

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE**
(Criminal Jurisdiction)

Appeal No. 169,170,171/2020

BETWEEN:

**BENSON KACHINGWE
TITUS BWEUPE
LUCKSON CHALWE**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

AND

THE PEOPLE



RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 19th May, 2021 and 28th May, 2021.

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

For the Respondent: Mrs. G. C. Mulenga, Principal State Advocate, National
Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. William Muzala Chipango and Others v The People (1978) ZR 303 (SC)**
- 2. Douglas Mpofu and Washington Magura v The People (1988 - 1989) ZR 24**

3. **Boniface Chanda and Others v The people (1988 – 1989) ZR 164**
4. **Chabala v The People (1976) ZR 14 (SC)**
5. **Ilunga Kabala and John Masefu v The People (1981) ZR 102 (SC)**
6. **George Nswana v The People (1988 – 1989) ZR 175**
7. **David Zulu v The People (1977) ZR 151 (SC)**
8. **Yona Jere v The People – Appeal No. 102 of 2019 (CA)**
9. **Ezious Munkombwe and Others v The People – CAZ Appeal No. 7, 8, 9 of 2017**
10. **Simon Miyoba v The People (1977) ZR 218 (SC)**
11. **Yokoniya Mwale v The People – Supreme Appeal No. 285 of 2014.**
12. **James Mwango Phiri v The People – Supreme Court Judgment No. 171 of 2018**
13. **Elias Kunda v The People (1986) ZR 93 (SC)**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia.**

At the hearing of this appeal, we were informed by learned counsel for the state that the 2nd appellant's remainder of the sentence was remitted. He did not turn up for the hearing of his appeal. We take it he is not desirous of proceeding with it and we accordingly dismiss it.

The appellants were jointly charged on an amended information containing two counts of aggravated robbery contrary to **Section 294(1)** and also

two counts of murder contrary to **Section 200** of the **Penal Code, Chapter 87 of the Laws of Zambia**.

In the first count, the particulars of the offence allege that the first and second appellants on 19th June, 2017 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, whilst armed with a knife did steal one motor vehicle namely Toyota Corolla registration number ACH 1262 valued at K22,000.00 the property of Reward Sinyangwe and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Mike Ntokoshi in order to obtain, retain, prevent or overcome resistance from it being stolen.

In the second count the particulars of the offence allege that on 19th June, 2017 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, the first and second appellants jointly whilst acting together with other persons unknown, did murder one Mike Ntokoshi.

In the third count, the particulars allege that the first and third appellants on 24th July, 2017, at Ndola in the Ndola District of the Copperbelt Province

of the Republic of Zambia, jointly and whilst acting together with other persons unknown, whilst armed with a knife did steal one motor vehicle namely Toyota Fun Cargo registration number ACZ 1729 valued at K25,000.00 the property of Peter Chainda and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Peter Chainda in order to obtain, retain, prevent or overcome resistance from it being stolen.

In the last count, the particulars of the offence allege that on 24th July, 2017 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, the first and second appellant whilst acting together with other persons unknown, did murder one Peter Chainda.

The prosecution called a total of twenty-two witnesses. A summary of PW1's evidence was to the effect that some time in June 2017 while at his workshop he was approached by a tall dark gentleman on two occasions, who came with a metal plate with a design of a knife and wanted him to make a knife for him. He later came to identify the gentleman as the first appellant. PW2 a taxi driver who was operating at Mushili Kansengu

station led evidence with respect to the unique features of the missing car a Toyota Corolla registration number ACH 1262. He identified the said motor vehicle parts at Ndola Central Police Station.

PW3 a taxi driver told the trial court that on 19th June 2017, between 10 and 11 hours, he was approached by a tall, dark slim gentleman with a problem in one of his eyes. He told the court that the gentleman wore a black T-shirt and a pair of jeans trousers. He later come to identify him as the third appellant. The gentleman booked PW3's taxi to go to Maria Chimona in the evening of that day. The gentleman gave PW3 his cellphone number. The trip failed to take off as PW3 did not have fuel. He later came to learn that the gentleman went with another driver by the name of Michael Ntokoshi, the deceased. Later he was called to identify the body of the said Michael Ntokoshi.

PW4 also a taxi driver led evidence to the effect that on 20th June, 2017 around 16:00 hours, while he was putting a tint to his car, he was approached by a tall, dark and slim person who wore a jean trousers and a black leather coat. He later came to identify him in court as the first

appellant. The first appellant asked to book his taxi to Maria Chimona to carry four tyres and two sacks of groundnuts and had a discussion with him for about ten minutes until they agreed on a fare of K350.00. The first appellant then left to buy a few items in the market. When it was PW4's turn to load, he was booked by another customer. On his return he was informed by his friends that the first appellant had booked the late Michael Ntokoshi and they had left. Later he was called to identify the body of the deceased.

PW5 a scrap metal dealer and owner of a Toyota Corolla ACH 1262 a pirate taxi which Micheal Ntokoshi, the deceased herein was her driver led evidence on how she is part of the people who went identify the deceased's body in the bush near Kawama. She also identified the car parts for her car. The testimony of PW6 a motor vehicle spare parts dealer operating at Maiteke area in Masala was to the effect that some time in June, 2017 a young man who he identified in court as the first appellant visited his shop and told him that he had a gearbox and a 5A engine for a Toyota Corolla for sale at the price of K4 000.00. PW6 negotiated the price and they settled for K2 000.00. He paid him K1 000.00 and told him to

return for the balance in two weeks' time. PW6 proceeded to sell the engine to a customer. Whilst waiting to conclude the sale with his customer, PW6 was surprised to see the first appellant at his shop in handcuffs in the company of police officers. The police asked him if he knew the first appellant and he explained to them how he knew him. He identified said engine and gear box. PW7 a taxi driver is the one who purchased the engine from PW6. His evidence on how he bought the engine is essentially similar to that of PW6. Elias Moonga PW8 a mechanic at Emmanuel Kaputo's garage in Pamodzi told the trial court that on 20th June, 2017 he received two young men, one was tall, slim and dark in complexion while the other was short. PW8 later identified the duo as the first and second appellant respectively. The duo had a Toyota Corolla which had a problem which they wanted fixed. PW8 attempted to fix the said vehicle but the first appellant instructed PW8 to strip it off so that he could sale the car parts. PW8 obliged and after so doing, he never heard from the first appellant until when the police went to the garage to collect the remainder of the body parts for the car for identification. It was his further testimony that he spent ample time conversing with the first appellant.

PW9, Emmanuel Kaputo was the owner of the garage where PW8 worked. His narration of the events of the evening of 20th and 21st June, 2017 was similar to that of PW8 and we shall not repeat the same. He told the court that on 25th July, 2017 he met a bus driver by the name of Chomba who told him that he had business for him. It turned out that the business in question involved a Toyota Fun Cargo alleged to belong to the first appellant. The said car had allegedly been involved in an accident at Maria Chimona. The car was then towed to PW9's garage. The first appellant then instructed PW9 to remove the car's engine as he had found a buyer for the same. The engine was duly sold to Mr. Bruce. The following day PW9 was visited by police officers who were inquiring about a Toyota Fun Cargo. He narrated to the police exactly what the first appellant had told him. The police then asked him to call the first appellant and they agreed to meet in town. When they met in town the police officer apprehended the first appellant and asked PW9 to go back to his garage. He was later joined by the police who interrogated him on the fun cargo as well as the remaining parts of the Toyota Corolla car. The following day the police also recovered Mr. Bruce's Fun Cargo.

In cross examination, PW9 told the trial court how he met the first appellant and denied being the ring leader. PW10 a scrap metal dealer's testimony was essentially that he was the owner of the motor vehicle Toyota Corolla ACH 1262. He proceeded to identify the registration book, the engine in issue and the parts of his car.

Happy Chalwe, a taxi driver testified as PW11 and he led evidence on oath of how he introduced the first appellant to Mr. Bruce who in turn purchased the Toyota Fun Cargo engine. PW 12 was Bruce Chipoya. He told the trial court that on 26th July, 2017 he came to learn of an engine from his driver PW11 and confirmed owning a motor vehicle Fun Cargo registration number ACT 2022 silver in colour. He told the trial court that the following day, he went with PW11 to PW9's garage where they found him with other people. He also found another silver Fun Cargo whose engine was removed and put on the side. He asked PW9 if he was the one selling the engine, but PW9 denied and pointed at the first appellant as the owner of the engine in question. He engaged in a conversation with the first appellant and they agreed on the price K3 500.00. When he inquired

about the paper work for the said vehicle, the first appellant told him that he had left them in Congo and he promised to bring them for him. He told the court that a day after purchasing the said engine, he received a phone call from a CID officer by the name of Lombe of Chifubu Police. He later went to Chifubu Police Station where he identified the first appellant.

Alice Ntokoshi testified as PW13. She led evidence on how she accompanied the police officers and the first and second appellant to identify the body of his late brother Mike Ntokoshi. She told the trial court that the first and second appellant led the police to where the body was found.

PW14 also a taxi driver, led evidence to the effect that on 23rd July, 2017 he was approached by two gentlemen who he later came to identify one of them as the first appellant. He told the trial court that on the material day, the first appellant asked him to take him to Maria Chimona. He was unable to take him there as his car was not road worthy. He told the trial court that the late Peter Chanda (the deceased herein) offered to drive the first appellant. PW14 told the court that the following day he came to learn

that Peter Chainda never returned home the previous day. A search for him ensued. Later on, he was called to participate in an identification parade where he identified the first appellant as the person, late Peter Chainda drove Maria Chimona. PW15's evidence was substantially the same as that of PW14. The only material difference is that he told the court that the other person who was with the first appellant had an impairment in his eye. He proceeded to identify him in court as the third appellant.

Eugene Chengo testified as PW16. He was the owner of the Toyota Fun Cargo Registration Number ACZ 1729. His evidence was to the effect that the late Peter Chainda was his Taxi driver. He proceeded to identify his car at Chifubu Police Station. Derick Chainda PW17, was the young brother to the late Peter Chainda. His material testimony was that he was the one who identified Peter's body when it was found and also identified the same body to the doctors for a post mortem examination. He told the court that when the clothes were removed, he observed a deep cut on his stomach, another deep cut on the back and a swollen head.

PW18 was Inspector Freedom Machona. He told the trial court that on 17th August, 2017, he conducted an identification parade formed by 11 people in relation to two cases of aggravated robbery and Murder. His material evidence was that the identification parade was well conducted and the witness only identified the first and third appellant.

Detective Sergeant Justine Sichula testified as PW19. He told the trial court that on 28th July, 2017, while at Chifubu Police Station, he received a report from a reliable source that a Fun Cargo suspected to be stolen was being dismantled at a garage. In the company of Detective Sergeant Ilukena, Detective Sergeant Banda and Detective Sergeant Lombe, he went to Pamodzi in a private vehicle. They arrived at the said garage and entered. They found a Toyota Fun Cargo grey in colour which was partially dismantled. Some parts were removed from the car, the engine, gear box and bonnet. The owner of the garage PW9 was questioned about the vehicle and he revealed that the vehicle was brought by a Mr. James. PW9 was then instructed to call the said James who answered the phone and they arranged to meet in town. They went to town together with PW9 and while there they managed to apprehend the said James who was later

identified as the first appellant. After interviewing him, he led the police to the second and third appellants and they were both apprehended. It was PW18's further testimony that after further interrogation, the appellants led the police to a bush near Kawama Cemetery where the body of Michael Ntokoshi was recovered in a decomposed condition. The police also recovered a knife which turned out to be the murder weapon. The appellants also led the police to Maria Chimona where the body of Peter Chainda was recovered. A knife was also recovered 50 meters away from where the body was lying. It was also his testimony that he also recovered a radio cassette and a speaker from the second appellant's house in Kafulafuta.

Detective Sergeant Anthony Sichilima a scenes of crime officer testified as PW20. His testimony was to the effect that on 31st July, 2017, he was assigned to photograph an identification parade held at Chifubu Police Station made up of 12 persons in a motor vehicle theft case. One witness identified the first appellant. The rest of his evidence is materially similar to that of PW19. The evidence of PW21 Detective Sergeant Francis Banda

of Masala Police Station and PW22, Detective Sergeant Ilukena of Chifubu was materially the same as that of PW19.

When put on their defence, all the appellants elected to testify on oath and called no witness. In his defence, the first appellant denied having committed the offences he was charged with and instead implicated PW9 as having approached him at his car wash inquiring on a taxi that could ferry meat from his farm. He told the trial court that he was beaten by the police, taken to Kawama in the bush where he was asked to bury a knife and when he refused, he was beaten again. He told the court that after this incidence, he was taken to the boarder of Zambia and Congo where they remained in the car and the police went into the bush and come back with a dead body. In cross examination he admitted leading the police to the apprehension of the second and third appellants who were in his company on 20th to 24th July, 2017. With regards to the testimony of PW1, he denied approaching him at Maiteke twice so that he could make knives. He stated that the only reason PW1 pointed at him was because they spent some time together in custody. He further admitted negotiating a taxi fare with PW3 and admitted booking a Fun Cargo on which he alleged did so on

behalf of PW9. He denied taking the Corolla to PW8 and PW9 and he further denied selling the engine to PW6.

He told the court that the only reason why all the witnesses were implicating him, is because PW9 had instructed them to do so.

The second appellant testified as DW2 and informed the trial court that he was a grade 12 pupil at Kaela Secondary School. His version of the story was that on 19th June, 2017 he was at school and knocked off around 16:30 hours. That on 2nd August, 2017 as he was preparing to go to school, he was approached by two people who asked him if he knew the first appellant and he confirmed that he was his cousin and that he worked at the car wash. He came to learn that the two persons who had approached him were police officers and he accompanied them to Pamodzi Police Station. The rest of his evidence relating to the recovery of the dead bodies of the deceased and the murder weapons is essentially the same as that of DW1.

The third appellant testified as DW3. He denied the two charges alleging that all the prosecution witnesses found him in Masala. According to his testimony, on 23rd July, 2017, PW9 went to their car wash and called the first appellant whom he instructed to look for a motor vehicle to deliver cement to his farm. When they reached Masala, they found a Taxi driver who said he was not working that day but told them to go back the following day. On 24th July, 2017, PW9 went to their car wash and went away with a taxi driver driving a fun cargo but he did not know where they were going. He denied ever going to PW9's garage. The remainder of his evidence is similar to that of DW1. In cross examination he told the trial court that he co-owned the car wash with the first appellant and that he was still working with the first appellant.

The learned trial court found that the odd coincidences in counts 1 and 2 removed the circumstantial evidence from the realm of conjecture to attain a degree of cogence which only permitted an inference of guilt on the part of the 1st and 2nd appellants. The trial court also found that the circumstantial evidence in count 3 and 4 led to the conclusion that the first and the third appellants stole Peter Chainda's vehicle and later murdered

him. The trial court also observed that none of the accused gave any reasonable explanation as to how they came to be in possession of the stolen cars. The trial court also found that none of their defence was established. The trial court found the first appellant guilty of two counts of murder and aggravated robbery, the second appellant and third appellants were each found guilty of one count of aggravated robbery and one count of murder. In count one the trial court sentenced the first appellant to life imprisonment while the second appellant was detained at the president's pleasure. In count two, the first appellant was sentenced to death by hanging while the second appellant was detained at the president's pleasure. In count three the first appellant and third appellant were sentenced to life imprisonment and in count four the first and third appellants were sentenced to death by hanging.

Dissatisfied with the conviction, the appellants appealed to this court on three grounds of appeal as follows:

- 1. The trial court erred in law and in fact when the court found that the odd coincidences in counts 1 and 2 removed the circumstantial evidence from the realm of conjecture to attain a degree of cogence which only permitted an inference of guilt on the part of the 1st and 2nd appellants herein.**

2. The trial court erred in law and fact when the court found that the circumstantial evidence in count 3 and 4 led to the conclusion that the first appellant and the 3rd appellant stole Peter Chainda's vehicle and killed him as well.
3. The trial court erred in law and in fact when the court found that the three appellants herein did not give any reasonable explanation as regards their involvement and that they were not credible witnesses in this matter.

Counsel for the appellants filed heads of argument. In regards ground one of the appeal, it was contended that PW1 having been detained by the police for three days and released after he gave his statement to the police, had an interest to serve. That the trial court should have treated him as a suspect witness. The court was referred to the case of **William Muzala Chipango and Others v The People**¹ where the Supreme Court held that:

"Where the prosecution puts a witness forward as one who at the very least has an interest to exculpate himself the court cannot decline to treat him as such without some very positive reasons. 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."

It is contended that the police were led to the place they had already been and no new incriminating evidence was recovered. That no evidence was adduced during the reconstruction of the crime scene to show which of the three appellants did in fact have the guilty knowledge. We were referred to the case of **Douglas Mpofu and Washington Magura v the People**²

where it was held that:

"Where a number of persons are alleged to have led the police to where incriminating evidence is found, it is essential for the trial court to ascertain what is exactly meant by leading. Except in the most exceptional cases only one person could do the actual leading and evidence should be adduced to show which of a number of the persons alleged to have done the leading did in fact have the guilty knowledge."

It is further contended that perusal of the record of appeal indicated that PW3 and PW4 did not see with their eyes who actually booked Mike Ntokoshi. They claimed to have interacted with a person that they were later informed had booked Mike Ntokoshi but they did not provide any proof whatsoever to show that the person they each interacted with booked Mike Ntokoshi the deceased in count 2.

Further it was contended that it cannot be said conclusively that the engine that PW6 identified in Court came from the vehicle that Mike Ntokoshi was driving as the said engine was not identified by any special feature save the writing of 5A which is a common feature for all Toyota Corolla of that make and type. It was also contended that PW8 was not a credible witness as his evidence in court and his statement to the police were different with respect to the number of people that came to the garage with the motor vehicle that Mike Ntokoshi was driving.

It was submitted that from the foregoing, there were no odd coincidences as stated by the trial court and there was no indication that the first appellant and the second appellant committed the offence in counts one and two. That the circumstantial evidence adduced by the prosecution against the first and second appellants in count one and two has not taken the case out of the realm of conjecture to attain such a degree of cogency which can only permit an inference of guilt. We were urged to allow this ground of appeal and quash the conviction against the first and second appellant in count one and two.

In ground two, Mrs. Liswaniso learned Senior Legal Aid Counsel, submitted that PW14 and PW15's identification of the people that allegedly booked the deceased in count 3 was not reliable. That PW14 stated that he interacted with the two people and helped them to find a taxi, however he only managed to identify one of them and described the other one as having had a lot of hair. PW15 who identified the other person that was not identified by PW14, did not identify this person by his short hair. PW14 never mentioned in his evidence that the person had a white spot in his left eye which was a distinguishing feature.

With regard to the finding by the trial court that the first appellant was found in possession of the motor vehicle that was being driven by Peter Chainda, it was submitted that PW9 was the one who implicated the first appellant as having been in possession of the Fun Cargo that was being driven by Peter Chainda the deceased in count 4. That because of the circumstances of this case such as, both vehicles in count 1 and 3 having been found at his garage, he was in police cells and only released after giving a statement to the police, he had a motive to give false evidence against the first appellant. It was also submitted that the danger of false

implication was not excluded and thus the conviction of the first and third appellant on count 3 and 4 was not safe. It was contended that PW12 cannot be regarded as an independent witness to corroborate the evidence of PW9 as the two knew each other. We were referred to the case of **Boniface Chanda and Others v The people**³ where it was held that:

"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognise this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe."

With respect to ground three, we were referred to the case of **Chabala v The People**⁴ where it was held that:

"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. There is no onus on an accused to prove his explanation and the court is required to consider whether the explanation might reasonably be true."

We were further referred to the case of **Ilunga Kabala and John Masefu v The People**⁵ where it was held *inter alia* that:

"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it."

It was submitted that the explanation given by the appellants giving their side of the story on this matter were reasonable explanations that were reasonably true. There was no onus on them to prove their explanations and that the trial court ought to have considered whether the explanations they each gave might reasonably be true. We were urged to allow this appeal and quash the conviction of all the three appellants and set them at liberty.

On behalf of the respondent Mrs. Mulenga, learned Principal State Advocate, in response to ground one and two, submitted that there was overwhelming circumstantial evidence in respect of all counts which the trial court amply described and relied upon. Which included the appellants' possession of recently stolen property within twenty-four hours of such stealing. We were referred to the case of **George Nswana v The People**⁶ where it was held 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."

It was contended that the conviction of the appellants hinged on circumstantial evidence which *inter alia* includes the appellants' recent possession of stolen property which took the case out of the realm of conjecture and attained a degree of cogency which could permit only an inference of guilty. Were referred to the case of **David Zulu v The People**⁷. Further, it was submitted that whilst they acknowledge the fact that the conviction of the third appellant is largely hinged on the last seen principle, they contend that there are some odd coincidences which when combined with the evidence of being last seen with the deceased takes the case out of the realm of conjecture. They referred us to the case of **Yona Jere v The People**⁸ wherein we guided that on the applicability of the last seen principle:

"The last seen theory espouses the principle that when an accused person was the last person to be seen with the deceased, the trial judge will have to take into consideration the time lapse i.e., the time the appellant was last seen with the deceased and the time that the deceased was subsequently found dead. The other issue to consider is the explanation that is tendered by an accused regarding what could have transpired after he was last seen in the company of the deceased. The explanation is on that would exonerate the accused as being the perpetrator as it offers a possibility of someone else being the perpetrator. The last seen theory may be a weak kind of evidence by itself and a conviction on it alone cannot be founded. However, one has to look at other circumstances which, in this case, the trial judge looked at."

It was contended that evidence of leading in this case when assessed holistically with the other evidence on record supports the conviction of the trial court. We were referred to the case of **Ezious Munkombwe and Others v The People**⁹ where we guided that: **"when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individuality."**

It was submitted that the evidence of PW1 was corroborated as it was supported by the following odd coincidences.

- 1. Mike Ntokoshi went missing in June 2017, the same month the first appellant enlisted the services of PW1 in making the homemade knife;**
- 2. The first appellant led to the recovery of the knife which PW1 identified as one of the knives he made for the first appellant;**
- 3. The first appellant led the officers to PW1's place as the person who made the knife that was used to stab the deceased.**

In light of this it was submitted that no miscarriage of justice was occasioned to the appellants on account of the trial court having failed to treat PW1 as a suspect witness as his evidence was sufficiently corroborated. Further it was contended that whilst the respondent concedes that both PW2 and PW3 did not personally perceive the person who booked Mike Ntokoshi, from the record of proceedings there are certain basic facts from which it can still be inferred that the 1st appellant jointly and whilst acting together with others booked Mike Ntokoshi's taxi and later murdered him. That evidence from PW8 and PW9 was given to the effect that the 1st and 2nd appellants were in possession of Mike's taxi on the day that Mike Ntokoshi died. Later the 1st appellant led to the recovery of the knife within the same vicinity that Mike's body was recovered from. It is submitted that the only reasonable inference that can

be drawn from the foregoing facts is that the 1st appellant jointly and whilst acting together with others who include the 3rd appellant booked Mike Ntokoshi.

We were referred to the case of Miyoba v The People¹⁰ where the Supreme Court stated that:

- "1. The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.**
- 2. Neither the depositions taken at a preliminary inquiry nor statements to the police, which in summary committal proceedings are furnished to the court and the defence, are formally before the court and the court is not entitled to have regard to the contents of such depositions or statements."**

With regards to the appellants' argument that PW9 had motive to give false evidence against the appellants, it was submitted that the danger of false implication of the appellants was excluded by the overwhelming corroborative evidence of the various witnesses who testified. Further it was contended that contrary to the appellants' contention, PW12 cannot be regarded as a witness with an interest to serve by his mere relationship with PW9 as evidence on record does not suggest any bias

or motive on PW12's part to falsely implicate the appellants. In support of this argument, the court was referred to the case of **Yokoniya Mwale v the People**¹¹.

With respect to ground three, we were referred to the case of **James Mwango Phiri v The People**¹² where the Supreme Court held *inter alia* that:

"When an issue or defence is raised when the accused is on stand, the trial court cannot be faulted in treating it as an afterthought and an explanation which cannot be reasonably be true."

In the case of **Elias Kunda v The People**¹³ where the Supreme Court held that: **"there cannot be a conviction if an explanation given by the accused either at an early stage or during the trial might reasonably be true."** It was submitted that it is clear from the record of appeal that the appellants' defence was raised for the first time when the appellants were put on stand to testify. And the same was merely an afterthought. In summation it was submitted that the trial court cannot be faulted for having discounted the evidence regarding the appellants involvement in the case as their version of events only arose at defence. We were urged to dismiss the appeal as it did not have merit.

At the hearing of the appeal both counsel relied on their heads of argument submitted into court.

We must state on the onset that ground 3 deals with the explanations the appellants gave in relation to all the 4 counts. As we consider ground one, we will consider ground 3 in so far as it relates to counts 1 and 2. Similarly, when we consider ground 2, we will consider ground 3 in so far as it relates to counts 3 and 4.

We have carefully scrutinized the evidence on the record, the judgment of the court below and the arguments by both parties. We shall first consider ground one, which relates to count one and two, in which the first appellant is the only convict before us.

It is common cause that the evidence against the 1st appellant is purely circumstantial. In the celebrated case of David Zulu *supra* the Supreme Court held *inter alia* that:

"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of fact in issue may be drawn.

It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilt."

It is thus important for a trial court to guard against making wrong or unwarranted inferences from the evidence before it. It is also trite that where guilt is as a matter of inference, an inference of guilt shall not be made unless it is the only inference which can reasonably be drawn from the facts. Thus where there are more than one inferences, an inference more favourable to the accused person must be made.

Mrs. Liswaniso argued that the odd coincidences in this matter has not taken the circumstantial evidence outside the realm of conjecture to attain a degree of cogence permitting only an inference of guilt. It was further argued that PW1 was a witness with an interest to serve having been detained for three days and that the photos produced concerning the recovery of the knives related to scene reconstruction.

The 1st appellant turned up to Mushili Kansengu rank looking for a taxi to take him to Maria Chimona. He approached PW4 and negotiated the fare. PW4

identified the 1st appellant as the person who came to book him around 16:00 hours on the 20th June, 2020. PW4 thus requests a friend of his to accompany him as he takes the 1st appellant. Upon that being said by PW4, the 1st appellant in turn said he would come back later as he wanted to buy something in the market. PW4 later took customers and upon his return he was informed that the 1st appellant had hired and gone with the deceased. The deceased never appeared. On the same day around 18:00 hours the 1st appellant took a vehicle to the garage belonging to PW9. The 1st appellant later instructed PW8 and PW9 to dismantle it as he wanted to sell parts. This was the vehicle which was driven by the deceased person on the day he was booked. Further the 1st appellant turned up selling a 5A engine and a gearbox for a Toyota Corolla at PW6's garage. The 1st appellant also led, while handcuffed with the Titus Bweupe (whose sentence was remitted), to the recovery of the deceased person's body. The 1st appellant personally unearthed his custom made designer knife. It has been argued by counsel for the appellants that leading cannot be done by two people. We were referred for this submission to the case of **Douglas Mpofu** *supra*. When it came to the issue of leading, the learned trial court when placing reliance on it simply stated, at page J73 that:

"Finally it was A1 and A2 who led the police to the recovery of the body of Mike Ntokoshi and the knife P1 which was recovered 10 metres from where the body lay."

We agree that this was a misdirection. The learned trial court ought to have considered the issue of leading by more than one person and determine in the circumstances of the case who among the two accused persons did so with guilty knowledge. We are however satisfied that had the learned trial court properly directed its mind to this issue, it would have nonetheless found that the 1st appellant is the one who did the leading and did so with guilty knowledge. In the circumstances of this case we have no doubt the 1st appellant did the leading to the recovery of the body of the deceased and the his custom made knife.

In the month of June 2017, the 1st appellant turned up at the workshop for PW1 with a metal plate with a special design of knife on it drawn with instructions that PW1 cuts it out and sharpens it. When asked what it was for, the 1st appellant said they needed to use it at the farm to slaughter goats. It was done for him and he left. The knife which he caused to be made in June is the one which he unearthed near the body of the deceased.

Mrs. Liswaniso further argued that PW1 should not have been believed in the absence of corroboration because he was detained for three days in police custody in respect to the offence. We are inclined to disagree with counsel to the extent that she states that there is no corroboration. It is trite that the learned trial court ought to have treated the testimony of PW1 with caution being a witness with a possible interest to serve. This failure was a misdirection. We find that it is too much of a coincidence that he would lead the police to PW1 the knife maker. How then would the 1st appellant have led the police to PW1 who turned out to be a knife maker? It would have been different if the police arrested PW1 and then PW1 mentions or leads to the apprehension of the 1st appellant. The circumstances in this case are too much of a coincidence and the trial court cannot be faulted for accepting PW1's evidence. In any event, we find that there is sufficient corroboration in the circumstances of this case. The totality of the evidence leads to an irresistible conclusion that the 1st appellant murdered Mike Ntokoshi in the process of stealing the motor vehicle. The 1st appellant's explanation in the light of the strong circumstantial evidence cannot reasonably be true as rightly observed by the learned trial court. We agree with Mrs. Mulenga, learned counsel for the respondent, the period from the time the deceased was booked to the time the 1st appellant was in possession of the said motor

vehicle was too short. We find no merit in the appeal in ground one. We accordingly dismiss it.

In respect to ground two which relates to counts 3 and 4, we shall consider the 1st appellant's appeal first.

We wish to state on the onset that the particulars of offence in count 3 is incorrect in respect of the owner of the motor vehicle question. The evidence shows that the owner of the motor vehicle registration number ACZ 1729 is Eugen Chengo and not Peter Chainda as indicated in the particulars of offence. We note that there was no prejudice occasioned as a result of the variance in particulars and the evidence. We wish advise the state to always be alert and make an application to amend the charge or information before a trial court as soon a variance is discovered. Failure to do so, in more deserving cases, would lead to a miscarriage of justice.

Having made the foregoing observation, we now proceed to consider ground two. PW 14 identified the 1st appellant as a person who booked the deceased Peter Chainda on the 24th July 2017 and the deceased never returned. In the month of July, the 1st appellant appeared at PW1's workshop with the

remainder of the metal plate from the first designer knife in counts 1 and 2, with yet another different design for a knife with the same instructions as he gave in respect of the knife in counts 1 and 2. On the 27 the July 2017, the appellant was in possession of the motor vehicle which was driven by the deceased. This was barely 3 days after the deceased was booked. The 1st appellant sold the engine for the fun cargo to PW12. He also led to the recovery of the body of the deceased and his custom made designer knife. The argument by counsel for the appellant that PW9 was a suspect witness having been detained in police custody for 7 days and his evidence needed to be treated with caution because he had a motive to extricate himself from the case. We agree that PW9 is a witness with his own interest to serve. His evidence requires corroboration or evidence of something more to be believed. In fact even the trial court considered this issue and found sufficient support. We agree that there is a lot of other evidence on the record which provide the requisite support. Some of which are the fact that the 1st appellant, booked the deceased driver of the Fun Cargo herein, sold the engine for the Fun Cargo to PW12, he led to the recovery of the body of the driver for the Fun Cargo and led to the recovery of his custom made designer knife. All these provide the requisite support for the evidence of

PW9. We thus find no merit in this argument in the circumstances of this case.

The question we have to determine is whether the circumstantial evidence herein in respect of the 1st appellant would lead to only an inference of guilt?

The learned trial court found that the circumstantial evidence had attained such degree of cogency to lead only an inference that the appellants stole the vehicles and in doing so murdered the deceased persons.

We agree that the pieces of evidence are well kneaded together and only lead to an unassailable conclusion that the 1st appellant murdered the deceased Peter Chanda and in the process stole the motor vehicle question. Surely how unfortunate can a person be that all these unusual circumstances accidentally befall him? That can only be life in a fiction novel. Again, we find that the explanation given by the 1st appellant cannot reasonably be true in the light of very strong circumstantial evidence. All in all, we are satisfied that the conviction of the 1st appellant is safe. The circumstantial evidence is overwhelming. We thus find no merit in the 1st appellant appeal. We accordingly dismiss it.

We turn to the evidence in respect of the 3rd appellant. The only evidence on the record against the 3rd appellant is that given by PW15 to the effect that a day before the deceased was booked, the 3rd appellant has come with another person whom he could not identify wanting to book PW15's taxi going to Maria Chimona. The following day on the 24th July 2017, a phone call was received through PW14 from the persons who had come the previous day. PW15 spoke with one on the phone but declined to be booked due to the poor shocks his taxi had. That is how the deceased was interested in the contract. The deceased was thus escorted by PW14 to the meeting point. That is where PW14 met the 1st appellant, who he saw going with the deceased. The 3rd appellant was never connected in any way to the deceased the day he was booked or disappeared, neither was involved in the sale of any fun cargo vehicle parts nor did he turn up at PW9's garage.

The question therefore is whether the foregoing circumstantial evidence would lead to inference that the 3rd appellant took part in the aggravated robbery and murder of the deceased?

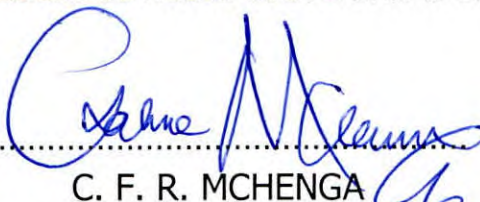
There is evidence that the 1st and 3rd appellant led to the recovery of the body of Peter Chainda and the knife. As we have already observed above, the two were handcuffed together and clearly the one who led is the 1st appellant. In


fact he is the one who even recovered his custom made designer knife near the place where the body of the deceased was found.


We are satisfied that the circumstantial evidence in respect of the 3rd appellant is not satisfactory. Had the trial court carefully considered the facts and the surrounding circumstances, he would have found that the circumstantial evidence in respect of the 3rd appellant could not permit only an inference of guilt.

We allow the appeal by the 3rd appellant. We set aside his convictions for aggravated robbery and murder. We quash the sentence of life imprisonment and death. He now stands acquitted.

In sum total, the appeal by the 1st appellant on all the grounds of appeal is dismissed. The sentences of life imprisonment and death are confirmed. The 3rd appellant's appeal succeeds as noted above and is set at liberty forthwith.


C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


B. M. MAJULA
COURT OF APPEAL JUDGE


K. MUZENGA
COURT OF APPEAL JUDGE