

THE PEOPLE v ROBERT PHIRI AND TENSON SIAGUTU (1980) Z.R. 249 (H.C.)

HIGH COURT

MUWO, J.

23RD NOVEMBER, 1979

HP/135/79

Flynote

Evidence - Identification - Personal identification - Adequacy of.

Evidence - Identification - Single witness - Possibility of honest mistake - When made.

Evidence - Burden of proof- Prosecution to prove guilt of accused.

Headnote

The two accused were charged with aggravated robbery contrary to s. 294 of the Penal Code Act, Cap. 146. It was alleged that in the early hours of the morning of 29th June, in Kafue, they stole property worth K5,906.21 from the plaintiffs. The couple were tied up with wired cords. The two accused unmasked themselves before leaving the room where one of the plaintiffs, the wife was, and she identified accused A1 as their ex-shopkeeper and A2 as the man who was working in the third shop from theirs.

The issue before the court was whether the two accused were the participants in the commission of the crime. The defence case was that of honest mistake on the part of the plaintiff who identified the accused persons. The learned judge held that the plaintiff impressed him as a witness of truth and that there was no possibility of an honest mistake on her part. He further held that the prosecution had proved its case beyond reasonable doubt and the two accused were convicted as charged.

Held:

- (i) The adequacy of evidence of personal identification always depends on all the circumstances surrounding each case which must be decided on its merits.
- (ii) A person is said to have made an honest mistake when he or she mistakes A for B. both of whom may have similar features. Stress of the moment is the most common cause of persons making honest mistakes.
- (iii) The prosecution bears the onus of proof as the accused person carries no onus of proving his innocence.

Cases referred to:

- (1) Bwalya v The People (1975) Z.R. 125.
- (2) Honest Solope v The People (1974) S.C.Z. Judgment No. 11.
- (3) Mpundi Nyambe v The People (1973) Z.R. 228.
- (4) Abdullah Ain Wendo and Anor v R. (1953) 20 E.A.C.A. 166.
- (5) Katebe v The People (1975) Z.R. 13.

Legislation referred to:

Penal Code Cap. 146 s. 294.

For the people: Mr Balachandran, State Advocate.
For the accused: Mr Simumba.

Judgment
MUWO, J.:

The two accused Robert Phiri and Tenson Siagutu (hereinafter referred to as A1 and A2 respectively) are charged with aggravated robbery contrary to s. 294 of the Penal code Act, Cap. 146. The allegation in the particulars of offence is that on the 29th June, 1979, at Kafue in the Lusaka District, the said accused jointly and whilst acting together stole K5,906.21 the property of Valibahthai Makanji Patel and that immediately before or immediately after the time of stealing they did use or threaten to use actual violence to the said Valibahthai Makanji Patel. Both accused have denied the offence, and the prosecution therefore bears the burden of proving not only the commission of the offence but also that the accused persons were the robbers.

It is common cause both to the prosecution and the defence that a robbery as alleged in the information took place in the early hours of the morning of 29th June, 1979, at approximately 0600 hours, and the victims of this robbery were Mr and Mrs Patel, PWs 1 and 3. The main issues however, is whether the two accused were the participants in the commission of the alleged offence. This being the issue I will now relate the story of the case in the simplest way I have mastered it. The story now follows in the coming paragraph.

A1 was in the employment of the complainants and was working in their shop as a shopkeeper for over two years. He left employment three months before the alleged robbery; A2 was working in the third shop from the complainants' shop in the same street. It follows therefore, according to the evidence adduced by the two complainants that the two men were known to them before the alleged robbery.

The story of Mr and Mrs Patel is that at approximately 0600 hours in the morning of 29th June, 1978, the couple woke up: Mrs Patel went into the kitchen to warm water for her husband to shave and wash his face. Meanwhile the husband went into the toilet which is situated outside the main building, approximately three to four metres from the back door, to answer the call of nature. Whilst in the kitchen Mrs Patel heard her husband shouting loudly for help from the direction of the toilet; she rushed there to find out what her husband was shouting about. Her husband was loudly calling out her Christian name Savitaben. When Mrs Patel got out of the house and reached the toilet she saw a man holding her husband by the throat; when she went close in an attempt to assist her husband the man who was holding her husband pushed her and she fell down. The second man then emerged and immediately caught hold of her and dragged her back into the house. There the man demanded money from her: she produced K832.00 cash and gave it to him, the man still demanded for some more money; for fear of being hurt or her husband killed she reached for some more money from a bag in which they had kept another sum of money which they intended to bank that morning, i.e. the same day of 29th June. When the bandit found that the second lot of money given to him was small he demanded

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for some more and threw down the bag and asked for some more money. She then opened her cupboard and got out a larger sum of money which was again intended for banking. The bandit was still not satisfied with all the money he had been given and continued asking for some more money. Mrs Patel told him that there was no money in the house to give them. At this stage Mr Patel was brought into the house and then the two bandits worked on the couple. Mr Patel had an electric wire cord and rubber bands tied around his neck, face and legs. To complete the whole operation Mr Patel was wrapped in a pair of bed sheets and his face completely covered and another piece of electric wire cord wound over his face. The other robber who was working on Mrs Patel at this stage in a separate room had her legs tied up with the same type of cords and she was laid on top of the bed. Mr Patel was pushed underneath the bed in one of the bedrooms. At this time both bandits were in the room with Mrs Patel where she was lying bound. Satisfied that their mission had been accomplished the bandits removed their masks from their faces as they were leaving the room where Mrs Patel was. It was at this stage when Mrs Patel recognised A1 their ex-employee and A2 the man who worked in the third shop from theirs. Mrs Patel was the first to loosen herself from the bonds around her legs and went and untied her husband. Both couple got into a state of hysteria and started crying uncontrollably. Their immediate neighbour Mr Issa, PW5, was in his bathroom at the material time of the alleged robbery when he heard shouts from the direction of the complainant's toilet which is situated about fifteen metres from his own house. PW5 said he looked through the window of his bathroom and saw Mrs Patel rushing out of the house towards the toilet, and observed a man grabbing her immediately she got there and started dragging her back into the house. Sensing that there was trouble at the Patel's house PW5 rushed to his brother's house which is situated on the same street as his and informed his brother what he had seen. Both brothers rushed to the Police station which was not very far from their residence to report the incident. Meanwhile PW4, Mr Shah, was returning from his night shift driving to his house when he met PW5 who beckoned to him to follow them to the Police station and went inside and PW5 explained that there was something strange happening at the premises of the Patels. The Police officers who were on duty at the time armed themselves and were driven to the house of the complainant. On arrival there the Police officers told PW5 to go back to the Police station to ask for more reinforcement because, apparently, the situation could not be controlled by the two of them. According to the evidence of PW4, when he and PW5 and the two police officers arrived at the house of the Patels, and before PW5 was sent back to the Police station to ask for more reinforcement, PW4 and one of the Policemen went together to the back of the house while PW5 and the other Policemen remained at the front. PW4 said while he and the policeman were walking he saw two figures of men scurrying away from the fence, that is to say running away from him and the Police officer. PW4 decided to give chase after the two men but as he turned the corner he saw one of the two men coming off the fence; he picked up a piece of stone with the intention of throwing it at him, but when the man who was running saw him

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(PW4) with the stone in his hand he changed his course and ran very fast past him. PW4 threw the stone at this man but it missed him. However, as the man passed he was in fact going in the

direction where the armed policeman was. PW4 said he heard the Policeman shout to the man to stop and to put up his hands. At that stage PW4 realised that the man had no chance of escaping because the Police officer had already cornered him. PW4 however turned to try and see if he could find the second man who was running away but when he did not see him he decided not to give chase because if he did so he would put himself between the fugitive and the armed Police and probably be shot at by mistake. Later Mr and Mrs Patel came out screaming and shouting; and in fact Mrs Patel fell down. PW4 did his best to try and console the crying couple. After calming down the couple he accompanied the Police officers to take the man they apprehended to the Police station in his own vanette. From the Police station he returned to the Patels' residence and assisted them by taking them to see a doctor for treatment because they both appeared to be in pain after the ordeal. PW4 said that at the time of his apprehension when he was running past him he saw him holding a cloth hand bag with floral designs. He said when they got to the Police station they opened the bag and started counting the money it contained.

I have already stated that after PW5 arrived at the complainant's house with PW4 he was sent by one of the Police officers to go back to the Police station to ask for more reinforcement. PW5 said however that while he was reporting the matter to one of the officers there he was told that reinforcement could only come from the Police camp and was told to wait until this was done. Meanwhile as he was waiting for reinforcements he saw A1 being brought into the Police station by PW2 the Police officer who had remained at the Patels' residence. He said at the time A1 was wearing green overalls, and that he was the same man he had seen dragging Mrs Patel into the house when Mr Patel was being throttled by the other man outside the toilet.

I have deliberately decided to put the story according to the sequence of events that is why I have not dealt with the prosecution witnesses' evidence in the order it was given. However, the story of Mr Patel, PW3, is very similar to the account given by his wife. The only difference is this: whereas PW1, Mrs Patel, stated that she saw the two accused's faces very clearly when they removed their masks immediately after the robbery and identified A1 as their ex-shopkeeper and A2 as the man who was working in the third shop from theirs, Mr Patel, PW3, was not in the same position. In fact, of the couple, Mr Patel was in a worse position to be able to observe who his assailants were than his wife.

I will now proceed with the story by briefly giving the accounts of the events by the two Police officers who went to the scene, i.e. PW2 and PW6 both of whom are constables stationed at Kafue Police Station. Their accounts so far as the reporting of the incident by PW4 and PW5 is concerned are similar. Their stories only differ in minor detail relating to the final events which culminated in the apprehension of A1 by PW2.

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Briefly PW2 said on receiving the report of the alleged robbery at the house of the complainants he and PW6 went to the scene in the car driven by PW5, and that on arrival there they deployed themselves and went in different directions. He said whilst so placed one of the alleged robbers who had not seen him earlier ran straight into him; the person was one of the two men PW2 had seen scurrying off the fence; that when the man came face to face with him he ordered him to surrender

and seeing him armed with a rifle the man quickly stopped and dropped the bag which he held in his hands to the ground. PW2 said the suspect was at the time wearing green overalls but he had no mask over his face; that as he was searching the man some members of the public who had gathered around the Patels' fence came and helped him to apprehend the suspect. PW2 then picked up the bag the suspect had dropped, opened it and found that it contained a large sum of money. He then took the suspect to the Police Station and then handed him to Detective Constable Wamundila (PW10). He identified the first accused in the court as the McLean he apprehended with the cloth bag with floral designs containing the money, which when counted at the Police station, was found to consist of one cheque in the sum of K2,094.21 and cash money in the sum of K2,098.00. The evidence of PW6 confirms the account given by PW2 in most material particulars. PW6 further said he gave chase in vain after the man who later disappeared. He confirmed the fact that Mr and Mrs Patel were tied up at the time the Police party arrived at their residence together with PW4 and PW5. He however said that on arrival he did not find Mr Patel covered by anything over his face and that after checking the house to try and find out if there was anybody still hiding there he found there was nobody. Being satisfied there was nobody or anything of importance to assist him in his investigation he returned to the Police station.

The warning and caution statement was taken from A2 by PW7 on the morning of 29th July, 1979. The statement was put in evidence and admitted as exhibits P1 A and P1 B, i.e. Tonga and English translation respectively.

PW8 the elder brother of the second accused, a train guard employed by Zambia Railways, deposed to the fact that he left Kafue on 26th June, 1979 and went to Choma on duty, leaving his young brother (A2) at his house where he had been staying with him. He said so far as he was concerned his young brother was still at the house on the 28th June, 1979. He said when he returned to his house at about midnight on the 28th June, 1979, he did not bother to find out whether his brother was in the house at the time, and that although his two wives were there he did not find it necessary to ask them whether his brother was in his room. The following morning, however, i.e. 29th June, at about 0800 hours, Police came to his house and found him asleep and woke him and requested him to accompany them to the Police station without telling him why they wanted him there. At the Police station when he was asked whether his brother was at his house he replied that he had not checked to find out

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if he was there when he arrived from Choma the previous night. He was however told by the Police to go to his house to find out where his young brother was and then return to the Police station to report. He said after he enquired unsuccessfully from his children about his young brother's whereabouts he returned to the Police station and reported that he had no information about his young brother's whereabouts.

On 17th July, 1979, A2 went to the Police station, probably on his own and was interviewed by PW10. On the same day an identification parade was conducted by PW9, a sub-inspector in charge of the traffic section at Kafue Station; the parade consisted of nine men and there was only one suspect, namely A2: the two identifying witnesses were Mr and Mrs Patel. PW9, said he explained

to the suspect what his rights were and told him to take any positions he wanted on the line and gave appropriate instructions to the identifying witnesses before they went to inspect the line of men. He said the first identifying witness was Mr Patel, whom he told to look at the line of men very carefully before going to touch anybody. He said after Mr Patel inspected the line he finally identified A2 as one of the robbers. He then called Mrs Patel to inspect the parade who after looking at the men carefully identified A2 without any such difficulty. Assisting PW9 at the parade was Detective Constable Uzya whose function was to call the identifying witnesses from the office where they were kept away from the parade to come to inspect the parade.

The evidence of PW10 in the main relates to the recording of the warn and caution statement from A1 and the taking into custody of the money brought; together with the accused by PW2 and carrying out further investigation to locate the second suspect. The warn and caution statement taken from A1 was not put in evidence.

On the 17th July, 1979, the second suspect was located and interviewed In connection with this offence: on the 19th July, 1979, he jointly arrested A1 and A2 for aggravated robbery and both accused made statements.

The reply of the first accused was not read or produced because of the objection by the defence counsel. The second accused however made a denial reply (exh. P1A and B).

At the close of the prosecution case I put both accused on their defence and explained fully their rights of elections. The first accused elected to give evidence on oath and said he had no witness to call; the second accused elected to remain silent and said he had no witnesses to call. The following is the first accused's story.

A1 is a fitter by occupation employed by Nitrogen Company of Zambia (NCZ), his present address is House No. 0429 Lubuto Site and Service, Ndola. He said on the 20th June, 1979, he was on duty at his place of work at Kafue: he started work at 10pm (2200 hrs) and reported off duty at 0600 am the following day and started going to his house on foot; his house is situated in Mtendere Compound, Kafue. He was walking along the main road that runs from Lusaka to Mazabuka.

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This road passes through the Kafue Town Centre. As he was walking along he met two men coming from the opposite direction, both of whom were dressed in green overalls like those used by members of Zambia National Service (ZNS). One of the two men had a bag in his hand which looked like the one which was exhibited in court: he saw this man drop the bag to the ground and for no apparent reason the two men started running, passing him going in the direction where he had come from. He then walked a few steps forward and came to where the bag had been left and picked it up. Suddenly he heard a voice "You stop!" He looked around and saw a Police officer pointing a gun at him. He stopped and the Police officer immediately asked him where he had picked the bag from but as he was trying to explain to the Police officer that he had picked it on the road a few paces away where one of the two men had dropped it, the officer told him that he was the man who had stolen it from the Indians from the nearby house. A said the Police officer then

started beating him and a mob gathered and joined in the beating. The Policeman then hit him with the butt of the gun and he fell down and was rendered unconscious. The accused does not recall when he recovered consciousness but when he did so he found himself in the Police cells. He said he knew Mr and Mrs Patel because he had worked for them from February, 1977, up to March, 1979, when they fired him and told him they did so because they wanted to reinstate their previous driver to take over his duties as shopkeeper. He said when he left employment he was not paid wages for March, 1979, and that he had in fact been dismissed without being given due notice of termination of his employment. He admitted that when the Policeman challenged him to stop he had the bag of money in his hands which he had picked up innocently after the two men who had dropped it ran away.

From the prosecution I have heard evidence of ten witnesses; from the defence I have only the evidence of the first accused, the second accused having declined to speak in his defence; a right which he properly exercised.

The position however is that the prosecution bears the onus of proof as the accused persons carry no onus of proving their innocence. There is one crucial issue in this case and that is one of identity. The actual commission of the robbery is not in dispute at all. The other issue is regarding the evidence linking the accused persons with the alleged robbery. The evidence of the identity of the robbers comes from one witness only and that is PW1, Mrs Patel. This is so because although both Mr and Mrs Patel were attacked by the robbers almost simultaneously, Mr Patel did not have the opportunity of seeing the faces of their assailants throughout the attack. Mrs Patel on the other hand claims to have had the opportunity of seeing the faces of the two assailants when they (assailants) deliberately or carelessly removed the masks they were wearing from their indices when they were satisfied that their mission had been accomplished and that their victims were no longer in a position to observe their faces. The evidence of Mr Patel, which was supported by PW9 who conducted the identification parade, that he identified the

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second accused cannot be allowed to stand because unlike his wife he had no opportunity of seeing the faces of his assailants at the time of the robbery because first of all they had masks over their faces and secondly he was blindfolded at the time they left the house. Evidence of Mrs Patel regarding the identification of the second accused at the parade is worth considering and I will come to it shortly, after I have dealt with the question of a single witness identification.

On identification I do not have to go far beyond referring to our two celebrated cases, namely *Bwalya v The People* (1) at p. 125 and *Honest Solopi v The People* (2) and many others quoted in the afore-mentioned cases. In the case of *Bwalya v The People* (1) Baron, D.C.J., succinctly said:

"It is not sufficient to be satisfied that a witness is honest; the court must be satisfied that a possibility of an honest mistake has been ruled out."

And in the case of *Honest Solopi* (2) it was said:

"That the question is not one of credibility in the sense of truthfulness but of reliability and that the greatest care should therefore be taken to test the identification because it is not only for the witness simply to say that the accused is the person who committed the offence . . ."

The matter was further clarified in an unreported case of *Mbundi Nyambe v The People* (3). To illustrate that identification by a single witness can be fallible, the court had this to say:

"There is perhaps no area in which there is a greater danger of honest; mistake than in the area of identification, particularly where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence; the witness should be asked to specify by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed; the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed. The foregoing, considerations are not, of course, exhaustive, but are intended merely to illustrate; the adequacy of evidence of personal identification will depend on all the surrounding circumstances and case must be decided on its merits.

The danger of honest mistake in identification is even greater where there is only a single identifying witness."

Further in the case of *Abdullah Binwendo and Another v R.* (4). at p. 168 :

"Subject to certain well known exceptions it is trite law that a

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fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness representing identification especially when it is knowing that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which the judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

Guided by the authorities contained in the above quoted passages I can safely say that although Mrs Patel is the only identifying witness her evidence can be believed or rejected as the case may be depending on whether I am satisfied that the possibility of an honest mistake has been ruled out or that it has not been so ruled out. If I choose to take the first line of thought I will not be relying on Mrs Patel's credibility the sense of truthfulness but on reliability that I repose in her. Of course if I take the second line of thought, I will be saying to myself that the possibility of an honest mistake has not been ruled out and that I do not rely on her testimony of the identification of the accused person. In whatever way I consider Mrs Patel's evidence I must take the greatest care to test the accuracy of the identification of the robbers at the time of the offence. Of course the adequacy of evidence of personal identification always depends on all the circumstances surrounding each case

which must be decided on its merits. I will go further to say the danger of a single witness identification is greatest where the alleged robber is not previously known to the witness. In the present case however, so far as Mrs Patel is concerned this difficulty does not arise because the first accused was in the employment of the complainants for a period of almost three years and the alleged offence was committed only three months after he left their employment. The second accused was also known facially to the complainants and his place of employment prior to the commission of the alleged offence was not far from their own shop. Be that as it may the problem does not end there. I have still to consider whether or not the two accused were robbers and that Mrs Patel had not made an honest mistake in identifying them as being the robbers. I do not wish to appear too academic by trying to define the phrase "honest mistake". I will be content by simply saying that a person is said to have made an honest mistake when he or she mistakes A for B, both of whom may have similar features. Stress of the moment is the most common cause of persons making honest mistakes. I saw Mrs Patel in the witness box when she was giving her evidence. In the course of her recounting the events that took place in the early morning of 29th June, 1979, she broke into tears. This of course did not mean that she wanted to win my sympathy but was simply a display of her mental torture which does not render whatever she said to me untrue or passionate desire for revenge. On the contrary she impressed me as a witness of truth. I am satisfied in my own mind that the possibility of an honest mistake on her part in identifying the two assailants has been completely ruled out.

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As I said earlier that the robbers by sheer carelessness or indifference and overpowered by the feeling that they had severely dealt with their victims and rendered them incapable of keeping proper observation on them decided to remove their masks. This they did to their disadvantage because unlike Mr Patel, Mrs Patel's face was not covered or obscured by anything or in any way. Although her legs were bound her hands were left free that is why she in fact quickly freed herself and went to free her husband, assisted by PW6 who quickly came to their aid. On the issue of the identity of the two accused I am satisfied beyond doubt that first accused and second accused were correctly identified by Mrs Patel as being the robbers. Taking the matter still further I have to consider whether there is evidence linking both accused with the commission of the offence. I will take the first accused first. This accused does not deny being found in possession of the bag containing the money stolen from the complainant's house: the bag was positively identified by Mrs Patel and the cheque in the sum of K2,094.21 was also positively identified by Mr Patel as the cheque that was part of the money that was stolen. The first accused's only defence is that he innocently picked up the bag and before he had the opportunity of seeing what was in it he was challenged by a Policeman PW2; and where he claims to have been found in possession of the bag is no other than the spot near the Patel's residence where the robbery took place only a few minutes before. So far as the first accused is concerned the link is there and I outright reject his exculpatory story. In my view there is no scintilla of truth in it. He is the robber. Turning to the second accused the position is different; here an alibi was made by the accused to the Police when he made his denial statement: the alibi is that at the material time he was at the village of his uncle Sianyambe; and the village is called Kanchele. The accused's brother PW8 gave evidence that although their uncle lives at Kanchele Village he and his brother come from Namuswa Village Chief Singani, Choma District, and that so far as he (PW8) is concerned when he left his home on the 26th June,

1979, and travelled on duty to Choma he left his young brother at his house and that when he returned during the night of 28th June, he still believed that his brother was in the house. His inquiries from his two wives and children produced no useful information as to the whereabouts of his young brother.

In his submission at the close of the defence case counsel for the accused stated that the prosecution had failed to negative the second accused alibi that he was not in Kafue Township on the date of the alleged offence. He argued that the law on alibi was clearly stated in the case of *Katebe v The People* (5) where it was stated:

"Where a defence of alibi is set up and there is some evidence of such an alibi it is for the Prosecution to negative it; that there is no onus on the accused person to establish his alibi. Further that it dereliction of duty for an investigating officer not to make proper investigation of an alleged alibi."

This is the case cited by counsel for the accused. Counsel however did not consider the decision in the case of *Bwalya v The People* (1975) (1) where it was stated as follows:

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"Simply to say 'I was in Kabwe at the time' does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says 'I was not there' he puts forward an alibi which it is the duty of the police to investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been the duty of the police to investigate; but the appellant not having done so there was no dereliction of duty on the part of the police."

In the present case so far as the second accused is concerned the case of *Katebe* is of little assistance to the defence because there is no evidence of such alibi which would have necessitated the Police taking the necessary steps to investigate the alibi and the investigating officer cannot be said to have committed a dereliction of his duty. The accused's statement to the Police exhibit P1 where he said he had been at Kanchele Village is a wild statement not warranting any investigation to the Police. I will rely on the evidence of Mrs Pates that the accused was at the material time with the first accused and they together committed the offence. He was not out of Kafue Township as claimed. Although the evidence of his elder brother is a bit sketchy I still feel that the accused was present in Kafue and not at his uncle's village as claimed by him. For the foregoing conclusions I find that the prosecution has proved its case beyond reasonable doubt against both accused and in consequence I cannot them as charged.

Accused convicted

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