IN THE SUPREME COURT OF ZAMBIA **Appeal No. 62, 63 & 64/2006**

HOLDEN AT LUSAKA/NDOLA

(Criminal Jurisdiction)

BETWEEN:

FELIX KASILA LIWANGA	1st Appellant
PECOSE NYAMBE LIWANGA	2nd Appellant
SIBUKU MUTAFELA	3rd Appellant

- VS -

THE PEOPLE

Coram: Sakala, CJ. Chibesakunda and Chitengi JJS
on 7th November, 2006 and 7th June, 2007

For the Appellant : Capt. F. B. Nanguzyambo,
Director - Legal Aid

For the People : Mr. P. Mutale
Principal State Advocate

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

1. ***Bwalya V The People 1975 (ZR) 227***
2. ***Mukwakwa V The People 1978 ZR 347***
3. ***Fanwell V Regina 1959(1) R & N 81***

The Appellants were convicted by the High Court at Mongu of ***Aggravated Robbery*** contrary to ***Section 294(2) of the Penal Code Chapter 87 of the Laws of Zambia*** and sentenced to

death. The particulars of offence alleged that **Felix Kasila Liwanga**, **Pecose Nyambe Liwanga** and **Sibuku Steady** on the 19th day of May, 2002 in Kalabo in the Kalabo District of the Western Province of the Republic of Zambia, jointly and whilst acting together, did rob Elvis Mubanga Kusila of his 7 pairs of tropicals, 35 packets of salt, 4 chitenge materials, 265 bubble gums, 18 batteries, 91 exercise books, 19 geisha soaps, 4 Romeo soaps, 9 geza soap, 17 bars of extra soap, 3 small boom detergent soap, 6 big boom detergent, 5 matches, 5 body lotions, 24 bottles of Vaseline, 5 bottles of Rub-on, 57 cafenol packets, 6 panadols, 10 razer blades, 4 glycerine, 1 blouse and 1 mosquito net all valued at K446,300 and at or immediately before or immediately after the time of such stealing did use violence to Elvis Mubanga Kusila in order to retain or prevent resistance to the property being stolen.

The facts of this case are that on 19th May, 2002 about 24:00 hours, Winters Mubanga, (PW1), was in a shop owned by his son Elvis Mubanga Kazila, (PW2). The shop is at a school. PW1 heard a knock at the door and later someone shouted "*come out!*" Sensing that the people telling him to come out were not genuine, he shouted for help and thereafter he heard a gun shot. PW1 opened the window and peeped to see the people knocking at the door and he saw Kasila, the first Appellant. PW1 knew the first Appellant before for some years because the first Appellant's sister is married in the village

where PW1 stays. The first Appellant was with his young brother Pecose, the second Appellant. The first Appellant had a gun while the second Appellant had an axe. With the first and second Appellants were two other persons standing on one side. PW1 was able to see because there was moonlight.

Fearing that if he remained in the shop the people outside would kill him, PW1 went out of the shop and went to report to one Mbumwae, the Headmaster. Together with Mbumwae, who had a torch, PW1 went back to the shop and PW1 saw that his mosquito net was missing. PW1 hid himself in a shelter and heard two more gunshots.

The following morning it was discovered that the robbers had made three holes in the wall of the shop through which they took items from the shop. The robbers had also tried to break the door.

Elvis Mubanga Kazila, (PW2), the owner of the shop which was robbed, went to the shop after receiving a report and found three empty cartridges and one live ammunition (Exhibit P1). On entering the shop, PW1 found the property, particularized in the information valued at K446,300.00, missing. Thereupon, PW1 reported the matter to the neighbourhood watch and the Police at Sikongo Police station. PW1 was later called to the Police Station where he identified most of the

property stolen from his shop. Sometime in June 2002, the first Appellant gave one of the chitenge material stolen from PW2's shop to PW3, his girl friend. The chitenge material was recovered from PW3 by the Police in the presence of PW2 and the first Appellant.

Sergeant Lihuwe Moses Mubiana, (PW4), who was investigating this matter, was handed the three empty cartridges and the one live ammunition by PW2. During the investigation, he apprehended the first and the second Appellants. The first and second Appellants led PW4 to PW2's shop and demonstrated how they broke into the shop. The first Appellant showed PW4 where the gun was fired and said that he had an AK47 rifle. The second Appellant showed PW4 three holes in the wall which they made with an axe to gain entry into the shop. Thereafter, the first and second Appellants led PW4 to PW3 where PW4 recovered a chitenge material stolen from PW2's shop. Another chitenge material stolen from PW2's shop was also found with the first Appellant's wife. The third Appellant led PW4 to a house in Siyanga Nangoma village where the third Appellant said they kept part of the goods stolen from PW2's shop. In the house, PW4 recovered part of the property stolen from PW2's shop. The first Appellant led PW4 to a place near his village where he said he threw the gun into the water when he heard that there

were Police officers in the area. A search for the gun in the water did not yield anything.

The first Appellant's defence, in his unsworn statement, is to deny knowledge of this offence and said that he bought the chitenge material found with his wife from the third Appellant. He explained how he was tortured when he was apprehended by the Police. He admitted taking the Police to the river to get the gun but he said he did this as a way to avoid further beating but there was no gun.

The second Appellant, in his unsworn statement, also denied knowledge of this offence. He said that all he knows was that his brother, the first Appellant, had bought a chitenge material from the third Appellant. All that the witnesses said did not happen.

The third Appellant, in his unsworn statement, also denied knowledge of this offence. The third Appellant said the property found in the house he was sharing with the Simushi belonged to Simushi who ran away. The third Appellant then narrated how he and the first Appellant were tortured by the Police.

On this evidence the learned trial Judge found that the three Appellants committed the offence charged. The learned trial

Judge found that the first and second Appellants were identified by PW1 at the shop. With respect to the third Appellant, the learned trial Judge found that a mosquito net and other property stolen during the robbery were found with the third Appellant. On the use of the firearm, the learned trial Judge found that although the firearm was not found, there was evidence that the firearm was used because empty cartridges were found at the scene.

Further, with respect to the third Appellant, the learned trial Judge said the third Appellant did not explain as to how he came to be in possession of the chitenge material which the first and second Appellants said was sold to the first Appellant by the third Appellant. On the explanation by the third Appellant that the items found in the house where he was staying belonged to Simushi who is at large, the learned trial Judge said it would have been interesting to hear what Simushi would have said in reply. On submissions by Mr. Muyenga that there was no evidence that the firearm was used by the Appellants and on the possibility of a mistaken identity, the learned trial Judge said this case was another example of what has popularly come to be notoriously known in that part of the country as the infamous super story of the Karavinas.

Dissatisfied with the judgment of the court below, the Appellants now appeal to this court.

The first and second Appellants filed joint heads of argument based by two grounds of appeal.

The first ground of appeal is that the learned Legal Aid Counsel for the Appellants did not adhere to Articles 18 Act No. 1 of (1991) Part (III) Section 24A of the Legal Aid Act.

The second ground of appeal is that the learned trial Judge misdirected himself when he convicted the first and second Appellants based on evidence of identification by a single witness without considering aside from the possibility of honest mistake of identity, the possibility of recent fabrication.

The third Appellant filed one ground of appeal, which is that, the learned trial Judge erred in law in convicting the Appellant for aggravated robbery in the absence of evidence connecting him to the commission of the crime.

The written heads of argument by the first and second Appellants on ground one attack the alleged mediocre performance of the defence counsel resulting in no proper hearing and rendering the proceedings a nullity. The first and second Appellants cited three cases in support of this ground of appeal and arguments on it. However, on account of the view we take of this ground of appeal and the arguments on it, we do not find it necessary to go into the details of the

arguments on this ground of appeal. Suffice it to say that the principle being canvassed does not apply to this case and that the cases cited in support of the arguments have no bearing on this case. In any case, in our jurisprudence, the inexperience or incompetence of a defence counsel is not a basis on which a court can overturn a conviction.

The thrust of the written heads of argument on the second ground of appeal is that the prosecution evidence did not exclude the possibility of an honest mistaken identity and recent fabrication. It is contended that at the time of the robbery, PW1 was frightened before peeping through the window. On recent fabrication he pointed out that PW1 gave a statement to the Police a month after the apprehension of the Appellants had been seen by PW2. It is the submission of the first and second Appellants' that if PW2 identified the Appellants at the scene, PW2 should have assisted the Police to apprehend the first and second appellants. In conclusion, the first and second Appellants submitted that the evidence implicating them is that of a single identifying witness and there is nothing else to support the evidence of the single identifying witness in order to exclude the possibility of a mistaken identity. On possession by the first Appellant's girl friend of the chitenge material stolen during the robbery, it is submitted that the possession was explained. The first Appellant bought the chitenge material from the third

Appellant. It was further submitted that the evidence of the first Appellant's girlfriend as to what she said about the chitenge material is hearsay as she was not called to testify. In fact the first Appellant's girlfriend was called as a witness. She was PW3.

The first and second Appellants made brief oral submissions. In fact these submissions were not submissions as such but a brief summary of their evidence.

The third Appellant advanced one ground of appeal which is that the learned trial Judge erred at law in convicting the Appellant for aggravated robbery in the absence of any evidence connecting him to the commission of the crime.

Captain Nanguzyambo, the learned Director of Legal Aid, filed written heads of argument on behalf of the third Appellant and on which he relied. In his written heads of argument, the learned Director submitted that PW1 did not identify the third Appellant at the scene. He said that the evidence by the first and second Appellants implicating the third appellant is evidence only against the makers and not against the third Appellant. Further, the learned Director submitted that the evidence by PW4 that the third Appellant led him to the recovery of the stolen property in a friend's house does not connect the third Appellant to the crime because firstly, the

mosquito net was not identified as the complainant's; secondly, the items were found in a friend's home who was at large; thirdly, the items were common items which could come into anybody's possession through many ways. The learned Director concluded that the third Appellant had not been connected to the offence and urged us to acquit him.

Mr. Mutale, the learned Principal State Advocate, supported the convictions. He submitted that the first and second Appellants were positively identified by PW1 as people he knew before. Mr. Mutale pointed out that the issue is one of single identifying witness where caution against an honest mistaken identity is required. He submitted that the first Appellant led PW4 to the recovery of the chitenge material stolen from the complainant's shop. He pointed out that PW3 testified that the first Appellant gave her the chitenge material. As regards the second Appellant, Mr. Mutale pointed out that this Appellant led to the apprehension of the third Appellant from whom the mosquito net and other items were recovered. He said that the second Appellant also showed PW4 the holes at the shop made to gain entry. About the third Appellant, Mr. Mutale submitted that although this Appellant was not identified at the scene, when apprehended he led PW4 to a house where some of the stolen property was recovered. He said that there was evidence justifying the conviction.

Mr. Mutale ended by saying that the discovery of three empty cartridges at the scene shows that a firearm was used.

We have carefully considered the evidence that was before the learned trial Judge, the submissions of the first and second Appellants, the submissions by the learned Director on behalf of the third Appellant and the judgment appealed against.

On the evidence there is no doubt that the offence of aggravated robbery was committed. It is also beyond doubt that the robbery was committed by people who were armed. Although the firearm was not recovered, there is evidence that the firearm was fired and three empty cartridges were found at the scene. This is conclusive evidence to us that a firearm within the meaning of ***Section 2 of the Firearms Act Chapter 110 of the Laws of Zambia*** was used in this robbery.

As we see it, the critical issue in this case is the identity of the persons who committed this offence. The learned trial Judge's finding that the Appellants were connected to the offence has been criticized by the first and second Appellants that the possibility of an honest mistaken identity has not been excluded; and by the third Appellant that there is no evidence at all to connect him to the offence charged.

On the facts of this case, it is appropriate to deal with the first and second Appellants together. PW2, who was in the shop at the time of the robbery, testified that he identified the first and second Appellants outside the shop with the aid of moonlight. PW2 said he knew the first and second Appellants for some years before and that these two Appellants are brothers. After these Appellants were apprehended, no identification parade was held by the Police. Perhaps this was due to the fact that PW2 said that he knew first and second Appellants for some years before and that at the identification parade PW2 would be repeating the same mistake, if he had made a mistake at the scene.

As the first and second Appellants said, and Mr. Mutale quite properly also said, as far as the first and second Appellants are concerned, this is a case of single identification witness. The learned trial Judge in his judgment did not deal with the issue of a single identifying witness. The learned trial Judge dwelt on identification of the first and second Appellants at the scene by PW1 and the recovery of some of the stolen property without making any definite findings as to effect of the finding of this property. We are bound to say that the learned trial Judge did not adequately treat the critical issue of identify in so far as the first and second Appellants were concerned.

As we said in ***Bwalya V The People***[1], usually in the case of an identification by a single witness the possibility of an honest mistake cannot be ruled out unless there is some connecting linking between the accused and the offence which would render mistaken identity too much of a coincidence or evidence such as distinctive features or an accurately fitting description on which a court might properly decide that it is safe to rely on the identification. And in the case of ***Mukwakwa V The People***[2] we said that possession of various stolen property strengthens the weak evidence of identity.

In this case, contrary to what the first and second Appellants submitted, there is other evidence to support PW1's identification of these Appellants at the scene of the robbery. These two Appellants led PW4 to the scene of the robbery and demonstrated how they gained entry into the shop. Later, these Appellants led PW4 to PW3 where one of the chitenge materials stolen during the robbery was recovered. Of course, having been found in possession of the stolen chitenge material PW3 is a suspect witness whose evidence must be taken with caution. But in this case, the evidence on record is that all the four robbers were men. This excludes the possibility of PW3, a woman, of having been the robber herself who was trying to falsely implicate the first and second Appellants. We therefore accept PW3's evidence as to how she

got the chitenge material namely that; it was given to her by the first Appellant. Further, another of the chitenge material stolen during the robbery was found with the first Appellant's wife. And for the same reasons we have given in respect of PW3 we are satisfied that the first Appellant's wife could not have been the robber.

We are satisfied, as Mr. Mutale submitted, that there was sufficient evidence to connect the first and second Appellants to the offence they were convicted of. We are also satisfied that had the learned trial Judge approached the issue of identification as we have done, he would have come to the conclusion that the first and second Appellants committed this offence as he found. In the result, we do not accept the submissions by the first and second Appellants that the learned trial Judge erred in convicting them because there was no evidence to connect them to the offence they were convicted of.

We now deal with the third appellant.

As the learned Director submitted, the third Appellant was not identified at the scene of the robbery. But contrary to the submissions of the learned Director, there is ample evidence to connect the third Appellant. The third Appellant led to the recovery of a substantial quantity of the property stolen during

the robbery. The learned Director submitted that the mosquito net was not identified. This submission which is based on the evidence of PW1 ignores the evidence of Pw2 who identified the mosquito net saying that he personally bought it for his father (PW1).

The learned Director also submitted that the items were found in the third Appellant's friend who is at large. The learned Director misunderstood the evidence. The third Appellant himself did not say that the house where the property was found belonged to his friend (Simushi) who is at large but that he and Simushi shared the house. On the evidence in this case, the presence of Simushi in the house alone does not exonerate the third Appellant but implicates Simushi in the robbery.

The learned Director also submitted that the property in question is common property which can be obtained in many ways. This submission does not rest on any evidence. The ownership of the property is not disputed and there is no assertion that the property belongs to third Appellant or the fugitive Simushi. The fact that the third Appellant was found in possession of the property stolen from PW2's shop is beyond any reasonable doubt.

As far as the third Appellant is concerned, the case against him rested on the doctrine of recent possession. Briefly stated that doctrine is that where the accused is found in possession of property proved to have been recently stolen, the inference that the accused was the thief or broke in to steal and stole or received the property with guilty knowledge may, but not must, be drawn. However, the inference of guilt may only be drawn in the absence of any reasonably possible explanation by the accused as to how he came about the property and if on the proved facts the inference of guilt is the only reasonable possible explanation. The accused does not bear any onus to prove his innocence. If the accused gives an explanation, which might be reasonably true, then he is entitled to an acquittal. See ***Fanwell V Regina***[3].

In this case, we havc found that thc third Appellant led to the recovery of some of the stolen property and that he was in possession of it. The third Appellant imputed the possession of the stolen property to one Simushi who is now at large. We have already said that the presence of Simushi on the scene rather than exonerate the third Appellant in fact implicates Simushi in this crime. On the evidence, we are satisfied that there is no any other reasonably possible explanation as to how the third Appellant came about the property than the inescapable inference that the third Appellant stole it during the robbery with the other Appellants. In the event, although

the learned trial Judge did not approach the issue of possession as we have done, we are satisfied that had he done so, he would have come to the same conclusion as he did.

Before we leave this matter, we wish to observe that there is a variance between the information and the evidence as to who was actually robbed. The information alleges that it was Elvis Mubanga Kusila (PW2) who was robbed when in fact the person robbed was Winters Mubanga (PW1). PW2 is the owner of the property stolen. No amendment was made to the information to reflect this. However, we do not consider the variance fatal to the prosecution case because on the evidence, we were satisfied that the person robbed was PW1 but that the property stolen belonged to PW2.

The result of our judgment is that we found no merit in the appeal by the three Appellants. The appeal is accordingly dismissed and we confirm the convictions and the sentences imposed on them.

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E.L. SAKALA
CHIEF JUSTICE

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L. P. CHIBESAKUNDA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE