IN THE SUPREME COURT OF ZAMBIA — SCZ JUDGMENT NO. 16 OF 1988

HOLDEN AT LUSAKA — Appeal No. 20 of 1986

(Criminal Jurisdiction)

JOHN NYAMBE LUBINDA — Appellant

- v -

THE PEOPLE — Respondent

CORAM: Silungwe, C.J., Gardner, J.S. and Bweupe, AJ.S.

18th November, 1987.

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

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

J U D G M E N T

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

Cases Referred to:

(1) Kalebu Banda -v- The People (1977) ZR 169

(2) Ali and Another -v- The People (1973) ZR 233

The appellant was convicted of murder; the particulars of the charge being that he, on the 21st February, 1986, at Sesheke, did murder Helen Nachiza Nazila.

The prosecution evidence was to the effect that a schoolgirl, the deceased - Helen Nachiza Mazila, left Sesheke Secondary School, on the 21st February, 1986, and did not return to her school. Sometime later, the body of this girl was found buried in a field.

There was evidence from PW.4, that this witness saw the deceased on the 21st of February, 1986, in the company of a man whom

the witness had not seen before, and this witness identified the appellant in court as having been the man whom she had seen with the deceased.

Mr. Sakala, Director of Legal Aid, has argued on behalf of the appellant that there should have been an identification parade at which PW.4 should have had an opportunity to identify the appellant, and that the identification in court was of little or no value. He further argued that the identification of a watch was unsatisfactory.

Our attention was drawn to the evidence of PW.5, a school friend of the deceased, who said that she had known the watch that the deceased had worn for the last twelve months. In her evidence-in-chief, this witness said that the watch worn by the deceased had a crack on it from top to bottom, and, although she purported to identify the watch, which was produced in court as having been found on the appellant, she agreed in her evidence that the crack on the watch in court ran from left to right. Mr. Sakala argued that, as the learned trial judge had not resolved this discrepancy in the course of his judgment, there was a misdirection as to the finding by the learned trial judge that the watch had been properly identified. He further pointed out that PW.6, the witness who had found the watch on the appellant, had given evidence that the watch had been identified by a young boy who was the brother-in-law of the deceased. It was argued that the failure to call that evidence in support of the prosecution made it necessary to bring into play the principle which we set out in the case of Kalebu Banda -v- The People (1). In that case we said:-

> "Where evidence available only to the police is not placed before the court it must be assumed that had it been produced it would have been favourable to the accused."

Mr. Chanda, on behalf of the State, indicated that he would not support the conviction.

On its own motion, the court raised a question as to whether or not there was sufficient evidence to indicate that the deceased died of unnatural causes. In the course of the trial, the prosecution indicated that it intended to put in a post mortem report from the doctor who examined the body of the deceased. When this proposal was made there was an objection by the defence cousel, and the State advocate at that time said that, as the doctor had left the country, he would neither put in the post mortem report nor would he ask to call the doctor from overseas. In the event, therefore, there was no evidence whatsoever as to the cause of death, and, albeit that when the body was found buried in the field, some very serious suspicion must have arisen, it is surprising that in a capital case the prosecution took no further steps to support the charge fully against the appellant.

In this case, we are not satisfied that everything was done to place before the court the available evidence as to the cause of death. It may well have been that, as the body was not found for some period after it was buried, the doctor was unable to establish the cause of death. If this was the case then the court should have been told so by the production of the post mortem report under the provisions of section 19(1) of the Criminal Procedure Code (Cap. 160), which makes it mandatory for the court to admit such a document in evidence. As it is, the evidence before the court was insufficient to substantiate a charge of murder. It follows, therefore, that what we have to say about the arguments of the learned Director will be obiter, but we will deal with them in order to make our position clear.

We agree with Mr. Sakala that there should have been an identification parade at which PW.4 should have an opportunity to identify the person whom she saw with the deceased. We agree with the quotation from the case of Ali and Another -v- The People (2) that an identification in court is of little or no value, especially

where there is no satisfactory explanation for failing to hold an identification parade. The acceptance by the learned trial judge of the evidence of PW.4 in the manner set out in his judgment amounted to a misdirection. We also agree with Mr. Sakala that the discrepancy as to the description of the watch worn by the deceased and the watch produced in court with regard to the position of the crack should have been resolved by the learned trial judge in his judgment, and his failure to resolve this issue amounted to a further misdirection. For the reasons we have given, this appeal will succeed.

The appeal is allowed, the conviction is quashed and the sentence is set aside.

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Annel M. Silungwe
CHIEF JUSTICE

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B. T. Gardner,
SUPREME COURT JDUGE

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B. K. Bweupe
ACTING SUPREME COURT JUDGE