

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

I.T
HP/152/2016

BETWEEN:

THE PEOPLE

Versus

**SIMON CHARLES SAKALA
JOSEPH LUNGU
DONALD VINCENT CHISANGA**



CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the State: Mrs. S.C. Kachaka – Senior State Advocate
For the Accused: Mr. M. Nsapato – Messrs Chibesakunda & Company

R U L I N G

Legislation referred to:

- 1. Penal Code Chapter 87 of the Laws of Zambia*
- 2. Criminal Procedure Code Chapter 88 of the Laws of Zambia*

Cases referred to:

- 1. The People v. Japau (1967) ZR 95*
- 2. Mwewa Munoro v. The People (2004) ZR 206*

The 3 accused persons stand charged with the offence of Aggravated Robbery Contrary to Section 294 (1) of the Penal Code¹.

The particulars of the offence allege that the accused **Simon Charles Sakala, Joseph Lungu and Donald Vincent Chisanga** on the 15th of October, 2014 in the Lusaka District and Province of the Republic of Zambia jointly and whilst acting together with other persons unknown and whilst armed with a machete and other unknown objects did steal from **Given Banda** a television set, a home theatre, 2 cell phones all valued at K790.00 the property of Given Banda and at or immediately before or after the time of such stealing did use or threaten to use actual violence to the said Given Banda in Order to obtain or retain the said property to prevent or overcome resistance from its being stolen.

The people of Zambia called 4 witnesses.

PW1 was Given Banda. The essence of his evidence was that on 14th October, 2014 at about 22 hours he locked the door and retired to bed in his one bedroomed house with his cousin **Charles Lukelo**, he left the light on. In the early morning of 15th October, 2016 about 02:30 hours he was awoken by some people who were knocking at his door ordering him to open the door. The intruders claimed they were police officers.

He removed a security bar used to secure the door. The bandits who were 6 in number forced the door open and they broke the doors padlock. They gained access and they started beating him. He somehow found himself outside where the assault continued.

The assault included kicking him. He then noticed that one of the assailants was armed with a short button. He noticed that the bandits started removing items from the room which were (1) a 21 inch television set (ii) 2 cellular phones and a home theatre with 2 speakers. After the bandits left, the matter was reported to Marapodi Police Post where he was given a medical report ID3 as he had suffered a swollen left arm and right shoulder. The left shoulder also suffered a cut.

He was attended to at Chipata clinic where he was medically attended to. The following day he gave statement to police and went back home. A few days later he was summoned by Marapodi police who referred him to Mandevu police where he indentified some of the stolen items namely television set ID1; Home Theatre ID2, he was not able to identify the bandits.

Cross examined by defence Counsel, the witness testified that the bandits broke the padlock. That it had a smooth handle outside which the intruders were touching or holding in trying to secure entry. There were no police officers who visited the scene of the crime. He remembered giving 2 statements to the police. He was unable to identify the bandits because it was dark.

PW2 was a police constable No. 40691 Hikanza Hibaleyi of Emmasdale Police. He recalled that on 15th October, 2014 during night shift he received a report from an informer that some criminals were carrying some television sets and radios. A neighborhood search party was mounted. The search party met the

criminals who bolted upon being confronted. The search party pursued one person amongst the group, he was cornered and apprehended. He later led the search party to where certain items were recovered which later were identified as PW1's property ID1 and ID2. The person who had been cornered was later identified by PW2 as accused 1.

Cross examined by Defence Counsel, the witness denied being told by the 1st accused that he was a "ZAMCAB" (meaning that he conveys commodities for customers using wheel barrow) and that he was a happily married family man.

I should summarily at this point deal with the line of cross examination taken by defence counsel. He sought to extract an answer from PW3 by challenging him to tell the court what the accused told him when he was being interviewed.

In reexamination of PW3, the learned senior state Advocate Ms Kachaka asked the witness to clarify what he had told the witness PW2 which drew a sharp objection on the ground that the state was trying to introduce unproven confession of accused number 1.

I overruled the objection on the ground that the Defence Counsel had himself introduced the issue of what the accused told the police. The predicament the defence found itself in was self inflicting as they are the ones who introduced the accused' excuria statement made by accused to the police. They are the ones who had brought the pudding on the table for everyone to eat.

It is counsel of prudence that a cautionary approach always be taken when cross examining and to avoid an approach or questions which may elicit unfavorable to the accused. One of the thumb rules is that if a witness has not harmed your client it is safer to “*let lying dogs lie*”.

PW3 was **Edison Phiri**. It was his testimony that on 16th October, 2014 he was attending to a funeral at a neighbors house in Mandevu. Around 04:00 hours he noticed some people at his house; he drew near and he identified them as A1, A2 and A3. A1 had been known to him for about 3 years and they are married from the same family.

A2 known as Jose is a drinking mate. He had known him for 2 to 3 years whereas A3 is a neighbor and have known him for a long time. The witness inquired from the accused who were in the company of other people altogether they were about 5. A1 explained that he had a problem with the Landlord and he wanted to live the goods for safe keeping. The witness allowed them to leave the goods and went back to the funeral house. A little while later he saw there were police officers and there was a chase going on. A1 was subsequently apprehended and the goods were recovered.

Cross examined by defence Counsel – the witness testified that he was at the funeral house which was nearby and he could observe what was happening at his house which was nearby. He could not see what was happening in the house but he saw the police enter

and come out with the goods the 1st accused had brought in the company of others which he had claimed were his and had been taken at PW3's house for safe custody.

The police were on foot and there was no vehicle parked anywhere nearby.

PW4 was Detective Sergeant Conrad Andeleki No. 32251 of Emmasdale Police. It was his testimony that on 20th October, 2014 he was assigned a docket of Aggravated Robbery wherein the victim was **Given Banda PW1** of Garden Compound who had been robbed by bandits who were armed with a crow bar and shot button and stolen from him a Toshiba 21 inch colour TV, Home theatre and 2 cellular phones all valued at K790.00. Entry was accessed by damaging the door.

In course of his investigations he received helpful information that lead to the apprehension of the 2nd and 3rd accused. The robbery victim went to the station with his relative **Jonathan Lisekelo** who was with him at the house at the material time of the crime. The items which were stolen were identified by the victims as Toshiba 21 inch colour TV, 3 piece Home theatre which he tendered as peoples exhibits P1 and P2 respectively.

He learnt that the 1st accused had been apprehend by Constable Ikanza. He picked suspect who was later identified as Accused 1 who later led him to the apprehension of A2 and A3. At one time all the 3 accused escaped from lawful custody but were subsequently

traced, apprehended, detained, arrested and charged of the subject offence.

He finally produced PW1's medical report as peoples exhibit P3. Cross examined by Defence Counsel, the witness testified that A2 was known as a habitual suspect at the police. A3 too was known to him before his apprehension. He denied the suggestion that there was a contest between A3's girl friend named Agnes and the witness.

The prosecution rested.

The defence made submissions of no case to answer. The State equally made the submissions.

I am indebted on the researchful industry of both the learned counsel. Due to time constraints and brevity, I will not restate the host of the very relevant of authorities.

It is trite law that "a submission of no case to answer may properly be upheld:-

(a) If an essential element of the alleged offence has not been proved.

(b) When the prosecution evidence has been so discredited by cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it"

See the case of the People vs. Japau¹.

The following facts are common cause from the evidence so far led by the prosecution.

- (1) That during the early morning hours about 02:30 hours on 15th October, 2014 bandits raided the house of PW1 masquerading as police officers and stole exhibits P1 and P2.
- (2) That the assailants (bandits) were 6 in number and that shortly before and after stealing the items listed above, they threatened and actually used violence on PW1 as evidenced by peoples' exhibit P3.
- (3) Later in the morning around 04 hours a group of 5 people conveyed the stolen items to the residence of PW2 who identified the 3 accused persons as the persons who brought the stolen items to his house.
- (4) That group of 5 people who had conveyed stolen items to PW3's residence were accosted by a team of neighborhood watch headed by PW2 where upon the said person took to their heels and escaped the dragnet but for A1 who was pursued cornered and apprehended. He then led the neighborhood search team to A3's residence where the stolen items people's exhibits P1 and P2 were recovered namely the 21 inch Toshiba colour Television set and a three piece home theatre.

In respect of A1, I am satisfied that there is sufficient evidence against him connecting him to the robbery which had occurred a few hours previously at PW1's residence. It was A1 who led the police to PW3's residence where some stolen items were recovered.

PW3 had identified A1 and the other 2 accused as the persons he found at his residence. He was well known to all the accused.

I accept the submission by the learned Defence Counsel that PW3 for all intent and purpose falls in the category of accomplice witnesses or persons with an interest to serve. It is trite law that the evidence falling under the above classes require corroboration or something more in addition to the evidence of accomplices or witnesses with an interest to serve.

In the case in casu, the stolen items in a robbery shortly after the commission of the crime were found at PW3's residence. The inference is that the witness either personally participated in the crime or was found in possession of stolen property.

There is something more to PW3's evidence that may tend to independently confirm PW3's evidence. A1 was pursued by the neighborhood watch team, they did not lose sight of him. He was captured and later led the team to PW3's house where the loot was recovered.

Further, it was not disputed that A1 was captured in the manner and style described by PW3 and PW2. The line of cross examination was that Accused 1 was lawfully at the place he was

found conducting his lawful business of a "ZAMCAB" i.e conveying merchandise for members of the public at a fee.

In my view the state has established a prima facie against Accused 1 requiring him to be put on his defence and I so put him on his defence.

In respect of A2 and A3, the only evidence against them is from PW4 that after he learnt that A1 had been apprehended by PW2 he collected the accused to assist him or the police with investigations. In the process, A1 divulged information which led to the ultimate apprehension of A2 and A3.

Nothing was recovered from A2 and A3 tending to connect them to the crime. The accused were not apprehended at A3's residence. The allegation by PW3 that A2 and A3 were amongst the persons who brought the contraband, looted from PW1's house remain unsupported.

I have already alluded in one of the preceding paragraphs that PW3 is in the class of witness whose evidence require corroboration or something more.

The question I have to ask myself on the proper application of the true import of the case of *Mwewa Munoro v The People*² if A2 and A3 were to be found with a case to answer and they elected to remain silent whether a reasonable tribunal might convict. My answer will be in the negative.

I therefore invoke the provisions of section 206 of the Criminal Procedure Code². In the circumstances, I hold that it will not be safe to put A2 and A3 on their defences.

I accordingly dismiss the charge against both A2 and A3; I acquit them and order that they be forthwith set at their liberty.

Leave to appeal granted.

Delivered at Lusaka this 16th day of September, 2016



**Mwila Chitabo, SC
Judge**