

## **MWALE v THE PEOPLE (1968) ZR 84 (HC)**

HIGH COURT  
WHELAN J  
16th AUGUST 1968

### **Flynote and Headnote**

**[1] Evidence - Identification Parade - Objection to conduct by accused - Magistrate's duty.**

If an accused raises an objection to the conduct of an identification parade, the trial magistrate cannot ignore the objection, but must make a finding on its validity.

**[2] Criminal procedure - Court record - Observations by arraignment court contained on the record prejudicial to the accused.**

An observation made by the arraignment court which is pre-judicial to the accused must not appear on the record of that court - in order that it should not come to the notice of the trial magistrate.

*Gani, Legal Aid Counsel, for the appellant.*

*Chaila, State Advocate, for the respondent.*

### **Judgment**

**Whelan J:** On the 28th May, 1968, in the subordinate court of the third class for the Kitwe District, the appellant was convicted on two counts of cheating and on 21st June, 1968, he was sentenced to a total of six months' imprisonment with hard labour. He appeals to this court against his conviction and sentence. The State does not support the conviction.

[1] The vital issue in the trial of the appellant was his identification as the person who had committed the offences with which he stood charged. The evidence relating to this was as a result of an identification parade conducted by the police. In the course of his evidence as to the conducting of the identification parade a police officer stated that the appellant after the parade had been concluded stated that the witnesses had seen him at the time that he was being brought to the police station.

This was not explored by the prosecution, and in his judgment the magistrate in no way adverted to it. Because of the allegation by the appellant that there may have been something unfair in the manner in which the parade had been conducted, it was incumbent upon the magistrate to make a finding in that regard. Had he considered the matter he might well have found that the parade was properly conducted and that the appellant had not been prejudiced, but in the absence of any direction on the matter I consider that it would be unsafe to allow this conviction to stand, and this appeal is allowed. The conviction is quashed, and the sentence imposed in respect of it is set aside.

[2] There is one further matter which I feel I should mention. It appears on the face of the record that after the appellant had been arraigned the court made the following observation: "The accused is to continue serving a prison sentence for another offence but to be brought to court whenever required." I appreciate that this was not an observation of the trial magistrate, but, as I have said, it appears on the face of the record, and the trial magistrate must have seen it, and it might have had a prejudicial effect on the appellant, and such observations should not be recorded in the court minutes.

*Appeal allowed.*