

IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

The People versus

JAMES NJOVE & ROBERT N'GANDU

BEFORE:

HIS WORSHIP F. KAOMA

FOR THE PEOPLE:

C. P MBEWE - ZESCO PUBLIC PROSECUTOR

FOR THE ACCUSED:

BOTH IN PERSON

*Miss T E Nyumba Legal
At 1 Pover.*

J U D G E M E N T

CASES CITED

1. RV WASH (1824) 1 Mood C. C. 14 C.C.R
2. ILUNGA KABALA AND JOHN MASEFU v THE PEOPLE (1981) Z.R. 102 (S.C.)
3. WINZY SAKALA AND GERALD PHIRI V THE PEOPLE (S.C.Z.JUDGMENT No. 11 OF 2009)
4. Winford Kaleo v The People (1978) Z.R. 250.
5. LAZAROUS KANTUKOMWE v THE PEOPLE (1981) Z.R. 125 (S.C.)
6. MBINGA NYAMBE v THE PEOPLE (S.C.Z. Judgment No. 5 of 2011)
7. DARLINGTON CHIBOBO v THE PEOPLE (1977) Z.R. 284 (S.C.)

STATUTES REFERRED TO

The Penal Code Chapter 87 of the Laws of Zambia

The Road Traffic Act No of 2011

COUNT ONE



In this case the first accused stand charged with the offense of theft of a motor vehicle contrary to section 281A of the Penal Code chapter 87 of the laws of Zambia. The particulars of the offence alleged that the accused on unknown date but between 26th July, 2016 and 29th July, 2016 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 a motor vehicle namely Toyota Land cruiser registration No. ABV 8878 valued at K850, 217.00 the property of ZESCO limited. The accused pleaded not guilty to the charge.

COUNT TWO

In this count both accused this stand jointly charged with the offense of theft of a motor vehicle contrary to section 281A of the Penal Code chapter 87 of the laws of Zambia. The particulars of the offence alleged that the accused on unknown date but between 26th July, 2016 and 29th July, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with did steal a motor vehicle namely Toyota Land cruiser registration No. ABR 2140 valued at K690, 540.00 the property of ZESCO limited. Both accused pleaded not guilty to this charge.

WARNING

I warn myself from the outset that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defenses available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes this offense as charged **beyond all reasonable doubt**. I must reiterate that proof **beyond reasonable doubt** is not synonymous with proof beyond any **shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favor of the accused and he must be accordingly acquitted.

At this point I propose to analyze the law creating this offence before considering the evidence adduced by both parties herein.

ANALYSIS OF THE LAW

The general offense of theft is created by section 272 of the penal Code which is couched in the following language;

“Any person who steals anything capable of being stolen is guilty of the felony termed “theft”, and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.”

Section 281A (1) of the Penal court specifically provides the penalty if the thing which is stolen is a motor vehicle. It is couched as follows;

If the thing stolen is a motor vehicle, the offender is liable to imprisonment for a period-

- (a) in the case of a first offence, of not less than five years and not exceeding fifteen years;
- (b) in the case of a second or subsequent offence, of not less than seven years and not exceeding fifteen years.

For the purposes of this offence the term ‘theft’ is defined by section 265(1) of the Penal code as follows;

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.”

In the same vein the word ‘taking’ or *asportation* is defined by sub section 5 of section 265 in the following terms;

“A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

Further, sub section 2 of the same section in defining fraudulent taking provides that a person who takes or converts anything capable of being stolen is deemed to do so

fraudulently if he does so with any of the following intents, that is to say among other things an intent permanently to deprive the general or special owner of the thing of it.

In the light of the foregoing therefore the onus is on prosecution to prove each of the following ingredients beyond all reasonable doubt;

- a) Taking of the items as per indictment
- b) The identity of the offender
- c) Lack of bonafide claim of right
- d) The intent of the offender at the time of taking.

Having analyzed the law creating these offenses it has now become absolutely necessary to consider the evidence adduced herein in order to satisfy myself as to its truth or falsity.

In their Endeavour to prove the guilty of the accused the prosecution called to court 16 witnesses. At the close of the prosecutions' case I put both accused on their defense. Thereafter defense counsel informed this court that both accused opted to give their evidence on oath and calling no witness of which they is perfectly entitled to do at law.

EVIDENCE OF THE PROSECUTION

The first prosecutions witness was Fredson Mbewe a farmer of Zanimuone West who I shall be referring to as PW1. This witness deposed that he does his farming at Munyika in Chongwe area and on 6/08/16 he was at Munyika area working at Mr. Ngoma's farm cleaning the yard. At around 04:00hrs two vehicle came to the farm and he went out of the house thinking that his boss had come. He welcomed the person as his boss but in response he said he was not his boss but James Njovu. He asked him what he wanted and in response he said he had come to rest. According to this witness they were two of them. He described the two motor vehicles to be Land cruisers that had colours white, orange and green. Around 05:00hrs they got one vehicle and took it under a tree and started dismantling it and because it was still new he became scared and went to his neighbor Mweenda and explained to him. The two vehicles were ZESCO vehicles. He went with Mweenda to the

farm. By the time they reached the farm they found that they had already removed the engine and put it at the back of another vehicle. They later used the other vehicle to tow the one they removed the engine from. According to this witness he was about 25m from where they were working from adding that he was able to see everything. At the time they were towing the vehicle it was about 10:00hrs. This witness described the motor vehicle from which the engine was removed to be ABR 2140. This witness further told this court that he was able to identify the people who dismantled the motor vehicle. He identified A1 to be James Njovu and the person he was with to be A2 who he did not know the name.

During cross examination by A2 he testified that he didn't report to the police instead called Mr. Mweenda to come and witness.

PW2 was Joseph Mwakikomo a transport officer at ZESCO who has worked for ZESCO for about 5 years. He testified before this court that his duties are to allocate vehicles to department and to monitor their movements among others. In relation to this matter he deposed that on 29/07/16 he was called by a driver by the name of Sililo who stays in Chelstone. He informed him that there was a ZESCO vehicle by the roadside without tyres. He immediately tasked the head driver Collins Chibiko to rush to the scene. After about minutes he called back and explained that the tyres were missing, gear box, propeller shaft and the battery were all missing. He then called the workshop to make arrangement to tow the motor vehicle. That is how they rushed there and managed to bring the motor vehicle. According to this witness the motor vehicle was intact apart from the missing parts. This witness was able to know that it belonged to ZESCO by the registration number which is ABV 8878, hard top land cruiser, white in colour with ZESCO lines which are orange and green. After that they checked the white book and compared the chassis number and confirmed that it was for ZESCO. This witness positively identified a white book in this court which he produced and was admitted in evidence and marked P1. He told this court that this motor vehicle was valued at K890, 571 which vehicle he said was under transmission.

This witness further deposed that on 8/08/16 about 07:40hrs he was visited by a workmate a Mr. Mphande who came and asked him if he knew anything about the vehicle he was driving ABR 2140. He asked him what happened and in response he told him that he did not find the vehicle where he had parked it. This witness told him that he did not

know anything and immediately instructed him to report to the security for investigations. The vehicle in question was allocated to transmission. It was his further evidence that in September, 2016, he received a report that there was a shell of a vehicle found at Chiyawa for a land cruiser. He rushed with the security team where the vehicle was and found the shell of a land cruiser in a burnt state. Upon checking they found the engine, gear box, bonnet, tyres, the van, the bumper, the wind screen rear and front were all missing from the motor vehicle. He then instructed one of the senior drivers to come with a crane truck. That is how they managed to take it to ZESCO yard. He added that the vehicle was burnt but some colours for ZESCO were still remained on one of the doors. He further checked the chassis number and compared with the white book and confirmed that indeed it was a ZESCO vehicle though in a burnt state. This witness identified in court a copy of the white book of land cruiser ABR 2140 adding the original was at RATSA for road taxi which was marked ID2. He added that the original will be available in due course of trial. He valued this motor vehicle at K690, 281. It was his further evidence that at some point he was informed that some of the missing parts were recovered and the person involved was one of them a driver at IT department. He testified further that he saw the recovered parts that he described to be engine, 2 gear boxes, deaf, tyres and 2 batteries that he valued at K331, 000. He told this court that the two vehicles were their ZESCO workshop.

At that point the PP applied to move this court to go and view the two motor vehicles at the ZESCO yard which was not objected to by both accused. The application was accordingly granted and the court moved to ZESCO yard. At the scene this witness identified the two motor vehicles from the features already alluded to and they were later admitted in evidence and marked P3 and P4. He further identified the recovered parties that included 2 gear boxes marked P6A and P6B. 5 Tyres for P3 marked P7 and 4 tyres for P4 marked P8, The radiator marked P9, white battery marked P10A and black battery marked P10B, propeller shaft marked P11, deaf marked P12, 4 rims for P3 marked P13A and 5 rims for P4 marked, springs marked P14 and a diesel tank marked P15. This witness was not cross examined by any of the accused.

PW3 was Neddy Ntandala a Mechanic of Kamwala who also has a workshop near Soweto in Lusaka. In relation to this matter he testified that in August, 2016 he was out in Tanzania when he received a phone call from James Njovu who he has known from childhood. He

told him that he had a gear box for a land cruiser for sale. According to this witness he said that ZESCO had conducted an auction sale from which he bought it. He asked him hoping that what he was telling him was true because he didn't want to be in trouble. By that he was joking and in response he said he said this witness knows him and he knows him too. He then told him that he was selling at K10, 000. 00. In response he told him that he didn't have that much but only had a K5000 which was with his wife. He later told him go home to his wife and get K5000 from her and leave the gear box with her. He thereupon called his wife and she gave him the money after which she confirmed with him. The time he came back he found the gear box and confirmed with James. Unfortunately in September, 2016, he received the police at his workshop. He was picked and taken to the police. He found a lot of people and he was asked if he knew any of them from whom he recognized James. Thereafter they asked him about the gear box. This witness identified A1 in court to be James. He further identified a gear box which he said he had for almost 2 weeks and later sold. Thereafter he led the police to its recovery. This witness described exhibit P6b to be the gear box he bought from A1. He further testified that A1 told him that he would bring the papers later but he has not brought. This witness was not cross examined by any of the accused.

PW4 was Judith Banda Ntandale an executive officer at the Ministry of Agriculture and wife to PW3. She testified before this court that in August 2016, he husband went to Tanzania. He called to find out if she had K5000 with her of which she admitted. He told her that his friend by the name of James would come and collect the money. He further told her that his friend was selling a spare part. Accordingly his friend came home around 16:00hrs to 17:00hrs who she said was her first time to meet him. She described him to have been a bit tall and brown in complexion. She added that she did not make him sign because he was her husband's friend but she gave him the K5000 which she said was in K100 and K50 notes. According to this witness she was with the person in less than 5 min but she was able to identify him. She accordingly identified A1 in the dock to be the person she gave the K5000. This witness was not as well cross examined

PW5 in this case was Isaac Nkhoma a businessman of Chizanga whose business in buying and selling tyres which he conducts at Chibolya School. This witness deposed that in July 2016 a vehicle for ZESCO came with 5 tyres. He was asked if he buys tyres of which he



admitted. He was showed the tyred in the vehicle. He asked the price for all the tyres and he was told to be K2500. He negotiated and he was offered at K2200 and he accepted. He asked the person to drive to Chibolya School where he keeps the tyres. He later organized the money and paid him. He added that he was able to know that it was a ZESCO vehicle by the stripes of arrange and it was also labeled ZESCO. According to this witness the vehicles for ZESCO cannot be mistaken. It was his further evidence that he told him that he bought the tyres from an auction at ZESCO. This witness positively identified A1 in court to be the person that sold him tyres. He added that he was with the person for almost 30 minutes. After sometime he phoned him to say he had more tyres. When he reached the place he found people. He did not know that they were officers. They got him and took him to Central Police. He was interviewed during which he told the officers that he bought the 5 tyres from James. They asked him if the tyres were there and he admitted. He later led the officers where he sold the tyres and they were recovered them. This witness further deposed that the tyres had rims and at the time of selling he removed the rims so they recovered the 5 tyres and 5 rims. This witness described exhibits P7 AND 13B which are rims and tyres for exhibit P3. He added that he has not recovered his K2200 from A1 who he said told him that his name was James and even gave him his phone number. This witness was not as well cross examined by the accused.

PW6 in this matter was Tembani Nyirenda a driver at ZESCO who has been a driver from 2005. He testified before this court that on 28/07/16 he was given a Toyota land cruiser by his supervisor Mr. Dickson Phiri around 16:00hrs. he was asked to go and refuel it at the filling station. At the filling station he was told that the vehicle could not be refueled because it was refueled the day before. He went back to the office where he was instructed to go and get materials from the stores by Mr. Ngulube using the same vehicle. He went and collected and later offloaded. He described the materials to have been clumps. Afterwards he locked the vehicle and handed over the keys to Mr. Dickson Phiri at about 16:30hrs. According to this witness the vehicle was parked at the Transmission office at RCC. He described the vehicle to be ABV8878 a Toyota land cruiser. The following day on 29/07/16, he went to Kafue and whilst in Kafue Mr. Dickson Phiri came and told him that the vehicle he told him to park had been stolen. That is how he came to know that it had been stolen. It

was his further evidence that the vehicle was recovered after sometime which he said he saw parked at transport office. This witness by his evidence referred to exhibit P3.

When cross examined by A1 he denied seeing him getting the vehicle or seeing him with it anywhere.

PW7 in this matter was Dickson Phiri a chief metal fabricator of Transmission Line Department at ZESCO. This witness testified that on 28/07/16 around 15:30hrs he gave the key to one of their drivers by the name of Tembani Nyirenda to the vehicle ABV 8878 because the gage was showing that there was no fuel. After sometime he came back with clumps in the vehicle and said that he did not refuel because the vehicle had been refueled the previous day by the driver who was using it. Around 16:30hrs when he was about to leave he told the driver Nyirenda to lock the vehicle of which he did and gave this witness the keys to the vehicle. He added that the vehicle was parked at RCC transmission Line adding that he was there when he was parking it. The following day he was assigned to go to Kafue. That is how he gave the keys to his workmate Chriford Kafwanka to give their superintendent a Mr. Ngulube the keys for the same motor vehicle without knowing that the vehicle was not there. On the way to Kafue he received a phone call from Joe the transport manager asking him where the vehicle was parked. In response he told him that it was parked at RCC. He then told him that the vehicle was in Kamanga adding that they had found it without tyres, battery, starter motor, gear box and front propeller shaft. He proceeded to Kafue and informed his boss Mr. Ngulube who advised him to come back to Lusaka. When he came back he went straight to the security department. He was informed that they had recovered the vehicle and were on the way to bring it to the workshop. After a few minutes the vehicle was brought. When he checked it had no tyres, gear box, battery, starter motor and propeller shaft. This witness added that he was able to identify it from the registration number ABV 8878, the colour white and stripes for ZESCO. It was his further evidence that the vehicle is parked at ZESCO workshop which he said they had been using for more than a year. The witness by his evidence referred to P3 which this court had taken cognizance of. This witness further deposed that at that the time the keys were at the office. He went on to say that he visited where the vehicle was parked when he came back from Kafue but he did not find it. This witness was not cross examined by the accused persons.



PW8 was Marvin C. Ngulube a driver for ZESCO at the Transmission Department. This witness told this court in his evidence that on 5/08/16 he reported for work at around 06:40hrs. He collected vehicle registration number ABR 2140 a Toyota land cruiser from the Regional Control Center (RCC). He signed for it in the ZESCO Motor Movement Book. He added that he was able to identify the book in question and he positively identified it in court which was later admitted in evidence and marked P16. After collecting the said vehicle he was assigned by his boss James Simfukwe to go to Lusaka West Sub-station. At the sub-station he was assigned by Mr. Mphande to go to Numpundwe. That is how he left the land cruiser ABR2140 with Mr. Mphande and went with a truck. He came back from Nampundwe at around 15:30 and came to Lusaka to offload what he carried. He was told by Mr. Mphande to park the truck at the head office ZESCO. He reached the head office around 16:30hrs and parked the truck at the filling station and left the key at RCC. At the time he was parking he found the land cruiser ABR2140 already parked at RCC. ON 8/08/16 he was called by his boss Mr. James Simfukwe around 06:50hrs. He asked him where he parked the land cruiser ABR2140. He told him that it was not him who was driving it on 5/08/16. He then went to the RCC to check for the keys for ABR2140. He found his bosses Mr. Mphande and Mr. Simfukwe. They checked the ZESCO car park but they did not find it. In September, 2016, he just heard that it was recovered in a burnt condition but the colours for ZESCO were still visible which he said is parked at Transport.

When cross examined by A1 he testified that he did not find the keys at RCC. He denied seeing A1 with the same vehicle. When cross examined by A2 he deposed that it was not him who drove the vehicle to where it was parked.

PW9 was Mphande Simfukwe a substation technician under ZESCO. This witness testified that on 5/08/16 he reported for work at Lusaka West substation around 07:45hrs using a private vehicle. When he reached the station he received instructions from his supervisor Mr. James Simfukwe who was not at the station then. He instructed him to send the driver Marvin Ngulube who came with a vehicle ABR 2140 to Nampundwe to do house keeping with a truck. He accordingly instructed the driver who returned handed over the land cruiser to this witness and he left for Nampundwe. Around 09:30hrs he received a phone call from one of his bosses Mr. Tony Kiprios an engineer. He was requesting for a truck to go to Kafue. He promised to get back to him. He then informed his immediate supervisor Mr.

James Simfukwe who gave him gave him a go ahead. He then phoned Marvin and gave him instructions to the effect that after offloading the items he should drive the truck to the head office. That meant that the land cruiser Marvin was driving had no one to drive it to the head office. He then decided to drive it to the head office and gave his personal vehicle to Brian Ngulube to drive it to the head office. That how he drove ABR2140 to the head office with the worker on board. At the head office he parked it near the RCC. He locked it with the gear lock, closed the windows and locked the doors and took the keys to the National Control Center. He added that the locking of the vehicle was done manually. Thereafter he deposited the key at NCC by giving it to the security and signed in the book called the motor vehicle movement book. By then it was around 15:10hrs. He left ZESCO premises around 17:30hrs. This witness described the booked in court and accordingly identified it when shown it him. It was admitted in evidence and marked P16. It was his further evidence that from Friday, there was no call from the center so he did not go for work until Monday. Before reaching the head office he received a call around 07:05hrs from his supervisor Mr. James Simfukwe who asked him where he parked the vehicle. He told him and at about 07:10hrs he linked up with him and showed him where he parked the vehicle. They proceeded to check around ZESCO premises but they didn't find it. They also inquired from colleagues but to no avail. The checked with security at D-Gate if they saw the vehicle but there was no information. They went to check with the motor vehicle movement book if anyone picked it but there was no one who signed for the keys. His supervisor phoned their principal engineer who instructed him to report to the investigations which they did and the investigations started. This witness further deposed that sometime in September, 2016 particularly on 27/09/16 he was at home when his friend Elias Mutale sent him a whatsapp picture of a recovered ZESCO vehicle asking him if he was aware. He asked him where it was and in response he said at Transport head office. Immediately he went to transport section. According to him he was not able to recognize it at a distance of 2m away. He was only able to tell it was a ZESCO vehicle from colours. He added that the vehicle was vandalized and burnt. When he got close he discovered that most of the parts were removed. He then decided to check on two features namely a missing bolt from the pan and the battery base. At one point the battery base got broken and he had it fabricated so these made him identify that this was the vehicle he parked on



5/08/16. This witness added that the vehicle had no pan when he saw it. The witness in his evidence he described exhibit P4 which was already viewed by the court.

When cross examined by A1 he testified that he never mentioned that the vehicle was found with someone. He denied ever seeing A1 driving the vehicle in question. When cross examined by A2 he deposed that before driving the vehicle out after working hours they get a gate pass which is signed by the driver and the security but during working hours you just drive in and out.

During re-examination he stated that the working hours for ZESCO from 7:45hrs to 16:45hrs and if the vehicle is driven out after 16:45hrs it must be accompanied by a gate pass. The same applies during weekends and holidays.

PW10 was Augustine Mwiinga a farmer of Kapapi Village in Chongwe. This witness testified that on 6/08/16 at around 06:00hrs he was at home in Kapapi Village shelling his maize when Mr. Mbewe (PW1) the care taker for Mr. Ngoma came. Mr. Mbewe stays about 3 KM from this witness's home. According to this witness he told him to go and see adding that 2 vehicles had come that he described to be ZESCO landcruisers. At first he refused but he reminded him that his boss told him to be telling him his challenges after which he agreed. They went to the farm and find two vehicles one parked in the yard and the other under a tree. He described both vehicles to be land cruisers for ZESCO. They had colours green, white and orange and written ZESCO on the doors. He got nearer and found two people from whom he recognized one. According this witness the person he recognized used to come with Mr. Ngoma to the farm to ferry maize. He named the person to be James Njovu. This witness like others positively identified A1 in the dock to be James Njovu. When he got nearer he asked what was happening to the vehicle. They said there was an auction at ZESCO and Mr. Ngoma had bought the vehicle ABR 2140 and the engine was bought in Ndola. They further told him that the auction was reversed so the engine was going back to Mr. Ngoma and the body going back to ZESCO. It was the evidence of this witness that the engine and the gear box removed from one vehicle were put in put in another vehicle and they started towing the other. He added that he saw the registration number for the one being towed which he said was ABR 2140. It was his further evidence that since they were passing near his farm he was given a lift and he dropped off at his farm. According to this witness the other person was short and dark who he said was his first time to see him. He

identified A2 to be that other person. This witness further deposed that on 22/09/16 at around 22:00hrs he heard a knock from the police. They got him and took him to the police where he gave a statement of what he observed. He added that the next time he saw the vehicle it was at ZESCO in a burnt state which he said was the one from which the engine was removed. He added that he identified it to by the registration number ABR 2140

During cross examination by A1 he testified that the day he came with vehicles, that was the day Mr. Ngoma's wife died so it was difficult to communicate with him. He added that Mr. Ngoma was informed after the funeral after which he sent his son to come and check. His son told them that they made a mistake not take get the registration number for the vehicle which was towing the other

During cross examination by A2 he deposed that Mr. Ngoma was his father in law. However, he could not stop them because they said the body was bought by Mr. Ngoma the owner of the farm. He added that he did not pay attention to the vehicle towing the other but the one being towed. When further cross examined he reiterated that he saw this accused adding that he was putting on cloths for ZESCO adding that he was with a person he knows.

In re-examination he testified that he saw A1 several times because he used to drive Mr. Ngoma's vehicle. He maintained that A1 was with A2 who he saw for the first time. He added that he can't mistake him because they spent some time together.

PW11 was Shabalala Nkhomesha a farmer of Sichala Village in Lusaka. This witness deposed that in July or August, 2016, he was at a tavern when he saw 2 vehicles passing towing each other. By then he was at Lishiko Village just near the road. According to him he was just alone. He added that there were two people one in each vehicle passing in chayaba road. The time he wanted to go home around 14:00hrs he saw one vehicle coming back. It had tyres and the engine at the trailer. It was his further evidence that he was just about 2m from the road. According to him the vehicle was for ZESCO because it had colours for ZESCO and it was written ZESCO. He added that he did not pay attention to the registration number by the occupants and things in the vehicle allegedly because initially they had 2 vehicles but this time they only had one. He saw the driver who described to have looked slim with beards and a bit dark. This witness identified A1 in the dock to have been the driver. It was his further evidence that after about 3 days the police came to investigate the



matter. Before the police came they heard that a vehicle was burnt in the village. He went there with headman Sichaba and found a burnt vehicle at Sichaba Village about 2km from his home in the bush. He added that the vehicle didn't have most of the parts but the colours were still seen for ZESCO. According to this witness he thought it was thrown so he decided to get springs from it and took them home. Later when the police came he explained to them and gave them the springs. He described them to have been two and each had 8 metals in apparent reference to P14. He further deposed that the burnt vehicle is at ZESCO in apparent reference to P4.

When cross examined by A1 he deposed that he was driving slowly so he saw him howbeit he denied talking to each other but averred that they were the two of them.

When cross examined by A2 he said he was a passenger in the vehicle though he concentrated on the driver.

PW12 was Henry Mwanza a businessman of D146 Chawama in Lusaka. This witness deposed that he does his business at Soweto in a shop in which he sells tyres and rims. In relation to this matter he testified that in August, 2016 a land cruiser for ZESCO came with 2 people. They parked opposite his shop. He thought they wanted to buy a tyre or a rim. When he asked they answered in the negative but told him that they had tyres from a vehicle which had an accident and had not been working for some time so they decided to sell the tyres. According to this witness both had ZESCO IDs. They discussed the price and he gave them the money at K400 each. The tyres were 5 in number. He added that he was with them for almost 30 minutes in the afternoon though it was his first time to see them. He described them to be as one short and dark while the other light and a bit tall. This witness identified A1 to have been the driver while A2 as a passenger. He added that he gave the money to A1 but he was not given documentation for the tyres. It was his further evidence that on 28/09/16 the police came to his shop and said they had come to get the stolen tyres he bought. They came with the two people who brought him tyres. The police got 5 tyres from him because the fifth one had been sold. He described the tyres to have been good year and general tyres 750 R16 in apparent reference to P8. He went on to adduce that the tyres were with the rims attached to them in apparent reference to P14A. This witness summed up by deposing that the money he paid for the tyres has not been given back to him.

When cross examined by A1 he deposed that it was him that brought the police because they did not know his shop. When cross examined by A2 he deposed that what he knows is that they were two of them adding that he was there when the police came. He maintained that he saw the IDs but averred that he didn't know if he works for ZESCO but he saw IDs for ZESCO.

PW13 was Kelvin Ngosa Silungwe a businessman of Kanyama Site & Service who conducts his business at Soweto market dealing in auto spares. In relation to this matter he recalled that in August 2016 2 gentlemen came to his work place. The first one came inside who was short and dark and the other stood outside who was a bit taller than him and a bit lighter in complexion. The one who came inside said he had spares for 1HZ engine that is for a land cruiser. He told him that he didn't have money but suggested that he may have money the following day. The following day they came back and said they had not yet sold. He went out to see them. He saw a land cruiser van. It had a plastic sheet covered behind with spares. He said it was a ZESCO vehicle adding that he knew it because it had registration number ABZ 2257. It had white, green and orange symbol for ZESCO. The driver had an ID for ZESCO I saw the diff, engine, propeller shaft and gearbox for land cruiser. They started talking during which they said they were selling because they had a funeral at the farm so they got them from the farm and wanted to sell. I requested for papers of the items. The tall man said the papers were not a problem expect they would be sent for maintenance and promised to bring the papers when he comes back. They discussed and settled for K13, 000 for everything and he gave out that money. In September on 23/09/16 Police in civil cloths approached him and said they were policemen from ZESCO and said they were informed that he had bought spares for the land cruiser that were stolen from ZESCO. He co-operated and went to the vehicle where he found 2 gentlemen he dealt with in handcuffs. He recognized them. He was picked and 2 items that he sold which were a gear box and engine. The others were still at his shop. On the same day all the items were recovered including those 2 he sold. This witness identified both accused in court as the 2 gentlemen who sold him the spares.

This witness in his evidence described the engine, gear box and propeller shaft for land cruiser ABR 2140

It was his further evidence that he has not recovered the money he used to purchase the items and no document has been given to date

When cross examined by A1 he testified that he never called him for papers but his co-accused who he said assured him that the papers would come. He added that they didn't sign anywhere because he saw his ID and mastered the registration number for the vehicle. When cross examined by A2 he testified that he was there when they were discussing the sale of spares. He added that it was him that even said if he didn't have money he would not go on with the business

In re-examination he did confirm that he did communicate with A2 on phone. According to this witness at no point did A2 move out the business.

PW14 was Hamphery Chikoye a workshop manager an automotive Technologist trained at NOTECH which qualification has been holding for 27 years. He has worked for ZESCO worked for ZESCO for 12years. This witness stated some of the duties to include supervision, directing repairs and maintenance of ZESCO vehicles. He also purchase spares for the same vehicle. In relation to this matter he deposed that on 29/09/16 he received a call from Detective Inspector Msiska who asked him to go and look at spare parts that were recovered for the 2 stolen land cruisers. The parts were within ZESCO premises. He was asked to identify them. He described the first parts to have been 4 namely gear box, battery 699, 5 rims 16 inches, 5 tyres 750 x 16. He was told that they were recovered for ABV 8878. He was later taken to another batch were he saw a gear box, propeller shaft, a complete rear axle, a battery, body pan, chassis and burnt cabin. He identified these parts to be synonymous with the land cruisers they have because the gear box on the bale housing has a bolt on it and he found it. The out-put has 21 splines which he found and the other gear box has the same. As for the tyres they are the ones they put on the land cruisers 750 x16. The battery size 669, he also saw the N50 which is a Japans made which are used for land cruisers. He then proceeded to examine the propeller shaft. He checked the flange which was matching with the flange on the tail of the gear box. He added that the engine for ABR 2140 was marked IHZ and the engine number was matching with the white book

PW15 was Wilson Phiri an Assistant Constable Security under ZESCO and has worked for ZESCO since 2014. Some of his duties include to safe Company Property and people's lives



at the company. This witness explained to this court the procedure of vehicles. He said that they have two gates, the main gate located in the North and D-Gate in the South. This witness described the procedure in their operation at the D-gate during the day from 06:00hrs to 16:45hr which he said is the time ZESCO employees work. At that time the drivers who came inside they don't give gate passes. At 16:45hrs each driver going out must produce a gate pass authorized by a senior personnel in the department. If the driver comes without a gate pass they would tell him to take back the vehicle in the company premises. He added that there are vehicles which are duty vehicles which work through the night and for such they don't ask for gate passes. According to this witness this was the procedure then. But after the issue of the ABV 8878 and ABR 2140 they requested for a book called the motor vehicle movement book in which each driver going out would record all the details. This witness further deposed that on 28/07/16 he took over duties around 17:00hrs until the following day between 07:00hrs and 08:00hrs. When he knocked of he was with two other officers who were under Guardo. On 29/07/17 he was called at the investigation office. He was asked if he saw motor vehicle ABV 8878 going out. He told them that he did not see it going out. They asked him how he could not see it and in response he told them that the vehicle is parked very far about 100m. That night ZESCO vehicles were coming in and going out. He was then informed that the motor vehicle was stolen. It was the further evidence of this witness that on 5/08/16 it was a long holiday and all the period during the holiday they didn't know what happened. He was just called on the 4th day after the holiday which was a Wednesday by the Investigations officer who said that motor vehicle ABV 2140 had gone missing. They asked him if he saw it of which he denied because he knew the vehicle very well. The vehicle was later recovered in a burnt state. It had no trailer and no engine. He described it to have been complete scrap in apparent reference to P4. This witness further deposed that the ABV 8878 was also recovered but it had missing parts which he said was also at investigation in apparent reference to P3. According to this witness before introducing the book it was possible for the motor vehicle to go out without knowing except at night. He added that the people who were keeping the keys were the best to know which motor vehicle was going out. .

When cross examined by A1 he denied ever seeing him with the motor vehicle in question. During cross examination by A2 he denied know him adding that it was his first time to see him.

PW16 in this matter was Detective Inspector Moses Msiska a police officer who is currently seconded to ZESCO under investigation department based at ZESCO headquarters. This witness deposed that on 29/07/16 he reported on duty around 07:45hrs. whilst on duty he received a report from Joseoh Mwakakoni (PW2) that there was a vehicle belonging to operations abandoned in Kamanga. He described the vehicle to be land cruiser registration No ABV 8878. He organized fellow officers in the office and rushed where the vehicle was abandoned. When they reached Kamanga they found the vehicle branded with ZESCO colours without wheels. Further it had no gear box, battery, front propeller shaft and starter motor. They organized a break down vehicle to bring it to ZESCO. According to this witness the said vehicle was valued at K850, 217. Whilst he was carrying out investigations on 8/08/16 he received another report of a missing vehicle Toyota land cruiser from the same RCC. The registration number was ABR2140 which was parked by Mr. Mphande Simfukwe of Lusaka West Substation. The said motor vehicle was parked on 5/08/16 and it was found missing on 08/08/16. He combined both case and started gathering information. On 25/08/16, he received information from a concerned citizen that there was a shell of a Toyota burnt along Chiyawa, Chirundu Road in Chongwe District. They went to the said area and indeed found a shell of a burnt land cruiser. They were able to identify it by ZESCO colours. They also closely examined the chassis No. which was found to be the same with the chassis number for ABR2140. He counter checked with the chassis number on the registration book. Thereafter he started making inquiries around the same area. He managed to apprehend one person by the names of Shabalala Nkhomesha who was found with the tail of the body of the Toyota land cruiser and the deaf. However, he just told him that on 6/08/16 he saw two ZESCO vehicles towing each other going towards his village in Chongwe Manyika area. He further told him that he was able to identify the people who took the vehicle as the time they came back they only came back with one vehicle with body parties such as engine, wheels, deaf, and other parts. He assessed the person and he had doubts if he was the one who stole the motor vehicle. He continued with

investigations. On 22/09/16 he received vital information on how the vehicle was dismantled. He was informed that it was taken to one of the ZESCO employee's farm and stripped from there. The person who witnessed was Fedson Mbewe the care taker at the farm for Mutwalo Ngoma a ZESCO employee. The same night he picked Mulala Mwiinga who revealed that the vehicle was taken at the farm by James. He only knew him as James. This witness further interviewed Fedson Mbewe who said that when the vehicle arrived at the farm he informed his boss Mr. Ngoma and Mulala Mwiinga. After getting this information he summoned Mr. Ignatius Mutwalo Ngoma who gave an explanation that at the time he had a bereavement his friend James Ngoma a driver at IT went to the farm where they were stripping a vehicle belonging to ZESCO. That is how he led him to the office of James Ngoma IT ZESCO Head Quarters. He apprehended James Ngoma and interviewed. James led him to his cousin Robert who assisted him to dismantle the vehicle and to drive the other one. He equally apprehended Robert. Both led him to the person they sold the engine, gear box and the deaf. He came to know him as Kelvin Ngosa Silungwe (PW13). He recovered the said items. Afterwards James alone led him to another person Neddy Ntandala (PW3) who bought the gear box and 2 batteries. He also led him to another place where he sold wheels. The first set he sold to Mr. Isaac Nkhoma 5 of them where he recovered them separately the rims and the tyres. He also led him to another place where he recovered 4 rims and 4 tyres. The owner of the place was Mr. Mwanza. This witness further deposed that James and Robert led him to a place where they dismantled the engine in Chongwe and where they dumped ABR 2140. When they reached where the abandoned it he recovered a fuel tank and 2 number plates that were burnt and a door to the passenger side. That is when he asked James Njovu why he was stealing company property. However, he failed to give a satisfactory answer. He also asked Robert the question. Thereafter he made up his mind to arrest and charge James Njovu with 2 counts of theft of motor vehicle contrary to section 281A and Robert with one count of theft of motor vehicle. Under Bemba language, the language of their choice both denied the charge. That is how he detained them pending court appearance. This witness identified both accused in court by their respective names as the persons he arrested and charged.

This witness further deposed that he had proof that the two motor vehicles belong to ZESCO. He added that he was given motor vehicle registration certificate bearing the details



of the two motor vehicles by the transport manager Joseph Mwakikomo. This witness positively identified exhibit ID2 white book for ABR 2140 which he accordingly produced in court as part of evidence. It was admitted in evidence and marked P2. In addition he identified the white book for ABV8878 which was already admitted in evidence and marked P1.

It was his further evidence that on ABV8878, it is not able to move because the gear box, wheels, starter motor, battery and propeller shaft are all removed. The vehicle is as such parked at ZESCO workshop. This witness described the feature to the court of P3 and P4 to the court. At this point the court was invited view the exhibits again on the application of the Defense Counsel since she was not there when the court first visited the scene.

This witness further testified that the ABR 2140 was completely damaged adding that it was burnt. It has no tyres, engine, gear box. He went further to describe the body structure of the said Motor vehicle in its current state. He also described the engine, the deaf, the gear box, 2 batteries, a set of 5 tyres and 5 rims, a set of 4 tyres and 4 rims, 2 number plates, a fuel tank and a radiator, motor vehicle control book that were among the spares he recovered. It was his further evidence that he did interview Mr. Kelvin Ngosa who told him that a Toyota land cruiser was used to deliver the spares to him which was ABZ2257 motor vehicle for ZESCO allocated to the IT the department in which A1 was a driver. This witness described the said motor vehicle and he positively identified it when the court was moved to view the same outside the court room. It was admitted in evidence and marked P18. According to this witness P18 was used to tow ABR2140 and after removing the spares they loaded in the vehicle and delivered to Kelvin Ngosa Silungwe. At this point the matter was adjourned for the court to go and view the exhibits in presence counsel. The court convened at the scene on the agreed day where the witness positively identified all the exhibits from ID3 to ID17 and he accordingly produced them as part of his evidence. They were all admitted in evidence without objection from the defense. This witness estimated the value of the recovered items to be at over K1m.

When cross examined by the D/C he deposed that it was not true that A2 was not around when he was being led. He added that in the first place he was led to Mr. Silungwe by both accused but for the other recoveries A2 was not there. This witness admitted that A1 was a worker at ZESCO as a driver. When further cross examined he deposed that the motor



vehicle movement sheet does not show that it was him who got the motor vehicle but he stole it. However, he conceded that the keys for the two motor vehicles were not found with the accused and that no eye witness saw the accused driving off the motor vehicles from the premises. This witness agreed to have picked up PW3 in connection with what was stolen but denied arresting him. He further denied him being beaten for him to disclose that he bought a gear box from the two accused. He added that there was no documentation on the transaction made between the accused and the persons they recovered the items from.

When re-examined he deposed that he said accused stole because accused works from IT but the motor vehicles were from Transmission department. He added that the keys are kept at the RCC when the motor vehicle is parked but the method used to steal is not known. He reiterated that PW3 was not beaten.

At the close of the prosecutions' case I invited both parties to make submission howbeit both parties opted not to make any submission. In that regard this court proceeded to make its ruling on the matter. Both accused were found with a case to answer. They both elected to give sworn statement and to call no witness of which they are perfectly entitled to do at law.

DEFENSE

The first witness for the defense was the first accused who deposed that it was on 23/09/16 when he reported for work at ZESCO. He was there for 30 minutes when the senior manager called him to go to the office. When he got at the office he found 5 people. The senior manager told him that those people wanted to find out something from him and that he should go with them. That is how they took him to ZESCO workshop to their office. When they entered the office they asked him where he had taken the spares for the vehicle. He asked what he was talking about because he didn't know anything. Thereafter they started to beat him up so that he tells them the truth. They told him that they had known everything. Afterwards they handcuffed him and said they should go to his house and go and check. When they reached home they didn't find anything but found Robert Ng'andu who they picked and said he was working with him. When they took them back they passed at Emmasdale police. The person who was in custody was brought. They later took them back to ZESCO offices. From there they said they go to see Rasta. When they reached at



Soweto they parked outside and went to see the same man. They later took them to Los Angeles police post where they were detained up to 16:00hrs from 11:00hrs. They came and took them to Central police. The following day they came around 11:00hrs and took them in a certain room. They made them to sit down. Thereafter a man by the name of Neddy (PW3) came. He was asked if he knew this accused and he admitted. He was taken back to the police cells. The following day they came with the motor vehicle this accused was using. They got him and started beating him up and said they should go to Soweto so that he explains properly. He was asked to put on a coat for transmission. They gave him a phone number to call a person to tell him that he had tyres he was selling. He phoned and the person answered and came. He was picked and taken to central police. They were left in cells while they went with him. After 2 days they came with papers and asked them to sign he signed without reading them. After signing they kept them in cells again. The following day they took them to ZESCO investigations office. He was asked if he knew anything that happened in Chongwe. He told them that he knew nothing except they had a farm in Chongwe. However, they started beating them again. Later they said they go and see in Chongwe. When they reached the farm they didn't find anything. They were brought back to central police. After about 3 days they brought them to court. This accused denied selling anything to PW3. In relation to PW1's evidence he denied ever going to Chongwe. He added that he only goes to Chongwe on weekends with a motor vehicle from his department. According to this accused it is not true that he led PW16 to the recovery of the exhibits. He added that when he got him he said he already knew everything so it was him who was directing them and later left them at Los Angel Police. He denied getting the vehicles in question. It was his further evidence that when getting the motor vehicle they don't open the gates for themselves but the guards who refused seeing him with the vehicle. In summing up, he deposed that he knew nothing over the case.

During cross examination by the PP, he admitted to have been working for ZESCO under IT department as a driver whose duties involved ferrying workers from one place to another place. He further conceded to have been driving ABZ2257 among other vehicles which he said was allocated to his department. He has been with the department for 3 years adding that they driver are two himself and Lesa Musonda. He added that he was reporting at 06:00hrs when on standby and when not on standby at 07:45hrs which is the normal shift.

This accused denied ever going on leave in July and August 2016. When further cross examined he said that he could not recall if he went on leave from July to September, 2016 allegedly because they were just given few days. According to this accused he was not going with ABZ 2257 when going to Chongwe allegedly because they had about 5 vehicles in their department instead he averred that he used to use ALD 648 and ABC 1201. He further told this court that the farm in Chongwe is for his cousin Paul Ngoma adding that Ignatius Ngoma was also his cousin. He denied knowing Fedson Mbewe who he said only saw in court. This accused confirmed to this court that exhibit P3 and P4 belong to ZESCO and not his so are the recovered spares. He further confirmed that the engine number on P2 is the same engine number on exhibit P5 which was sold to PW13. However, he would not know if the engine was removed from ABR2140 the time it was stolen. This accused recalled that PW13 said he sold him the gear box, deaf and propeller shaft and that the discussion for the price was between him and the two of them. He denied ever having had any misunderstanding with PW13 adding that he does not know but only saw him in court neither did he know where he got the items from. In relation to PW3 he confirmed that he knows him and he is his family friend. He further admitted that his wife said he got K5000 but he denied ever getting the K5000. Notwithstanding, he conceded that PW3 has been his good friend up the time he came to testify. According to this accused he would know why he would falsely accused him because it was not him that brought him to court but the police. He denied leading the police to PW3. He further recalled what PW5 said but denied having had any transaction with him. he added that he was just told by the police to call him. he also recalled that PW12 said he sold him tyres but he denied selling him tyres. According to this accused all the witnesses lied against him because he had no business with them. This accused maintained that he does not know PW1. However admitted to have been going to the farm he said he used to stay but averred that he never used to find him. He added that he lied against him when he said he was with him when he was dismantling the vehicle but does not know why he lied against him. When further cross examined he said he knows PW10 because they used to leave materials at his house. He recalled him saying that he gave him a lift after dismantling a vehicle but he averred that he was not there the time he was talking about. He added that he would not know why he would lie to the court. According to this accused may all the witness saw a different person.



During further cross examination he deposed that A2 is his brother though not blood brothers. He further deposed that he stays in Chawama but he went to pick him so that he could be staying with him. He denied picking him to drive ABR 2140 TO Chongwe. He added that he got him in September, 2016 and not on 6/07/16. He denied getting the vehicles. It was his further evidence that on 5/08/16 he was on duty and knocked off at 21:00hrs. This accused denied using the keys for ABZ 2257 to drive ABR 2140. He denied calling A2 that night. When further cross examined he deposed that he did not know why all these people lied against him.

The second witness for the defense was A2 who recalled that on 23/09/16 he was at home when a vehicle a Hilux came and 2 people came out. They knocked and when he went out the officer who was by the door got hold of him and called him a thief. He asked what he did but they said he will know better. They started beating him. According to this accused he was scared because it was his first time to be apprehended. They passed through Emmasdale and got those in custody. They took them to ZESCO Head Quarters. From they took them to Soweto to Rasta. They later left them at Los Angels police post. They later picked them at 11:00hrs and took them to Central Police where he was in custody. He remained in custody for one week. The following week they got him and told him to sign papers. The following day they took them to ZESCO offces. They said they would beat them for the last time. They later took them to Chongwe where they met PW2. They talked to him and later passed somewhere where they found a fuel tank. They took them to the cells afterward and he was later brought to court. This accused refused ever leading PW16 to the recovery of the spares adding that by then he was in handcuffs. It was his further evidence that he has a bar in Chawama so the time they said he was in Chongwe he was at his bar adding that he has no time to move around. This accused recalled that A1 phoned him so that he could sleep at his house but he refused because he has things to do. He added that he called him during the day time. He denied working for ZESCO adding that he does not know this matter very well. He summed up by saying that he cannot steal.

When cross examined by the PP he deposed that he was aware that he was facing one count of stealing ABR2140. According to accused from August, 2016, he has been staying in Chawama with his parents. On 23/09/16 he was preparing to go to Matero to get his NRC adding the he was alone. When further cross examined he told this court that he did not



know any of the officers who came to apprehend him except they were with A1. He was not aware that it was A1 who brought the officers to his home. He didn't find out how the officers knew his home. According to this accused he would not deny if it was said that it was A1 who led them to his home because they did not know it. He denied staying with A1. Instead he averred that A1 asked him to go and stay with him but he refused which he said was between June and July, 2016. He was not aware that ABV 8878 was stolen in July. He was also not aware that ABR2140 was stolen in August, 2016. During further cross examination he recalled PW13 and what he told the court that it was this accused who entered to negotiate the price of the engine, propeller shaft and deaf. However, he denied ever knowing PW13. He also recalled PW1 and what he said in court. However, he averred that he would not know why he lied against him and would not know if was paid to come and lie against him. He further refused to have driven ABZ2257. It was his further evidence that at the time he was apprehended he was staying in Chawama though not with A1. This accused further deposed that none of the recovered spares are his so are the 2 motor vehicles from which the spares were gotten from.

This is the evidence in totality from which it seems clear to me that some facts are not in dispute while other facts are actually in dispute as outlined hereunder. At the close of the defense I invited both parties to file in submission. The defense opted to rely on the evidence on record while the prosecution filed in written submission timeously.

FACTS NOT IN DISPUTE

It seems from the totality of the evidence that both accused do not dispute two motor vehicles namely Toyota land cruiser registration number ABV 8878 and ABR 2140 went missing from ZESCO premises on 29/07/16 and 5/08/16 respectively. ABV 8878 was found the following day abandoned in Kamanga with the gear box, starter motor propeller shaft and all the five tyres removed. Further, ABR 2140 was found in a burnt state in Chongwe at Chiyawa area on 25/08/16. It was also found with no engine, gear box, tyres, battery and the deaf. It seems also not in dispute that the dismantling of ABR2140 was done in Chongwe at Mr. Ngoma's farm who is a ZESCO employee. Further, it seems not in dispute that PW16 through his investigation he recovered almost all the spares removed



from the two motor vehicles in or about September, 2016 from the people they were sold to. All the people mentioned and identified the first accused to be the person who sold them while some added that he was with A2. I therefore find these to be facts in this case.

FACTS IN ISSUE

What seems to be in dispute to me is the identity of the person or person that moved two motor vehicles from ZESCO premises up to where they were found abandoned? Further, whether or not it was the accused herein who sold the spares to the people they were recovered from. These are the facts in issue I have to resolve in this case and I propose to resolve them concurrently with the application of the law.

APPLICATION OF THE LAW

a. Taking of the motor vehicle at law

The first question to be decided at this point is whether or not there was taking of two motor vehicles as per indictment.

In addition to the definition of 'taking' or *asportation* provided for by the penal code already alluded to, I wish to also refer to the definition in Halsbury's Laws of England 3rd Ed V10 at p767 par 1484. It is defined in the following terms;

"The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation."

The foregoing definition is fortified by the decision holding in the ancient of RV WASH (1824) 1 Mood C. C. 14 C.C.R where a prisoner tried to remove a bag from the boot of a coach but did not succeed in getting it entirely out was held to be sufficient *asportation* to constitute the offence of larceny.

It follows therefore that in order to constitute taking at law the offender need not part away with the thing in question but it is sufficient to prove any slightest moving of the thing even within the owner's premises.

In this case what is alleged to have been taken are two motor vehicles. It is therefore imperative to define a motor vehicle before delving into the question of taking



Definition of a motor vehicle

A motor vehicle is defined by section 2 THE ROAD TRAFFIC ACT No. 11, 2002 which is couched as follows;

“Motor vehicle” means any mechanically propelled vehicle intended for use, or capable of being used, on roads unless such vehicle shall have been specifically excluded by regulations from this definition;

I wish to state here that the foregoing definition is plain and unambiguous. It does not require proof of use of the vehicle but intent to use it or capability of it being used on the roads provided it is mechanically propelled then it is motor vehicle within the meaning of law. In the case before me, I must state that I need not stretch in order to satisfy myself that a Toyota land cruiser which was moving and later parked but found missing is a motor vehicle within the meaning of the law. In the circumstances I am satisfied beyond reasonable doubt that there were two motor vehicles namely Toyota land cruisers Registration Number ABV 8878 and ABR 2140 property of ZESCO limited.

Having so said it has now become absolutely necessary to consider the question of taking of the said motor vehicles.

Turning to the evidence in this case I must mention from the outset that the question of taking seems not to be a difficult one as it is a fact that both vehicles were moved from ZESCO premises where they were parked on the material dates but they were found in Kamanga and Chongwe respectively. In the premise I am satisfied beyond all reasonable doubt that there was ipso jury taking of motor vehicles as per indictment.

b. IDENTITY OF THE OFFENDER

The crucial question to be decided at this point is the identity of the person or person that moved or caused the two motor vehicles to move.

In the first count the prosecutions have alleged that is now first accused that moved or caused the motor vehicle in question to be moved or simply put he is the one that stole the vehicle. In count two they have alleged that it is both accused herein that moved or caused the motor vehicle to move.



I must state here that while the prosecutions allege the foregoing there has been no direct evidence adduced of any eye witness who saw any of the accused driving or moving the said vehicles from ZESCO premises. Howbeit evidence has been adduced which seems to connect both accused to this offense which I will analyze shortly begin with the vehicle in count ^{one} two ABV 8878.

In relation to this matter PW3 deposed that in August, 2016 he was out in Tanzania when he received a phone call from James Njovu who he has known from childhood. He told him that he had a gear box for a land cruiser for sale which he said that ZESCO had conducted an auction sale from which he bought it. It was agreed to be bought at K5000. He asked him to go and get the money from his wife home and he went to get. The wife to this witness was also called as PW4 who came and confirmed that she gave A1 K5000 for the purchase of a gear box on the instruction of her husband who was by then in Tanzania. Both PW3 and PW4 identified A1 to be the person they bought the gear box from. The gear box in question was admitted in evidence and marked P6 (b). It was confirmed to have been removed from land cruiser ABV 8878. To augment this evidence PW16 who is the arresting officer in this matter deposed that he was led to the recovery of the said gear box from PW3 by A1 after he was apprehended. Further evidence was given by Isaac Nkhoma (PW5) who deposed that he bought 5 tyres that has rims in July, 2016 that were admitted in evidence and marked P7 and P13(b) respectively. The said exhibits were recognized to have been removed from Toyota land cruiser ABV 8878. This evidence was augmented by the evidence of PW16 who deposed that he was led to PW5 by A1 and he accordingly recovered the said exhibits including the propeller shaft which was sold to PW13. In relation to this matter further evidence was given. A1 however denies ever selling the said spares to the witness herein stated instead he avers that they all lied against him. he further deposed that it was in fact PW16 who was leading him where the spares were recovered as he told him that he already had information. I must state here that I find it very difficult for all the three witnesses of all the people to point at A1 to be the one who sold them the spares for PW16 an officer of the state to falsely implicate A1 if it was another person that led him to the recovery of the said exhibits. To the contrary I find overwhelming evidence of the fact that it was A1 that sold the gear box, tyres and the deaf that were removed from Toyota land cruiser ABV 8878 and I find the same to be a fact. It



follows from these findings that what connects A1 to moving ABV 8878 is the fact of being found with spare parts of the motor vehicle barely few days from that date it was moved. This is so because the motor vehicle went missing between 26th and 29th July, 2016 and in the same July he sold its tyres to PW5 and in August he sold the gear box to PW3. The question to be decided therefore, is whether by these facts it can be said that it was A1 that moved or caused the vehicle to move and that actually removed the said parts from it or not.

In that regard I have been referred by the learned PP to the holding of the Supreme Court in the case ILUNGA KABALA AND JOHN MASEFU v THE PEOPLE (1981) Z.R. 102 (S.C.). In that case it was held inter alia that;

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation”.

To augment the foregoing I was further referred to the case of WINZY SAKALA AND GERALD PHIRI V THE PEOPLE (S.C.Z.JUDGMENT No. 11 OF 2009). In that case it was held by the Supreme Court that

“The evidence that scratch card number 071000608020, PW1 bought on the night her car was stolen, was traced after professional investigations to A1’s 1, Sim Card bearing mobile phone number 097766516. This was the best evidence the prosecution could secure, linking A1 to the scene of the crime, and the commission of the offence.”

Reverting to the case in *casu*, I wish to state here that it is strange that a motor vehicle went missing in the company where A1 works and it was recovered the following day with parts missing which parts were sold by A1 few days later and he does not explain how and where he found them. Given the circumstance definitely no other rational hypothesis can be drawn from these circumstances other than the fact that it was A1 that moved or caused the motor vehicle land cruiser ABV 8878 from ZESCO premises jointly and whilst acting together with others unknown and removed the spares before abandoning it and I find the same to be a fact.

c. Intent of the offender.



The *mens rea* for the offense theft is clearly stated in section 265(2) which provides that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say among other things an intent permanently to deprive the general or special owner of the thing of it.

Reverting to the evidence in this case it is a fact that the vehicle was taken but it was later abandoned in Kamanga compound after removing the gear box, starter motor, deaf, battery and the tyres. Can this be said sufficient to amount to intent to deprive the owner permanently because it is abundantly clear that the accused did not want to part away with the whole vehicle but only its parts?

Before answering this question I wish to refer to the holding of the Supreme Court in the case of Winford Kaleo v The People (1978) Z.R. 250. In that case it was held inter alia that

”However, there was evidence that the motor vehicle used in the course of the robbery was abandoned shortly after the robbery had taken place; there was therefore no evidence that appellant intended permanently to deprive the owner of the ownership of the vehicle. The learned State Advocate has argued that because the wires had been tempered with, it has brought the offence within the definition of theft under section 265 (2) (d) of the Penal Code, which provides that it is theft to take something with an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time it had been taken or converted. We doubt whether this paragraph was intended to cover this kind of case; but, in any event, the damage was trivial, and so easily repairable as to be de minimis. The offence therefore was not theft. The appeal in respect of the conviction on count one is allowed and we substitute a conviction of conversion of a motor vehicle not amounting to theft contrary to section 291 of the Penal Code”.

I wish to distinguish the case before me from the above case in the sense that in the foregoing case only wires in the vehicle were tempered with before the vehicle was abandoned. To the contrary, in this case a gear box, propeller shaft, battery and tyres were removed from the vehicle before it was abandoned which undoubtedly is not de minimis as the damage is substantial thus it falls within the ambit of section 265(2)(d). That is to say accused had the intent to deal with the vehicle in such a manner that it cannot be returned



in the condition in which it was at the time it had been taken or converted. I am therefore satisfied that accused had sufficient mens rea at the time of taking the vehicle in question

e) Defense

The question that rises at this point is whether there is any defense available for the accused in this matter.

I wish to state here that I have closely considered the evidence adduced by both parties but I don't find anything that may be said to be defense for the accused at law.

In the circumstances and by the reasons of the foregoing therefore I am satisfied that the prosecutions have proved count one against A1 for the offense as charged and as such I find him guilty and I accordingly convict him.

In count two the prosecutions have alleged that it was the now accused that is A1 and A2 who jointly and whilst acting together that moved or caused the motor vehicle to move or simply put it was them that stole the motor vehicle.

I wish to reiterate in this count like in count one there is no direct evidence of any eye witness that saw the accused moving or causing the motor vehicle in question. However, direct evidence has been adduced by PW1 Fedson Mbewe to the effect that on 6/08/16 at around 04:00hrs two ZESCO vehicles went to the farm in Chongwe where he works. Initially he thought it was his boss but when he went out he found that it was not his boss but found that it was James Njovu with another person. At around 05:00hrs they took one of the vehicles ^{and} a tree and started dismantling it. He got scared and went to inform his neighbor Augustine Mwiinga. He came with him and at the time they arrived they found the engine had already been removed. It was put on other land cruiser together with other spares. Later the one in which the engine was removed was towed by the other vehicle. He further deposed that he got the registration number for the one being towed which he said was ABR 2140. This witness's evidence was directly corroborated by the evidence of PW10 Augustine Mwiinga. He confirmed to have been called by PW1 to go and see what was happening from distance of 3km. He went there with PW1 and found spares already loaded on the other vehicle. He saw the other vehicle being towed and was in fact given a lift up to his farm by the same vehicle. Both witnesses identified both accused as the person that



dismantled ABR 2140 at Mr. Ngoma's farm. In relation to the same matter further evidence was given by PW13 Kelvin Ngosa Silungwe to whom the engine, diff and gear box for land cruiser ABR 2140 was sold. This witness identified both accused to be the ones that sold the said spares to him at K13, 000. His evidence is corroborated by the evidence of PW16 the arresting officer who deposed that it was both accused that led him to PW13 where he recovered the parts moved from ABR 2140. In the same vein PW12 Henry Mwanza deposed that he bought 5 tyres from people who went to his shop with a ZESCO vehicle. He as well identified both accused as the persons that sold him the tyres which tyres were identified to have been removed from ABR 2140. Another witness for the prosecution in this matter was PW11 Shabalala Nkhomesha of Chongwe who confirmed having seen both accused passing with two vehicles towing each other in his village but later passed with one vehicle. He later heard that a vehicle was burnt in the village. This witness well identified both accused to be the persons that passed with two vehicles on 6/08/16. He particularly identified A1 to have been the driver of the vehicle that came back. To the contrary both accused denied ever taking the vehicle in question instead accused all the witnesses to have lied against them. I wish state here that it is incredulous that both accused would deny in the face of such overwhelming directing evidence against them of being seeing in Chongwe dismantling the vehicle in question and subsequent selling of the spare certainly it cannot be a question of mistaken identity or false implication. i therefore find as a fact that it was the two accused herein that went to Mr. Ngoma's farm on 6/08/16 around 04:00hr with 2 ZESCO land cruiser vehicles and at about 05:00hrs they started they started dismantling ABR 2140 and later towed it to the village where it was burnt. Further it not possible that another person could have burnt other than the ones that removed the spares and went to abandon in the bush. Furthermore, given the fact that the vehicle went missing on 5/08/16 at night and the following day it was with the accused person in Chongwe, in the absence of any explanation it can be inferred that it was them who moved the vehicle from ZESCO premises up to where it was burnt. By the foregoing I am fortified by the doctrine of possession of property that was recently stolen.

In relation to this doctrine in LAZAROUS KANTUKOMWE v THE PEOPLE (1981) Z.R. 125 (S.C.) the Supreme Court of Zambia made the following pronouncement;

“When a person is found in possession of recently stolen property, it is the duty of the trial court to consider whether the only reasonable inference is that, that person stole the item in question. It is the duty of the court to consider whether there was another explanation for the appellant being in possession of the stolen property.”

Further in *MBINGA NYAMBE v THE PEOPLE* (S.C.Z. Judgment No. 5 of 2011) the Supreme Court recently held inter alia that;

“When a Court purports to draw an inference of guilt in a case of recent possession of stolen property, it is necessary to consider what other inferences may, be drawn.”

This position may be qualified by the holding of Supreme Court in the case of DARLINGTON CHIBOBO v THE PEOPLE (1977) Z.R. 284 (S.C.). In that case it was held inter alia that;

“Not every possessor of recently stolen property is liable to be convicted of being either the thief or guilty receiver of it, he is to be found guilty of an offence, whether that charged or some other offence, only if the inference of guilt is the only one that can reasonably be drawn from the facts.”

It follows that before an inference of guilty can be drawn by the trial court it must guard itself against drawing wrong inference.

In the case before me I must state that given the circumstance that is to say being not only in possession of the recently stolen property but also removing vital parts from it and setting it ablaze coupled with selling of the vital parts definitely leads only one irresistible inference of guilty.

In relation to A2 I wish to state here that in the absence of any explanation of how he became involved in the whole matter it is difficult to separate him from the activities of A1. This is so because there was no way A1 could have driven two vehicles from ZESCO premises to Chongwe. He therefore properly aided the commission of the offense more also that he actively participated in the dismantling of the vehicle in question

In the circumstance I am satisfied that the ^{the} prosecutions have proved count two against both accused in count two for the offense of a Motor vehicle as charged and as such I find both accused guilty and I accordingly convict them.



DELIVERED IN OPEN COURT

DATED THEDAY OF



F. KAOMA

