighth prosecution witness was the robber who also murdered John Sensele on the fateful night. The evidence of

identification is corroborated by the fact that he was found with the Girson pistol in Kasama, which the ballistic expert confirmed was used to discharge the projectile that was picked at the scene where John Sensele was murdered.

The evidence of the ballistic expert sufficiently connects the 1st appellant to the two offences. We are therefore satisfied that the 1st appellant was the person who shot and murdered John Sensele on the material night and robbed him and his wife, PW8 of their mobile phones and K600 cash. We are also satisfied that PW8's evidence of identification was corroborated by the overwhelming evidence of the ballistic expert.

We accordingly agree with the learne trial Judge that the first appellant was properly convicted o murder and aggravated robbery on counts four and five. We ho ver do not find sufficient evidence that connects the 3rd appella the commission of the offences in counts four and five. We rdingly uphold the 1st appellant's conviction and sentence f urder and aggravated

robbery. However, due to insufficient evidence, the third appellant is acquitted of the offences of murder and aggravated robbery on counts four and five.

The net result is that the second and third appellants are acquitted on all counts.

The 1st appellant's convictions and sentences on counts four and five are upheld, and the appeal relating to these counts is accordingly dismissed.

C.K. MAKUNGU
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE