IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 52,53,54/2022**
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

BETWEEN:

OSCAR KAKUNDA **1ST APPELLANT**

HENDRIX CHINYANTA **2ND APPELLANT**

LUCKSON SAMPA **3RD APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Hamaundu, Mutuna and Chisanga, JJS
On 1st November, 2022 and 8th June, 2023

For the Appellants: Mrs. K. C. Bwalya, Legal Aid Counsel
For the State: Mr. C. Bako, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS delivered the Judgment of the court.

Cases referred to:

1. **Choka v The People (1978) ZR 243**
2. **Phiri (E) & Others v The People (1978) ZR 79**
3. **Kalonga v The People (1988/1989) ZR 90**
4. **Kalebu Banda v The People (1977) ZR 169**

5. Hamenda v The People (1977) ZR 184
6. Chola v The People (1988/1989) ZR 163
7. Machobane v The People (1972) ZR (Reprint) 136
8. R v Baskerville (1916) 2 KB 658
9. Shamwana v The People (1985) ZR 41
10. Chimbo v The People (1982) ZR 20
11. Nswana v The People (1988/1989) ZR 174

1.0 INTRODUCTION

1.1 The appellants appeal against their conviction by the High Court (Presided by Chawatama, J). In that court, the appellants were charged with two offences, namely, aggravated robbery and murder. At the end of the trial, they were convicted on both charges and sentenced to death, thereby giving rise to this appeal.

1.2 This appeal is being determined on the basis of the judgment of the trial court only, the record of the proceedings in the court below having not been found.

2.0 THE FACTS

2.1 On 16th April, 2013, in the morning, a warehouse containing stored assorted goods was found to have been broken into during the night. A number of the goods therein had been

taken away by the burglars, and a security guard who was guarding the premises was found dead. Among the goods that had been taken away were dinner plates, mugs and pad locks. It appears not to be in dispute that there was evidence before the trial judge that the police found a pick and a torch at the scene of crime, although the judge did not capture that piece of evidence in her review of the testimony of the witnesses.

2.2 In a seemingly unrelated incident, earlier that morning around 04:00 hours, a police officer (PW5) and a member of the local crime prevention unit in Chibolya compound, whilst on patrol, spotted a minibus which sped off upon seeing them. However, the minibus reached a dead-end in the road, whereupon three people jumped off the bus and started running away. PW5 fired warning shots with his gun but the three disappeared within the compound. PW5, though, managed to apprehend two people who identified themselves as the driver (PW2) and conductor (PW3) of the minibus. The duo told PW5 that the three people who ran away had hired them to ferry some boxes from Chibolya compound to Misisi

compound. In the bus, PW5 found six boxes of pad locks and a box containing dinner plates and mugs.

2.3 The driver and conductor, together with the minibus and boxes, were first taken to the local police station; and later to Lusaka Central Police Station for further investigations.

2.4 Later that afternoon, one of the tenants of the warehouse (PW1) was called to Lusaka Central Police Station where he identified the dinner plates.

2.5 Subsequently, the police apprehended two young men named Rodrick Saili (PW4) and Jeka Daka (PW7). The duo told the police that they had merely helped to load the boxes into the mini bus. The information which the police obtained from them led to the apprehension of the three appellants.

2.6 PW2, PW3, PW4 and PW7 identified the three appellants at an identification parade which was held for that purpose.

2.7 All the three appellants dissociated themselves from the crime. They denied having hired the mini bus to ferry the carton boxes: They denied having been on the mini bus at all.

3.0 THE HIGH COURT'S DECISION

3.1 The learned trial judge proceeded with caution on the evidence of PW2 and PW3 because they had been apprehended and detained over this case. However, she found it safe to rely on their testimony because, in her view, the evidence had established that they were detained only to help police with the investigations; according to the judge, they should not have been arrested at all. The judge also relied on the testimony of PW4 and PW7 whom she did not consider to have any possible interest of their own to serve.

3.2 The learned judge then pointed out that all these four witnesses had, between them, identified all the three appellants; and that this had reduced the danger of honest mistake significantly. On the strength of the testimony of these witnesses, the judge found that the appellants had been in possession of the goods found in the mini bus. She said that the appellants did not offer any explanation as to how they had come by those goods, other than merely denying knowledge of the robbery and responsibility for its

commission. The learned judge concluded that all this evidence pointed to the three appellants as the ones who robbed the warehouse, and killed the guard.

4.0 THE APPEAL

4.1 The appeal is on two grounds; these read as follows:

> "**Ground One**
> **The trial judge erred in law and in fact when the Court convicted the appellants based on uncorroborated testimonies of witnesses with an interest to serve.**
> **Ground Two**
> **The trial judge erred in law and fact in convicting the appellants without due and proper investigations by the arresting officer".**

4.2 In the first ground of appeal, Mrs Bwalya, on behalf of the appellants submits that all the four identifying witnesses, that is, PW2, PW3, PW4 and PW7 were witnesses with an interest to serve by virtue of the fact that they had all been arrested and detained over this offence. She argues that, for this reason, they were capable of tailoring their testimony in such a way as to implicate the appellants in order to distance themselves from the offence. She goes on to argue that, in the circumstances, the learned trial judge

should have looked for evidence that corroborated the testimony of these witnesses; or, at least, there should have been something more which tended to support their testimony. According to counsel, the *"something more"* that was needed was any other evidence which proved that the appellants in fact robbed the warehouse and murdered the watchman. Mrs Bwalya then submits that, in this case, there was neither corroboration nor *"something more"* to support the testimony of the witnesses. To back her argument, she has referred us to a number of our own decisions on this issue, some of which are to be found in the cases of **Choka v The People**[1] and **Phiri (E) & Others v The People**[2].

4.3 In the second ground of appeal, Mrs Bwalya accuses the police of dereliction of duty for allegedly failing to lift finger prints from the pick and torch that were found at the scene. She argues that this raises the presumption that such finger prints as there may have been on those items did not belong to any of the appellants. She, then, submits that, since the evidence of identification is suspect, there

is no other evidence that rebuts the above presumption. Counsel has relied on our decisions in the cases of **Kalonga v The People**[3], **Kalebu Banda v The People**[4] and **Hamenda v The People**[5] for her arguments on this point.

4.4 Mrs Bwalya now urges us to allow this appeal, and acquit the appellants.

4.5 In response, Mr Bako, the learned Deputy Chief State Advocate, agrees that indeed PW2 and PW3 were witnesses who fell to be regarded as accomplices; but he points out that in this case, however, the learned trial judge found, upon considering the whole evidence, that the two witnesses should not even have been arrested at all. Mr Bako submits that this finding is supported by PW5 who, at the time that he apprehended PW2 and PW3, was oblivious to the robbery and murder at the warehouse but told the court that PW2 and PW3 told him that they were hired to ferry the goods that were found on the minibus. Mr Bako adds that the evidence revealed that the appellants were unknown to these two witnesses prior to

the offence, and that the testimony of PW4 and PW7 confirms, in a material particular, that of PW2 and PW3.

4.6 Responding to the argument by the appellants in the second ground of appeal, Mr Bako argues that the failure to lift the finger prints at the scene did not prejudice the appellants because the learned trial judge had ample evidence upon which she convicted them; such as the fact that, according to the testimony of the witnesses, PW4 and PW7 knew the appellants prior to the incident: Hence, according to Mr Bako, it was too much of a coincidence that the said witnesses would point at the appellants as the people whom they assisted to load the stolen goods on the minibus.

4.7 With those arguments, Mr Bako urges us to dismiss this appeal.

5.0 OUR DECISION

5.1 We will begin by quoting one of our holdings in the case of **Chola v The People**[6]. In that case, we held:

> **"(3) 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 recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices".

5.2 In this case, PW2 and PW3 were the ones in charge of the minibus, and it was in that minibus that the goods that were stolen during the robbery were found. We may mention also that, in fact, upon seeing the police, PW2, the driver, tried to evade them; however, the bus reached a dead-end in the road. Clearly, it cannot be disputed that PW2 and PW3 were the people whom the police found in possession of the goods that later turned out to have been taken during the robbery which had happened earlier in the night. Certainly, it was on that basis that they were detained. We, therefore, do not agree with the learned trial judge's view that PW2 and PW3 were merely detained to help police with investigations; or the judge's sentiment

that they should not even have been detained at all: It is clear from these circumstances that PW2 and PW3 were detained as prime suspects in the robbery and murder. And as we said in the case of **Chola v The People**, the circumstances in which PW2 and PW3 were would motivate them to give false evidence. Therefore, it was a misdirection on the part of the judge for not strictly treating PW2 and PW3 as accomplices.

5.3 Coming to the witnesses PW4 and PW7, the learned trial judge did not even consider the possibility that these too could have been witnesses with possible interests of their own to serve: And yet they were because, by their own admission, they were involved in loading the goods, at that awkward hour, into the minibus. In the circumstances, it can be said that the two witnesses also handled the stolen goods not very long after the robbery and murder. In addition, they too were detained. It cannot, therefore, be disputed that PW4 and PW7 were as well detained as prime suspects: These were circumstances which would motivate them to give false evidence. So, here again the

trial judge fell into error when she failed to treat PW4 and PW7 as accomplices.

5.4 The correct position, therefore, is that the testimony of all the four witnesses PW2, PW3, PW4 and PW7 fell to be treated as that of accomplices.

5.5 In the case of **Machobane v The People**[7] it was held:

> **"While a conviction on the uncorroborated evidence of an accomplice is competent as a strict matter of law, the danger of such conviction is a rule of practice which has become virtually equivalent to a rule of law, and an accused should not be convicted on the uncorroborated testimony of a witness with a possible interest unless there are some special and compelling grounds".**

5.6 In the case of **Phiri (E) & Others v The People**[2], we explained the special and compelling grounds in the following holdings:

> **"(1) A Judge (or magistrate) sitting alone or with assessors must direct himself and the assessors, if any, as to the dangers of convicting on the uncorroborated evidence of an accomplice with the same care as he would direct a jury, and his judgment must show that he has done so.**
>
> **(2) The Judge should then examine the evidence and consider whether in the circumstances of the case those dangers have been excluded. The Judge**

should set out the reasons for his conclusions; his *'mind upon the matter should be revealed'*.

(3) As a matter of law those reasons must consist in something more than a belief in the truth of the evidence of the accomplices based simply on their demeanor and the plausibility of their evidence– considerations which apply to any witness. If there be nothing more, the court must acquit.

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

5.7 So, the treatment of the evidence of an accomplice is a two-stage process: First, the court looks for evidence which corroborates the testimony of the accomplice or witness with an interest to serve. What constitutes corroboration can be discerned in the following words of Lord Reading in the case of **R v Baskerville**[8]:

> **"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not**

only the evidence that the crime has been committed, but also that the prisoner had committed it..... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be highly dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime".

5.7.1 In some instances, accomplices or suspect witnesses may be mutually corroborative where they give independent evidence of separate incidents; and where the circumstances are such as to exclude the danger of a jointly fabricated story, as we held in the case of **Shamwana v The People**[9]. In the case of **Chimbo & Ors v The People**[10] we illustrated how this rule operates in practice when we said:

"There are circumstances when the evidence of one suspect witness could be corroborated by the evidence of another suspect witness provided of course that not only

is the suspicion for different reasons but the one supplying corroboration or both of them must be what one might call, for lack of a better expression, an innocent suspect witness. An illustration of this distinction would be where one witness is a true accomplice and the other an innocent by-stander whose evidence of identification is not free from the danger of an honest mistake and is for that reason only a suspect witness. Where however, as in this case, both witnesses may have the same dangerous motive of false implication, the witnesses could not in these circumstances corroborate each other and each would require corroboration or support from some independent witness or other circumstances amounting to something more"

5.8 Secondly, where the type of corroboration described above is not present then the cases of **Machobane v The People**[7] and **Phiri (E) & Ors v The People**[2] cited above come into play, namely that it is still competent to convict on the testimony of such accomplice or witness with an interest to serve if there are circumstances which satisfy the court that the danger that the accused is being falsely implicated has been excluded: that is, if there is *"something more".*

5.9 In practice, though, it is not necessary for the court to

pedantically follow this two-stage process: it is perfectly in order for the court to look out simultaneously for either corroborative evidence or for *"something more"*.

5.10 Coming back to the case, we have demonstrated that the four witnesses PW2, PW3, PW4 and PW7 fell into a category whereby their testimony ought to have been treated on the same footing as that of an accomplice. Hence, in respect of their testimony, the learned trial judge ought to have looked for either corroborative evidence or something within the evidence that satisfied her that the danger of false implication had been excluded.

5.12 In this case, corroboration as a strict matter of law was not present because; first, these witnesses were suspect for the same reason, namely, their connection with the stolen goods: PW2 and PW3 were found with those goods in the minibus while PW4 and PW7 were the ones who loaded the goods onto the minibus. Secondly, they were not giving testimony of separate incidents; Instead, their testimony was about the same incident, namely that they were all present at the house in Chibolya compound

where the goods were loaded onto the minibus. Consequently, these witnesses could not mutually corroborate each other

5.13 When it comes to *'something more'*, however, there were certain features about the testimony of these witnesses which we think would have satisfied the learned trial judge that the danger that the four witnesses were falsely implicating the appellants had been excluded. Chief among these was the fact that PW2 and PW3, on one hand, and PW4 and PW7, on the other, had hitherto been unknown to each other. Another feature of the testimony was that PW4 and PW7, between them, knew the 1st and 2nd appellant prior to the incident, while PW2 and PW3 did not know any of the appellants before that morning.

5.14 So, the two questions that arise are; first, given that the two sets of witnesses did not know each other, how could they have connived to come up with false testimony which implicated the appellants? Secondly, how could PW2 and PW3 have agreed to falsely implicate the appellants whom

they did not know? All these, in our view, were circumstances which would have satisfied the trial judge that the danger that the four witnesses were falsely implicating the appellants had been excluded, and that their testimony could be believed: This was the *"something more"*.

5.15 So, had the learned trial judge taken this approach she would still have come to rely on the testimony of these four witnesses.

5.16 However, it should be borne in mind that all that the testimony of PW2, PW3, PW4 and PW7 did was to prove that the appellants were in possession of the goods that were stolen during the robbery and murder. Whether or not the appellants participated in those crimes is another matter.

5.17 In the case of **Nswana v The People**[11].

we held:

> **"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."**

5.18 Relying on this very holding, which she quoted, the learned trial judge went on to point out that the appellants did not offer any explanation for their possession of the goods, but merely denied knowing anything about the crime. She pointed out that it was not by coincidence that PW2, PW3, PW4 and PW7 pointed out the appellants to the police. The judge noted that the appellants were well known to PW4 and PW7 while PW2 and PW3 had spent sufficient time with the appellants to be able to identify them. All these, said the learned judge, were features surrounding the case which pointed to the appellants as the ones who robbed the warehouse and murdered the guard.

5.19 That was a misdirection by the trial judge because, as we have pointed out, all that the testimony of PW2, PW3, PW4 and PW7 did was to prove that the appellants were in

possession of the goods in the morning of 16th April, 2013 around 04:00 hours; and not that the appellants took part in the robbery and murder. What was required of the trial judge at that stage was for her, not having been given any explanation by the appellants, to go further and consider whether, on the evidence as a whole, there was any reasonable likelihood that the goods might have changed hands between the robbery and the time that PW2, PW3, PW4 and PW7 saw the appellants with those goods: in other words, was there any reasonable likelihood that the appellants may have received those goods from a person who had taken part in the robbery and murder.

5.20 Perhaps the first issue to consider is whether the appellants could be said to have been in innocent possession of the goods. The answer to that question is in the negative because the appellants ran away from the mini bus when they were confronted by the patrol car: this was a clear indication on their part that they knew that their possession of those goods was not innocent.

5.21 The next issue for consideration is whether the appellants

were the thieves; or whether they were only guilty receivers, or retainers, of the stolen goods. According to the evidence, by 04:30 hours that day, when the appellants hired PW2 and PW3, they already had the goods in their possession; and were keeping them at a house in Chibolya compound. Now, the robbery and murder had taken place that same night. That means that the appellants were in possession of the goods just a few hours after the robbery. Surely, the only logical inference to be drawn from those circumstances is that the appellants themselves stole the goods from the warehouse, or at least participated in the robbery during which the goods were stolen: This is because the period between the robbery and the appellants' possession of the goods was very short. We cannot see how possible it was that, within that brief period, the appellants who, from their own testimony in defence, appear not to have been living in the same house, got together at that odd time of the night to jointly receive stolen goods.

5.22 Now, once it is established that the appellants staged, or took part in, the robbery, the case of murder is automatically established because the guard was killed in the course of that robbery.

5.23 Coming to the ground about the non-lifting of the finger prints, we can only say that the presumption that the finger prints may not have been those of the appellants is clearly rebutted by the evidence of the appellants' possession of the stolen goods in circumstances which clearly point to the fact that they took part in the robbery.

5.24 All in all, even though the learned trial judge misdirected herself in one or two areas, she was nevertheless on firm ground in convicting the appellants for aggravated robbery and murder. We, therefore, find no merit in this appeal **and we dismiss it.**

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E. M. Hamaundu
SUPREME COURT JUDGE

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N. K. Mutuna
SUPEME COURT JUDGE

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F. M. Chisanga
SUPREME COURT JUDGE