

(Criminal Jurisdiction)

ALLAN MACHIKO

Appellant

v

THE PEOPLE

Respondent

CORAM: Ngulube, D.C.J., Gardner and Sakala, JJ.S.,

15th July, 1987

C.P. Sakala, Acting Director of Legal Aid, for the appellant

C.K. Chanda, Senior State Advocate, for the respondent

JUDGMENT

Gardner J.S., delivered the judgment of the court.

Case referred to:

- (1) Kabukala Abu Tambwe, Shafiko Hachi v The People SCZ
Judgment No. 3 of 1987

The appellant was convicted of aggravated robbery with a gun contrary to section 294(2) of the Penal Code, the particulars of the charge being that on the 18th of February, 1983, at Nyimba Council Tavern in Petauke District being armed with a G3 rifle he robbed Captain-Lungu of K166 cash, and at the time of such stealing threatened to use violence to Captain Lungu.

The prosecution led evidence in support of the charge to the effect that on the 18th of February, 1983, PW.5 Captain Lungu and PW.6 Alick Lungu a security guard were at Nyimba tavern and at about 22.30 hours PW.5 met a person at the door who had a gun. This person was wearing paramilitary uniform and was wearing a face mask. He pointed the gun at PW.5 and said that he wanted money. PW.6 took the keys from PW.5 and collected a cash box. This cash box was given to the armed man who then departed. The following morning on the 19th of February, 1983, PW.7 a police sub-inspector went to an area near Mupeta village. In his evidence PW.7 said that he received information that led him to Mupeta village and from there to a house at Daniels village. There they found the appellant. He was asked about his gun and was questioned

as to where he had stolen it. PW.7 said that the appellant said to him that before he would show the gun all paramilitary officers should leave. After that all the paramilitary officers left and the appellant was detained at the police station. On the 20th of February, PW.7 talked to him again and asked him to lead him to the gun and the appellant together with PW.7 and a number of other police officers including Detective Sergeant Lungu went to Hoffmeyer Mine where they were led by the appellant to show where the gun was hidden. It was wrapped in green long trousers and a paramilitary shirt. PW.7 in his evidence said that the appellant also showed him a cash box and a paramilitary cap. The witness said that inside the cash box were pieces of torn Zambian bank notes and ten live rounds of ammunition. Subsequently the cash box was identified by PW.5 as having been the one that was stolen on the night of the 18th of February.

In addition to that evidence there was evidence from PW.3, a constable in the paramilitary police who said that on the 11th of February, 1983 he was on duty at Luangwa bridge and at 08.00 hours a man, whom he identified as the appellant, asked him to help him get a lift to a nearby village. He did obtain a lift for the man and he left. Later that day a colleague by the name of Mwila, who was PW.4, informed him about something as a result of which he went to his tent and found that his rifle and uniform were missing. He identified the rifle found by PW.7 as the one which belonged to him. He also identified the uniform which was also produced to him by PW.7.

PW.4 another constable in the paramilitary police gave evidence that on the 11th of February, 1983, he was on duty at Luangwa bridge when he saw someone leaving PW.3's quarters. As the man was in the bush and behaving suspiciously the witness followed him, and when the man threatened him the witness went to call his colleagues for assistance. He was unable to find his colleagues and when he returned the man had gone. He then returned to the bridge where he found PW.3 and reported to him that he had seen a man in his quarters. He confirmed PW.3's evidence that when they searched they discovered that his gun and uniform were missing. He said that he had talked to the man he had seen for about thirty minutes and identified him in court as the appellant.

There was also expert evidence from a ballistics expert who gave evidence that the gun belonging to PW.3 which had been found by PW.7 after being led by the appellant, had been examined and tested by him

and he found it to be in good working condition and capable of being fired. There was further evidence from PW.2, a fingerprints expert who said that he had compared fingerprint impressions from the appellant and some felions which were given to him and found them to be identical.

The appellant gave evidence in his own defence and said that on the 19th of February he was employed at a mine at Nyimba, and that he used to take some green tomalian stones from there and hide them. On that day he went to his hiding place about two hundred metres from the line and saw there some green uniforms and a gun. He therefore reported to Nyimba Police Station where he saw Detective Sergeant Lungu and told him about having seen uniforms and the gun. He was told by Sergeant Lungu that as the police had no transport he would come to the mine to collect the appellant at some later time. He then went home and at 16.30 hours on that day the police and paramilitary officers came and tied him with ropes and demanded that he showed them where the rifle was. He told them that he knew nothing about any rifle but he showed them the rifle which he had first reported to Sergeant Lungu. He testified that he had never gone to Luangwa bridge during February of that year, and said that when the cash box was found the police made him touch the box and that was the reason why his fingerprints were found there.

The learned trial judge found that the identification of the appellant at Luangwa bridge where the rifle was stolen and his leading them to the place where the rifle and the stolen uniform were found in the bush was sufficient evidence to support the conviction of the appellant. The learned trial judge was not satisfied with the story that the appellant had found the gun and the uniform in the bush and had reported to the police, because such evidence did not tally with the evidence of PW.7 who said that he was the first to arrest the appellant and asked for information about the gun.

Mr. Sakala, the Acting Director of Legal Aid on behalf of the appellant put forward a number of grounds of appeal, the first was that the appellant was wrongly convicted of stealing K166 as referred to in the charge because neither PW.5 nor PW.6 who gave evidence of the details of the robbery mentioned any such sum of money. Mr. Sakala argued that although there was evidence that a cash box had been taken at the time of the robbery the particulars of the charge should not be amended because by so doing the appellant would be prejudiced.

With regard to this ground of appeal we are quite satisfied that the charge was defective, and this conviction can only stand if we were

able at this stage to amend the particulars of the charge. We have recently dealt with a similar matter in the case of Kabukala Abu Tambwe-Shafiko Hachi v The People (1), in which an appellant had been charged with aggravated robbery without reference to his being armed or in the company of others. There was ample evidence in that case that the appellant was in the company of other persons and the appellant's defence was a complete denial of having anything to do with the aggravated robbery. Under the provisions of section 15(3) of the Supreme Court of Zambia Act this Court may substitute a judgment of guilty of such other offence as the trial court could have entered, and, as the trial court could under section 273(2) of the Criminal Procedure Code amend the information at any stage of the trial unless having regard to the merits of the case such amendment could not be made without injustice we found in that case that it was appropriate to make such amendment by adding to the particulars the words "whilst acting together with persons unknown."

In this case in view of the fact that the defence of the appellant was that he had nothing to do with the robbery in question and that he himself had found the gun, the cash box and uniform and had reported his find to the police, we are satisfied that there would be no prejudice to the appellant by an amendment to the particulars of the offence in this case by deleting the reference to K166 and substituting the words "a cash box." Accordingly subject to what we have to say later, we will make an amendment to that effect ourselves.

The second ground of appeal put forward by Mr. Sakala was that the identification of the appellant by PW's 3 and 4 which was made by both witnesses in court without the holding of identification parades was unsatisfactory and did not rule out the possibility of honest mistake. In this respect we entirely agree with Mr. Sakala that identification in the witness box only is undesirable, and in the circumstances of this case we must regard the identification evidence as being unsatisfactory unless there is some other evidence to support it. We have examined the evidence in this case and we are satisfied that the argument put forward by Mr. Chanda on behalf of the State that there was such other evidence is correct. In this case the leading by the appellant of the police to the place where the stolen gun, uniform and cash box were found, regardless of the explanation he made, is further evidence to support the identification evidence of PW's 3 and 4. For that reason, although the identification in court was undesirable the evidence of

PW's 3 and 4 was sufficiently supported by the appellant's having been the person who led the police to the gun for their identification evidence to be accepted .

The third ground of appeal related to the fingerprint evidence. Mr. Sakala correctly pointed out that there was no evidence by the fingerprint expert to connect the prints which he saw with those found on the cash box, nor was there evidence that the fingerprints which he saw belonged to the appellant. However the appellant himself said that his fingerprints were found on the cash box and, regardless of the truth or otherwise of his explanation for their presence, this remedied any defect in the chain of evidence on the part of the prosecution .

Finally Mr. Sakala argued that the appellant had given an explanation as to why his fingerprints were found on the cash box, he had given an explanation as to how he came to lead the police to the place where the incriminating items were found in the bush and that his evidence in this respect should have been accepted by the trial judge.

We have examined all the evidence and we are satisfied that the learned trial judge properly rejected the explanation by the appellant that the reason why he was able to lead the police to where the stolen items were found was because he himself had found them near the hiding place for his stones and he had made an earlier report to the police. This suggested explanation was not put to PW.7 in cross-examination and it is inconceivable that Sergeant Lungu to whom the appellant said that he had made an earlier report, should have accompanied the party being led by the appellant to where the stolen items were hidden without mentioning the earlier report to PW.7. In those circumstances there was no duty whatsoever upon the State or the court to call Sergeant Lungu as a witness. The learned trial judge was entitled, as she did, to treat PW.7 as a witness of truth and to disbelieve the appellant. He was also found to be in possession of a stolen gun and a uniform of the type used by the masked robber which effectively negated any suggestion that his being in possession of the cash box could have been for any other reason than he had obtained it in an armed robbery. There are no grounds upon which this appeal could succeed.

The appeal against conviction is dismissed. There is no appeal against the mandatory death sentence.

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M.S. Ngulube
DEPUTY CHIEF JUSTICE

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B.T. Gardner
SUPREME COURT JUDGE

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E.L. Sakala
SUPREME COURT JUDGE