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**IN THE SUPREME COURT OF ZAMBIA      APPEAL NO.21, 22/2023**  
**HOLDEN AT NDOLA**  
*(Criminal Jurisdiction)*

BETWEEN:

**DICKSON SHAMBOKO**  
**JOSEPH HAMOOMPA**



**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**V**

**THE PEOPLE**

**RESPONDENT**

**Coram: Malila, CJ, Hamaundu and Chisanga, JJS**  
On 5<sup>th</sup> June, 2024 and 11<sup>th</sup> June, 2024

For the Appellants : Mrs S. M. Bwalya, Senior Legal Aid Counsel

For the Prosecution : Ms M. I. Mwala, Acting Principal State Advocate

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**JUDGMENT**

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**HAMAUNDU, JS**, delivered the Judgment of the Court

Cases referred to:

1. **The People v B (1980) ZR 219**
2. **Anayawa & Sinjambi v The People, Appeal No. 143 & 144 of 2011**
3. **Muwowo v The People (1965) ZR (Reprint) 107, 113-114**
4. **Modester Mulala v The People, SCZ, Appeal No. 51 of 2013**

Legislation referred to:

**The Supreme Court Rules, Chapter 25 of the Laws of Zambia, rule 25**

**Introduction**

- 1.0 This appeal is against conviction by the High Court at Kabwe (presided by Katanekwa, J). When we sat to hear this appeal on 5<sup>th</sup> June, 2024, we were informed by the State, and indeed proof was availed to us in the form of a medical certificate, that the 2<sup>nd</sup> appellant died on the 9<sup>th</sup> May 2010. His appeal has therefore abated.
- 2.0 We should point out here that, since the 2<sup>nd</sup> appellant died well before the judgment in the High Court was pronounced (which was on the 27<sup>th</sup> November, 2013), there should ordinarily not have been any appeal by the 2<sup>nd</sup> appellant before us. However, the appeal was only brought because of an administrative policy, which existed then, whereby all convictions for capital offences were treated as automatic appeals to the Supreme Court.
- 3.0 The 1<sup>st</sup> appellant's appeal has, however, proceeded. For purposes of easy narration in this judgment, we shall refer to 2<sup>nd</sup> appellant as such as if his appeal have not abated.

## **The Facts**

### 4.0 The undisputed facts are these:

The deceased, John Chiluba Chikonda, lived at House number 11 Holy Street, in the Luangwa Township of Kabwe. On the 7<sup>th</sup> May, 2008, around 18:00 hours, he and his wife (Theresa, Mulenga Chikonda, PW3) had just returned home from a prayer meeting at church when he received a call from his driver that a tyre on his vehicle had burst in Solwezi.

5.0 The deceased then went into town with a view to buy some tyres and send them on a bus to Solwezi. He phoned his wife around 20:00 hours and told her that he had been unable to find the tyres, and that he was now on his way back home. When the wife saw that by 21:00 hours the deceased had not yet reached home, she called his phone. This time the deceased's phone was off. She tried to call several times but her husband's phone was not responding. That is how she waited the whole night for her husband, who never came back home.

6.0 The body of the deceased was however noticed around 23:45 hours, on the same Holy Street where he lived, by a neighbour (Musonda Kapena, PW2) who lived on House number 10 of the same street. The neighbour did not recognize the deceased at



the time because, being scared, he did not stop to look at the body but instead rushed to inform the police who then made arrangements for two officers to guard the body until the following morning. The deceased was only identified around 05:00 hours when his wife went to the scene.

- 7.0 At the scene, the deceased's wife noticed that items such as the phone, wallet and handkerchiefs, were not on the deceased's body. The wife was able to give the police the serial number of her husband's phone. The police then sent that number to the service provider, *Airtel* who began to trace the phone.
- 8.0 Later, on the same day, the 8<sup>th</sup> May, 2008, the 1<sup>st</sup> and 2<sup>nd</sup> appellants went to Martin Nyasulu's (PW4) shop in Shamabanse compound within Kabwe and sold the deceased's phone to him. He bought the phone on behalf of his cousin Moses Moyo (PW5), who started using it.
- 9.0 A couple of days later, the deceased's wallet containing an ATM card and an ATM withdrawal receipt was found discarded by the railway line. The handkerchiefs were also found at the same place. The withdrawal receipt showed that the deceased, just before his death, had withdrawn from the ATM a sum of

K200,000 (unrebased). That money, or any part thereof, was not found in the wallet.

10.0 About two months later, with the help of information received from Airtel on the activities of the deceased's phone, the police traced it to PW5. He, in turn, led them to his cousin PW4. With the help of the latter, the police apprehended the 2<sup>nd</sup> appellant, who also led them to the 1<sup>st</sup> appellant.

11.0 The two appellants were then charged with the offences of murder and aggravated robbery.

### **The Trial**

12.0 The evidence against the appellants was from Martin Nyasulu (PW4) and Detective Sub-Inspector Chiyala (PW8), the arresting officer. PW4 told the court that on the 8<sup>th</sup> May, 2008, during the day, he was approached by the 2<sup>nd</sup> appellant whom he knew. He said that the 2<sup>nd</sup> appellant was selling a phone; and that, when he sought to reduce the price that the 2<sup>nd</sup> appellant was asking for, the latter said that he needed to consult the owner of the phone. According to PW4, the 2<sup>nd</sup> appellant left and came back later with the 1<sup>st</sup> appellant with whom PW4 then bargained and brought the price down. It was PW4's testimony that, he later followed the two appellants to



a drinking place known as *Blue Inn* where he gave the money specifically to the 1<sup>st</sup> appellant.

13.0 PW4 testified also that when his cousin, PW5, was picked by the police, he too followed and started helping with investigations until both appellants were apprehended.

14.0 The arresting officer (PW8) told the court that, upon being apprehended, the 2<sup>nd</sup> appellant led them to the 1<sup>st</sup> appellant who at that time was serving a sentence at Mpima Prison in Kabwe. PW8 told the court that he picked the 1<sup>st</sup> appellant from the prison and took him to the police station where, during the preliminary interview, the 1<sup>st</sup> appellant admitted the allegations against him. According to PW8, he then made arrangements for a formal warn and caution statement to be recorded from the 1<sup>st</sup> appellant.

15.0 When the arresting officer sought to produce the statement in evidence, the 1<sup>st</sup> appellant raised objection on the ground that the statement was made under duress. A trial-within-a-trial then ensued where the appellant told the court that before he succumbed to confessing around 16:00 hours, he had been subjected to severe beatings from about 07:00 hours in the morning. The 1<sup>st</sup> appellant showed the court two cars, one on

the stomach and the other on the arm, to support his allegation.

- 16.0 The trial court disbelieved the 1<sup>st</sup> appellant's allegations for the following reasons; that the scars that he had shown to the court looked, and were indeed, old; and that, although the 1<sup>st</sup> appellant was escorted to the police by an officer from the prison, he did not show those injuries to the prison officer after the interview. According to the court, this was confirmation that the scars that the appellant had shown to the court were for injuries that he had sustained long before the interview. The court then found that the 1<sup>st</sup> appellant had made his statement freely and voluntarily. Consequently, the confession statement was admitted in evidence.
- 17.0 When put on their defence both appellants chose to remain silent, and called no witness.
- 18.0 From the evidence of the print-out from *Airtel* and the testimony of PW4, the court found that both appellants sold the deceased's phone to PW4 just hours after the attack on the deceased. Consequently, it concluded that their possession of the stolen phone was very recent. With regard to the 1<sup>st</sup> appellant, the court found that the above evidence



was strengthened by his own confession statement in which he placed himself at the scene of the attack on the deceased. The two appellants were then convicted for both offences. As we have said earlier, the 2<sup>nd</sup> appellant had already died when the judgment was delivered. Therefore, only the 1<sup>st</sup> appellant was available for sentencing. The trial court sentenced him to death on both counts.

### **The Appeal**

19.0 The appeal is only on one ground, and this reads as follows:

**“The learned trial Judge erred in law and in fact when he held that from the evidence before him, the only conclusion he could draw was that the appellants acted together in committing the offences they were charged with.”**

20.0 The appeal has been argued on three issues, namely; (i) the doctrine of recent possession, (ii) the purported lie by the 2<sup>nd</sup> appellant as to his whereabouts on the day of the attack on the deceased (in other words, his alibi) and (iii) the admission in evidence of the 1<sup>st</sup> appellant’s confession statement.

21.0 Now, all the argument that have been advanced on the first two issues are concerned only with the 2<sup>nd</sup> appellant’s situation. As we have said above, his appeal has abated and we shall not delve into it.



- 22.0 The only issue raised with regard to the 1<sup>st</sup> appellant's appeal is the admission into evidence of his confession statement to the police. On behalf of the 1<sup>st</sup> appellant, Mrs Bwalya, the learned Senior Legal Aid Counsel, submits that the burden of proving the voluntariness of a confession lies on the prosecution; and that that voluntariness must be proved beyond reasonable doubt. Counsel relies on two cases for that submission, namely the case of **The People v B**<sup>(1)</sup> and the case of **Anayawa & Sinjambi v The People**<sup>(2)</sup>.
- 23.0 Mrs Bwalya goes on to briefly outline the allegations that the 1<sup>st</sup> appellant told the court about during the trial-within-a-trial, and argues that, in resolving the trial-within-a-trial by discounting, or disbelieving, the allegations made by the 1<sup>st</sup> appellant, the trial court shifted the burden of proof from the prosecution to the 1<sup>st</sup> appellant.
- 24.0 With those arguments, Mrs Bwalya has urged us to allow this Appeal and acquit the 1<sup>st</sup> appellant.
- 25.0 In response, Ms Mwala, the learned Acting Principal State Advocate, on behalf of the State, first concurs with Mrs Bwalya's submission that the prosecution bears the burden of proving the voluntariness of a confession statement beyond

reasonable doubt. Her authority for that proposition, however, is the case of **Muwowo v The People**<sup>(3)</sup>. But, relying on the case of **Modester Mulala v The People**<sup>(4)</sup> counsel then goes on to argue that a court is entitled to make findings of fact where the parties advance directly conflicting stories. She then submits that, in this case, when the trial court discounted, or disbelieved, the 1<sup>st</sup> appellant's allegations, it was merely enaged in the process of arriving at findings of fact; and not that it was shifting the burden of proof to him.

26.0 Mrs Mwala, therefore, urges us to dismiss this appeal.

### **Our Decision**

27.0 We begin by referring to **Rule 25(4)** of the **Supreme Court Rules, Chapter 25** of the **Laws of Zambia**. It reads:

**“(4) Except by leave of the court the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those referred to in this rule (that is filed in accordance with Rule 25), but nothing in this sub-rule shall restrict the power of the court to make such order as the justice of the case may require”** (*underlined words supplied for clarification*).

We have referred to this rule because the arguments that have been advanced on behalf of the appellant, which question the admission of the confession statement, are incompatible with



the sole ground of appeal herein. Clearly, the words by which the ground of appeal is couched merely call for a consideration whether, on the evidence that was available to the trial court (that is, the recent possession of the phone and the confession statement admitted in evidence), any reasonable court would have come to the same conclusion as that of the trial court; namely that the 1<sup>st</sup> appellant committed the two offences.

28.0 The appellant did not seek leave to file any additional ground that attacked the admission of the confession statement in evidence. So, ordinarily we would have declined to entertain the arguments on the confession statement. However, since the appellant was convicted for capital offences, we have exercised our leniency and we shall consider his appeal on that issue, instead of shutting him out on a technicality.

29.0 The 1<sup>st</sup> appellant's grievance with the admission of the confession statement is that the trial judge shifted the burden of proving the voluntariness of the confession statement to him, when such burden ought to have remained with the prosecution. In the case of **Muwowo v The People**<sup>(3)</sup>, a case

which was decided by The Court of Appeal (this court's predecessor) Charles J, in his judgment said:

**“It follows that, when an incriminating statement by the accused to a person in authority is tendered in evidence, the prosecution has the burden of proving beyond reasonable doubt that it was not the result of the accused’s mind having been influenced by any prior inducement of the kinds mentioned. That necessarily means that if there were a prior inducement, or if the reasonable possibility of there having been a prior inducement has not been negated, the prosecution has to prove that the inducement or possible inducement either did not, or had ceased to, operate on the accused’s mind when he made the statement in question.**

**While the prosecution has the burden of proving that any incriminating statement by an accused to a person in authority which it tenders was made voluntarily, that burden does not involve negating the making of every form of inducement. That would be an impossible task. As the burden is to prove a negative, and a negative of wide scope, the burden is initially discharged by adducing evidence sufficient to show that *prima facie* the statement was made voluntarily, such as that it was made after a caution”.**

30.0 In this case, the 1<sup>st</sup> appellant, when raising his objection, did not specify the form of the duress that was alleged to have been brought to bear on him. Hence, the prosecution went to the trial-within-a-trial without knowing what it was that they needed to negative. In the circumstances, while it is accepted





that the burden was on them to prove the voluntariness of the confession statement, that burden was discharged initially when the prosecution led evidence which showed *prima facie* that the 1<sup>st</sup> appellant was warned and cautioned; that the interview was conducted in a peaceful atmosphere; and that the duration of the interview was very short, some twenty minutes or so. The 1<sup>st</sup> appellant however only raised the issue of the beatings when he took to the stand. His testimony, like that of any other witness, was subject to the court's scrutiny. And, in this regard, the trial court was entitled to assess the credibility of his allegations. In this case, the trial judge dismissed the allegations for not being credible after observing weaknesses in the 1<sup>st</sup> appellant's story, and making some observations on his scars. Doing so, in our view, did not amount to shifting the burden of proof on to the 1<sup>st</sup> appellant but was merely a process which the court was required to engage itself in, so that it could determine the credibility of the testimony before it.


31.0 In the circumstances, we find no merit in the arguments by the 1<sup>st</sup> appellant on the admission of the confession statement.

**Conclusion**

32.0 In conclusion, it is our view that the evidence of the 1<sup>st</sup> appellant's recent possession of the deceased's phone and that of his confession statement had the combined effect of proving beyond reasonable doubt that the 1<sup>st</sup> appellant participated in the robbing and killing of the deceased. The trial court was, therefore, on firm ground when it convicted him of the two offences. This appeal must consequently fail. It accordingly stands dismissed.

  
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Mumba Malila  
**CHIEF JUSTICE**

  
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E. M. Hamaundu  
**SUPREME COURT JUDGE**

  
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F. M. Chisanga  
**SUPREME COURT JUDGE**