IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 12 OF 2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN

KINGSLEY NGOSA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **CHASHI, LENGALENGA AND SIAVWAPA JJA**

On 22ND May and 21st August 2018

FOR THE APPELLANT: MRS. C. LUKWESA, SENIOR LEGAL AID COUNSEL, LEGAL AID BOARD

FOR THE RESPONDENT: MRS. F. NYIRENDA TEMBO, SENIOR STATE ADVOCATE, NATIONAL PROSECUTIONS AUTHORITY

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

The Appellant herein was convicted by the High Court on two counts of Aggravated Robbery contrary to section 294 (2) of the Penal Code chapter 87 of the Laws of Zambia. In count 1, the Appellant is alleged to have robbed Victor Simukwanya of a Toyota Corolla motor vehicle the property of Agent Chula while in the company of other people unknown whilst armed with offensive weapons including a non-descript firearm on 25th April 2016. In count 2, he is alleged to have stolen a Samsung S2 cell phone and

K70.00 cash from Edwin Musheke in similar circumstances and on the same date as in count 1.

After evaluating the evidence before her, the learned trial Judge came to the conclusion that, the prosecution had proved the case beyond reasonable doubt in both counts and convicted the Appellant accordingly and sentenced him to death.

The uncontested facts of the case in the court below are that, an aggravated robbery was indeed committed in the night of 25th April 2016 during which PW1, was robbed of an identified motor vehicle, a Toyota Corolla bearing registration number, BAA 9478. It is also a fact that none of the robbers was identified by the victims and as such, the learned trial Judge had to be satisfied on the evidence as to whether or not the Appellant was one of the robbers.

The stolen car was recovered and the circumstances of its recovery are the only lead to the identity of the Appellant as one of the robbers. However, no firearm, spent cartridges or live ammunition were recovered from the scene or anywhere near or along the route taken by the robbers.

PW4 was the key witness as it was his testimony that connected the Appellant to the robbery. In a nutshell, his testimony was to the effect that on the night of the robbery, the Appellant drove the car in issue into his premises around 21:00 hours. He and six others

alighted from the car and entered his bar and started drinking. Before leaving, it was discovered that the car had a flat tyre as a result of which the Appellant requested to leave the car and come back the following morning to fix and collect it.

The Appellant then asked for a hundred kwacha and some bottles of beer after which he left. The following morning, he went back to the bar and gave the witness the K100.00 he had borrowed and also replaced the number plates on the car with ones bearing registration number ACX 6710.

The evidence before the learned trial Judge was uncontested with regard to the identity of the car as PW1, PW2 and PW3, the occupants of the car, at the time of the robbery, all identified it by its registration number, type, colour and other identifying features as well as the car key. However, all the three witnesses were categorical on their inability to identify any of the robbers.

In his evidence, the Appellant admitted being acquainted with PW4 and going to PW4's bar in the night in issue but that it was in response to a call from one of his friends whom he found at the bar with others drinking while seated on the car in question bearing registration number ACX 6710. He however, denied the charges and accused PW4 of falsely implicating him on account of a dispute he had with him over an amount of K60.00.

In her judgment, the learned trial Judge discounted the possibility of self interest on the part of PW1 to PW3 as they were not related to the victim. She relied on the case of Kambarage Mpundu Kaunda v the People.[1] She also ruled out any possible reason for falsely implicating the Appellant.

We totally agree with the learned trial Judge on the above findings save to state that it was unnecessary for her to venture into the possibility of the witnesses having an interest of their own to serve as they were not accomplices. In fact, all the occupants of the motor vehicle were victims of the robbery. As regards PW4, it was necessary for the learned trial judge to exclude the possibility of self interest since he was found in possession of the motor vehicle in which case he was a suspect.

After taking all the circumstances of the case into consideration, the learned trial Judge came to the conclusion that PW1 to PW3 were all credible witnesses who recounted that which happened to them and as such, establishing the fact of the robbery by a group of men armed with assorted offensive weapons including a firearm.

The learned trial Judge was also satisfied with PW4's evidence of the Appellant's identity as the person who drove the stolen car into his premises on the night of the robbery and ruled out the danger of an honest mistaken identity.

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[1] (1990) ZR 215

On the possibility of the Appellant being a mere recipient of stolen property, the learned trial Judge discounted it on the basis that the Appellant was in possession merely two hours after the robbery and further handed the car key to PW4 without giving a reasonable explanation of how he came into possession. She called into aid the case of Kunda v the People[2] in which the Supreme Court held that recent possession may imply guilty knowledge if no explanation of possession is rendered or the Court does not believe the explanation.

We largely agree with the trial Judge's findings of fact and the verdict of guilty to the offence of Aggravated Robbery. We however, find that the learned trial Judge did not properly deal with the issue of the use of a firearm in relation to the evidence before her. We find that although PW1, PW2 and PW3 testified as to seeing a firearm in possession of one of the robbers and hearing gunshots from the car as the robbers drove away, no firearm was recovered and neither were any cartridges or live rounds of ammunition recovered from the scene or the suspects.

This is important because it is a requirement that where it is alleged that a firearm was used in the commission of an offence, it must be established that the firearm was a firearm within the meaning of the Firearms Act, Chapter 110 of the Laws of Zambia.

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[2] (1980) ZR 100

This was the holding by the Supreme Court of Zambia in the case of Timothy and Another v the People[3].

Under section 2 of the Act, Firearm is defined in the following terms;

> ***"(a) any lethal barrelled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile***
>
> ***(b) any weapon of any description designed or adapted for the discharge of any noxious liquid, gas or other thing***
>
> ***(c) any barrel or any frame or body to which a barrel may be attached, incorporating a mechanism designed to cause controlled detonation or discharge of any shot, bullet, bolt or other missile and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing such weapon"***

From the definition above, it is impossible to establish use of a firearm where neither firearm, cartridge nor indeed live bullets of the same calibre as the firearm are recovered. In a case where a firearm has been discharged into an object, it may be possible to

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[3] (1977) ZR 394

determine whether or not the mark or injury caused is that of a firearm by use of forensic science even where neither a firearm nor ammunition has been recovered.

In this case the police made no attempts to establish that indeed a firearm was used in the robbery other than relying on the words of the three prosecution witnesses. As a result, the learned trial Judge also fell into the same error by not addressing her mind to the fact that there was insufficient evidence to corroborate the evidence of PW1, PW2 and PW3 as to the use of a firearm.

In the case of Joseph Mulenga and Albert Joseph Phiri v the People,[4] the Supreme Court upheld the conviction of the appellants under section 294 (2) despite there being no firearm recovered. The Supreme Court found that there was evidence by two witnesses that they heard gunshots during the night of the robbery. It further found that a live bullet and a spent cartridge had been recovered from the scene. The Supreme Court held that since the said evidence had not been challenged in cross-examination, the trial court was entitled to find that an armed robbery had been staged by the Appellants.

We totally agree with the Judgment of the Supreme Court. We however, clearly distinguish the facts of that case from the facts before the lower court in this case. The point of distinction between

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[4] (2008) ZR 1

the two cases is that in the former, a live bullet and a spent cartridge were recovered from the scene, and the same corroborated the evidence of the witnesses who testified that they heard gunshots during the robbery which evidence stood unchallenged.

In the case before us, as earlier pointed out, nothing was recovered from the scene tending to confirm the evidence of gunshots. Moreover, to bring the evidence to within the definition of the firearm under the Firearms Act, sound alone is not enough as there must be evidence that what was fired was indeed a firearm capable of causing death or serious bodily harm. We take the view that in the absence of the firearm itself, live ammunition or spent cartridges recovered from either the scene or the suspects, there can be no other means of proving beyond reasonable doubt that a firearm was indeed used in the robbery.

It is for the above reasons that we find no basis upon which the learned trial Judge proceeded to convict the Appellant in this case under section 294 (2) of the Penal Code. The record shows that she solely relied on the testimonies of the three prosecution witnesses who said that they heard gunshots and that one of the robbers put a gun to his head.

In the case of John Timothy and Feston Mwamba v the People,[5] the Supreme Court upheld the conviction for aggravated robbery with a

[5] (1977) ZR 526

firearm for the reason that two of the prosecution witnesses saw one of the robbers carrying an automatic rifle and a magazine with two live rounds of ammunition was recovered on the path the robbers took when fleeing. On that account, the Supreme Court stated as follows;

> ***"The finding of the magazine with two live rounds of ammunition on the path taken by the robbers when they ran away must lead to the irresistible conclusion that the automatic weapon seen by prosecution witnesses 1 and 2 in the hands of one of the robbers was capable of firing the live rounds of ammunition found in the magazine".***

This statement re-enforces the position that a conviction under section 294 (2) is competent only if the use of a firearm as defined under section 2 of the Firearms Act can be inferred from strong circumstantial evidence where the firearm is not recovered. It is also a further requirement that the accused in those circumstances will be convicted unless he shows that he was not aware that one among them had a firearm or if he knew, he disassociates himself from its use.

For the above stated reasons, we find that the learned trial Judge misdirected herself in law and in fact when she convicted the Appellant under section 294 (2) of the Penal Code, Chapter 87 of the laws of Zambia. We are, however, satisfied that the evidence

before the lower court satisfied the ingredients of section 294 (1) of the Penal Code. We accordingly set aside the convictions and sentence herein under section 294 (2) and substitute the same with convictions under section 294 (1) of the Penal Code and sentences of 25 years with hard labour in both counts.

The sentences will run concurrently with effect from the date of conviction.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE