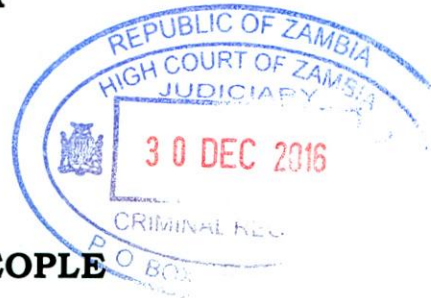


HP/174/2016

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

**THE PEOPLE****V****PATRICK CHITALU**

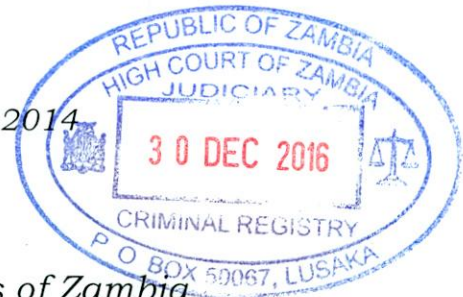
BEFORE HON MRS JUSTICE S.KAUNDA NEWA IN OPEN COURT
THIS 30th DAY OF DECEMBER, 2016

For the State : Ms P. Nyangu and Ms Hakasenke, State
Advocates
For the Accused person : Mrs M.K. Liswaniso, Legal Aid Counsel

J U D G M E N T

CASES REFERRED TO:

1. *Chizonde V The People* 1975 ZR 67
2. *Jonas Nkumbwa V The People* 1983 ZR 103
3. *Mwansa V The People* SCZ App/ No 170/171/2014

**LEGISLATION REFERRED TO:**

1. *The Penal Code, Chapter 87 of the Laws of Zambia*

The accused person in this matter stands charged with one count of aggravated robbery contrary to **Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence allege that Patrick Chitalu on 24th December, 2015, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did steal one Blackberry cell phone, 1 wrist watch, 1 pair of shoes and K1, 600.00 cash altogether valued at K3, 025.00, the property of Bornwell Sakala, and at or immediately before, or immediately after the time of such stealing did use or threaten to use actual violence to the said Bornwell Sakala in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

The accused person denied the charge. The onus is upon the prosecution to prove the case beyond all reasonable doubt. The State called six witnesses, while the accused person gave his defence on oath, and called no witnesses.

PW1 was Asnelly Chambakata. She testified that after Christmas in December, 2015 her husband Frank Mwale gave her a Blackberry cell phone 9860, that had a touch screen with silver lining and a brown cover. She put her sim card in the phone and started using it.

Then in February 2016 she had received a phone call from a police officer Sakalunda who asked her to report to Woodlands police. As she was not in Lusaka at the time, she reported there the next day at 10:00 hours. It was her testimony she did not go there with the phone, and she was placed in custody. Her husband later went

there with the phone, and both of them were taken to Kalingalinga police. She was released and her husband spent a night in custody. PW1 identified the said Blackberry phone, and it was marked 'ID1'.

In cross-examination she stated that she recalled signing the statement that she gave to the police. When shown the said statement PW1 testified that she had indicated in the said statement that her husband had bought her the phone in January 2016. She agreed that she had however told the Court that her husband bought her the phone in December, 2015. She also agreed that both her husband and herself were apprehended by the police, and later released, then turned into state witnesses.

Frank Mwale who is PW1's husband was PW2. He stated that on 1st January 2016 he found that Dennis had displayed phones for sale at his make shift shop opposite Shoprite on Cairo Road. PW2 told the Court that he knows Dennis well and he negotiated the price for a Blackberry 9860 from K300.00 to K250.00. He further testified that he gave the said phone to his wife, PW1 to be using.

That in a month he did not recall the police had called PW1 over the said phone. PW1 had recorded the conversation she had with the police officer, and PW2 then phoned the police officer and told him that PW1 would go there after he had located Dennis. That when PW1 went to the police against his advise, and PW2 went to look for Dennis, PW1's young sister had called him and had informed him that PW1 had been detained. That is how he went to the police

station and he gave the police officer the phone. PW2 confirmed PW1's evidence that they were both taken to Kalingalinga police, and that he spent a night in custody.

PW2 also testified that the police apprehended Dennis, and he was asked if he knew Dennis, and he agreed. He stated that the next thing he heard was that the people from whom Dennis had bought the phone had been apprehended. PW2 told the Court that he was detained for buying a stolen phone, though he not charged for the offence. He identified 'ID1' as the said phone.

This witness in cross examination told the Court that he bought the phone from Dennis in January, 2016.

The third witness was Dennis Mwango. He is a vendor who sells laptop bags and cell phones on Cairo Road. It was his testimony that on 26th December 2015, the accused person approached him and told him that he was selling a Blackberry 9860 cell phone at K150.00. That PW3 had initially declined to buy it as he did not know where the accused person lived. However the accused person had taken him to his house where they found his pregnant wife, and upon being satisfied of where the accused person lived, PW3 had bought the phone at K150.00.

He testified that thereafter a person he does not recall went to the shop, and liked the phone. He negotiated the price from K350.00 to K250.00. PW3 identified PW2 as the said person, and he stated that

some days later police officers went to his shop and picked him up and took him to Kalingalinga police. There PW3 explained that the person who had sold him the phone was in police custody at Central Police. He was taken there and the accused person confirmed to the police that he had sold the phone to PW3.

As to how he knew the accused person, PW3 told the Court that he knew the accused person as a taxi driver, but had not known him for a long time, as he had recently moved there. PW3 identified 'ID1' as the phone that the accused person had sold to him.

PW3 in cross-examination denied that the accused person was his neighbor when he sold him the phone. He also denied that the accused person had told him that he had bought the phone from Mateyo, though his evidence was that he knew Mateyo. He also stated that he bought the phone from the accused person on 26th December, 2015.

Bornwell Sakala was PW4. He testified that on 24th December, 2015 he boarded a bus at Marshlands bus stop around 21:00 hours to go to his home in Chelstone. He stated that when the bus reached Munali roundabout it turned to go to Kalingalinga instead of going straight. The bus had six male passengers, and PW4 asked why the bus was heading towards Kalingalinga instead of Chelstone, and he was told that it was because the bus driver wanted to pick up his girlfriend.

He testified that one of the passengers behind him grabbed him by the neck, started beating him, and covered him with the t-shirt he was wearing on his face. Another passenger held him by the legs, beat him and they took his shoes, watch, wallet containing two ATM cards, one for ZANACO and the other for Standard Chartered Bank. It was further his evidence that they threatened to kill him if he did not give them the pin numbers for the ATM cards. PW4 also testified that he gave them the pin numbers and told them that there was K1, 600.00 in the Standard Chartered account.

He was also stabbed twice in the chest, and once in the leg though he could not see what was used to stab him, as his face was covered.

That after they withdrew the money, they took him to Mutumbi Cemetery in Chamba Valley, and he walked from there to a nearby house, where he explained what had happened. He was taken to Stalilo Police to report the matter, but there he was advised that he should report to Kalingalinga police as Kamloops road falls under the jurisdiction of Kalingalinga police. He went and reported there, and was taken to the hospital, after he was issued a medical report. PW4 identified 'ID1' as the phone that was stolen from him, and he also identified the medical report and it was marked 'ID2'.

In cross-examination, PW4 told the Court that he did not see the faces of his attackers as it was dark, but his evidence was that they stole his phone.

Njekwa Carl Sakalunda was PW5. He is a police officer based at Woodlands Police. This witness testified that he was on duty at Kalingalinga Police post which falls under Woodlands police when he received a report of aggravated robbery in which PW4 had complained that his phone was stolen from him. PW5 had prepared a search warrant filling in the serial number for the phone, which he obtained from the box of the phone, and on 12th February 2016 he was given a print out from Airtel showing activity on the phone. That is how he had apprehended PW1, who was using the phone at the time, and her explanation was that her husband PW2 had bought her the phone.

It was stated that PW2 was apprehended so that he could help with the investigations, and he told PW5 that he had bought the phone from Dennis Mwango on Cairo road. He stated that he apprehended Dennis Mwango (PW3), who told him that he bought the phone from the accused person in Chaisa, and that the accused person was detained at Central Police.

PW5 went with PW3 to Central Police, and there PW3 identified the accused person as the person who had sold him the phone and he had told him that he needed the money to buy diapers for the baby at home. He also obtained a bank statement from Standard Chartered bank which confirmed the time that the money was withdrawn. He identified 'ID1' as the said phone.

When cross examined PW5 testified that the phone was stolen on 24th December 2015, and he only obtained the printout from Airtel

in February 2016, about two months later. He also stated that he apprehended PW1 on 16th February 2016. He agreed that the phone had changed hands, and told the Court that he had detained PW1 and PW2 as he had regarded them as suspects.

The last state witness was Lewis Mwila, the arresting officer. His testimony was that on 20th February 2016 he took over the docket for the matter from PW5. He found that the phone had been recovered and that PW3 had led police to the accused person who was at the time in police custody facing other charges. PW6 interviewed the accused person who agreed to having sold the phone to PW3, but that this was after he had bought the phone from Mateyo, a person he did not know where he stayed or was found.

Further in his testimony PW6 stated that his investigations established that PW4 was attacked and robbed of the phone between 21:30 and 22:00 hours on 24th December, 2015, and PW3 had bought the phone from the accused person around 05:00 hours on 25th December, 2015. Looking at the facts he made up his mind to charge and arrest the accused person for the subject offence.

He produced 'ID1' and 'ID2' in evidence and they were marked 'P1' and 'P2'.

In cross-examination, PW6's evidence was that he had interviewed PW3 at length, and that if he had stated that he bought the phone

on 26th December 2015, he had lied. He denied that the accused person told him that he had bought the phone at K60.00 from Mateyo who stays in Mandevu Compound.

In his defence the accused person testified that on 25th December, 2015 around 10:00 hours, he bought the phone from Mateyo at K60.00 after negotiating the price from K100.00. Mateyo had removed the MTN sim card that was in it, and the accused person put his own MTN sim card. However when one called him, the phone would not reflect that it was ringing, and that is how on 26th December, 2015, he met PW3 around 16:00 hours and asked him to put volume on the phone. PW3 had advised that the buttons for volume on the phone had come out and that they cost K30.00.

That PW3 had asked to buy the phone so that he could repair it and sell it, as he sells phones in town from a location that the accused person did not know. He stated that he sold PW3 the phone at K150.00, and PW3 had asked him to show him where he lived before he could buy it. They went to his house and the accused person stated that he introduced PW3 to his wife and children, and that is how PW3 paid for the phone, and they parted company.

It was testified that some days later the accused person committed a traffic offence and he was taken to Central Police. He was placed in custody and PW3 went to the police station and the police officers asked him if he knew PW3, and he agreed. PW3 was also asked the same, and he told the police that the accused person had sold him the cell phone. The accused person testified that he had

agreed to having sold PW3 the phone, but told police that he had also bought it from Mateyo. He added that he had also told the police that even PW3 knew Mateyo, as well as where he could be found. However the police did not take him to lead them to Mateyo.

I have considered the evidence. It is a fact that PW4 was robbed of his cell phone, a Blackberry and the other items on 24th December, 2015, between 21:30 hours and 22:00 hours. It is also a fact that PW1 was found in possession of that phone in February 2016. It is further a fact that PW3 led the police to the accused person who admitted having sold him the phone. The question is whether it has been proved beyond all reasonable doubt that the accused person did commit the offence of aggravated robbery?

Aggravated robbery is defined in Section 294 (1) of the Penal Code as;

“any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.

Section 4 of the Penal Code defines an offensive weapon as

"any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article;

Therefore it must be proved in this case that the accused person if he was alone was armed with an offensive weapon when he attacked PW1. Further that if he was with other persons he threatened or used actual violence to PW1 at or immediately before or after the time of such stealing.

It has been seen from the testimony of PW4 that he had boarded a bus at Marshlands so that he could go home to Chelstone, and was attacked, beaten and stabbed by the seven persons whom he found on the vehicle before they robbed him of 'P1' his cell phone, and the other items. PW4 also testified that he did not see his assailants as it was dark and they had covered his face with the t-shirt he was wearing. The medical report 'P2' shows that the accused person sustained lacerations on his chest. Therefore PW4 was attacked by more than one person, and that violence was used at the time that the items were stolen from him.

It has also been seen from the evidence that PW4 did not see his attackers as it was dark at the time of the attack, and moreover his face had been covered with the t-shirt that he was wearing. Therefore the identity of the persons who committed the offence is in issue.

The accused person in this matter has been linked to the offence on the basis that he sold the stolen phone to PW3, a fact that he does not dispute. His defence is that he bought the said phone from Mateyo then sold it to PW1. The evidence on record shows that the accused person sold the phone to PW3 either on 25th or 26th December, 2015, after it was stolen from PW4 on the night of 24th December, 2015.

The case of **JONAS NKUMBWA V THE PEOPLE 1983 ZR 103** held that;

“possession of stolen property simplicitor, does not inevitably lead to an inference that the appellant participated in the robbery, unless possession is so recent that there could have been no opportunity for the transfer of the property from another person into the appellants hands”.

In the case of **MWANSA V THE PEOPLE SCZ App/ No 170/171/2014** it was stated that;

“the vehicle was found some three days after it was stolen. There was, in our view, possession of the motor vehicle by the appellants. We must, however, hasten to state that, mere possession does not imply guilt. Thus, where the accused is found in possession of stolen property, shortly after the theft, the court must apply the doctrine of recent possession, by taking care to show that

it has given consideration of the possibility that the accused might have come into possession of the stolen property otherwise than by stealing it”.

It is therefore imperative in this case to establish that the inference of guilt of the accused person in this matter based on recent possession of the stolen phone can only be made, if there is no other inference that can be drawn.

PW3 told the Court that he bought the phone from the accused person on 26th December, 2015. The theft occurred on 24th December 2015 at around 22:00 hours. PW5, the arresting officer on the other hand testified that his investigations established that PW3 bought the phone from the accused person on 25th December, 2015 at around 05:00 hours. The question is which of the two witnesses should be believed?

The case of ***CHIZONDE V THE PEOPLE 1975 ZR 67*** held that;

- (i) ***An adverse finding as to credit is very different from a decision on an issue of credibility, i.e. resolving a conflict between two stories in favour of one of the parties. An adverse finding as to credit is a finding that the witness is not to be believed; such a finding is in turn one of the factors which will influence the court in its decision as to which of two conflicting versions of an affair it will accept.***

- (ii) It is not valid to hold a witness to be untruthful for no other reason than the existence of the very conflict which the court is called upon to resolve; such an approach would be purposeless and circular.**
- (ii) An adverse finding as to credit may be based for instance on discrepancies in the witness's evidence, or on a previous inconsistent statement or on proved bad character or on evasive demeanour and so on”.**

From the evidence it shows that PW6 in cross examination stated that he had interviewed PW3 at length and he had told him that he had bought the phone on 25th December 2015. PW2 in his testimony stated that he had bought the phone from PW3 in January 2016, who is a person he knows very well. PW3 on the other hand testified that a person he could not recall bought the phone from him. The evidence on record is that PW1 is the person who was found with the phone almost about two months after it was stolen from PW4.

Her evidence was that her husband PW2 gave it to her after he bought it. Both PW1 and PW2 are witnesses with an interest to serve as they were found in possession of the stolen phone, and they would want to exonerate themselves from having been involved in the crime. However seeing that it is not in dispute that PW2 bought the phone from PW3, as he did not deny doing so, then there is no basis upon which I should approach their evidence with

caution, because of the category of suspect witnesses in which they fall.

What however remains unanswered is at what time did PW3 buy the phone from the accused person so that an inference may be drawn that the accused person was in possession of the phone a short while after the robbery, and therefore can be said to have stolen the phone? The accused person's explanation as already seen is that he bought the cell phone from Mateyo on 25th December, 2015, and he sold it to PW3 on 26th December, 2016. PW6 conceded that the accused person had told him that he had bought the phone from Mateyo. What PW6 denied was that the accused person told him where Mateyo was found.

There is nothing about the demeanor of PW6 that casts doubt on his testimony. PW3 on the other hand is a witness with an interest to serve, as he was also in possession of the stolen phone shortly after the robbery. His evidence may be tainted by the need for him to exonerate himself from any involvement in the robbery. He told the Court that he sold the phone to a person he did not know, yet PW2 testified that he knew him very well. Further while PW3 told the Court that he only knew the accused person as a taxi driver, when apprehended he had led the police to Central Police where the accused person was detained.

This evidence shows that PW3 and the accused person were very familiar with each other. Therefore PW3's evidence that he bought

the phone from the accused person on 26th December, 2015 and not 25th December, 2015, as testified by PW6 is more likely to be false, looking at the fact the two knew each other, and PW3 may have wanted to exonerate the accused person.

For that reason I believe the testimony of PW6, and resolve the conflict between the evidence of PW3 and PW6 as to when PW3 bought the phone from the accused person on the basis that PW6 was the more truthful witness, and find that PW3 was sold the phone by the accused person on 25th December, 2015 around 05:00 hours, as stated by PW6.

That being the position, I further find that the accused person was in possession of the cell phone, about seven hours after the robbery, before he sold it to PW3. His possession of the stolen cell phone was so recent, and the only inference I can draw is that he came into possession of the phone after he stole it from PW4. My inference is based on the fact that his defence that he bought the phone from Mateyo cannot stand in light of the fact the evidence of PW6 was that while the accused person told him that he had bought the phone from Mateyo, he had told him that he did not know where Mateyo was found.

PW6 was not seriously challenged on this evidence when he was cross examined, as when he denied that the accused person told him that Mateyo was found in Mandevu compound, no further questions were put to him to demonstrate that he was in fact told

so. The evidence on record shows that the accused person, whilst in the company of about six other persons, attacked, beat and stabbed PW4 at the time they stole the cell phone from him, and the offence of aggravated robbery is complete. I accordingly find the accused person **GUILTY** of the said offence, and I **CONVICT** him accordingly.

DATED THE 30th DAY OF DECEMBER, 2016

S. Kaunda

**S. KAUNDA NEWA
JUDGE**