IN THE SUPREME COURT FOR ZAMBIA **SCZ APPEAL NO. 47/2017**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

NICHOLAS NKAKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.

On 5th December, 2017 and on 11th December, 2017.

For the Appellant: *Ms E. I. Banda, Senior Legal Aid Counsel, Legal Aid Board*

For the Respondents: *Mr M. Mulenga, Senior State Advocate, National Prosecutions Authority*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. David Zulu v The People (1977) ZR 151
2. Peter Yotamu Haamenda v The People (1977) Z.R.184
3. Solomon Chilimba v The People (1971) Z.R. 36
4. Jutronich, Schutte and Lukin v The People (1965) Z.R. 9
5. Patrick Sakala v The People (1980) ZR 205
6. Mbinga Nyambe v The People (2011) 1 ZR
7. Anderson v The People (1968) ZR 68
8. M.S. Syakalonga v The People (1977) Z.R. 61
9. Bwalya v The People (1975) ZR 125
10. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.

Legislation referred to:

1. The Penal Code, Chapter 87, Laws of Zambia, section 341 D (1) (2) (a).

Works referred to:

1. Blackstone's Criminal Practice, London, 1992, paragraph F7.3.

The appellant was convicted on one count of Vandalism contrary to **section 341 D (1) (2) (a) of the Penal Code** in that, on 18th September, 2012 he, jointly and whilst acting together with one Kellies Mulenga, did wilfully and unlawfully vandalise an electrical cable valued at K18,195,738 (K18,195.73 rebased) the property of ZESCO Limited which is essential for or incidental to the distribution of a necessary service. Kellies Mulenga was acquitted of the charge after the trial. The appellant was sentenced to 20 years imprisonment with hard labour. The appeal is against conviction and sentence. The issue in this case is whether it is the appellant who vandalised the cable.

Although five witnesses testified for the prosecution, the critical evidence came from PW1 (a ZESCO Security Officer) and PW4 (a Zambia Police Officer) whose common evidence was that they were patrolling in Ndeke Natwange township, Kitwe in the early hours of 18th September, 2012 when they came upon two people who were

cutting a ZESCO take off cable near the perimeter wall of a house. They had not met any other person or persons before seeing the two people. The cable being cut was connected from a transformer to a pole and supplied electricity to households in the vicinity. When the two people apparently saw the officers, they scampered away. The area was poorly lit and the two officers did not clearly see the two men.

The two officers gave chase during which PW4, who was armed, fired a warning shot. PW1 testified that one of the fleeing duo fell down by the road after some distance and they apprehended him. He stated that the person they apprehended had a phone in his hand but it was on silent. PW4 testified that the one they apprehended had turned to the right and went to hide behind some blocks at an unfinished house in an area where there were houses and roads. He followed him and apprehended him. The record of proceedings shows that PW4 in one breath admitted to at one point losing sight of the people they were chasing before saying that he lost sight of only one of them. In re-examination, he re-joined that he lost sight of one of them only; that he and PW1 followed the other who, of course, is now

the appellant and apprehended him. PW4 testified that the appellant was, at the time he was apprehended, wearing socks without shoes. PW1 stated that the appellant was apprehended some 30 meters away from the scene of the crime while PW4 gave the distance as between 40 to 60 meters away.

The two witnesses testified that the appellant had a bag in which two pairs of shoes were found. The two witnesses both talked about a knife but PW1 stated that it was found at the scene where the cable was being cut while PW4 stated that the knife was in the bag. Both were, however, unanimous that a cutter was recovered at the scene of the crime where they went back after apprehending the appellant. Further, that the appellant had a cell phone which had missed calls sent by Kellies Mulenga between 01:00 hours and 03:00 hours on 18th September, 2012.

In defence, the appellant testified that he was apprehended by a group of six men who included PW1 and PW4 after midnight while on his way going home to Chamboli from a girl friend's house in

Ndeke Natwange Township. He did not give the name of the girlfriend or her address to his captors because, according to him, he was going to take them to her house. The reason for the nocturnal trip was to go home to open the house for his elder brother, Kellies Mulenga, who had arrived from Chingola where he had been evicted from his rented house. At the time of his apprehension he was talking on his cell phone to the brother. The men refused to be taken to the girlfriend's house but agreed to take him to meet his brother which they did not do. They instead took him to Wusakile Police Station where he was detained. He stated that the bag and the shoes were his but denied that the knife was found in the bag or that he was taken to the scene of the vandalism. He stated that the shoes were removed from his feet when he was apprehended.

The trial judge accepted that the appellant was one of the two men being chased by the officers because he had not ran far before he was apprehended, that the witnesses did not lose sight of him in the process of pursuing him. The judge found it to be an odd coincidence that the appellant was apprehended in the vicinity of the scene of the crime at that time of the night; that the two officers had

no reason to foist the bag and shoes on him which the learned judge appeared to have misapprehended as having been recovered from the scene of the crime when both PW1 and PW4 said the items were taken from the appellant when he was apprehended. He noted that the appellant admitted that the shoes and the bag in which they were, were his. The judge discounted the defence of alibi as the appellant did not deny that he was in the vicinity and not at the girlfriend's house at the material time. The learned judge also pointed out that the appellant did not also disclose the name and address of the girl friend to enable the officers investigate the explanation. The learned judge found the case against the appellant proved beyond reasonable doubt and convicted and sentenced him to imprisonment as it were.

Two grounds were listed in this appeal as follows:

1. **The learned trial judge erred in law and in fact when he convicted the appellant on circumstantial evidence when an inference of guilt was not the only inference which could reasonably be drawn from the facts.**
2. **In the alternative, the learned trial court erred in law and in fact when it imposed a severe sentence of 20 years imprisonment on the appellant considering he is a first offender.**

Ms Banda, on behalf of the appellant, pursued a spirited argument in the heads of argument which she filed and also orally. In the first ground of appeal it is contended to the effect that the appellant was convicted on the basis of circumstantial evidence which was not so cogent as to permit the drawing of only the inference of the appellant's guilt. Counsel cited the case of **David Zulu v The People**[1] in which it was held by this court that-

(i) **It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.**

(ii) **It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.**

Learned counsel contended that the appellant had denied having anything to do with the cutter and the knife which were alleged to have been found at the scene; that PW1 and PW4 did not see the people at the scene and lost sight of them as they ran away. Counsel was of the view that there was nothing wrong in the appellant running away at the sound of a gunshot as this was a

natural reaction for anyone especially so late in the night while he was walking to his home from his girlfriend's house. Counsel submitted that these circumstances did not take the case outside the realm of conjecture so that the conviction was not safe. It was further submitted that there was dereliction of duty in the investigation of the case because the cutter and the knife which were recovered in connection with the cutting of the cable were not dusted for finger prints to determine whether the appellant had handled them. Counsel referred to the case of **Peter Yotamu Haamenda v The People**[2] in which it was held that-

> **"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."**

Counsel implored that the duty to investigate in this case was even greater since no one saw the appellant commit the offence and that the implements were not found on him.

With regard to ground two, the submission was effectively that the sentence of 20 years imprisonment was too severe in the circumstances of the case and did not accord with the principles of sentencing which a trial court should bear in mind. The following two of the cases cited encapsulate the thrust of the submission as follows-

1. **Solomon Chilimba v The People**[3]

   Unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence. Such a feature in cases of stock theft might be an unusually large number of animals stolen, or facts which point to a well-planned rustling operation.

2. **Jutronich, Schutte and Lukin v The People**[4]

   In dealing with appeals against sentence the appellate court should ask itself these three questions:

   (i) Is the sentence wrong in principle?

   (ii) Is the sentence so manifestly excessive as to induce state of shock?

   (iii) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?

Counsel concluded that the severity of the sentence did not take into account the appellant's mitigation; that we should consider that the vandalised cables were not stolen and there were no aggravating

circumstances that justify a harsh sentence. We were consequently urged to uphold the appeal and set aside the sentence.

Responding to the first ground of appeal, it was submitted on behalf of the respondent by Mr Mulenga, that the circumstantial evidence necessitating the inference, which according to counsel is the only one, that the appellant is guilty of the offence is overwhelming. Learned counsel drew our attention to the cases of **Patrick Sakala v The People**[5] and **Mbinga Nyambe v The People**[6] both for the ultimate principle that a conviction based on circumstantial evidence is sustainable if it has taken the case out of the realm of conjecture so that it attains a degree of cogency which can only admit an inference of guilt. Counsel stated that the evidence on record strongly placed the appellant at the scene of the crime which he did not dispute, therefore, that he had the opportunity to commit the offence. The learned advocate submitted that PW1 and PW4 gave similar accounts of the evidence in which there was no material contradiction as the appellant was apprehended near the scene and there was no other person seen walking around in the area.

On the allegation that there was dereliction of duty by the investigators who did not submit the recovered implements for forensic examination, it was submitted to the effect that this was not necessary as there was no other person seen in the vicinity besides the appellant who was apprehended after a chase. It was submitted that we dismiss the appeal and uphold the conviction.

Regarding ground two, it was submitted that the sentence of 20 years was correct in principle and proportionate to the gravity of the offence. Counsel referred to the case of **Anderson v The People**[7] in which it was held that:

> **An appeal Court may only override the discretion to sentence vested in the trial Court when that discretion is exercised on a manifestly wrong basis.**

The case of **M.S. Syakalonga v The People**[8] was also cited for the holding that-

> **"It is perfectly proper to refer to the prevalence of an offence and to use that prevalence as a basis for imposing a deterrent sentence."**

It was counsel's prayer that we dismiss the entire appeal.

We have considered the grounds of appeal, the evidence adduced in the court below, the judgment of the court below and the

submissions on either side. The abiding issue in this appeal is as submitted by counsel for the respondent, whether the appellant committed the offence alleged.

We would like to state at the outset that although both Ms Banda and Mr Mulenga out rightly argued the appeal on the basis that the conviction was based on circumstantial evidence, this does not seem to be the correct position. The position is that in the judgment in the court below the learned trial judge had made a finding of direct evidence at page J9 of the judgment or page 54 of the record of appeal in the following manner:

> **"The two young men were tampering with the electrical cable. As PW1 and PW4 approached the scene, the two young men saw them and started running away. The two witnesses gave chase and managed to apprehend one of them who came to be identified as Accused 1.**
>
> **From the evidence of those two witnesses, I am satisfied and I find as a fact that Accused 1 was one of the two men who had been tampering with the cable. He had not run very far before he was apprehended. The witnesses had not even lost sight of him in the process of pursuing him."**

After making the above finding of fact, the learned trial judge went on to consider other circumstances that confirmed that the

appellant was one of the two persons seen by the two officers whom they chased after and apprehended. These included what the learned judge regarded as the odd coincidence that the appellant was apprehended in the same area where the witnesses said they had seen the two people tampering with the cable, coincidentally, around midnight; that the appellant admitted that the shoes and the bag were his; that these indicated that he was not an innocent passer-by; that he did not tell his captors the names and address of his girlfriend to place a burden on the officers to investigate the alibi in the manner stated, for instance, in the case of **Bwalya v The People**[9]. Our view is that these circumstances did not affect the earlier finding of direct evidence already made by the trial court. They only buttressed the finding that the appellant was one of the two people that had run away from the scene of the crime.

That being the case, ground one would then be a challenge to the finding of fact made by the learned trial judge on the significant basis of which the appellant was convicted. The law is that a finding of fact made by a trial court can only be reversed on the basis that it was perverse or made in the absence of any relevant evidence or upon

a misapprehension of facts as was held in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[10].

We are, as such, at large to consider whether we can interfere with the said finding of fact based on the evidence on record.

We have read through the material parts of the evidence of PW1 and PW4 in the record of appeal regarding the unfolding of the events after the two officers came upon the two vandals. PW1 said the following, in his evidence in chief, at page 3 of the record of appeal:

> **"I spotted the two suspects from the witness box to outside the court room (about 20M). They started running, we pursued them and managed to apprehend one of them some 30m away. The other escaped."**

And at page 6, PW1 said the following during cross examination:

> **"Accused 1 was at the cable when I first saw him. He was bending or stooping. We caught him when he fell down some distance away by the road."**

For his part, PW4 testified in this way at pages 13 and 14 of the record of appeal:

> **"When the two people saw us they started running away. We were 20m from them ... We gave chase. I fired a warning shot. I went to apprehend one of them who went to hide by the concrete blocks at some unfinished house. That was about 40 to 60m from where they**

had been cutting the cable ... The one we caught had turned to the right after I fired in the air. I followed and went to apprehend him."

In cross examination, PW4 responded, at page 16 of the record of appeal:

"Yes, at some point I lost sight of both of them. I fired the gun before I lost sight of both but after losing sight of only one of them."(Sic)

In re-examination, PW4 sought to clarify the matter in this way at page 17 of the record of appeal:

"When I lost sight of one of them I fired a warning shot. My colleague followed the other and we caught him".

It can be seen from this evidence that the witnesses were mutually agreed only on the points that they gave chase to two people who ran away from the scene of the crime; that PW4 fired a shot while in pursuit and shortly after, they apprehended the appellant. There is discord in how and where the appellant was apprehended. PW1 said that he was apprehended when he fell down along the road while PW4 said he was apprehended from behind some building blocks where he had gone to hide. PW1 did not categorically say whether or not he ever lost sight of the person they were pursuing while what we can only describe as an unintelligible response was recorded from PW4. This evidence does not inspire in us any faith in the finding by

the court below that the two key witnesses did not lose sight of at least one of the fleeing persons. The evidence as recorded leaves a lingering doubt in our mind which we resolve in favour of the appellant that PW1 and PW4 did lose sight of the person they were pursuing. If this was the only matter on which the case was to be decided, the appeal would be resolved in favour of the appellant. There is, however, the rest of the circumstantial evidence which even the learned trial judge highlighted.

It is notable that although the appellant came up with an almost convincing explanation how he came to be found in the area where he was apprehended, it is curious that none of the prosecution witnesses, particularly PW1 and PW4 and to an extent PW5, the arresting officer were cross-examined on the pertinent issues that the appellant brought out in his defence. These are his defence that he was apprehended by a group of six men who included PW1 and PW4; that he told his captors that he was coming from his girlfriend's house; that he was going to his home in Chamboli to give accommodation to his brother, Kellies Mulenga who had arrived from Chingola in the night; that his captors refused to be taken to his

girlfriend's house; and that he was wearing shoes which were removed when he was apprehended. He chose not to question the witnesses before he sprung up his defence on all these pertinent issues which the prosecution had no reasonable opportunity to rebut. The learned editors of **Blackstone's Criminal Practice**, London, 1992 explain the position of the law in this area at paragraph F7.3 in this way:

> **"A party who fails to cross examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on the matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness-box, or at any rate, to make it plain to him at that stage that his evidence is not accepted."** (Underlining supplied for emphasis)

The appellant cannot expect the court to ignore the testimony of the prosecution which he did not challenge, at the earliest opportune time, during cross-examination in preference for his explanation which seems to indicate that it was tailored to fit the case advanced by the prosecution. The totality of the prosecution evidence, even taking into account our agreeing with the appellant that PW1 and PW4 did at one point lose sight of the people they were

pursuing, is such that it provided weighty circumstantial evidence pointing to the fact that the appellant was one of the two people that ran away from the scene of the crime that night and was shortly after apprehended. We accept the evidence that there were no other people in the vicinity at that very late hour of the night and that the appellant was not wearing shoes which were in the bag found on him. He did not challenge the witnesses on these issues during the cross-examination. Coupled with the appellant's failure to properly account for his presence in an area in which a crime had just been committed, this amounted to an odd coincidence. We would point out also that while Ms Banda appeared to have accepted the assertion that a gun shot was fired and the appellant was running away when he was apprehended, the appellant's defence does not show that he ever heard the gun shot. He did not even say that he was running away when he was apprehended. We did, of course, wonder as to what instructions the appellant had given the learned advocate for them to end up at cross purposes. This notwithstanding our conclusion is that in the circumstances of this case there is only one inference that can be drawn from the facts of the case. This is that the appellant was one of the two people seen at the scene of the crime who ran

away, were pursued and ended up in the appellant being apprehended. As such, we find no merit in ground one of the appeal and dismiss it.

We turn now to the alternative argument in ground two that the sentence was severe and should be reduced. Learned counsel on either side ably discussed the case authorities that give guidance on the imposition of sentences. The section stipulating the offence of vandalism provides a mandatory minimum sentence of 10 years imprisonment and a maximum of 25 years of imprisonment.

The mandatory minimum sentence is certainly reserved for cases in which there is minimum or no aggravation. The higher the degree of aggravation grows so will the sentence be stiffened. The sentence of 20 years imposed in this case indicates a degree of aggravation that is beyond the middle line. We do not think that the fact that the cable was not completely severed or stolen affects the gravity of the case. The focus of the offence of vandalism is the damage done to the installation and any other consequential damage. The evidence in this case is that several houses which were being serviced on account of the cable lost power. We do not need to look

for evidence from the households to perceive what damage the appellant's action could have caused. The potential for damage arising from vandalising a cable of the capacity to supply power to several houses is an aggravating factor in itself justifying the imposition of a sentence of imprisonment of 20 years. We do not, therefore, regard the sentence as being wrong in principle or manifestly excessive and it does not come to us with a sense of shock. We find no merit in ground two of the appeal and dismiss it.

In sum we confirm the conviction and the sentence and dismiss the appeal altogether.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE