

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO 102,103,104/2023

HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN

MASHATI CHOLA

1ST APPELLANT

SAMSON PHIRI

2ND APPELLANT

BONIFACE MWABA

3RD APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Ngulube, Muzenga and Chembe, JJA

On 13th August 2024 and 20th August 2024

**For the Appellants : Mrs. Mary Mulanda Banda- Legal
Aid Counsel, Legal Aid Board**

**For the Respondent : Ms L. Zunduna –Senior State
Advocate, National Prosecution
Authority**

JUDGMENT

CHEMBE, JA delivered the judgment of the Court

Cases referred to:

1. *Chiyovu Kasumu v The People* (1978) ZR 252
2. *Major Isaac Masonga v the People* (2009) SCZ Judgment No. 24
3. *Latins Lungu v The People* SCZ Appeal No.35 of 2018
4. *Jack Maulla and Asu Kile Mwapuki v The People* (1980) ZR 199 (SC)
5. *Phiri and others v The People* (1973) ZR 49
6. *Saidi Banda v The People* SCZ Judgment No. 144 of 2015
7. *Bwanausi v The People* (1978) ZR 103
8. *Chabala v The People* (1976) ZR 4
9. *Saluweme v The People* (1965) ZR 4
10. *Haonga v The People* (1976) ZR 124
11. *Peter Yotamu Hamenda v The People* (1977) ZR 184 (S.C)
12. *Elias Kunda v The People* (1980) ZR 10
13. *Martin Mupeta and Another v The People* SCZ 137/2012
14. *George Nswana v The People* SCZ Appeal No. 171 of 2015
15. *Ilunga Kabala and John Masefu v The People* (1981) ZR 10
16. *Sevelino Zulu and Another v The People* CAZ Appeal No. 123-124/2021
17. *David Zulu v The People* (1977) ZR 51
18. *Salton Banda v The People* SCZ Appeal No 137 of 2018
19. *Kambafwile v The People* (1972) ZR 242
20. *Mambwe v The People* SCZ Judgment No. 8 of 2014

1.0 INTRODUCTION

- 1.1 The Appellants were jointly charged with two counts of aggravated robbery contrary to section 294(1) of the Penal Code.

- 1.2 The particulars of offence in the first count were that on 11th April 2022 at Ndola, the 1st Appellant (Mashati Chola) and the 2nd Appellant (Samson Phiri) jointly and whilst acting together did rob Steven Ngandwe of 1 motor vehicle, 1 cellphone and K200.00 cash together valued at K41,800.00 the property of Steven Ngandwe and at or immediately before or after the time of such robbery did use threaten to use actual violence to the said Steven Ngandwe in order to obtain or retain the thing stolen or prevent or overcome resistance to the said property being stolen.
- 1.3 The particulars in the second count were that on 30th April 2022 at Ndola the 1st, 2nd and 3rd Appellant (Boniface Mwansa) jointly and whilst acting together did rob Josephat Phiri of 1 motor vehicle and 4 motor vehicle tyres altogether valued at K47,300.00 the property of the said Josephat Phiri and at or immediately before or immediately after the time of such robbery did use or threaten to use actual violence to Josephat Phiri in order to obtain or retain the things stolen or prevent or overcome resistance to said property being stolen.

1.4 They were tried and convicted on the second count by Judge D. Musonda and were each sentenced to 20 years imprisonment with hard labour. The 1st and 2nd Appellants were acquitted of the charges under count one.

2.0 THE EVIDENCE IN THE COURT BELOW

2.1 The prosecution's case was that PW2, Josephat Phiri, worked as a taxi driver and operated a Toyota Carib registration number ACL 3856. The vehicle was owned by Mr Haggai Maluzi Hangoma. There was evidence that on 30th April 2022, around 22 hours, he was hired by two men from Mulungushi bus station to Itawa.

2.2 When he got to Itawa, the man who was seated in the passenger seat produced a gun and asked him to exit the vehicle. The man who had sat at the back got out of the vehicle and took over the driver's seat. The two men drove away. The matter was reported to Central Police Station.

2.3 There was evidence that following a tip that the stolen vehicle was being dismantled in Masala, the police went to the 2nd Appellant's house. They found the Appellants there with the

stolen vehicle which was partially dismantled. The 2nd Appellant was shot as he fled from the scene. A toy pistol was recovered from the 1st Appellant's bedroom. The 1st and 3rd Appellants were apprehended. The following day the 2nd Appellant who was injured was apprehended. They were all subsequently charged with the subject offence.

- 2.4 On 1st May 2022, Josephat Phiri was informed that the vehicle had been recovered. When he went to see the vehicle, he observed that it had been partly dismantled with the engine, the fenders and number plates having been removed.
- 2.5 The evidence of the 1st Appellant was that on 1st May 2022, he received a call from 2nd Appellant who asked him to go and assist him resolve a problem. When he got there, the 2nd Appellant explained that he had an issue with a client who had borrowed some money. During the conversation, they were joined by the 3rd Appellant who was a mechanic. He later saw people on the wall fence brandishing guns.
- 2.6 Shots were fired and they were ordered to lie down. The police then proceeded to physically assault the Appellants. They were

subsequently detained. The following day they were informed that they were apprehended in connection with theft of a vehicle. He denied that a toy pistol was recovered from his bedroom. He denied any involvement in the robbery.

2.7 The 2nd Appellant told the Court that he knew PW2 as Richard Banda who was his regular taxi driver. His evidence was that PW2 borrowed money from him on 18th March 2022. PW2 pledged 4 tyres and a white book as security for the loan. The following day he collected the white book. On 18th April 2022, he hired PW2 to take him to Chifubu and along the way PW2 offered to sell him the vehicle he was driving at a cost of K20,000.00 due to financial difficulties he was facing.

2.8 His further evidence was that on 30th April 2022 he called PW2 to go and collect the money for the vehicle. PW2 drove to his house and he paid him K12,000.00. An argument ensued over the balance due and PW2 cancelled the sale and offered to pay back the K12,000.00 which he had left at home. The 2nd Appellant detained the vehicle while PW2 left in anger. He did

not return and the next day the 2nd Appellant called the 1st Appellant who was the chairman to inform him about the issue.

2.9 When he was narrating what had transpired to the 1st and 3rd Appellants, a person climbed over the wall fence and shot him. He lost consciousness and when he woke up in hospital, he was in handcuffs. He was later informed that he had stolen a motor vehicle from PW2. The photocopy of the white book which was in his custody was taken by the police and thrown away. He told the Court that he was taken to the clinic in the Toyota Carib. He admitted that he did not get the NRC for Richard Banda when he bought the vehicle.

2.10 The 3rd Appellant's evidence was that on 1st May 2022 he had arranged to go to church with the 1st Appellant. When he went to his house, he was informed that the 1st Appellant had gone to the 2nd Appellant's house. He decided to follow him there.

2.11 When he got there, he found the 1st Appellant with the 2nd Appellant. As soon as he arrived there, people with guns jumped over the wall fence and started beating the Appellants. They were subsequently taken to the police station. He later

learnt that he was detained as a suspect in connection with a case of robbery of a vehicle.

2.12 The 3rd Appellant admitted having seen the vehicle in issue at the 2nd Appellant's home. He maintained that the vehicle had been intact but when it was produced in Court, it had been tampered with.

3.0 FINDINGS OF THE COURT BELOW

3.1 The learned trial Judge accepted the prosecution's evidence that the Appellants were found dismantling the stolen vehicle at the home of the 2nd Appellant a few hours after it was reported stolen. He rejected 2nd Appellant's version that the car was sold to him by PW2 because PW2 and PW5 were not cross examined on the issue.

3.2 The trial Court also found that the doctrine of recent possession applied as the Appellants who were found in possession of the vehicle a few hours after it was stolen and therefore guilty knowledge could be inferred that they had stolen it. The Court concluded that were no other reasonable inferences that could be drawn from the facts other than that the Appellants stole the

vehicle from PW2. All the Appellants were found guilty of aggravated robbery and sentenced to 20 years imprisonment with hard labour.

4.0 THE APPEAL

4.1 Aggrieved with the decision of the Court below the Appellants launched this appeal and raised the following ground:

The Learned trial Court erred in law and in fact when the Court found that the prosecution had proved its case beyond reasonable doubt when the evidence fell short.

5.0 ARGUMENTS IN SUPPORT

5.1 In the arguments in support of the appeal, the Appellants challenged the investigating officer's failure to lift finger prints from the toy gun recovered from the 1st Appellant's home. They charged that there was dereliction of duty by the officer in that regard which may have prejudiced the Appellants who could have been exonerated by the findings. In support of the argument, we were referred to the cases of ***Chiyovu Kasumu v***

***The People*¹, *Major Isaac Masonga v the People*² and *Latins Lungu v The People*³.**

5.2 The Appellants also submitted the case was decided on circumstantial evidence which was not cogent. It was argued that the trial court's findings ignored other inferences that could be drawn. They pointed out that PW5's evidence that he found the vehicle being dismantled was not supported by any other evidence. They decried the failure to include a scenes of crime officer during the raid and the lack of photographs to show the state of the vehicle when it was recovered. The case of ***Jack Maulla and Asu Kile Mwapuki v The People*⁴** was referred to.

5.3 It was also argued that the trial Judge's finding that the vehicle he observed had been tampered with should have been tempered with the knowledge that it had been in police custody for a year. The appellant's submitted that there was a gap in the evidence relating to how the dismantled car was moved to the Police Station. The prosecution was criticized for failing to call the witness who towed the vehicle. The case of ***Phiri and others v The People*⁵** was referred to in support of the argument that

a trial court is not permitted fill in gaps in evidence by making assumptions to justify a conviction.

5.4 Regarding the circumstantial nature of the prosecution's evidence, the Appellants referred to the case of **Saidi Banda v The People**⁶ in submitting that the circumstantial evidence adduced was not so cogent as to permit only an inference of guilt.

5.5 The Appellants also argued that the 2nd Appellant had proffered a reasonable explanation for how he came to be in possession of the vehicle which was reported stolen. They disagreed with the trial Judge's finding that the 2nd Appellant's explanation was not brought to the attention of the police as he was cross examined on the issue.

5.6 A further argument by the Appellants was that there was no evidence linking the 1st and 3rd Appellants to the motor vehicle other than the fact that they were present at the 2nd Appellant's house when the police arrived. It was submitted that there were other inferences that could be drawn in view of the explanations

given by the Appellants. The case of ***Bwanausi v The People***⁷ was referred to in that regard.

5.7 The Appellants contended that the trial Judge should not have disregarded the 2nd Appellant's explanation relating to the written sale agreement as it was reasonably possible. The cases of ***Chabala v The People***⁸, ***Saluweme v The People***⁹ and ***Haonga v The People***¹⁰ were referred to. We were urged to allow the appeal.

6.0 RESPONDENT'S ARGUMENTS

6.1 In its opposing arguments, the Respondent supported the verdict of the trial court. Regarding the issue of whether there was dereliction of duty due to failure to lift finger prints from the toy pistol, the Respondent relied on the case of ***Peter Yotamu Hamenda v The People***¹¹ in submitting that dereliction of duty on the part of the investigating officer will not result in an acquittal where overwhelming evidence has been adduced

6.2 It was submitted that there was no dispute that the Appellants were found in possession of the vehicle which was

recently reported stolen. It was contended that the trial court was entitled to infer guilty knowledge in the absence of a reasonable explanation. The cases of ***Elias Kunda v The People***¹², ***Martin Mupeta and Another v The People***¹³ and ***George Nswana v The People***¹⁴ were referred to in this regard.

6.3 The Respondent argued that the Appellants provided explanations which could not reasonably be true and therefore could not be considered to be explanations at all as held in the case of ***Ilunga Kabala and John Masefu v The People***¹⁵. We were referred to the evidence that PW2 handed over the original white book for the vehicle as collateral for the loan when the evidence of the owner of the vehicle was that the said document was with a third party and was never in PW2's possession. We were asked to take judicial notice of the fact that a vehicle cannot be sold without the white book and National Registration Card which documents the Appellants did not produce.

6.4 Regarding the failure to produce photographs, the Respondent referred to the case of ***Sevelino Zulu and Another v The***

People¹⁵ where we held that we could not doubt the evidence of witnesses because it was not supported by photographs.

6.5 A further argument by the Respondent was that the circumstantial evidence in this matter had taken the case out of the realm of conjecture and had attained a degree of cogency that only permitted an inference of guilt on the Appellants. The Respondent relied on the cases of **David Zulu v The People**¹⁷ and **Saidi Banda v The People**⁶.

7.0 CONSIDERATION AND DECISION

7.1 We have carefully considered the record of appeal together with the arguments by both sides. The evidence adduced showed that on 30th April 2022 around 23 hours, PW2 reported to the police that he had been robbed of a motor vehicle Registration No ACL 3856, a Toyota Carib. It was not in dispute that the said motor vehicle was recovered at the home of the 2nd Appellant. It was also not in dispute that at the time the vehicle was found, the 1st and third Appellants were at the 2nd Appellant's house.

- 7.2 The 2nd Appellant's explanation was that the vehicle had been sold to him by PW1 partly in order to liquidate a debt. The 1st and 3rd Appellants denied having anything to do with the vehicle in issue. The issue that fell for determination before the lower Court was whether PW2 had been robbed of the vehicle or whether the facts showed that he had sold the vehicle to the 2nd Appellant.
- 7.3 The trial Court disregarded the testimony of the 2nd Appellant that he had bought the vehicle and convicted all the Appellants. The issue before us is to determine whether the prosecution adduced sufficient evidence to support the conviction.
- 7.4 The 2nd Appellant's evidence as to how he came to be in possession of the vehicle which was reported stolen was that it was sold to him by PW2. He produced a book which contained a sale agreement between himself and Richard Banda. He maintained that he knew PW2 as Richard Banda. However, he admitted that he did not obtain PW2's National Registration Card or the original white book. He explained that PW2 had left

in anger following a dispute on the balance on the purchase price.

7.5 The trial Judge rejected the 2nd Appellant's evidence on the ground that it was raised for the first time during the defence case and was an afterthought. He also noted that the issue of the sale of the vehicle was not put to PW2 or PW5 in cross examination.

7.6 However, the record shows that both PW2 and PW5 were cross-examined on the issue. The finding by the trial judge that the issue was raised for first time in the defence case was, therefore, a misdirection.

7.7 However, as correctly submitted by the Respondent, the 2nd Appellant's evidence was unreliable as he maintained that PW2 gave him the original copy of the white book which clearly had never been in his possession. The 2nd Appellant also maintained that PW2 was known to him as Richard Banda but he admitted that he was not given the National Registration Card during the sale. The NRC is a crucial document which proves the identity of the seller. The failure to take possession of the white book for

the vehicle and the NRC from PW2 rendered the purported sale of the vehicle suspicious.

7.8 Further, the evidence of PW2 was supported by the fact that he made the report of the robbery shortly after it occurred on the night of 30th April 2022. It was also corroborated by the fact that his name was not on the purported agreement of sale. The 2nd Appellant's version does not ring true especially in view of the fact that he alleged that PW2 accepted K12,000.00 and did not return it before reporting the vehicle stolen. We therefore cannot fault the trial judge's decision to disregard the 2nd Appellant's version of events.

7.9 After disregarding the 2nd Appellant's version of events, the remaining evidence was that the 2nd Appellant was found in possession of the stolen vehicle a few hours after it was stolen while the 1st and 3rd Appellants were at the his home when the police arrived. The Supreme Court in the case of **Salton Banda v The People**¹⁸ in elucidating the principle of recent possession, referred to the case of **Kambafwile v The People**¹⁹, held as follows:

“Under the doctrine, the Court is entitled to draw the inference, if the facts proved so warrant that the person in whose possession recently stolen property is found is the thief or guilty receiver thereof. It is therefore vital that the Court should be satisfied that the property so found is the property identified by the complainant as that which was stolen.”

7.10 In the present case there was no dispute that the vehicle which was found in the 2nd Appellant’s possession was the Toyota Carib Registration No. ACL 3856 which was stolen from PW2. The only issue to be determined is whether the Appellants can be said to be the robbers or the guilty receivers.

7.11 The fact that the stolen motor vehicle was found in the 2nd Appellants’ possession a few hours after it was stolen raises a strong presumption that the 2nd Appellant was the one who stole the vehicle. In the case of ***Mambwe v The People***²⁰, the Supreme Court guided that for an inference of guilt based on recent possession to be sustained, there must be no likelihood that the goods had exchanged hands.

7.12 Although in the present case the 2nd Appellant did not state that he acquired the vehicle from a third party, the doctrine of recent possession applies in view of the time lapse between the robbery

and the possession. Further in the case of ***Elias Kunda v The People***¹², the Supreme Court held that where an accused is in possession of property recently stolen, the Court could infer guilty knowledge if he tendered no explanation or if the Court was satisfied that the explanation offered was untrue. In the present case, the trial Judge did not believe the 2nd Appellant's explanation on how he came to be in possession of the stolen vehicle.

7.13 In view of the foregoing we are satisfied that the prosecution proved its case to the required standard and we uphold the conviction against the 2nd Appellant.

7.14 With regard to the 1st Appellant, the prosecution adduced evidence that a toy pistol was recovered from the top of the wardrobe in his bedroom following a search by PW5. However, we note that there was no evidence that tied the recovered toy pistol to the robbery was adduced. The pistol that was used in the robbery was not properly described by PW2 and it was not shown to him during the trial. We hold the view that it would be

unsafe to conclude that the toy pistol that was recovered was used in the robbery.

7.15 Further, the evidence of PW5 did not show that the 1st Appellant was dismantling the vehicle when he was apprehended. PW5 casually stated that he found the appellants dismantling the stolen vehicle but did not detail what the 1st Appellant was actually doing when he arrived at the scene.

7.16 We are not satisfied that there was sufficient circumstantial evidence connecting the 1st Appellant to the commission of the offence and we cannot uphold his conviction.

7.17 With regard to the 3rd Appellant, the only evidence against him was that he was present at the 2nd Appellant's house where the stolen vehicle was being dismantled. There was no evidence to suggest that it was the 3rd appellant who was dismantling the vehicle. In our view his mere presence at the house where the stolen vehicle was does not make him complicit in the offence of aggravated robbery. There was no evidence connecting him to the stolen vehicle or robbery. In view of this we are not satisfied that the prosecution adduced sufficient evidence

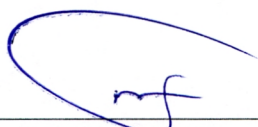
against the 3rd Appellant to support a conviction on a charge of aggravated robbery. We hold that the conviction of the 3rd Appellant was unsafe.

8.0 CONCLUSION

8.1 In view of the foregoing, we uphold the conviction and sentence relating to the 2nd Appellant, Samson Phiri. His appeal lacks merit and we dismiss it. However, we hold that the convictions of the 1st and 3rd Appellants are unsafe and we accordingly set them aside. We order that Mashati Chola and Boniface Mwaba be set at liberty.



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE