IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 60/2021

BETWEEN:

JACKSON SAKALA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Malila, Kaoma, and Chinyama JJS

On 13th July, 2021 and 7th September, 2021

For the Appellant: Mr. I. Yambwa - Legal Aid Counsel
For the Respondent: Mrs. M. Muyobwa Chizongo - State Advocate

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. George Nswana v The People (1988-1989) Z.R. 174
2. George Chileshe v The People (1977) Z.R. 176
3. Chabala v The People (1976) Z.R. 4
4. David Zulu v The People (1977) Z.R. 151
5. Saluwema v The People (1965) Z.R. 4
6. Dorothy Mutale and Richard Phiri v The People – SJ 51
7. Christpher Mubita and 4 others v The People – CAZ Appeal Nos. 137, 140, 141, 142, and 143 of 2019
8. Ilunga Kabala v The People (1981) Z.R. 102
9. Donald Fumbelo v The People (Appeal No. 476 of 2013)
10. Joseph Mulenga and another v The People (2008) Z.R. 1
11. Saidi Banda v The People (SCZ No. 30 of 2015)
12. Yotam Manda v The Attorney-General (1988-89) Z.R. 129
13. Rabson Chisenga v The People SCZ - Appeal No. 249 of 2017
14. R v Shemu Nyalongo (2 N.R.L.R. 136)
15. James Kunda v The People - SCZ Appeal No. 235 of 2013

Legislation referred to:

1. Penal Code, Cap 87 of the Laws of Zambia, sections 22, 200 and 294(1) and (2)

1.1 The appellant and one other person appeared in the High Court before Kondolo, J (as he then was) charged with aggravated robbery contrary to **section 294(1)** and murder contrary to **section 200** of the **Penal Code**, **Cap 87**. The two offences were allegedly committed on 30th April, 2012, at Lusaka.

1.2 The allegation in count one was that the appellant and his co-accused jointly and whilst acting together and whilst armed with an unknown object stole an assortment of items valued at K6,610.00 the property of Zhang Chao and that they threatened or used actual violence. In count two, they allegedly murdered Zhang Chao in the course of the robbery.

1.3 After the trial, the court convicted the appellant and sentenced him to death but acquitted his co-accused of both crimes.

2. Background facts and evidence in the High Court

2.1 We heard this appeal on the basis of the High Court judgment only because the original record purportedly went missing. From the judgment of the trial court, it is quite clear that the prosecution based its case mainly on the evidence of PWs 1, 2 and 3. PW1, a manager at Zhang Cheng Construction Company testified that he learnt of the murder of the deceased at the premises where they were carrying out construction works on 1st May, 2012 around 08:00 hours. He went to the crime scene and saw the deceased's

body covered in blood and there was blood on the ground. The windows and doors of the deceased's house were open, the room ransacked, and some tools were missing. He knew the missing items since they used to keep records and he described them.

2.2 Two days later, the police informed PW1 that they had arrested suspects and recovered some items. He identified the recovered items even if they had no special marks because he personally bought them from China and they were not available in local shops.

2.3 PW2 testified that on 1st May, 2012 about 11:00 hours, the appellant took to him a bag containing various items for safekeeping. He disclosed that a Chinese boss gave him some of the items while he bought others over a period of time. He asked him to sell one cutting machine, as he had no use for it. In the evening of the same day, the appellant and the police got back the items.

2.4 PW3, a police officer and PW4, scenes of crime officer confirmed that the deceased's body was lying in a pool of blood with deep cuts on the head and side of the chin and things in his room were scattered. PW1 described the missing items to PW3 who managed to obtain information from an informant that two former employees of the company were seen carrying a brown suitcase. This led to the arrest of the appellant and his co-accused and in turn, the appellant led the police to the recovery of the stolen items from PW2.

2.5 In his defence, the appellant agreed that he had worked for the company before they were put on forced leave on 5th April, 2012 when one of their number stole company money and he was familiar with the offices in Kabulonga. However, he denied any involvement in the crimes. He said he learnt of the deceased's death on 29th April, 2012 from a friend and he conveyed the news to his co-accused. Later, the friend led the police to him and they retrieved the bag he had taken to PW2 for safekeeping.

2.6 He said he told PW2 that a Chinese man gave him the building tools while he bought the other items and he asked him to sell the cutting machine. He said a person whose name he did not know gave him the building tools as payment for some work he did. He could prove that the items were his as he changed the start button on the big grinder and the grinding pin on the small cutter was a bit finished.

3. Consideration of the matter by the High Court

3.1 The trial judge approached the matter from the position that it was not in dispute that an aggravated robbery occurred at Zhang Cheng Construction Company during the course of which the deceased was murdered. That the appellant did not dispute that he led the police to PW2 where he had taken a suitcase for safekeeping; and that the appellant and PWs 2 and 3 had confirmed the contents of the bag as listed at page 11 of the High Court judgment.

3.2 The judge found that the listed items were the same items displayed in court and identified by PW1 as the items stolen during the aggravated robbery in which the deceased was murdered. He acknowledged that PW1 was able to identify the items even if they had no special identification marks as he had personally purchased them from China and they were not available in Zambian shops.

3.3 The judge was alive to the fact that there was no eyewitness to the commission of the crimes and that the only thing that connected the appellant to the crimes was the claim by PW1 that the items the appellant took to PW2 for safekeeping were the same items stolen during the robbery. The judge was also alive to the appellant's claim that the items were his; he had receipts and there were identification marks on the big grinder and on the small cutter.

3.4 However, the judge found it hard to believe the appellant's story because it would be an unusual coincidence that he took items for safekeeping to PW2 that were exactly similar to the stolen items. The judge found PW1 to be a credible witness and his evidence concerning his description of the stolen items unchallenged.

3.5 The judge noted that despite the appellant claiming that he bought the items secondhand, he did not say that he offered to take the police to the places he allegedly bought the items or did the piecework nor did he cross-examine any of the police witnesses on that issue.

3.6 The judge also disbelieved the appellant's claim that he had receipts and only forgot to mention to PW2 and considered that an afterthought because neither the police witnesses nor PW2 were cross-examined about the alleged receipts. Therefore, he found as a fact that the items the appellant took to PW2 were the items stolen from the deceased the night he was murdered.

3.7 The judge noted that the appellant had recent possession of stolen items but had not attempted to explain how they came into his possession other than simply claiming that they were his. Based on the cases of **George Nswana v The People**[1] and **George Chileshe v The People**[2], the judge discounted the possibility that the appellant might have received the items from a third party especially that he had not raised such defence, which placed him at the scene as a willing participant in the two crimes.

3.8 The judge was satisfied that this was the only inference to be drawn from the evidence and whether it was the appellant, some other people, or a person he might have been with who delivered the fatal blows was irrelevant. He observed that in terms of **section 22** of the **Penal Code** all participants in the commission of an offence do so with a common purpose and are equally culpable. He concluded by finding that the prosecution had proved its case against the appellant beyond reasonable doubt on both counts and convicted him. As we have said he sentenced the appellant to death.

4. Appeal to this Court and arguments by the parties

4.1 Unhappy with his conviction, the appellant filed this appeal on two grounds of appeal. In the first ground, the allegation is that the trial judge erred in law and in fact, when he convicted the appellant on circumstantial evidence that did not meet the required standard. In the second ground, the assertion is that the judge convicted the appellant on insufficient evidence that did not justify the standard of proof being beyond reasonable doubt.

4.2 In support of the first ground, Mr. Yambwa, learned counsel for the appellant argued first, that PW1 who claimed to have bought the items from China provided the court with neither receipts nor serial numbers. Secondly, that there was nothing to show that the missing items were not available in local shops as they were specially manufactured for the company or were of a special make and for that reason, PW1 had failed to prove ownership of the items.

4.3 Counsel quoted the cases of **David Zulu v The People**[3] and **Chabala v The People**[4] and submitted that the circumstantial evidence did not take the case out of the realm of conjecture and that the appellant's explanation as to how he acquired the items was reasonable, so, guilt was not the only inference from the case.

4.4 The core of counsel's submission in ground two is that being armed with an offensive weapon is one of the ingredients of the offence of aggravated robbery and no such weapon or instrument was

recovered from the appellant that he might have used. Therefore, the respondent could not have discharged the burden beyond reasonable doubt and there is nothing on record to show that the appellant was anywhere near to the scene of crime.

4.5 Citing the cases of **Saluwema v The People**[5] and **Dorothy Mutale and another v The People**[6] counsel insisted that in the absence of proof of ownership of the items, guilt was not the only inference to be drawn from the evidence. He urged us to allow the appeal.

4.6 In contrast, the learned State Advocate, Mrs. Chizongo supported the appellant's conviction. She contended in response to ground one that it is not always that serial numbers or receipts should be produced to prove ownership of goods stolen beyond reasonable doubt as the circumstances of each case would show what is necessary. To support this proposition, though for persuasive purposes only, she quoted a text from the Court of Appeal case of **Christpher Mubita and 4 others v The People**[7].

4.7 The gist of her submission is that PW1 sufficiently described the items, he was familiar with them since he was the one who purchased them and was able to identify them, and the items fit the exact description of the goods produced in evidence. She argued that it was an 'odd coincidence' that the goods stolen and properly described by PW1 were the same as those the appellant gave to PW2 for safe keeping barely a day after the robbery.

4.8 Citing the case of **Ilunga Kabala and another v The People**[8] counsel submitted that the appellant's explanation, taking into account other circumstances could not reasonably be true.

4.9 She argued that while the appellant testified that he had receipts of the items, and actually told PW2 about the receipts and gave them to him; it was PW2's evidence that the appellant told him that his Chinese boss gave him some of the goods, and yet the appellant did not cross-examine PW2 on that material evidence.

4.10 Further, counsel argued, if the explanation were true, the police would have found the receipts in the bag as it was recovered the same day and the appellant did not provide any details to enable the police to conduct more investigations to ascertain his claim and he only revealed that he had receipts during his defence and not during the prosecution case.

4.11 Citing the cases of **Donald Fumbelo v The People**[9] and **Joseph Mulenga and another v The People**[10], she argued that the judge was right to treat the appellant's testimony as an afterthought, to place less weight on it and to disbelieve him. In addition, PWs 1 and 2 were reliable witnesses and there was no evidence of bias or possible bias for them to implicate the appellant falsely.

4.12 In her response to ground two, Mrs. Chizongo submitted that there is circumstantial evidence such as the deep cuts the deceased sustained to his head and cheek and the nature of those injuries

that led to the inference that the robbers used an offensive weapon. According to counsel, even if the appellant had acted alone, all the ingredients of the offence were met but the trial court opined that the appellant could not have committed the offence alone and so the acquittal of his co-accused did not exonerate him. Based on the case of **Saidi Banda v The People**[11], counsel concluded that the circumstantial evidence did take the case out of the realm of conjecture and led to an inference of guilt as the only reasonable inference. She implored us to dismiss the appeal for lack of merit.

5. Our consideration of the appeal and decision

5.1 We have considered the grounds of appeal and the arguments by counsel on both sides. It is quite clear that recent possession of stolen property by the appellant occupied a central position in this matter there being nothing else to connect him to the crimes. There was no murder weapon or evidence of identification.

5.2 The issue in ground one is whether an inference of guilt was the only inference the trial judge could draw on the circumstantial evidence that was available to him. The appellant's argument is that in the absence of proof of ownership of the items, guilt was not the only inference the court could draw from the evidence and he gave a reasonable explanation as to how he had acquired the items. The

respondent's position is that guilt was the only reasonable inference and that the appellant's explanation could not reasonably be true.

5.3 In **George Nswana v The People**[1], we affirmed the principle in **Yotam Manda v The Attorney General**[12] that where a finding of guilt is dependent upon the drawing of an inference from the possession of recently stolen property, the inference will not be drawn unless it is the only one reasonably open on the facts.

5.4 In that regard, any explanation offered by the accused must be considered and where the explanation turns out to be a lie or one that could not reasonably be true, the court is still obliged to consider what other inferences, if any, could reasonably be drawn, taking care that the court does not in the process indulge in insupportable speculation. If the facts would justify the drawing of two or more equally, reasonable inferences, it is customary in a criminal case to adopt that, which is more favourable or less disadvantageous to the accused.

5.5 In **Rabson Chisenga v The People**[13], we said that the onus is on the accused to explain how he came by the stolen property and the onus is discharged if the explanation given is found to be reasonably true. We reiterated that where an accused gives an explanation, it is the duty of the court to consider whether the explanation offered might reasonably be true. The court will take into account the totality of the evidence to see whether the

explanation is displaced and supports the inference of guilt; as the only inference that can be drawn on the facts or else, the explanation must be accepted even if it is not necessarily true.

5.6 In this case, the trial judge was alive to the fact that the evidence against the appellant was circumstantial. However, he concluded that the only inference he could draw from the evidence before him was that the appellant committed the crimes because he was satisfied, on the evidence of PWs 1 and 2 that the appellant had recent possession of items stolen during the aggravated robbery.

5.7 The trial judge did consider the appellant's explanation of how he came into possession of the items and whether he could have come by the items because of being a receiver of stolen property other than a robber. The judge discounted both the explanation and the possibility that the appellant might have received the items from a third party particularly that he had not raised such defence.

5.8 We are satisfied that on the totality of the evidence before him, the learned trial judge was entitled to come to the conclusion that the explanation given by the accused for his possession of the stolen property was not reasonable and supported the inference of guilt as the only inference he could draw on the facts of the particular case.

5.9 We agree entirely with the judge that it was an odd coincidence that the appellant took items to PW2 for safekeeping that were exactly like the items stolen from the deceased the previous night. As Mr.

Yambwa conceded at the hearing of the appeal, the appellant did not even try to explain, why he had to take the items to PW2 for safekeeping the morning after the robbery, if the items were his.

5.10 The trial judge was right to reject as an afterthought, the appellant's claim that he had receipts for the stolen items especially, as the judge noted, he did not attempt to lead the police to the sources of the items he claimed were his and the prosecution witnesses were not cross-examined on the supposed receipts. Certainly, if the receipts were in the bag or suitcase together with the items, the police would have found them and exonerated the appellant.

5.11 Besides, he mentioned the receipts for the first time in his evidence in defence. We adopt what we said in **Donald Fumbelo v The People**[9] and **Joseph Mulenga and another v The People**[10] that an accused must cross-examine witnesses whose testimony contradicts his version on a particular issue. When he raises his own version for the first time during his defence, it raises a very strong presumption that the version is an afterthought. Hence, less weight will be attached to such version and in a contest of credibility against other witnesses, the accused is likely to be disbelieved.

5.12 Further, as argued by Mrs. Chizongo, the appellant admitted that he told PW2 that a Chinese boss gave him the building tools but his evidence as captured in the High Court judgment does not show

that he mentioned the name of the boss or the tools the boss gave him of the items identified by PW1.

5.13 In our view, this strengthens the finding by the trial judge that the items the appellant had in his possession were stolen from the deceased the night he was killed. We reiterate our holding in the case of **Ilunga Kabala v The People**[8] that odd coincidences, if unexplained may be supporting evidence and an explanation, which cannot reasonably be true is in this connection no explanation.

5.14 In any case, as Mrs. Chizongo argued, the learned trial judge found PW1, who identified the stolen items, to be a credible witness. Mr. Yambwa is right that the prosecution was required to prove the ownership of the stolen items beyond reasonable doubt and that there is nothing in the High Court judgment to show that the items were not available on the local market.

5.15 However, the trial judge believed PW1's identification of the stolen items even if they had no special marks and even if he had no receipts or company record because he personally procured them from China and he was very familiar with them as they belonged to the company. The judge was satisfied with PW1's evidence of the description of the items and noted that the evidence was uncontested and that PW1 was not accused of concocting the list of the items. We wish to add, that PW1 described the stolen items to

the police before the police recovered the items and the items recovered fit that very description.

5.16 The trial judge had the benefit to hear the witnesses and to assess the credibility of their evidence, which benefit we did not have. In fact, we approve of the Court of Appeal decision (Mchenga, DJP) in the case of **Christpher Mubita and 4 others v The People**[7] that it is not in all cases that property will only be said to have been properly identified, when a serial number, receipt or inventory is used. The amount of evidence required to discharge such burden, is dependent on the circumstances of a particular case.

5.17 We wish to point out further that in fact, this appeal is attacking findings of fact made by the trial judge. It is trite that an appellate court will not interfere with findings of fact made by a trial court unless the findings of fact are perverse and based on a misapprehension of facts and we do not lightly interfere with findings of fact based on the credibility of witnesses. We reject the contention that PW1 did not prove ownership of the stolen items.

5.18 As we conclude, on the first ground of appeal, we are satisfied that the circumstantial evidence met the requisite standard and that there were suspicious features surrounding this case, from which the trial court could draw an inference that the appellant was not in innocent possession but was guilty of robbery. The appellant even claimed, in an effort to distance himself from the crimes that he

learnt of the death of the deceased on 29th April, 2012, a day before the robbery and murder. We find no merit in this ground of appeal.

5.19 We come now to the second ground of appeal. The question is whether the appellant was convicted on insufficient evidence that did not meet the standard of proof. The main grievance is that no offensive weapon or instrument was recovered from the appellant that he might have used during the robbery.

5.20 Of course, being armed with an offensive weapon or instrument as defined in **section 4** of the **Penal Code** is an essential element of the offence of aggravated robbery under **section 294(1)**, particularly where one person is alleged to have committed the offence. However, two or more persons could commit an aggravated robbery although they were not armed with an offensive weapon or instrument.

5.21 In the present case, the particulars of the offence alleged that the appellant acted with one other person and that they were armed with an unknown object. The fact that the deceased sustained deep cuts to the head and to the cheek was not in dispute. Although the trial judge did not make any finding on the nature of the injuries sustained by the deceased, we agree with Mrs. Chizongo that from the nature of the injuries, there could have been no doubt that the robbers used an offensive weapon or instrument.

5.22 It would have been prudent for the charging officer or the respondent to disclose in the particulars of the offence that the

robbers were armed with an offensive weapon or instrument whether or not that weapon or instrument was known or recovered.

5.23 Nevertheless, this omission was not fatal to the prosecution case since the trial judge was satisfied that the appellant acted with some other person, persons or people to commit the crimes and the occurrence of the aggravated robbery was not in dispute. Therefore, the non-recovery of the offensive weapon from the appellant and the acquittal of his co-accused did not absolve him from his crimes. Suffice to say that it is not always that the police will recover the offensive weapon or instrument used to commit a robbery.

5.24 We are satisfied yet again that the evidence before the learned trial judge was sufficient to found a conviction and that the prosecution had proved its case against the appellant beyond reasonable doubt. The second ground of appeal is equally devoid of merit.

6. The sentence

6.1 Lastly, we are constrained to deal with the issue of sentence although there is no appeal against sentence because the trial judge passed one sentence after convicting the appellant on both counts.

6.2 In **R v Shemu Nyalongo**[14], Law, C.J held that where an accused is found guilty on more than one count, a separate sentence should be passed in respect of each count. We totally agree with this principle of law and the Court of Appeal applied it in the **Christpher Mubita**

and 4 others v The People[7]. Therefore, the learned trial judge, in the present matter should have passed two separate sentences, for the aggravated robbery and for the murder.

6.3 We have considered whether we should extend the single death sentence passed by the trial judge, which was the proper sentence for the offence of murder, to the offence of aggravated robbery. However, in the case of **James Kunda v The People**[15], we said that capital punishment cannot be imposed for an aggravated robbery where a firearm is not used unless the particulars of offence indicate that grievous bodily harm was caused during the robbery.

6.4 In this case, although the deceased sustained deep cuts to his head and to his cheek and he actually died from those injuries, the particulars of the offence did not or omitted to disclose that grievous bodily harm was caused to the deceased during the aggravated robbery. Therefore, the appellant was not put on notice and for that reason; we cannot pass the death sentence for the offence of aggravated robbery. However, because of the seriousness of the injuries inflicted on the deceased, we are satisfied that life imprisonment would be the appropriate sentence.

7. Conclusion

7.1 In the event, we dismiss this appeal for lack of merit; uphold the conviction on both counts and the sentence of death on count two.

7.2 In addition, we sentence the appellant to life imprisonment on count one.

M. MALILA
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE