

IN THE COURT OF APPEAL OF ZAMBIA Appeal No.49, 50/2022
HOLDEN AT KABWE AND NDOLA
(Criminal Jurisdiction)

BETWEEN:

KELLIES KABASO

ISAAC NJOVU



1ST APPELLANT

2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga, JJA

ON: 12th October 2022 and 15th November 2023

For the Appellant: L. Tembo-Tindi, Legal Aid Counsel, Legal Aid Board

For the Respondent: Y.M. Banda, State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. George Musupi v The People [1978] Z.R. 271
2. George Nswana v The People [1988 - 1989] Z.R. 174
3. David Zulu v. The People [1977] Z.R. 151
4. Katebe v. The People [1975] Z.R. 13
5. Darius Sinyinza v. The People, SCZ Judgment No. 2 of 2009

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia

INTRODUCTION

- [1] The appellants appeared in the High Court (Lamba, J.), charged with the offences of aggravated robbery and murder contrary to **Sections 294(1) and 200 of the Penal Code**, respectively.
- [2] They denied both charges and the matter proceeded to trial.
- [3] At the end of the trial, they were both convicted for committing both offences.
- [4] They were each condemned to suffer capital punishment for the murder, and each sentenced to 15 years imprisonment, for the aggravated robbery.
- [5] They have both appealed against the convictions.

EVIDENCE BEFORE THE TRIAL JUDGE

- [6] On the 15th of July 2019, in the evening, Frank Ntalasha closed his shop which he operated as a grocery store and studio, in Kitwe's Luangwa Township, and left for home.

[17] At that time, he left Gift Kunda, the caretaker, in the shop.

[18] When he returned the following morning, Frank Ntalasha found Gift Kunda dead and that various properties, which are the subject of the aggravated robbery charge, had been stolen from his shop.

[19] Earlier that morning, at about 05:15 hours, George Mwewa, a minibus driver, was stopped by 3 men who included the appellants. They loaded 10 bags of mealie meal, packets of sugar and other items on to his minibus and he drove them to Mulenga Compound.

[10] The same morning, the two appellants approached Lewis Chanda Chileshe with an amplifier stolen from Frank Ntalasha's shop and pledged it as security for a loan.

[11] That morning, they also approached Esther Mbale and pledged a laptop computer, stolen from the same shop, as security for a credit.

[12] On the same morning, the appellants approached Joyce Twanyambi and sold her packets of sugar.

[13] The duo also approached Richard Mumba the same morning and left a speaker, monitor, a home theatre, a black woofer and sound control mixer, for safe

keeping. These items were also stolen from Frank Ntalasha's shop.

[14]When a post-mortem was conducted on the body of Gift Kunda, the pathologist found that a deep piercing wound to the skull, had caused his death. The pathologist opined that a sharp instrument was used to cause the injury.

[15]George Mwewa, the minibus driver, was detained by the police for transporting goods stolen during the robbery.

[16]There was also evidence from Inspector Morgan Njobvu, that the appellants led the police to the recovery of the stolen property from the various places where it had either been sold, pledged or left, for safe keeping.

[17]In their defences, the appellants denied killing Gift Kunda or selling the stolen property. They also denied leading the police to the recovery of the stolen property.

FINDINGS BY THE TRIAL JUDGE

[18]The trial Judge concluded, on the basis of the injuries Gift Kunda suffered, that the persons who inflicted the injuries on him, had *malice aforethought* and as such, that he was murdered.

[19]She accepted the prosecution evidence that the recovered property was stolen from Frank Ntalasha's shop on the night Gift Kunda spent the night in the shop.

[20]The trial Judge deduced that appellants were implicated by circumstantial evidence.

[21]They led the police to the recovery of the property that was stolen from Frank Ntalasha's shop on the night Gift Kunda was murdered.

[22]She noted that the persons from whom the stolen property was recovered were suspect witnesses on account of being found in possession of stolen property.

[23]She ruled out the possibility of false implication, having found no basis on which the witnesses could have falsely incriminated the appellants.

[24]The trial Judge concluded that the only inference that could be drawn on the evidence before her, was that the appellants murdered Gift Kunda because they went around selling the stolen property so soon after the robbery.

GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

[25]The sole ground of appeal is that an inference of guilty, is not the only inference that could have been drawn on the evidence against the appellants.

[26]In support of the sole ground of appeal, it was pointed out that the case against the appellants was anchored on the evidence of suspect witnesses.

[27]The witnesses were suspect because they were found with stolen property. In the case of George Mwewa, he was detained by the police in connection with the robbery.

[28]The case of **George Musupi v. The People**¹ was referred to and it was submitted that in the circumstances, there was a danger of the appellants being falsely implicated.

[29]Counsel also referred to the case of **George Nswana v. The People**² and submitted that it is possible that

the appellants were mere receivers of the stolen property. That being the case, an inference of guilty is not the only inference that could have been drawn on the evidence that was before the trial Judge.

[30] In conclusion, counsel submitted that since more than one inference can be drawn on the evidence that was before the trial Judge, the threshold set in **David Zulu v. The People**³, for a conviction being based on circumstantial evidence, was not met.

ARGUMENTS AGAINST THE SOLE GROUND OF APPEAL

[31] In response to the sole ground of appeal, it was submitted that there was no basis on which the trial Judge would have ruled that the prosecution witnesses could have had a motive to falsely implicate the appellants.

[32] It was also argued that an inference that the appellants were the persons who murdered Gift Kunda, was warranted because the appellants failed to render an explanation of how they came into possession of the stolen property, so soon after it was stolen.

CONSIDERATION OF THE APPEAL AND DECISION OF COURT

[133] It is common cause, that other than the owner of the stolen property and the police officers, all the other witnesses against the appellants, were suspect witnesses.

[134] They were suspect on account of being receivers of the stolen property, and in the case of George Mwewa, because he was detained in connection with the robbery.

[135] It is settled law that a person cannot be convicted on the evidence of a suspect witness, unless such evidence is corroborated. It is also settled law, that in certain circumstances, it is possible to convict on the uncorroborated evidence of such witnesses where there are "special and compelling grounds".

[136] In this case, the trial Judge recognised that the witnesses were suspect and went on to exclude the danger of false implication on the basis that there was no reason why they could have falsely accused the appellants as being the persons who pledged or sold them, the stolen property.

[37] In effect, the trial Judge found that there were special and compelling grounds. This deduction is in line with the decision in the case of **Katebe v. The People**⁴, where it was held that the absence of a motive to falsely incriminate, can be a special and compelling ground.

[38] As we indicated earlier on, other than George Mwewa who was suspect on account of being detained, the others were suspect because of being found with the stolen property. As it turned out, it is the appellants who led the police to those witnesses.

[39] In effect, it is the appellants who led to the discovery of these witnesses and the recovery of the stolen property.

[40] The trial Judge, was, in the circumstances, entitled to come to the conclusion that the witnesses had no motive for falsely incriminating the appellants because the appellants are the ones who led the police to where they had sold or pledged the stolen property.

[41] Further, in the case of **Darius Sinyinza v. The People**⁵, it was held that suspect witnesses can

corroborate each other if their reason for being suspect is different.

[42] While the other witnesses were suspect because they were found with stolen property, George Mwewa was suspect because he was detained in connection with the robbery. Since George Mwewa and the other witnesses were suspect for different reasons, his evidence that the appellants loaded stolen property into his minibus, is corroborated by the evidence of those who were found with the stolen property.

[43] It is corroborated in the sense that soon after he transported the stolen property they were carrying, they sold or pledged some other property that had been stolen from the same place.

[44] In the circumstances, we find that the trial Judge cannot be faulted for accepting the evidence of the witnesses that it is was the appellants who took the stolen property to them. If that was not the case, one would ask how they would have known where the stolen property was?

[45] As regards the argument that it is possible that the appellants could have bought the stolen property and

not necessarily stolen it, nearly all the stolen property was sold or pledged to the witnesses by the appellants, the morning after the robbery.

[46] If they were not involved in the robbery, it would be an odd coincidence that they ended up being in possession of all the property stolen in the robbery. Is it possible that the robbers would have sold the stolen sugar and millie meal to them before 05:00 hours that morning, to enable them hire George Mwewa transport it at around 05:15 hours?


[47] It is our view that the decision in the case of **George Nswana v The People**², is inapplicable to the circumstances of this case. The appellant's possession of the stolen property was so recent that the possibility of them buying the stolen property early that morning was so remote.

[48] We find no merit in the sole ground of appeal and we dismiss it.

VERDICT

[49]The sole ground of appeal having been dismissed this appeal fails.

[50]We uphold their convictions for both counts and the sentences imposed on them.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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F.M. Chishimba
COURT OF APPEAL JUDGE



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K. Muzenga
COURT OF APPEAL JUDGE