

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

SSPB/143/2016

THE PEOPLE

V.

CHRIS KAWINA

Before Magistrate Mrs Mwaaka Chigali Mikalile – Principal Resident Magistrate

JUDGMENT

The accused was charged jointly with one James Lyamba with one count of Breaking into a building and committing a felony therein contrary to section 303(a) of the Penal Code, Chapter 87 of the Laws of Zambia. Particulars of offence allege that on 24th October, 2016, the two at Lusaka in the Lusaka District, with intent to steal did break and enter into a shop namely Chambwe family shop and did steal therein 1 amplifier, assorted alcoholic beverages and air time all valued at K 4,050.00 the property of Teddy Chambwe.

Both accused pleaded not guilty.

At the close of the state's case, I found the second accused with no case to answer thus acquitted him in compliance with section 206 of the Criminal Procedure Code, cap 88 of the Laws of Zambia.



In criminal matters, the state bears the burden to prove a case and the standard is proof beyond reasonable doubt. If that standard is not met and doubt is created in the mind of the court, that doubt must be resolved in the accused's favour and he must be acquitted.

In order to establish a finding of guilty the prosecution must satisfy me upon and every ingredient of the offence charged. The prosecution therefore must establish that:

1. there was an entry by the accused into the complainant's shop
2. the accused entered knowingly or recklessly as a trespasser
3. Whilst in the shop, he committed a felony namely theft of goods as per indictment.

I will now consider the evidence in this case.

The prosecution called four witnesses and the accused elected to give a statement not on oath and called one other witness.

PW1 was the complainant in this matter Teddy Chambwe. It was his evidence that on 24th October, 2016, he went to his bar at midday and discovered that it had been broken into. He reported the matter at Mumbwa Police Post and the inventory done revealed that an amplifier, Mosi, castle, Black label, castle lite, Best whiskey, Best cream, Autumn Harvest and airtime had been stolen all valued at K 4,050.00. The now accused was apprehended and a few hours later, his friend went to the police and volunteered information regarding the stolen items. Some items were recovered from the said friend's house and these are the amplifier, Autumn Harvest and Best Whiskey all valued at K 1,948.00. The recovered items were disposed of by the court and a disposal of exhibits form was issued (identified and marked ID1).

When cross examined, PW1 stated that the accused from the onset denied knowledge of the breaking and never mentioned that the person from whom the items were recovered stole them. He also stated that nothing was recovered from the accused's house. He further stated that information was received that his worker by the name of Choolwe was involved in the crime and he was taken to the police. He was however later released by the police.

PW2 was Gloria Moonga who was employed as a saleslady in PW1's bar and restaurant. It was her evidence that on 23rd November, 2016, she was on duty and when the bar next door closed, some of its clients shifted to their bar, among them was the accused and his friends. As PW2 was about to lock, the accused got the lock from her saying he would lock up but according to PW2, she stopped him as he was not an employee there. This upset him and he begun insulting. The place was locked between 23 and 24h00 and the accused remained standing at the door. According to PW2, the following morning, she received a phone call from the employer that the shop had been broken into and the amplifier, airtime and some alcoholic beverages were gone.

When cross examined, PW2 stated that the accused got the keys from Choolwe, her workmate in his attempt to lock up but she grabbed the keys from him and did the locking herself. She said she had no idea where Choolwe was.

PW3 was Victor Phiri whose evidence was that on 24th October, 2016 around 05h00, he was awakened by a knock at the door. He opened the door and found the accused and his friend whom he did not recognise. The accused had in his possession an amplifier and alcohol and asked him to keep the items for him. When asked where the items

were from, the accused informed him that a friend of his that was working at a bar had been terminated and was given the items as severance package. The accused alleged that the said friend had asked him to keep the items for him and in turn the accused asked PW3 to keep them. He said he would collect them the following morning. According to PW3, he accepted the items. Around 7h00, however, he heard about the breaking and entering at Makali bar and he immediately rushed to the police and informed them that he got information that the accused and his friend stole and that he had kept some of the items brought by them. By then the accused was already in custody and so the police booked out to PW3's house in the company of PW3 himself as well as the accused. The police seized the items.

When given an opportunity to cross examine, the accused said he does not know PW3 hence had no question for him.

PW4 was Det. Sgt Stephen Lubinda of Moomba police post whose evidence was that following the complaint by PW1, he instituted investigations and apprehended the now accused. He later got information that the stolen items were being kept by Victor Phiri, PW3 herein. According to PW4, he picked the accused from the cells and the accused led him to PW3's house where the amplifier and assorted alcoholic beverages were picked. The said items were taken to the court house for disposal. PW4 identified the disposal of exhibit form (ID1) as the form issued following the disposal. As custodian, he tendered it in evidence and it was admitted marked P1. It was PW4's testimony that later on, he apprehended the second accused (who was acquitted at no case to answer) and recovered from him a breaking implement (ID2). PW4 also produced the said breaking implement and it was admitted marked P2. He then made up his mind

to charge and arrest the suspects for the subject offence. They freely denied the charge.

When cross examined, PW4 explained that perishable goods are disposed of at court before trial hence their absence from court. He said P1 represented the items stolen and recovered. He also stated that P2 was the breaking implement used in the act.

In his defence, the accused told court that he was instructed by PW1 that immediately he closed the bar where he was working which is next door he should be helping with collecting of bottles at his (PW1's) bar. The accused also told court that as soon as PW1's bar was closed on the material day, he went home. The following morning when he reported for work, he learnt that PW1's bar had been broken into and that he was a suspect. He was picked up by the police and despite being beaten badly he did not talk. The lady that worked in the bar by the name of Choolwe was picked up as a suspect also. Victor, PW3 herein brought to the police the amplifier and alcohol claiming that he, the accused, took the items to him. He was subsequently released on bond. The police later picked one Martin Siachiwena in connection with the breaking but he was later released. The arresting officer then came after him again and apprehended him. He was detained in custody and transferred to Kabangwe police and whilst in custody heard that there had been another breaking at the very bar.

DW2 was Alice Choto, the accused's mother whose evidence was that she heard about the breaking and entering at PW1's bar and as soon as the accused returned home from work that day, she asked him about the same and he denied knowledge. To her surprise, the accused was apprehended by the police the following morning. When she followed up at the station, she was informed by the police

that they had beaten up the suspects and that it was a matter of time before they admitted the charge. Later on, PW3 informed them that the beer was at his house and it was picked by the police. The police informed her the following day that the beer and amplifier were given back to the owner. According to DW2, she was bothered by the fact that Choolwe was left out of this matter.

When cross examined, DW2 admitted that she is not always with the accused and wouldn't know what he did on 24th October, 2016. She said she wouldn't know if he broke and entered the bar and stole. She also stated that she had no way of knowing if Victor's evidence to the effect that the accused took the stolen items to him for safe keeping is true.

Having considered the evidence, I will now state my findings of fact.

I am satisfied that the complainant's shop was broken into and items namely alcohol, airtime and amplifier were stolen. I find that some of the stolen items namely alcoholic beverages and amplifier were recovered from PW3 who voluntarily furnished the police with information regarding the presence of these items at his house.

The state sought to establish that the accused whilst acting with others did steal the said items but the accused denies any knowledge of the breaking and entering. But which version of events is supported by the evidence on record?

It is not in dispute that the accused did patronise the complainant's bar on the night in question and that he stayed until the said bar was closed.

There is damning evidence against the accused from Victor Phiri (PW3) to the effect that the accused who was in the company of a person unknown to PW3 brought the recovered items namely alcohol and amplifier to him around 05h00. I must state here that i had no reason to disbelieve PW3. There is no evidence to suggest that he had motive to falsely implicate the accused. In any case, this witness was not in any way challenged by the accused.

For the foregoing reasons, I am satisfied that PW3 told the truth that the accused is the one that took to him the stolen items.

Having made that finding, the question that arises is: is it the accused that stole from the complainant's bar? There is no evidence on record as to the actual breaking and entering, that is to say, there is no one that saw the persons that actually broke and entered. However, the fact that the accused had in his possession the stolen items very early in the morning on the material day proves that he is the one that entered and stole. There is no other reasonable explanation. Thus, one need not be a rocket scientist to deduce that the accused deliberately took the stolen items to PW3 so that he could cover his tracks. And had PW3 not made the revelation to the police, the accused would have gotten away with the crime.

I have taken note of the evidence from the accused regarding one Choolwe. However, the fact is that he or she was not brought to court and his or her absence does not make the accused innocent. He is still liable for his involvement in the crime.

There was also evidence regarding police brutality against the accused. The said testimony was however not substantiated. But

whether or not the accused was beaten, the fact is that he did not admit the offence at the police station.

I have further examined the arresting officer's evidence regarding the breaking implement allegedly used in the commission of the crime and found with the then A2. However, the officer did not establish any nexus between the said breaking implement and the breaking at the complainant's bar. It is for this reason that I have discarded that piece of evidence. It adds no value to the subject offence.

In conclusion therefore, I am satisfied beyond reasonable doubt that the accused whilst acting with others unknown broke and entered the complainant's bar during the night and stole the items as per indictment. He then proceeded to PW3's place where he took the stolen items for safe keeping. Unfortunately for the accused, PW3 revealed what he had done hence he was brought to court. Simply to say, the prosecution has discharged its burden of proof. As such, I find the accused GUILTY as charged and CONVICT him accordingly.

DELIVERED IN COURT THIS 9TH DAY OF MARCH, 2017



PRINCIPAL RESIDENT MAGISTRATE.

