

**IN THE SUPREME COURT FOR ZAMBIA**      SCZ APPEAL No. 46/2007  
**HOLDEN AT NDOLA**

(Criminal Jurisdiction)

**IN THE MATTER BETWEEN:**

BONIFACE SIKOMBE  
MICHEAL CHONDWA

1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT

**AND**

THE PEOPLE

RESPONDENT

**Coram: Sakala CJ; Chibesakunda and Chitengi, JJS**  
5<sup>th</sup> of June and 7<sup>th</sup> June, 2007.

For the 1<sup>st</sup> Appellant:      E.M. Mukuka of Mukuka & Company  
For the 2<sup>nd</sup> Appellant:      E.M. Sikazwe, Director of Legal Aid  
For the Respondents:      J.C. Kaumba, Deputy Chief State Advocate

---

**JUDGEMENT**

---

Chibesakunda, JS delivered the Judgment of the Court.

**Cases referred to:**

1. Ivor Ndakala Vs. The People (1980 ZLR P. 180)

When we heard this appeal on 5<sup>th</sup> June 2007 we allowed the appeal. We quashed the Lower Court's order of conviction and acquitted both Appellants. We announced that we would give reasons later in a written judgment. We now do.

The Appellants were charged and convicted on one count of trafficking in Psychotropic Substances Contrary to Section 6 of Cap. 96. The particulars of the offence were that the two Appellants, on the 7<sup>th</sup> of June 2006, at

Nakonde, in the Nakonde District of the Northern Province of the Republic of Zambia jointly and whilst acting together, did traffic in psychotropic substances namely, Miraa weighing 12.562 Kilogrammes without authority. They were sentenced to 12 years I.H.L. each.

Before the Trial Magistrate, the evidence for the prosecution was given by 2 witnesses. The 2 witnesses who were DEC officers testified that they got information from some source that the CV bus, leaving Nakonde at 16:30 had a passenger who was carrying Miraa. The two officers intercepted this CV bus at the police checkpoint and searched the bus, all the passengers and the bus crew. They seized a blue plastic bag which no one claimed ownership. This bag was found with 13 bundles of Miraa concealed. The bag was found behind the engine three seats from where A1 was sitting. This bag fitted the description that the informer had given PW1. Their evidence was that according to the information they had received, the two Appellants were involved in the commission of this crime and that they had connived to commit this crime. Their information was that A2, as an Inspector of the bus and as a loader, loaded the bag on the bus and connived with A1. The two Appellants when they were arrested denied the charge.

Before the Trial Magistrate, the two Appellants were put on their defence, they both chose to give evidence on oath. They denied being involved in the commission of the crime. A1 testified on oath that he was on his way from Tunduma to buy chitenge materials. He boarded CV bus, which was intercepted. The police officers searched the bus and all the passengers and crew. The police officers also searched one of the bags, which was a blue plastic bag. That bag was not claimed by anybody. As the



searching was going on, he, A1, received a telephone call from his house, the police suspecting that he was receiving a call from another collaborator confiscated the phone. A1 was arrested for the same offence.

A2 testified that on the day in question, as one of the five loaders, instructed to load the bus he loaded this CV bus that was scheduled to leave Nakonde at around 16.30 hours. He was not on the bus, but the bus started off around 16.30. Twenty (20) minutes later, he was phoned that DEC officers intercepted the bus. He and his workmate started off to the roadblock. According to him, he was arrested because A1 had implicated him as one of the loaders of the luggage in the bus. When he was asked about this bag which was searched by DEC officer, he responded that he could not tell which luggage he had loaded as he had loaded a lot of luggage on the bus in question.

The trial Magistrate, on this evidence, convicted the two Appellants. The two Appellants were committed to the High Court for sentence. The High Court confirmed the conviction and sentenced the two Appellants to 12 years IHL each. The two Appellants then appealed against both conviction and sentence to this court. Before this court, Mr. E.M. Mukuka for the 1<sup>st</sup> Appellant relied on his written heads of argument. The gist of these arguments is that there was no evidence, which connected the 1<sup>st</sup> Appellant to the commission of the offence. There was no evidence that, the bag which was searched and which had 13 bundles of Miraa, was his.

In as far as A1 was concerned Mrs. Kaumba agreed with this submission and therefore told the court that she did not support his

conviction. In as far as A2 was concerned, Mrs. Kaumba indicated that she was going to support his conviction. Mr. Sikazwe on behalf A2 argued that the lower court's verdict must be quashed. He argued that the evidence which sought to connect him to the commission of the crime was given by two witnesses who contradicted each other. In addition, citing *Ivor Ndakala Vs The People* (1), he argued that when an Accused makes an extra judicial statement in the absence of a co-accused that statement cannot be regarded as evidence against the that accused. So he urged this court to acquit A2. Mrs. Kaumba in reply changed her stand and submitted that she did not support the conviction of A2 as well.

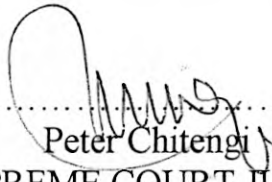
With these submissions, the court announced its decision of allowing the appeal thus quashing the Lower Court's Order and thus acquitting the two Appellants. The reasons of this are that (1) in as far as A1 is concerned, the state, rightly in our view, did not support his conviction on the ground that there was no evidence connecting him to the commission of the offence; (2) in as far as A2 is concerned, the court agreed with Mr. Sikazwe that the only evidence, which would have implicated A2 in the commission of the offence, was given by his co-accused, (A1). As stated in *Ivor Ndakala* (1) which case is good law, the statement that A1 made in the absence of A2 cannot be regarded as evidence against A2 because it was extra judicial statement made in the absence of A2. Because of these reasons we acquitted the two Appellants. We were satisfied that the prosecution had not discharged its onus of proving that the two Appellants committed the offence in question beyond reasonable doubt. The appeal therefore had merit and the appeal was upheld.



.....  
E. L. Sakala  
CHIEF JUSTICE



.....  
L.P. Chibesakunda  
SUPREME COURT JUDGE



.....  
Peter Chitengi  
SUPREME COURT JUDGE