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IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HPA/26/2024

BETWEEN:

OBRIEN SIBELEKI	**1ST APPELLANT**
EMMANUEL CHALI	**2ND APPELLANT**
FRANCIS KABANGA	**3RD APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

BEFORE THE HONOURABLE MR. JUSTICE I. M. MABBOLOBBOLO IN OPEN COURT ON THE 20TH DAY OF DECEMBER, 2024.

For the 1st Appellant:	*Mr. R. Petersen -Howard, Marrietta & Petersen*
	Mr. M. Malambo – Howard, Marrietta & Petersen
For the 2nd & 3rd Appellant:	*Mr. G. Hakainsi – Messrs LM Chambers*
For the Respondent:	*Mr. M. Sitali- State Advocate – National Prosecutions Authority*

JUDGMENT

A. CASES REFERRED TO:

1. *David Zulu v The People, (1977) ZR 151*
2. *Nelson Banda v The People (1978) ZR 300*
3. *Green Nikutisha and Another v The People (1979) ZR 215*
4. *Kambarage Mpundu Kaunda v The People (1990/92) ZR 286*
5. *Barrow and Young v the People (1966) ZR 43*
6. *Felix Chilungwe and Shadrack Banda v The People (1981) ZR 286*
7. *Chimbini v The People (1973) ZR 191*
8. *The People v Frank Musonda (1976)ZR 215*

9. *R v Turner (1975) ALL ER 70*
10. *People v Roxburgh (1972) ZR 31*
11. *Ngati and Others v The People SCZ NO. 14 of 2003*
12. *Mubanga Kaselo and Another v The People SCZ No. 80,81 of 2020*
13. *Woolmington v DPP (1935) AC 46 2*
14. *Nshinka Kaputo v The People Appeal No. 196 of 2020*
15. *Silungwe v The People (1974) ZR 130*
16. *Dorothy Mutale and Richard Phiri v The People (1997) S.J. 51 9SC)*
17. *Mwewa Murono v The People (2004) ZR 207*
18. *Phiri and Others v The People.* (1973) ZR 47
19. *The People v Fred M'mwembe, Masautso and Bright Mwape (1997) S.J. 63 (H.C)*
20. *Mbinga Nyambe v The People (2011) ZR Vol. 1*
21. *Kalaba and John Masefu v The People (1981) ZR 102*
22. *Nkhata and 4 Others v The Attorney General (1966) ZR 124*
23. *Dickson Sembauke Changwe v The People (1988-89) ZR 144*
24. *Saidi Banda v The People Appeal No. 144 of 2015*
25. *The People v Peans Luzendi Appeal No. 160/2017*
26. *Attorney General v Kakoma (2008) ZR 1 (SC)*
27. *Trywell Kalukula v The People (2015) 3ZR 69*
28. *Kapinda v The People (1977) ZR 32*
29. *Madubula v The People (1994) SJ 63 (SC)*

B. LEGISLATION REFERRED TO:

1. *The Zambia Wildlife Act No. 14 of 2015 of the Laws of Zambia*
2. *The Penal Code Chapter 87 of the Laws of Zambia*

1.0. INTRODUCTION

1.1. This is an Appeal against the Subordinate Court Judgment handed down by her Honour, Magistrate M. Mwenya on 3rd May, 2023.

2.0. BACKGROUND

2.1. The background to this Appeal is that the Appellants in the Lower Court were jointly charged with one Count of

Unlawful Possession of Prescribed Trophy contrary to **Section 87 (4)** and **130 (2)** of the **Zambia Wildlife Act No. 14 of 2015** of the **Laws of Zambia**.

3.0. DECISION OF THE LOWER COURT

3.1. At the close of the Prosecution and Defence cases, the Trial Magistrate was satisfied that the Prosecution had proved the case against the Accused, and now Appellants as charged, found them guilty and accordingly convicted them.

4.0. GROUNDS OF APPEAL

4.1. The Appellants fronted six (6) Grounds of Appeal as follows.

4.1.1. The Court below erred in law and in fact when it convicted the Appellants based on circumstantial evidence which did not take the case out of the realm of conjecture to attain such a degree of cogency which could permit only an inference of guilty;

4.1.2. The Court below erred in law and in fact when it convicted the 1st Appellant who was not found at the scene and without evidence proving his involment or knowledge about the Protected Trophy in issue;

4.1.3. The Court below erred in law when it convicted the 1st Appellant on the basis that he opted to remain silent after being placed on his Defence when the option to remain silent is a matter of right provided by law;

4.1.4. The Learned Magistrate erred in law and in fact when she failed to take proper Record of Proceedings and

evidence given during trial and also mistook the 1st Accused for 2nd Accused.

4.2. The 2nd and 3rd Appellant advanced the same Grounds of Appeal as the 1st Appellant in addition to the following two:

4.2.1. *The Court below erred in law and in fact when it convicted the 2nd and 3rd Appellants without evidence proving that that they were aware or had knowledge that there was Protected Trophy in the vehicle they were.*

4.2.2. *The Court below erred in law and in fact when it convicted the Appellants based on conflicting evidence by the Prosecution witness.*

5.0. APPELLANT'S ARGUMENTS

5.1. In Ground 1, the 1st Appellant urged me to over turn his conviction and that the Trial Court's reliance on circumstantial evidence was inadequate to meet the legal threshold required for a safe conviction as it did not exclude all reasonable hypothesis consistent with the Appellant's innocence and thus resulting in a conviction grounded in conjecture.

5.2. It was contended that circumstantial evidence while admissible requires careful handling by the Court as it is susceptible to misinterpretation and erroneous inferences. The cases of **David Zulu v The People**[1], **Nelson Banda v The People**[2] and **Green Nikutisha and Another v The**

People[3] were cited on the principles governing circumstantial evidence in the Zambian Jurisprudence.

5.3. The 1st Appellant submitted that in the present case, the circumstantial evidence relied upon by the Trial Court failed to meet the exacting standard that were evidence allows for more than one inference, the benefit of doubt must be given to the accused. That the evidence prescribed by the Prosecution while potentially suggestive of guilt did not exclude alternative hypothesis of innocence. Further that the Appellant's proximity to the crime scene and certain alleged behaviors were insufficient to form an unbroken chain of evidence pointing conclusively to his guilt.

5.4. The rider was that it is clear that in cases relying on circumstantial evidence, the Prosecution must exclude all reasonable hypothesis consistent with the accused's innocence, a principle which was forcefully articulated in **Kambarage Mpundu Kaunda v The People**[4]. The 1st Appellant also called in aid the cases of **Barrow and Young v the People**[5], **Felix Chilungwe and Shadreck Banda v The People**[6] to bolster his arguments.

5.5. In relation to Ground 2, I was urged to overturn the conviction of the 1st Appellant on grounds that the Trial Court erred in law and in fact by convicting him despite the absence of direct or circumstantial evidence proving his involvement, or knowledge, the offence concerning the Protected Trophy. That the conviction is unsafe as it lacks

any evidence linking the 1st Appellant to the scene of the crime or the alleged illegal activity in question.

5.6. It was submitted that it is a fundamental principle of Criminal Law that the Prosecution bears the burden of proving every element of the alleged offence beyond reasonable doubt including establishing the *actus reus* and *mens rea* of the accused. The cases of **Chimbini v The People[7] and Musonda v The People[8]** were cited on the emphasis by the Supreme Court that a conviction can not rest on mere suspicion as it must be founded on solid evidence directly connecting the accused to the crime. Further that by **Section 10** of the **Criminal Procedure Code**, an accused person can not be convicted unless all elements of the offence including participation and knowledge are proven beyond reasonable doubt. That the necessity of proving knowledge as an essential element was underscored in **R v Turner[9]** where the Court held that awareness of the illegality of possessing a prohibited item be established for a conviction to stand.

5.7. The 1st Appellant contended that in the present case, the 1st Appellant was convicted without any evidence placing him at the scene of the crime or proving his involvement with the Protected Trophy. That the prosecution failed to present eye witness testimony, forensic evidence, or any form of direct or reliable circumstantial evidence linking the 1st Appellant to the offence. Further that the Trial Court's reliance on assumptions rather than concrete proof contravenes the

contravenes the established legal principle highlighted in the **People v Roxburgh**[10] that it is imperative that evidence used to secure a conviction must be both cogent and conclucive and that the Proceedings were quashed in that case due to insufficient evidence proving the accused's involvement in the crime.

5.8. It was submitted that the Prosecution did not establish that the 1st Appellant had knowledge of the Protected Trophy, which is a critical element of the offence under the Wildlife Conservation Statutes as emphasized in the case of **Silungwe v The People**[15], where the Court held that an accused cannot be convicted based on the assumption that they ought to have known about the illegality without clear evidence demonstrating such knowledge. Further that mere association with individuals found in possession of the trophy does not suffice to establish guilt and that in **Ngati and Others v The People**[11], the Supreme Court quashed convictions that were based on insufficient and speculative evidence, underscoring the necessity for direct proof of an accused's involvement and knowledge.

5.9. Regarding Ground Three (3), I was urged to set aside the conviction of the 1st Appellant on the ground that the Trial Court erred in law by drawing adverse inferences from his decision to exercise his legal right to remain silent upon being placed on his defence. That the right to silence is a cornerstone of a fair criminal justice system, enshrined in both Statutory and Constitutional Law and the Trial Court's

reliance on the 1st Appellant's silence not only contravenes these legal protections but also undermines the integrity of the judicial process. **Article 18** of the **Constitution** was cited for the right to a fair trial which encompasses the privilege against self-incrimination and the case of **Mubanga Kaselo and Another v The People**[12] for the position that an accused's silence can not be construed as evidence of guilt.

5.10. It was submitted that in this case, the Trial Court convicted the 1st Appellant, in part, because he chose to remain silent after being placed on his defence which constitutes a fundamental misdirection in law. That the reason for this submission is that it is a violation of the right to silence contrary to the principle articulated in the **Mubanga Kaselo**[12] case; it is an improper shift of the burden of proof contrary to the principle enunciated in the similar cases of **Woolmington v DPP**[13] and; it was based on insufficient evidence like in the case of **Nshinka Kaputo v The People**[14] where it was held that a conviction can not stand if it is based on insufficient evidence, regardless of the accused's decision not to testify.

5.11. With respect to Ground Six (6), I was invited to quash the conviction of the 1st Appellant on the grounds that the Learned Magistrate erred in law and fact by failing to accurately record the Proceedings and the evidence during trial as she mistakenly identified the 1st Accused and the 2nd Accused, a judgment error that undermines the integrity of the trial and renders the conviction unsafe. That mistaking

one accused for another is not a mere procedural irregularity but a substantive error that strikes at the heart of the judicial process. Further that the Magistrate's confusion between the 1st and 2nd Accused may have led to the wrong attribution of evidence of culpability to the 1st Appellant, thereby violating his right to a fair trial as enshrined in **Article 18** of the **Constitution of Zambia**. The case of **Silungwe v The People**[15] was cited where the Court is said to have underscored those procedural irregularities affecting the fairness of the trial or the proper identification of the accused warranting the questioning of the conviction. Further that in **Chimbini v The People**[7], it was emphasized that procedural irregularities that prejudice the accused's right to a fair trial can not be overlooked and necessitate appellate intervention.

5.12. The 2nd and 3rd Appellants argued Grounds one, four, five and six which relate to them as the other Grounds related to the 1st Appellant as articulated above. It was submitted that at the centre of the controversy in this appeal is whether or not there was sufficient evidence to warrant a conviction of the Appellants bearing in mind that the standard of proof in criminal matters is beyond any reasonable doubt such that where there is a lingering doubt as to the guilt of the accused person, the Court should resolve the doubt in favour of the accused.

5.13. It was submitted that it was a misdirection for the Court below to convict the 2nd and 3rd Appellants on circumstantial

evidence without proving that they were aware or had knowledge that there was Protected Trophy in the vehicle they were in. That this is so because the Prosecution witnesses failed to give evidence to convincingly prove the offence which the Appellants were charged with. That as the Record will show, when the Appellants appeared for plea in the Court below, the owner of the Protected Trophy (Ivory) who was the 1st Accused admitted the charge and confirmed that he was in possession of the ivory for about a month without any certificate of ownership and that the said ivory was brought to him by someone who he did not mention as can be noted from Page 2 of the Record of Appeal.

5.14. According to the 2nd and 3rd Appellants it was not in dispute that the Protected Trophy was found in the boot of the Motor Vehicle which was being driven by the 3rd Appellant. That however, the presence of the said Protected Trophy is not without an explanation and when called upon to give their defence to the charge, the Appellants explained how the 3rd Appellant in the company of Davison Muuluka went to pick up the 2nd Appellant at Chelstone to Makeni Bonaventure at their boss's place. That they explained how two men who were standing at Chelstone Bus Stop requested for a lift to be dropped off at Cosmopolitan Mall. Further that when they reached Cosmopolitan Mall, the other gentleman jumped out of the car and ran away but his friend was apprehended together with the Appellants before he could run away. That the Appellants in their defence testified that they did not know that the two gentlemen who had

requested for a lift and were actually carrying Protected Trophy. That the Appellant's evidence was tested in Cross Examination by the State but the said evidence remained unshaken.

5.15. It was contended that it is surprising that the Court below decided to convict the Appellants and acquitted Darison Muuluka, the 5th Accused when they all had the same defence that they were not aware that the gentlemen who requested for a lift were carrying Protected Trophy. That the Appellants do not see any basis or justification for the Court below to accept the evidence of Darison Muuluka and reject the evidence of the 2nd and 3rd Appellants when the evidence and defence was the same. The Supreme Court case of **Dorothy Mutale and Richard Phiri v The People**[15] was cited as being instructive when there is a doubt raised by the Prosecution evidence.

5.16. The 2nd and 3rd Appellant submitted that the conviction can not stand to be safe in the absence of evidence showing or proving that the Appellants were aware that the gentlemen who they gave a lift from Chelston were carrying Protected Trophy in light of the principle set out in the cases of **Mwewa Murono v The People**[16]; **The People v Frank Musonda**[17] and; **Phiri and Others v The People**[18].

5.17. It was submitted that during trial, the Prosecution witnesses failed to adduce evidence to prove that apart from the 1st Accused who admitted to being the owner of the Protected Trophy, the other Accused persons (Appellants herein) were

also aware that the 1st Accused was carrying Protected Trophy. That the attempt by the Prosecution to introduce confession statements suffered expunction as can be noted from Pages 17 to 20 of the Record of Appeal.

5.18. Further that the Appellants were convicted purely on the basis of circumstantial evidence for being in the same vehicle where the Protected Trophy was found. While noting the case of **Madubula v The People** which the Court below relied on in convicting the Appellants, it was argued that this authority is not applicable under the circumstances of the case. That the said authority would only apply if the Appellants had admitted being aware that someone put Protected Trophy in the Motor Vehicle without a certificate of ownership of the Protected Trophy. The rider is that this is not the case in this matter because the 2nd and 3rd Appellants were simply not aware of the Protected Trophy in the Motor Vehicle. The case of **The People v Fred M'membe, Masautso and Bright Mwape**[19] was cited for the position that an act alone does not make a man guilty unless it is accompanied by a guilty mind.

5.19. Related to the above, it was argued that it is a criminal law principle on criminal liability that there ought to be proof of both the *mens rea* and *actus reus*. That in the case at hand, the Prosecution should have proved that these were present by not only showing that the Protected Trophy was in the same Motor Vehicle but that the Appellants were aware of the Protected Trophy in the vehicle. That there was no

evidence to prove that the said sack was at any point opened to check what was inside as the owner of the sack simply put it in the boot and got into the vehicle and that is how they started off from Chelstone heading to Makeni.

5.20. On behalf of the 2nd and 3rd Appellants, Counsel noted disputable findings of the fact by the Court below at Pages J9 to J10 of the Judgment where it stated that :

> *".....A3 conversed with two men who had a sack with the Trophy inside and the said sack was certainly protruding to show heavy contents and definitely needed help to carry them into the boot of the car belonging to A4....."*

The contention was that they found it extremely strange as they do not know how and where the Court below found the idea of the content of the sack protruding since none of the Prosecution witnesses were there when the sack was put on the Motor Vehicle. That there was no evidence led by any of the witnesses about the sack or the contents protruding and that what the Court did was filling up the gaps left by the Prosecution evidence which is a serious error on the part of the Court.

5.21 In relation to Grounds five (5) and Six (6), it was argued on behalf of the 2nd and 3rd Appellants that the conviction was based on conflicting evidence of the Prosecution Witnesses and that the Court below also failed to take a proper Record of Proceedings and evidence given during trial. That this is so because, it was noted from the Judgment that most of the

evidence which was given both in Chief and also in Cross Examination was not captured in the Judgment. Further that despite many questions having been asked on behalf of the 2nd and 3rd Appellants, the Court below only recorded a few answers which are also incomplete such that one can not relate what the answer is about.

5.22. Arguing further, it was submitted that while **PW1** admitted in Cross Examination that he did not take finger prints to link the sack or Protected Trophy to the Appellants and that it was cardinal to do so, **PW2** came and contradicted the evidence of **PW1** and told Court that he did not agree with the evidence of **PW1** that it was cardinal to take finger prints. That this clearly shows that the prosecution witnesses were not truthful but wanted to secure a conviction at all costs.

5.23. It was also argued that another piece of evidence which was strangely missing from the Record is that during Cross Examination, **PW1** was asked as to whether he had boarded another person's vehicle before and he responded in the affirmative. That when asked how possible it is that when a person boards another person's vehicle, he must know what everyone is carrying, **PW1** told Court that according to him everyone who is in the vehicle must know what is in the vehicle. Further that however, when the same question was asked to **PW2** in Cross Examination, he clearly stated that it is not possible to know everything in the vehicle. The issue was that all this evidence was not considered or just recorded as given by the witnesses and that all this evidence was aimed

at showing the Court the possibility of people being in same vehicle without knowing what other passengers are carrying.

5.24. The submission is that it was a misdirection by the Court below not to record all the evidence as the Trial Court has a duty to record all the evidence adduced by the parties and then decide which evidence to accept when making a decision. That it is not for the Trial Court to simply not record the evidence.

6.0. RESPONDENT'S ARGUMENTS

6.1. The Respondent elected to respond to all the six Grounds of Appeal together. It was submitted that in criminal matters, the legal burden of proof lies with the Prosecution as espoused in the case of **Mwewa Murono v The People**[16]. That in this case, the Prosecution led evidence of circumstantial nature due to unavailability of direct evidence.

6.2. According to the Respondent, Janne Chaninda, **PW1,** recounted that he was told that there were people intending to sell 5 elephant Ivory and they had agreed to meet at Cosmopolitan Mall. That when they reached the said Mall, they managed to identify the Motor Vehicle the criminals were using and when they went to the said Motor Vehicle, they introduced themselves and one of the accused person by the name of Mumba took to the heels but they managed to apprehend him. That when the three, occupants were apprehended, the 1st,2nd and 3rd Accused in the Court below informed the Officers that they were not alone in the deal, the other two were waiting for them in Chelstone Area. Further that he then advised the 2nd Appellant to call the two suspects

in Chelstone and inform them that the business had gone through and they agreed to meet at the office, that the phone was on loud and he did as he was advised and this led to the apprehension of the other two accused persons.

6.3. The Respondent submitted that the above evidence went unchallenged by the Appellants and it imputes knowledge on the part of the Appellants. That they did not inform the Officers that they just gave a lift to the man who ran away when they reached the Mall, the destination of the said man. That the defence proffered by the Appellants is an afterthought and without merit.

6.4. The Respondent cited the case of **Mbinga Nyambe v The People**[20] on circumstantial evidence and stated that the Trial Court was competent to convict on this even as espoused in the case of **David Zulu v The People**[1] that a conviction is complete where the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can only permit an inference of guilty.

6.5. The contention by the Respondent is that if the Defence of the Appellant was anything to go by, they could have stopped at the Mall just to drop off the passenger but on the contrary, they parked at the Mall and all of them sat in the Motor Vehicle waiting for the customer of the Ivory. That the circumstantial evidence in the Respondent's view, had taken the case out of the realm of conjencture and attained a degree of cogency as per the cases cited above.

6.6. That from the foregoing, it can be inferred that the Appellants had knowledge, were in possession of the Ivory and acted together to commit the offence. **Section 22** of the **Penal Code Chapter 87** of the **Laws of Zambia** was cited on common intention of two or more people in the commission of an offence. Further that the Appellants were found at the Mall inside the Motor vehicle, they were apprehended and disclosed that there were other two more suspects around Chelstone area and that these were odd coincidences as held in the case of **Kabala and John Masefu v The People**[21].

6.7. The question posed by the Respondent is whether this Court can tamper with the findings of fact by the Trial Court. That the case of **Nkhata and 4 Others v The Attorney General**[22] was cited for what the Court ought to consider before reversing findings of a Trial Court sitting alone without a Jury. That the Appellants have not demonstrated any one of the considerations to persuade me to tamper with the findings of fact by the Lower Court.

6.8. It was submitted that a close look at the Record of Proceedings reveals that there are no inconsistencies with the evidence adduced by the Prosecution witnesses as contended by the Appellants. That the Appellants have not gone further to demonstrate the alleged inconsistencies and that **PW2** to **PW4** adduced evidence corroborating that of **PW1.**

6.9. With regard to the Ground relating to the right to remain silent, the Respondent submitted that it is trite law that an accused person may elect to remain silent or say something

in the his or her defence. That the Judgment of the Trial Court had analyzed the evidence as adduced by the Prosecution witnesses and applied the law to the facts and at no point did the Trial Court state that the 1st Appellant was convicted because he opted to remain silent.

6.10. It was submitted that it is trite law that at the close of the Defence case, the Court is called upon to look at the totality of the evidence as adduced by the Prosecution and Defence. That the Trial Court properly analysed the role of each accused person as adduced by the Prosecution and did not mistake any of the accused person for the other as contended by the Appellants.

7.0. THE HEARING

7.1. At the hearing held on 25th October, 2024, Mr. Petersen on behalf of the 1st Appellant placed reliance on the Heads of Argument filed on 20th August, 2024, and augmented.

7.2. Barring what is already stated in the Heads of Argument, I was invited to consider the Record of Appeal and to see that it would be established that the evidence from the Prosecution and the Defence is that the 1st Appellant was never in physical possession of the Trophy though he was convicted of being in possession. That the circumstantial evidence linking the 1st Appellant to the crime is the purported phone call that was made to the 1st Appellant by one of the other Appellants whilst they were in the custody of the State which point is not in contention. That the evidence on Record does not include any evidence of exactly what was

said on this call and I was referred to Page 6 of the Record of Appeal, specifically the last but one Paragraph. Further that if this is the nexus connecting the 1st Appellant to the offence of being in possession, then surely more is needed to take it out of the realm of conjencture.

7.3. Further that there is no specificity on the business deal, but even more importantly, there was no evidence in the Court below that the 1st Appellant on that call admitted or said anything that can logically lead to the conclusion being one of guilty on the charges made against the 1st Appellant. That there was insufficient evidence to convict the 1st Appellant making the Conviction unsafe.

7.4. The other submissions were a rehash of the Heads of Arguments and will not be repeated to avoid monotony.

7.5. Mr. Hakainsi on behalf of the 2nd and 3rd Appellants placed reliance on the Heads of Arguments filed on 20th August, 2024, and indicated that he would reserve his right of reply.

7.6. Mr. Sitali, on behalf of the Respondent placed reliance on the Heads of Augments in response filed on 4th October, 2024, and augmented.

7.7. He submitted that it is not in dispute that the 1st Appellant was convicted solely on circumstantial evidence. That just like it was espoused by the Supreme Court in the case of **Saidi v The People**, and quoting Judge Howard who was the Chief Justice of England where the Court observed that where the prosecution depend wholly or in part on circumstantial evidence, the Court is in effect being called upon to reason in

a staged approach. The point being that Lower Court can not be faulted when it applied circumstantial evidence in this matter which led to the Conviction and Sentencing of the 1st Appellant.

7.8. Regarding reference to a phone call, Mr. Sitali stated that he would not belabour the point as the phone was on loud where the 1st Appellant was informed that the deal had gone through. That in respect of the main contention by the 1st Appellant that he was not in possession of the Trophy, the definition of possession in the **Penal Code Chapter 87** is clear. Further that when the 1st Appellant was informed that the deal had gone through, that imputes knowledge on his part and **Section 22** of the **Penal Code** guides on parties to a crime which brings the 1st Appellant into the realm of this case. That in this case it is not only physical possession that the Court took into account.

7.9. It was Mr. Sitali's Submission that the Trial Court was on firm ground when it Convicted and Sentenced the three Appellants based on the evidence adduced before it.

7.10. Regarding the issue of the right to remain silent, Mr. Sitali submitted that the Trial Court in *obiter* commented on why the 1st Appellant in the face of overwhelming evidence opted to remain silent.

7.11. According to Mr. Sitali, the 3 Appellants were convicted based on the evidence adduced before the Trial Court and was therefore competent to convict on circumstantial evidence. That the 2nd and 3rd Appellants, as the Court will infer were

among the people who were apprehended at the scene of crime. That for the 1st Appellant, there was evidence of leading that was adduced before Court which evidence was not disputed in the Court below as the Record of Proceedings will show and that this evidence went unchallenged. That on this premise, it was vehemently submitted that the Conviction of the three Appellants was safe and the trial Court was competent.

7.12. In Reply on behalf of the 1st Appellant, Mr. Peterson regarding the remarks that were said to be *obiter*, submitted that a proper reading of the Judgment and in particular the analysis of the charge against the 1st Appellant will show that the remarks regarding his silence made up the *ratio decidendi* or reason for deciding against the 1st Appellant by the Trial Court.

7.13. Regarding the question of knowledge in the definition of possession, my attention was drawn to the fact that the 1st Appellant was informed that the deal had gone through. That they take no issue with the legal principle but submit that merely informing the 1st Appellant of a vague deal going through can not impute knowledge of the 1st Appellant. It was submitted that the law particularly criminal law can not be satisfied that telling someone something in and of itself brings a person into the realm of the offence and that the Conviction is unsafe and should be vacated.

7.14. In Reply on behalf of the 2nd and 3rd Appellants, Mr. Hakainsi submitted that while it is trite law that circumstantial

evidence is good evidence, it is only good if it is capable of taking the case out of the realm of conjencture to only leave an inference of guilt of the accused. That on Page 3 Paragraph 3, the Prosecution admits that there was no direct evidence. That the Record will show that the owner of the Protected Trophy admitted the charge and was arrested and when the Appellants were called to give evidence, they proffered explanations expressing ignorance. That as the Record of Appeal will show, all the confession statements were expunged and as it stands there is no confession statement on the part of the Appellants.

7.15. Regarding Paragraph 8 in the Respondent's Heads of Argument, about the Officer who had gone into the vehicle and had a conversation, the Reply by Mr. Hakainsi is that there is no such evidence on Record. That according to Paragraph 2 and 3 at Page 6 of the Record of Appeal, it clearly shows that when they got to Cosmopolitan Mall one jumped out and attempted to run away upon seeing the Officers. That this person was apprehended by the Officers so the argument about the conversation in the Motor Vehicle between the 2nd and 3rd Appellants has no basis but is merely an attempt to justify a Conviction without evidence.

7.18. Mr. Hakainsi submitted that there was no evidence adduced to support the conviction of the 2nd and 3rd Appellants in light of the defence proffered and I was urged to overturn the conviction.

8.0. CONSIDERATION AND DECISION OF THE COURT

8.1. I have carefully considered the evidence on Record, the arguments by the Parties and the Judgment of the Court below.

8.2. I shall first consider Ground Two (2) and Ground Three (3) of the 1st Appellant as they have not been raised by the 2nd and 3rd Appellants.

8.2.1. The Court below erred in fact when it convicted the 1st Appellant who was not found at the scene and without evidence proving his movement or knowledge about the Protected Trophy.

8.2.2. The Court below erred when it convicted the 1st Appellant on the basis that he opted to remain silent after being placed on his defence when the option to remain silent is a matter of rights provided by law.

8.3. In respect of Ground Two the 1st Appellant's position is that there is no direct or circumstantial evidence proving his involvement in, knowledge of the offence concerning the Protected Trophy and that there is no evidence linking him to the scene of crime. Further that there is no evidence that the 1st Appellant on the phone call made to him by one of the accused admitted or said anything that can logically lead to the conclusion that he was guilty of the charges proffered against him.

8.4. I have noted from Page 6 of the Record of Appeal that **PW1**, Jane Chaninda, the Wildlife Police Officer, requested the

Appellant to inform the 1st Appellant by way of a phone which was on loud that the business deal was done (gone through). That the 1st Appellant was apprehended at Chelstone Tank and was not in physical possession of the Ivory.

8.5. "Possession" "be in possession" or "have possession" is defined in the **Penal Code Chapter 87** of the **Laws of Zambia** as:

> (a) *includes not having in one's own personal possession but also knowingly having anything in actual possession or custody of any other person, or having anything in any place (whether belonging to; or occupied by oneself or not) for the use or benefit of oneself or any other person;*
>
> *(b) If there are two or more persons any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the possession of each of them"*

8.6. The evidence that the 1st Appellant was on the other end of the phone which was on loud and where he was being informed that the deal had gone through, was not challenged, as far as I can discern from the Record of Appeal. I would not believe that the 2nd Appellant had any motive to falsely implicate the 1st Appellant by informing him that the deal had gone through. In my view, that imputed knowledge on the part of the 1st Appellant. Further the definition of possession

as set out in Paragraph 8.5 above is couched in very broad terms and captures the 1st Appellant on the facts of this case.

8.7. This leads me to **Section 22** of the **Penal Code** which is couched in the following terms:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that is commission was probable consequence of the prosecution of such purposed, each of them is deemed to have committed the offence".***

8.8. I have found unchallenged evidence by the Prosecution that on 22nd July, 2022, the Wildlife Police Officers had received intelligence information that there were people who intended to sell Elephant Ivory and had agreed to meet at Cosmopolitan Mall. That the Officers decided to carry out a secret operation which led to the Appellants being arrested.

8.9. The view I form on the totality of the evidence above is that the 1st Appellant can not reasonably be heard to say that the provisions of the law stated above would not apply to him, by reason only that he was not at the scene of crime at Cosmopolitan Mall where the others were apprehended from. In sum, the 2nd Ground of Appeal has not succeeded.

8.10. Regarding the 1st Appellant's right to remain silent, I have had occasion to read the Judgment of the Court below where it was stated at Page J14 as follows:

> *"I wish to comment here that I find it strange that A2 remained silent and yet A3 had found him with Bright and they all agreed to meet at Cosmopolitan Mall about his knowledge of the same."*

8.11. It is trite law that the right of an accused person to remain silent is a fundamental principle that is safeguarded under the Zambian Constitution. In the case of **Dickson Sembauke Changwe v The People[23],** the Supreme Court held among others that where an accused elects to remain silent, which he is entitled to do and should not be held against him, the prosecution has to prove its case.

8.12. While there is no evidence from the Judgment that the Trial Magistrate based his decision to convict the 1st Appellant because he elected to remain as correctly observed by the Respondent's Advocate, the Court should not have made a comment that it found it strange that the 1st Appellant remained silent. The Court's obligation was to draw proper inferences from the evidence available to it.

8.13. In the case of **Chimbini v The People[7]** cited by the Appellant, the Court of Appeal held that:

> ***"Where the evidence against an accused person is purely circumstantial and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless***

it is the only inference which can reasonably be drawn from the facts. In such cases, the fact that an accused person has elected not to give evidence on oath may, in certain circumstances, tend to support the case against him but will certainly not do so unless the inference was one which could properly be drawn in the first place" *(Emphasis Mine).*

Because I have found that the decision to convict the 1st Appellant was not based on his election to remain silent, I find that the 1st Appellant was not prejudiced. This Ground of Appeal fails.

8.14. I will proceed to tackle Grounds One (1) and Six together as they are common to the 1st, 2nd and 3rd Appellants.

8.14.1. The Court below erred in law and fact when it convicted the Appellants based on circumstantial evidence which did not take the case out of the realm of conjecture to attain such a degree of congency which could permit only an inference of guilt.

8.14.2. The Court below erred in law and in fact when it convicted the 2nd and 3rd Appellants without evidence proving that they were aware or had knowledge that there was Protected Trophy in the Vehicle they were in.

8.14.3. *The Learned Magistrate erred in law and in fact when she failed to take proper record of proceedings and evidence given during trial and mistook the 1st Accused for the 2nd Accused.*

8.15. In respect of the Grounds of Conviction being based on circumstantial evidence, it is not in dispute that there was no direct evidence and the Court below decided the case on circumstantial evidence adduced by the Prosecution. In the case of **Saidi Banda v The People**[24], the Supreme Court indicated that circumstantial evidence should be treated as follows:

> ***"Where the prosecution depends wholly or in part on circumstantial evidence, the Court is, in effect being called upon to reason in a staged approach. The Court must first find that the Prosecution had established certain facts. These facts do not have to be proved beyond reasonable doubt. Taken by themselves, these facts can not therefore prove the guilty of the accused person. The Court should then infer or conclude from a combination of these established facts that a further fact or facts exist. The Court must then be satisfied that these facts point to nothing else than to his guilt. Drawing conclusion from one set of established facts to find that another fact or facts are proved***

clearly involves logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion the Court is entitled to draw on the weight of the evidence before it".

8.16. In the present case, the Record shows that the Trial Magistrate found as a fact that the 2nd and 3rd Appellants were in the Motor Vehicle that was carrying the 1st Accused in the Court below and who admitted being the owner of the Protected Trophy from Chelstone to Cosmopolitan Mall where they were later apprehended. There is also unchallenged evidence that the 1st Appellant who was in Chelstone was called by one of the Appellants on a phone call on loud and informed that the business had gone through. Further evidence is that the Wildlife Police Officers, acting on intelligence information, set up a secret operation which led to the apprehension of the 2nd and 3rd Appellants and later the 1st Appellant.

8.17. I find it odd that the 2nd and 3rd Appellants could give a lift to a person who was carrying the Protected Trophy pieces in a sack and could accept to carry something that was unknown to them. I also find it odd that the person they had given a lift to was also going to Cosmopolitan Mall which is on the way to Makeni where they claimed they were going. It is also too much of a coincidence that on their way to Makeni, the 2nd and 3rd Appellants on their way to drop off the 1st Accused in the Court below found themselves, waiting

in the car until they were apprehended by the Police Officers while the 1st Accused attempted to run away. It can not be disputed that to set up an operation in the manner done by the Wildlife Police Officers requires meticulous planning, timing and resources. It was therefore a strange coincidence that, although the 2nd and 3rd Appellants claim to have gone to Cosmopolitan Mall to drop off the 1st Accused in the lower Court who admitted being the owner of the Protected Prophy, enroute to Makeni, they found a well laid ambush for them.

8.18. Quiet clearly, when all the odd coincidences are put together, they indeed tend to confirm the Prosecution evidence. The Trial Magistrate can not be faulted by relying on odd coincidences and circumstantial evidence that the Appellants were in possession of the Protected Trophy in league with the 1st Accused in the Court below. The Supreme Court in the case of **The People v Peanos Luzendi**[25] held, among others, stated that odd coincidences amount to corroboration. In the view that I have taken, it can not be argued that the 2nd and 3rd Appellants were convicted without evidence proving that they were aware or had knowledge that there was Protected Trophy in the Motor Vehicle they were in. There was circumstantial evidence.

8.19. It is evident from the Record that the Prosecution evidence on the matter differed substantially from that of the Appellants on what led to the apprehension of the Appellants. Following the Lower Court's findings, the Court

believed the evidence of the Prosecution. In the case of the **Attorney General v Kakoma**[26], the Supreme Court held that:

> ***"A Court is entitled to make findings of fact where the parties advance directly conflicting stories, and the Court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence".***

8.20. In the present case, the Trial Court having seen and heard the witnesses, for good reason, did not hesitate to believe the Prosecution and can not therefore be faulted for proceeding in the manner it did.

8.21. In the case of **Nkhata and 4 Others v The Attorney General**[22], the Supreme Court guided that it is unusual for the Appellate Court to set aside the findings of fact by a Trial Court. Similarly, the Supreme Court held in the case of **Trywell Kalukula v The People**[27] that an appellate Court will not interfere with the findings of fact unless perverse, not based on evidence or grossly unreasonable. I do not see anything perverse or unreasonable with the findings of fact by the Trial Court in the circumstances of this case. The upshot of my discourse is that Grounds One (1) and Four (4) of the Appeal must fail.

8.22. In respect of the Ground relating to the Lower Court failing to take a proper record of the Proceedings of the evidence presented during the trial, it was argued on behalf of the 1st

Appellant that this compromises the fairness and reliability of the entire trial process and may have led to attribution of evidence or culpability to the 1st Appellant. On behalf of the 2nd and 3rd Appellant, it is contended that it was a misdirection for the Trial Court not to record all the evidence in the Proceedings and in its Judgment which evidence was aimed at showing to the Court below the possibility of being in the same vehicle without knowing what the other passengers are carrying.

8.23. I must hasten to state that it is important for all Courts to scrupulously and accurately record all the evidence that is tendered by the parties during trial no matter how copious. This no doubt helps in the proper evaluation of cases by the Trial Court itself and by the Appellate Court if need be, as in this case

8.24. I have reviewed the Record and indeed find that the Record of Proceedings is lacking in some aspects and that the grammar leaves a lot to be desired. Having stated that, in view of my discourse above and the authorities cited, both statutory and case law, the errors and/or omissions do not go to the root of the subject matter and therefore do not prejudice the 1st, 2nd and 3rd Appellants in the manner argued on their behalf. I have no doubt that the Trial Court would still have arrived at the decision to Convict the 1st, 2nd and 3rd Appellants even without the interchange of the 1st Accused and 2nd Accused in the Court below. I say so because of the expansiveness of the charge as couched and

the definition of possession in the **Penal Code** in the circumstances and facts of this case. Accordingly, this Ground of Appeal fails.

8.25. I now move to Ground Five (5) on behalf of the 2nd and 3rd Appellants based on what they contend is conflicting evidence by the Prosecution witnesses. It has been argued that while **PW1** admitted in Cross Examination that he did not take finger prints which was a cardinal issue, **PW2** came and contradicted the evidence of **PW1** and told Court that he does not agree that it was cardinal to take finger prints. That because of that, they were not truthful but wanted to secure a conviction at all costs.

8.26. The view I take is that the subjective responses given by **PW1** and **PW2** respectively were not untruthful nor were they the basis for the Lower Court's decision to Convict the 2nd and 3rd Appellants. From my reading of the Judgment and evidence on Record, the decision was arrived at by reference to the High Court case of **Kapinda v The People**[28] for the position that actual possession was not necessary to constitute the offence and that it was sufficient if the Trophies were under the control of the Appellants. As far as I can discern, this was read together with the definition of "possession" in **Section 4** of the **Penal Code** and the case of **Madubula v The People**[29] which the Advocate for the 2nd and 3rd Appellants has stated is not applicable. In the view that I have taken earlier, I am not convinced that it should

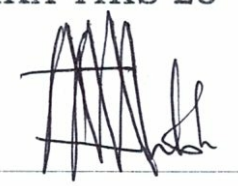
not apply in the circumstances of this case. In the result, Ground Five (5) fails.

9.0. CONCLUSION

9.1. Grounds one, two, three, four, five and six of the Appeal are all dismissed for want of merit. Consequently, the Convictions and Sentences of the 1st, 2nd and 3rd Appellants are upheld.

9.2. Leave to Appeal is granted.

DELIVERD AT LUSAKA THIS 20TH DAY OF DECEMBER, 2024.



I. M. MABBOLOBBOLO
HIGH COURT JUDGE