

**IN THE HIGH COURT FOR ZAMBIA**

**HJ/110/2017**

**HOLDEN AT CHIPATA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**THE PEOPLE**

**AND**

**MAXWELL PHIRI (Alias Macdaddy)**

**CORNELIUS MWANZA Jr.**

**PATRICK MITI**



**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 25<sup>TH</sup> DAY OF APRIL, 2018.**

**APPEARANCES**

FOR THE PEOPLE: MRS. R.N. KHUZWAYO, CHIEF STATE ADVOCATE, MRS. A.N. SITALI, DEPUTY CHIEF STATE ADVOCATE, MR. M. LIBAKENI AND MR. W. SILWIMBA ALL OF NATIONAL PROSECUTIONS AUTHORITY.

FOR THE ACCUSED MR. J. PHIRI, SENIOR LEGAL AID COUNSEL WITH MS S.F. BWALYA, LEGAL AID COUNSEL OF LEGAL AID BOARD

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**J U D G M E N T**

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**CASES REFERRED TO:**

1. MAJOR ISAAC MASONGA V THE PEOPLE (2009) ZR 242 (S.C.)
2. KALEBU BANDA V THE PEOPLE (1977) Z.R. 169 (S.C.)
3. LISWANISO V THE PEOPLE (1976) Z.R. 277 (S.C.)
4. MWEWA MURONO V THE PEOPLE (2004) Z.R. 207 (S.C.)
5. R V JOHN KAHYATA (1963-1964) Z AND N.R.L.R. 84
6. CHARLES LUKOLONGO AND OTHERS V THE PEOPLE (1986) Z.R. 115



7. MAKETO AND 7 OTHERS V THE PEOPLE (1979) Z.R. 23 (S.C.)
8. THE PEOPLE V HAMAINDA (1972) Z.R. 310 (H.C.)
9. ILUNGA KABALA AND JOHN MASEFU V THE PEOPLE (1981) Z.R. 102

**LEGISLATION REFERRED TO:**

- 1) *The Penal Code, Chapter 87 of The Laws of Zambia*
- 2) *The Criminal Procedure Code, Chapter 88, Laws of Zambia.*

**Maxwell Phiri, Cornelius Mwanza** and **Patrick Miti**, hereinafter referred to as **A1, A2** and **A3** respectively, stand charged with one count of **Aggravated Robbery** contrary to section 294(1) of *the Penal Code, Chapter 87 of the Laws of Zambia*.

The particulars of offence alleged that the three accused on the 3<sup>rd</sup> day of May, 2016 at Chipata in the Chipata District of the Republic of Zambia, jointly and whilst acting together, did rob **Chen Yong Sheng** of his 2 laptops, 2 wrist watches, 2 television sets, 5 phones, 8 T-shirts, 1 belt, 1 de Chanel perfume, 1 pair of sneakers, 2 gold finger rings, 3 mobile hard disks, 1 DSTV decoder, 3 bags, 1 home theatre, 2 barbing machines, 4 power banks, 8 SD cards, K80,000 cash, US\$1,100 cash, 2,000 Chinese Yen cash money all together valued at K183,190.00 and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to the said Chen Yong Sheng in order to obtain, or to prevent resistance to the property being stolen or retained.

All three accused persons pleaded not guilty to the charge and trial proceeded.

In a quest to establish the accused's guilt, the prosecution called six witnesses.



The first prosecution witness (**PW1**) was **Chen Yong Sheng**, a Chinese national and a businessman running Gaming Machines called Bonanza in Chipata District. He told the court that the second accused was one of his employees. He testified that on 2<sup>nd</sup> May, 2016 he was sleeping at night when around 02:00 hours he was suddenly disturbed by strange noises. PW1 said that he went to check what was happening and on the kitchen door he saw four people who had broken into his house. The intruders were armed with knives and they immediately threatened to kill him if he did not show them where the money was. PW1 went on to testify that he was attacked and forced to lie on the floor while the intruders ransacked the whole house. He asserted that he was able to see all that was happening as the light bulbs were switched on.

PW1 narrated that the robbers eventually got away with a lot of things which included two laptops (Dell and HP); five smart phones (3 i-phones, 1 Samsung and 1 Huawei); one television set; a home theatre system; two gold rings; two wrist watches (one white and the other black); two hard discs; a DVD player; some clothes and cash amounting to K80,000, US\$1,000 and 2,000 Chinese Yen. It was PW1's evidence that the robbery lasted for about two hours and after the robbers left he alerted the police using a phone from a shop next to his house. PW1 stated that in the morning, he went to the police station to give a statement in the company of one of his employees, PW2.



In his further evidence, PW1 said that a week after the robbery, he was notified by the police that some of his stolen items had been recovered. He stated that he was able to identify a television produced in court as exhibit **"P2"** that was recovered from the home of A2 because the product serial number JP140825170200 matched with the serial number on the television (T.V) box which was still in his possession. PW1 produced the T.V box as part of his evidence and it was marked as exhibit **"P1"**. The witness confirmed that on the fateful night his house was securely locked.

Under cross-examination, PW1 said that on the night he was robbed, all his phones were taken away and that was why he borrowed a phone in order to call the police. He told the Court that when he identified exhibit "P2", the police recorded a statement from him. That when he went to identify the television (P2) he only carried a picture of the T.V box but that he took the box with him when he went there the second time. He stated that he told the police that the photo of the box (P1) had a serial number which was the same as that on the T.V. PW1 said that he had always kept P1 in his house and that P2 was recovered from A2's house.

In re-examination, PW1 said that the police did not allow him to see **"P2"** but that he was asked to show them the serial number on the box. He confirmed that exhibit P2 was the same TV that was stolen from his home.



The second prosecution witness was **Michael Banda (PW2)**, aged 21 of Magazine Compound, Chipata. PW2 informed the Court that he worked as a general worker for PW1. The witness basically confirmed that he had accompanied PW1 to the police to go and give a statement following the robbery that was staged at PW1's house. PW2 narrated that he was familiar with some of the items that were stolen from PW1's home because he used to frequent the place where the robbery occurred. PW2 identified the T.V. (exhibit P2) as one of the items stolen from PW1's.

Under cross-examination, PW2 informed the Court that among the stolen items were some things that he knew from PW1's home. He said that he knew some other things in PW1's home especially those in the living room apart from the T.V. (P2) and a home theatre. He said he signed the police statement because that was the truth. He said he could not recall if he did not mention the home theatre at the police. That the only feature he was able to identify about the T.V was its colour black although he agreed that there were many other T.Vs that were black in colour.

**Mabvuto Mshanga** aged 18, a resident of Mchini Compound and a businessman was the third prosecution witness (**PW3**). He testified that sometime in 2016 he was approached by A3, one of the tenants at his premises who told him, that A1 was selling a home theatre at K350. The witness stated that he eventually bought the home theatre from A1 at K300. PW3 explained that it was brought to his



attention that the home theatre was a stolen property a week after he resold it to a stranger at a price of K400.

Under cross-examination, PW3 confirmed that in his statement at the police he stated that it was the police who told him that A1 and A3 had staged a robbery at Moth Compound and stole items including the home theatre they went to recover from him. He conceded that his deposition did not show that A1 told him he was in an aggravated robbery and apologised to him for selling him stolen property.

**PW4** was **Cornelius Mwanza Snr**, aged 45 from Mchini Compound in Chipata District. PW4 narrated how his son A2 went with A1 to his house and told him that A1 had taken Bonanza tokens worth K400 from A2. The witness testified that A2 further informed him that he had decided to take A1's Plasma T.V as a set off for the debt but that A1 demanded for a top-up payment of K100 before he could allow him to take the T.V. PW4 went on to testify that he gave A1 K50 and requested him to collect the balance of K50 the following Wednesday. He informed the Court that he later learnt that the T.V he had paid for was a stolen item. The witness confirmed that A2 was his biological son who worked for a Chinese national.

There were no issues raised in cross-examination.



Detective Inspector **Saul Chitomfwa**, aged 38 and based at Chipata Central Police Station, was **PW5**. He testified that in 2016 in a month he could not recall he reported on duty and was asked by PW6 to accompany him to Navutika Compound to apprehend one suspect by the name of Maxwell Phiri (alias Macdaddy) in connection with an alleged offence of aggravated robbery. With other officers, they went to Navutika Compound where they apprehended A1. PW5 told the Court that A1 led the police to Mchini Compound where they apprehended A3. PW5 testified that on the same day, PW6 interviewed A1 and A3 who later led them to the apprehension of A2 where a 32 inch T.V set belonging to PW1 was recovered. He explained that the three accused persons were taken to Chipata Central Police where PW6 continued with further investigations. PW5 said that the recovered T.V. (P2) was retrieved from A2's bedroom at his father's (PW4's) house.

Under cross-examination, PW5 denied receiving any intelligence information that A1 was in possession of an HP laptop believed to have been stolen from PW1. He however, agreed that an HP laptop was recovered from A1 but that was in connection with a different case. He informed the Court that PW1 had a chance to look at that laptop that was recovered from A1 but he said it was not his. He denied wanting to implicate A1 in other offences including murder. He agreed that A1 told the police that he was Malawian. PW5 expressed ignorance at the assertion that A1 mentioned his occupation to the police as an electronics technician. He said he



was not aware that A1 was hospitalised because of police beatings as he had gone on leave.

In re-examination, PW5 said that the laptop found on A1 was stolen from Winners' Chapel for which the two (A1 and A3) were charged with burglary and theft and were convicted.

The final prosecution witness, **PW6**, was the arresting officer, **Francis Ng'andwe Ngosa**, aged 44, a Detective Inspector based at Chipata Police Station. He told the Court that on 3<sup>rd</sup> May, 2016, PW1 reported that around 02:00 hours he had been attacked at his house by five unknown males armed with machetes and iron bars. PW6 informed the Court that PW1 told the police that the assailants robbed PW1 of various household goods and cash in Zambian Kwacha, United State Dollars and Chinese Yen currencies. Acting on the report a docket of the matter was opened and the scene of crime visited. PW6 stated that he was part of the investigations team that apprehended all the three accused on 13<sup>th</sup> May, 2016. PW6 told the Court that A1 was first to be apprehended and he was found at Navutika Market trying to sell an HP laptop. It was PW6's evidence that A1 told the police that he was a businessman selling second hand clothes. A1 later led the police to A2 from whom they recovered a 32 inch black Supersonic television set (exhibit P2) from his parent's house in Mchini Compound. PW6 informed the Court that A2 explained to the police that he acquired the T.V from A1 as set-off for the K200 he owed him but that A1 denied owing A2. He



went on to state that A1 said the T.V was payment in kind for giving him information about the Chinese.

It was PW6's further testimony that A1 later led the police to the apprehension of A3 on the same day. According to PW6, A1 and A3 sold a stolen home theatre to PW3. PW6 claimed that A3 told PW3 that the home theatre he sold him was stolen property.

It was PW6's further evidence that he called PW1 who identified the recovered television set (P2) as his, identifying it by way of serial number which matched with that on the television box (P1) that he had kept. PW6 later officially arrested and charged the accused jointly for the offence of aggravated robbery.

When cross-examined, PW6 denied having lifted finger prints from PW1's house but confirmed that the police did search for finger prints at that house. He denied inflicting injuries on the accused whilst they were in custody. He refuted the suggestion that the Television set (P2) recovered from A2's house was not the same one stolen from PW1's house.

At the close of the prosecution's case, I found each one of the accused with a case to answer and accordingly placed them on their defence. All the accused elected to give sworn evidence and called one witness.



Accused number one was the first witness for the defence, **DW1**. A1 in his evidence in chief told the Court that he was an electronics technician who operated from Dyakanani area in Mchini compound. He informed the Court that on 12<sup>th</sup> May, 2016 while he was at his shop A3 took an HP laptop for repairs. A1 narrated that as he was in the process of repairing A3's laptop he was apprehended and taken to Chipata Central Police Station. He asserted that at the police station he was accused of having stolen the laptop and he was subjected to severe beatings. A1 testified that upon being interrogated he told the police that he had prior dealings with A3, PW3 and A2. A1 disclosed that he told the police that the laptop in question belonged to A3. He further stated that he transacted with PW3 who bought a radio from him. As regards his relationship with A2, A1 explained that he owed A2 the sum of K400. A1 went on to explain that he gave A2 a 51 inch Samsung television as a set off for the debt. A1 informed the Court that his explanation prompted the police to ask him to lead them to where the mentioned individuals could be located. A1 testified that PW3, A3 and A2 were subsequently picked up and detained at Chipata Central Police.

It was his further assertion that the police officers accused him of being involved in several capital offences. He said he was further tortured which resulted in him sustaining serious injuries. He was later taken to the hospital where Dr Mubale examined him. A1 produced the medical record as part of his evidence and was marked as exhibit "**D1**". In winding up his testimony A1 stated that



the finger and foot prints that were lifted from him did not match those that were lifted from the complainant's house.

In cross-examination, A1 denied having told the police officers that he was a businessman but stated that the police merely likened him to another businessman. A1 confirmed that he was a Malawian national and was in the Country for only a year prior to his arrest. When asked whether he had a work permit to substantiate his claims that he was operating a shop as an electronics technician, he stated that the documents were left at the police station. A1 conceded that PW5 and PW6 were not cross examined concerning any passport or work permit he alleged the police retrieved from him.

A1 further conceded that he was jointly convicted with A3 for the theft of the HP laptop which was stolen from Winners Chapel. In further cross examination A1 confirmed having led the police to the shop where A2 was found. He further stated that the T.V. that he gave to A2 was obtained from a Douglas. A1 asserted that he did not lead the police to the home of Douglas because he did not know it. The witness conceded that he did not lead the police to his shop where he used to repair and sell electronic gadgets. A1 declined to comment when he was asked if the T.V (P2) that was recovered from A2's home was the same item that was stolen from the complainant's home. A1 confirmed that no questions were put to PW3 in relation to his alleged detention at the police station.



Upon further cross-examination, A1 said that prior to his apprehension, he had never transacted with PW3. He denied hearing PW3 tell the Court that A3 apologised to him in his (A1's) presence and the police for having sold him the home theatre which was stolen property. When asked as to how he knew PW3's house if he did not take the police there, he said he saw PW3 come out of that house and PW3 said that was his house. That he knew that A3 rented at PW3's place as that was what the two told him when he was transacting with PW3 over the home theatre. He agreed that A3 was present when he (A1) was transacting with PW3.

A1 denied going to A2's father's house to pretend that A2 owed him for the TV to conceal the theft. When referred to D1 and asked if his medical history was solicited from him by the doctor, he said he did not tell the doctor anything as the police officer interjected. He reiterated that five police officers including PW5 and PW6 assaulted him using different instruments such as a fan belt and a metal bar which left him scarred after the wounds healed. He told the Court that A3 was also beaten.

In re-examination, A1 admitted that on 13<sup>th</sup> May, 2016 he was found with the laptop by the police and taken to the police station. He stated that the issue of the TV came in because the police had asked him to mention the people from whom he bought and sold things and those he did repairs for. He could not comment on whether P2 was found at A2's father's house or not. He maintained that the T.V. he gave A2 was a 51 inch Samsung television set.



The second defence witness, **DW2**, was **A2, Cornelius Mwanza Jnr** aged 18, of Mchini Compound. He informed the Court that he was a pupil in grade 9 at Lutembwe Basic School. In his testimony, A2 confirmed having been employed by PW1 to operate the Gambling Machines called Bonanza. He lived with his parents. It was his further evidence that he knew A1 who used to patronise their bar situated at his parent's house. A2 testified that sometime in 2016, A1 obtained Bonanza tokens on credit to the tune of K400 from him. He further testified that eventually A1 failed to settle the debt and he got his television set as a set-off.

A2 narrated that he was arrested by the police from his work place two days after getting the television from A1. It was A1's testimony that the said television, which was different from P2, was retrieved by the police from his parents' house. He was thereafter conveyed to the police station where he found A1 and A3. He explained that the police used threats and force to extract information regarding the robbery that was staged at the complainant's house. He said he narrated to the police how he acquired the television set from A1.

Under cross-examination, A2 reaffirmed knowing A1 prior to their arrests. A2 insisted that when he led the police to his house to retrieve the television set A1 was not present. He told the Court that when he took the television set home there was only his young sister at home. He stated that he was not using it as he just kept it in his bedroom.



In re-examination, A2 reiterated that he gave A1 casino tokens for K400 without him paying for them because he trusted that he would pay him when he had the money.

A3, **Patrick Miti**, aged 32, testified as the third defence witness, **DW3**. He told the Court that he was a farmer residing in Mchini compound. In his evidence in chief, he testified that around lunch time on 13<sup>th</sup> May, 2016 he was at his girlfriend's house when he was ambushed by police officers who apprehended him and searched the house. A3 told the Court that nothing was recovered from the house. He informed the Court that the police took him to a car where he found A1 and PW3 in handcuffs. The trio were then taken to Chipata Central Police Station. A3 told the Court that at the police station he was severely beaten. He explained that the police asked him how he knew A1 and PW3 and his response was that he knew A1 as a technician to whom he took his laptop for repair while PW3 was his landlord. In further testimony he stated that the police got finger and foot prints from him which when compared with those they uplifted from PW1's home they did not match. It was his further evidence that he was later subjected to an identification parade whilst draped in black clothing but no one identified him.

Concerning his alleged involvement in the sale of the home theatre to PW3, A3 testified that he merely brought A1 and PW3 together to transact. That this was after he went to A1's shop to repair the



laptop and A1 had advertised the home theatre for sale and being a tenant to PW3 he knew that PW3 was looking for a radio to buy. A3 disputed PW3's evidence that he apologised to PW3 in the presence of police officers for selling him a stolen property because the radio was not his. A3 also refuted PW3's evidence that he was there when PW3 transacted with A1 over the home theatre.

In cross-examination, A3 endorsed PW3's story of what transpired over the home theatre transaction. He stated that he lived at PW3's home for 3 months prior to the arrest and that their relationship was cordial. When further cross-examined, A3 conceded that it was the same HP laptop he said he took to A1 for repair over which he had already been convicted.

In re-examination, A3 stated that during the home theatre transaction between A1 and PW3 he was not present and that his version of the story was more truthful than PW3's.

The final witness for the defence, **DW4** was **Christopher Mwale**, aged 37, a reception officer at Chipata Central Prison. In his evidence in chief, he confirmed that A1 and A3 were lodged at Namuseche Prison in May, 2016. He told the Court that at the time the police lodged them at prison the two had wounds. DW4 informed the Court that the two accused were treated at Namuseche Clinic. He refuted any suggestion that the two could have been beaten within the prison facilities.



Under cross-examination, DW4 conceded that he did not see A1 and A3 the day they were brought to Namuseche prison as another warder just informed him of the accuseds' condition. He informed court that the prison had a Clinic where remandees and convicts are treated.

At the close of the trial, both sides filed written submissions. It was submitted by Legal Aid Counsel on behalf of the accused persons that the evidence against the accused persons was solely based on self-incrimination. It was contended that this included the alleged confessions and the alleged leading of the police to the recovery of the alleged stolen property. That the State alleged that A1 was apprehended over an HP laptop which was not connected to this case. And that suddenly A1 was alleged to have voluntarily admitted to committing the offence herein. It was argued that the alleged leading by A1 to A2 and A3 had not been proved by the prosecution to have been free and voluntary. In support of this submission, Counsel cited the case of **Major Isaac Masonga v the People**<sup>1</sup> in which it was held, *inter alia*, that:-

**"It is a well-established principal at law that a suspect who has to be interviewed by a person in authority has to be warned and cautioned before he makes any statement which may be produced in Court against him.**

**Every suspect has a fundamental right not to give evidence against himself unless he freely decides to do so.**

**Any fair or improper conduct by persons, other than police officers extracting evidence can lead to exclusion of evidence by the discretion of the Court."**



It was submitted that the police in this matter did not conduct their investigations in accordance with established principles of fair trial. It was pointed out that the police did not go with a search warrant to search A2 and no reason was advanced by the State as to why the police neglected to carry a search warrant (see *Section 358 of the Criminal Procedure Code, CAP 88, forms 6 and 7*). Further, that the police did not show A2's mother the T.V which was allegedly recovered from her house when she was present at the time of the search; that the police did not also call an independent witness during the search to confirm what exactly was recovered from that house (A2's). It was contended that as such the prosecution did not present any evidence to demonstrate that the T.V which was recovered from A2's house was the same T.V. which was produced before court as exhibit P2. Defence Counsel also submitted that the State did not bring before court the phone in which PW1 allegedly stored the serial number of his stolen T.V. And that the arresting officer, PW6, conceded that the T.V. box (P1) was not mentioned in his report to the officer in charge nor in any of PW1's statements to the police. Therefore, that there is a real possibility that the serial number which is contained in the phone which was not brought before court may be different from the one on P2. As authority, the case of **Kalebu Banda v the People**<sup>2</sup> was relied upon in which it was held that "*where evidence available only to the police is not placed before the court it must be assumed that, had it been produced it would have been favourable to the accused.*"



Counsel argued that further improper conduct by the police was through torture of A1 and A3 as there was strong and unshaken evidence of torture of A1 and A3 at the hands of the police ( see exhibit D1). That the two accused were treated for injuries and bruises and that DW4 confirmed that the injuries were on the accused persons' bodies at the time they were taken by the police to Namuseche State Prison.

The defence in its further submission stated that there was no proof that exhibit P2 was recovered from A2's house. It was contended that although illegally obtained evidence was admissible, there was a burden to prove that the piece of real evidence before Court was actually the one which was recovered from a suspect's house. That in *casu*, the description of P2 was not established at the point it was allegedly being recovered from A2's house. The case of **Liswaniso v the People**<sup>3</sup> was cited wherein it was held, inter alia, that:-

**"Apart from the rule of law relating to the admissibility of in voluntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an in admissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law)."**

It was contended that P2 which was recovered from A2's house had been disputed by both A1 and A2; on one hand, A1 claimed that he gave A2 a Samsung 51 inch T.V and on the other hand A2 stated that what he collected from A1 and what the police got from his house was a Samsung T.V which was much bigger than P2. On the



strength of the holding in **Mwewa Muroho v the People**<sup>4</sup> regarding the principle on the legal burden of proof which rests on the prosecution throughout the case, it was submitted that the prosecution had failed to prove that P2 was actually the same T.V that was recovered from A2's home as no connection had been established between P2 and the T.V that was collected from A2's house. In urging this court to exclude the evidence of leading, confessions and the recovery of a T.V owing to the prejudicial effect that outweighs the evidential value, the defence relied on the following authorities:-

- i) **R v John Kahyata**<sup>5</sup>
- ii) **Charles Lukolongo and Others v the People**<sup>6</sup> and
- iii) **Major Isaac Masonga v the People**

The case of **Maketo and 7 Others v the People**<sup>7</sup> was also cited in which it was held that:

**"An extra-curia confession made by one accused person incriminating other co-accused is evidence against himself and not the other persons unless those other persons or any of them adopt the confession and make it their own".**

It was thus submitted that the confession attributed to A1 could not be the basis upon which A2's or A3's guilt could be determined because such confessions were only evidence against A1 himself.



The defence further relied on the case of **The People v Hamainda**<sup>8</sup> in which the High Court held that:

**“Although a person can legally and properly be convicted upon his confession alone, this should only be done with great caution and when there has been some pointer in the evidence tending to confirm his guilt.”**

It was contended that there is no supporting evidence to suggest that any of the accused persons were at the scene of the crime or that they, in any way, participated in the commission of the alleged offence. It was argued that the evidence of a home theatre which A1 and A2 allegedly sold to PW3 was speculative because the full description of the said home theatre (in terms of its size, make and serial number) was not given to the Court. It was pointed out that PW1 had testified that he had a box in which he purchased the said home theatre at home but the police did not explain why they failed to show PW3 the said box for him to confirm whether or not the home theatre he allegedly purchased could fit therein or if there was any picture on the box, to ascertain whether or not there was any similarity between what appeared on the box and the home theatre which passed through his hands. It was contended that although PW3 testified that A3 apologised to him in the presence of the police for having sold him a stolen item, the full context under which he is alleged to have uttered those words is not known. It was argued that there is no evidence that A3 stated that the said item was stolen from PW1's house as the said home theatre had not been



linked to PW1 in any way. That there are a lot of inferences which can be made in relation to the origin of the said home theatre. It was pointed out that in his defence A1 testified that he has been repairing electronic gadgets and the Samsung T.V which he gave to A2 and the home theatre came into his possession by virtue of his business and he denied ever stealing the same.

The defence concluded that the prosecution had failed to prove its case against the accused persons beyond all reasonable doubt and urged the Court to acquit the accused.

In its submissions, the prosecution submitted that the evidence on record clearly showed that A1 led the police to A2 from whom P2 was recovered. That notwithstanding the alleged beatings on A1 as the reason A1 led the police to A2 from whom real evidence (P2) was recovered, this evidence is admissible, whether voluntary or not, as it was relevant to the matter. The case of **Charles Lukolongo and Others v the People**<sup>6</sup> was cited as authority in which it was held that:-

**“Real evidence which is relevant to a fact in issue is admissible notwithstanding that it is unfairly or illegally obtained.”**

On the denial by A1 and A2 that P2 was not the actual television set they exchanged, it was submitted that this hinges on the credibility of witnesses; that the unshaken testimony of PW5 and PW6 was that P2 was the same television set recovered from A2's home. It



was submitted that during their defence, A1 and A2 lamentably failed to show why PW5 and PW6 would falsely incriminate them in this matter as they both admitted that they were unknown to PW5 and PW6 prior to their apprehension on 13<sup>th</sup> May, 2016 and the police did not know of their relationship.

The prosecution further submitted that it is an odd coincidence that P2 was found with A1 an employee of the complainant (PW1) in this matter. That it was also an odd coincidence that A1 and A3 sold a home theatre (black and grey in colour) to an unknown person which fitted the description of the home theatre stolen from PW1's home. Further, that it was equally odd that when A3 led the police to the home of PW3, he apologised for having sold PW3 a stolen item. As authority on odd coincidences, the case of **Ilunga Kabala and John Masefu v the People**<sup>9</sup> was cited in which it was held 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."*

I was urged to convict each of the accused persons as the prosecution felt that it has proved its case against the three accused persons beyond reasonable doubt.

I have carefully considered the evidence before me. The offence with which the trio is arraigned is provided under section 294(1) of the Penal Code. This section states as follows:-



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

The offence of aggravated robbery is therefore proved if there was a theft accompanied with violence or threats of violence before, during or after the theft.

It is common cause from the evidence adduced before me that in the wee hours of 3<sup>rd</sup> May, 2016 PW1 was attacked at his home by approximately five bandits who took away several personal and household goods as well as money after breaking into his house and threatened to kill him with the implements they carried. He was ordered to show the robbers where the money was and as if that was not enough he was bundled into his own convenience room until they got all that they could from his home. It is also not in dispute that although PW1 had a look at his assailants, he clearly did not point at any of the accused persons as having been seen in his house on the fateful day.

What is to be decided in this matter is whether from the evidence adduced before me it can be safely concluded that the prosecution has discharged its burden of proof against each one of the accused



beyond all reasonable doubt. It is settled that none of the accused was seen at the scene of crime as the evidence on record shows. Therefore, the evidence before court is purely circumstantial.

I have found as a fact that what triggered this prosecution is an HP laptop which was found in the possession of A1 and A3. My duty is to evaluate what evidence is more credible between the prosecution's and the defence.

The prosecution's evidence was that arising from the laptop belonging to Winners' Chapel which was found with A1 and A3 and over which they had already been convicted in the Subordinate Court, A1 led the police to the recovery of a television set from A2 which PW1 identified as one of the properties stolen from his home during the robbery. For whatever reason A1 and A3 also sold a home theatre suspected to have been stolen to PW3. Although A1 and A2 claimed that the television set they transacted in is not what was produced before court (exhibit P2), I have no reason to doubt the prosecution's evidence that P2 was indeed stolen from PW1. PW1 clearly identified it through the serial number which was on the box (P1) which he had retained after the robbery.

I further believe that indeed P2 was the TV stolen from PW1's home because PW4, the father of A2 and who from the evidence appeared to know A1 very well did not dispute that P2 was retrieved by the police from his house. It was also curious as to why A1 would of all people in Chipata he could have sold or repaired items for simply



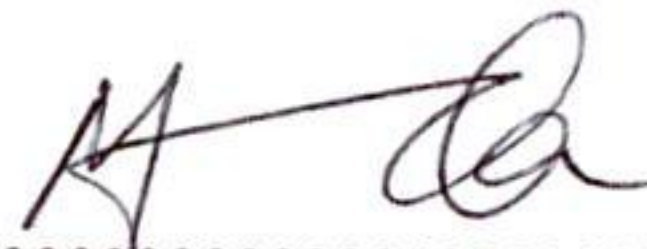
choose to take the police to A2 and A3 as persons he dealt with in the period prior to his arrest. This is certainly an odd coincidence. The inescapable inference I therefore, must draw is that the three accused were accomplices and formed a common intention to go and rob PW1. The prosecution's evidence was more credible and I have no reason to doubt it.

On the other hand, the evidence from the accused is very unreliable for the following reasons. A1 claimed to have been an electronics technician but failed to produce the work permit since he was Malawian; he did not even testify that he tried to take the police to his alleged shop in Dyakanani area of Mchini Compound and he did not refute the prosecution evidence that he was selling second hand clothes when he came to Zambia from Malawi. Further, it is unbelievable that A2 could give A1 tokens worth K400 (almost the entire cashing) without any payment and then A2 later collects a 51 inch Samsung T.V. which by my estimation cannot at all be valued at K500. A1 also said the T.V. he allegedly gave A2 had a broken LCD (screen) but this evidence did not come from A2 as all he said was that he kept it in the house. A1 and A3 also admitted that the HP laptop they were found with which A3 claimed was his but it turned out that it belonged to Winners' Chapel and the two have since been convicted over the same laptop provides evidence of bad character or disposition on the part of A1 and A3. This evidence also confirms that A3 was not a mere broker between A1 and PW3 for the sell of the home theatre but that A1 and A3 are partners in crime.



All in all, I am satisfied that because of the odd coincidences and inconsistencies in the defence, I am unable to tip the scale in their favour. On the other hand, the prosecution has adduced enough circumstantial evidence which in my considered view has taken the case out of the realm of conjecture and I have reached the ineluctable conclusion that the three accused persons were part of the common design to rob PW1 of his property and that force was used on him as it is clear that iron bars and machetes were used to induce fear in him. The number of assailants also proves that the theft from PW1 was with actual violence. I accordingly, find each one of the accused guilty and I convict them.

Delivered at Chipata in open court this 25<sup>th</sup> day of *April*, 2018



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**M. CHANDA**  
**JUDGE**