

CASE NO: 3PD/012/17

IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT HOLDEN
AT LUSAKA.

(Criminal jurisdiction).

THE PEOPLE

V

CLEMENT CHILESHE.

BEFORE: HON. MUBITA. A; MAGISTRATE III

For the State: Museta (pp).

For the accused: In person.

JUDGMENT

Statutes referred to:

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

Cases referred:

1. Nyambe V The People (SCZ of 2011)
2. Whoolmington V DPP (1935) AC 462.

Accused stands charged with one count of theft contrary to section 272 of the Penal Code Chapter 87 of the Laws of Zambia.

Particulars of the offence were that, Clement Chileshe, on 13th December, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did steal one black berry cell phone and K1800 cash altogether valued at K2400 the property of Gideon Banda.

When called upon to take plea the accused denied the charge. However, at the close of the prosecution case, the accused was found with a case to answer and was placed on his defence. The provisions of section 207 of the Criminal Procedure Chapter 88 of the Laws of Zambia were complied with. The accused elected to remain silent and did not call any witnesses.

I aptly warn myself from the onset that in criminal matters the onus to prove the accused guilty lies upon the prosecution and the standard of proof is beyond all reasonable doubt as provided for in the case of Whoolmington V DPP (1935) AC 462.

According to section 272 of the Penal Code Chapter 87 of the Laws of Zambia provides as follows;

"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."

From the foregoing, the prosecution must prove all the elements of the offence charged that:

1. There was taking and moving of the items

2. The items were capable of being stolen
3. The items belonged to another person and the accused had no claim of right in the same.
4. The taking was fraudulent and the intention of the accused was to permanently deprive the owner of the property
5. It was the accused who stole the items.

In order for the prosecution to prove their case, three witnesses were called.

PW1 was Banda Gideon who testified that on 13th December, 2016, he was visiting his bar called Vimacitika located in George compound. He said when Clement Chileshe entered the bar, he asked him why he was boasting and started arguing. He averred that friends to the accused went behind and grabbed him from the sides and Clement was in front of him and grabbed him by the neck. He testified that he was lifted him up, and they started searching him in the pockets, but never beat him. He was then dropped and the accused and his friends left. He testified that he had K1800 and a phone black berry 9300 that he bought at K600, but discovered that they were missing. He said before being attacked he had the phone and the money because he wanted to pay rentals for the bar. He reported the matter to Buyantashi Police. As he went back to his bar, he found the accused in another bar and he was apprehended by customers and taken to police. He said the accused was the one who held him by the collar. He averred that nothing of the missing items was recovered.

He described the phone as black and grey in colour. It was a black berry 9300.

Accused identified by pointing

There was no cross examination.

There was no re-examination.

PW2 was Banda Everisto who testified that on 13th December, 2016, he was at Vimacitika bar in George compound. He averred that he was seated with Gideon Banda and then Clement went in with his friends and lifted Gideon Banda up. He testified that the friends to Chileshe were the ones who were searching Gideon Banda, but he never saw anyone entering the pockets. He averred that he stood up to help and started struggling with a friend. He said Gideon missed everything he had in the pockets including the money. He said the money was K2400.

He described the phone as a black berry 9300

Accused identified by pointing.

When cross examined by the accused, he said he was the one who searched Gideon and that he saw him lifting him up. He said the accused was with friends.

There was no re-examination.

PW3 was number 41179, Constable Muyoba Liswaniso who testified that it was on 14th December, 2016, around 24:50 hours while on duty when he received a complaint of theft from male Gideon Banda who complained that a known person by the names of Clement Chileshe did steal cash money amounting to K1800 and a black berry phone valued at K600 taking the value to K2400. Acting on the report, he booked to the scene of crime but did not find the accused. He said, between 01:00 and 02:00 hours the same day, the accused was apprehended by the complainant and took him to the office. Around 08:00 hours the following day, he interviewed the accused who denied having stolen anything from the complainant. He testified that, since he had gathered enough

evidence from the eye witness Everisto Banda, he made up his mind to arrest and charge the accused for the subject offence as per indictment. He said nothing was recovered

Under warn and caution in English the language understood better, the accused gave a free and voluntary reply denying the charge.

Accused was identified by touching.

When cross examined by the accused, he said he was arrested by the complainant and he did not pick him from Vimacitika. He indicated that he interviewed him after he was brought by the complainant. He indicated that Gideon gave him the number that was in the phone and that it was not active up to the time of proceedings. He said the information was given by the eye witness who was there on the scene. He indicated that when he went to the pub there were people in the pub.

During re-examination, he said the complainant reported the matter and later apprehended the suspect. He said that he interviewed the other witness. He indicated that it was a second hand phone and needed no receipt.

The State closed their case.

DW1 was the accused Clement Chileshe who testified that on 14th December, 2016, he knocked off from work at 13:00 hours and passed through a bar, and started drinking. When he got drunk he decided to go to a bar closer to his home. Upon entering the bar he found Gideon Banda and he said after some time, Gideon started quarrelling with some gentlemen. He averred that later Gideon went to him and told him that he got a phone. He testified that he searched him and did not find anything. He

then took him to Police and told them that he did not search him as he was not found with the claimed items.

When cross examined by the State, he said he could not remember the date very well, but it was in the month of December, 2016. He admitted being drunk and that he could not remember certain things. He admitted drinking from the bar for Gideon Banda several times. He said he did not quarrel with Gideon Banda before and that he never accused him of getting anything from him. He said he did not remember stealing the phone for Gideon. He admitted having heard the evidence given by Gideon Banda that he stole a phone, but said he did not see the items. He said he could remember PW2 saying he grabbed Gideon because he was pompous, but said he disputed the evidence. He indicated that all the people who were there did not want to be witnesses. He said he was the one who was separating Gideon when he was fighting.

There was not re-examination.

STATEMENT OF FACTS.

Having heard from both the prosecution and the defence, the following issues were not dispute. The incident happened on 13th December, 2016 at Vimacitika bar in George Compound. Gideon Banda was the owner of the bar. Clement Chileshe went to Vimacitika bar as it was the one closer home after drinking beer from another bar. The accused was very drunk. There was a fight that happened within Vimacitika bar. The phone and some cash money were stolen from Gideon. The matter was reported to Buyantashi Police. The suspect was apprehended by the complainant with the help of customers and taken to the Police Post.

It was not in dispute that the incident happened on 13th December, 2016. PW1 testified that he had some cash money and a phone on him. He said when the accused entered the bar, he asked him why he was boasting and then they started arguing. He averred that in the process, the friends to the accused went on the sides and lifted him, while the accused grabbed him by the neck. He testified that the friends then searched him in the pockets and later left with the accused. Afterwards, upon checking in his pockets, he found that the money and the phone were missing. This evidence enough that there was the taking and moving of the items that the complainant had.

According to the available evidence, the things stolen were cash money and a cell phone. Section 264 (2) of the Penal Code chapter 87 of the Laws of Zambia provides that, things capable of being stolen include:

"Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it."

From the above quotation, there is one catch word and this is "inanimate". This word refers to anything that has no life in it, as long as it belongs to another person. Both the money and the cell phone have no life have no life in them. But the moment these items were moved for the sake of stealing them, they became capable of being stolen and hence meeting the provisions of the above section.

PW1 testified that the phone alleged to have been stolen was a Samsung 9300 black and grey in colour and the amount of cash money was K1800. He said the money was meant to pay rentals for the bar. PW2 also described the phone though he did not mention

the amount of money. When PW3 did his investigations, he failed to find the items that were stolen on the scene. However, since PW1 and PW2 described the phone and there was no objection of any sort from the defence. Furthermore, PW1 also mentioned the amount of money he had and its purpose and again there was no objection from the defence. It can safely be concluded that, the phone and the money belonged to PW1 and DW1 had no claim of right in the same. It was also PW1's evidence that the stolen items were not recovered. PW3 also echoed on the same after conducting his investigations on the matter. Since the missing items were not recovered, it can be concluded that the taking was fraudulent and the intention was to permanently deprive the owner of the same.

At this point, it has to be established whether it was DW1 who stole the alleged missing items. PW1 testified that DW1 went into Vimacitika bar and asked him why he was boasting, and then an argument ensued. DW1 then went in front of him and grabbed him on the neck while the friends went on the sides and then lifted him up. He said it was during this same act that he lost the phone and the cash money. He further said it was the friends to the accused who searched him and not the accused. PW2 also affirmed this evidence, though during cross examination said he did not see them enter the pockets. When DW1 was given an opportunity to cross examine PW1, he did not discredit the evidence given by PW1 by not asking any questions at all. This is an indication that he admitted to everything said by PW1. In his defence, DW1 said he was trying to help PW1 because certain people were fighting with him. He said after that he was told by PW1 that he stole a phone and some money. He further testified that he was searched and nothing was found on him. On the contrary, PW1 testified that it was not DW1 who searched him,

but the friends who later left and were not apprehended. With this evidence at hand which was not disputed by DW1 during cross examination, it is clear that it was not possible to find the phone and money with DW1. However, there is overwhelming evidence that the circumstances under which DW1 found himself was that of aiding the friends to search PW1 and get whatever they found in the pockets. This can be supported by the case of Nyambe V The People (SCZ 5 of 2011), where it was held that:

"Circumstantial evidence is evidence from which the Judge or Jury may infer the existence of the fact directly."

Furthermore, according to section 21 1(c) of the Penal Code Chapter 87 of the Laws of Zambia provides that, **"When an offence is committed, each of the following person is deemed to have taken part in the committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say: every person who aides or abets another person in committing the offence."**

The fact that DW1 grabbed PW1 by his neck and then the friends lifted him and in the process lost whatever he had, DW1 participated in the commission of the offence. He is also considered to be a principal offender especially that he did not discredit the testimony of PW1. It is also important to note that the cardinal issue here is not who got what, but the participation in the commission of the alleged offence. Therefore, the only reasonable conclusion that would be made by any tribunal would be that, DW1 was the one who stole the phone Samsung 9300 and K1800 cash money.

Having considered the discussion of the evidence above, I am satisfied that the prosecution has proved all the elements of the offence charged and a conviction would be safe. I,

therefore, find you Clement Chileshe **guilty** of theft contrary to section 272 of the Penal Code Chapter 87 of the Laws of Zambia and I **convict** you accordingly.

DELIVERED IN OPEN COURT ON THE DAY OF , 2017.