IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 19/2016**
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

BETWEEN:

HUMPHREY DAKA **Appellant**

And

THE PEOPLE **Respondent**

Coram : Muyovwe, Hamaundu, and Kabuka, JJS.
On 10th May, 2016 and 10th June, 2016

For the Appellant : Mr K. Muzenga, Deputy Director of Legal Aid and Mr M. Makanka, Legal Aid Counsel

For the State : Mrs M.C. Mwansa, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases Referred to:

1. **Timothy and Mwamba V The People [1977] ZR 394**
2. **Jonas Nkumbwa V The People [1983] ZR 103**

This is an appeal against a Judgment of the High Court by which the appellant was convicted of the offence of aggravated robbery contrary to **Section 294(2)** of the **Penal Code Chapter 87** of the **Laws of Zambia** and was sentenced to death.

The background to this appeal is thus:

The appellant was brought before the High Court on the charge stated above. The particulars of the charge were that the appellant, on the 25th August, 2011, together with other persons unknown and armed with a firearm stole MTN, AIRTEL and CELL Z scratch cards, 10 cartons of cigarettes and K500 (rebased) cash, from the victim, Emmanuel Njovu.

The prosecution's evidence as presented through three witnesses was as follows: Emmanuel Njovu, PW1, was a businessman who sold scratch cards and cigarettes in Kanyama. In the morning of the fateful day, around 06:00, hours he went to his shop to open it up for business. As he was in the process of opening his shop, a Toyota Corrolla with about four men inside pulled up. Three of those men got out of the vehicle and confronted him with a firearm. They forced him to lie down on the floor of the shop and then proceeded to take the cash, the scratch cards and the cartons of cigarettes. When the assailants were retreating to their vehicle, the appellant was the one trailing behind, whilst pointing the firearm at PW1. It was at this time that Given Mulenga, PW2, who was PW1's girlfriend, appeared at the scene. The appellant

continued moving backwards towards the car until he reached it; then the appellant threw the cartons of cigarettes and the firearm in the vehicle. He was in the process of getting in the car when PW1 took out his own firearm and started shooting at the car and the robbers. The car sped off. The appellant, who had not yet completely got into the car, was thrown on to the ground in the process. A group of people then descended on the appellant and started beating him as they shouted "thief", "thief". PW1 then called police officers from C5 section who came to the scene. An attempt by PW1 and a police officer to follow the Toyota Corolla yielded no fruit. The appellant was taken to the University Teaching Hospital and, then, to Lusaka Central Police Station. It was there that the police officers recognized the appellant and remarked to PW1 that he was lucky to have survived the attack because in, his previous attacks, the appellant had killed his victims. The appellant was arrested and charged for this offence by Detective Sergeant Victor Mwangala, PW3.

The evidence presented by the appellant was as follows: He was a businessman who lived in Ndola. On the 20th August, 2011, he had come to Lusaka on business and had slept at a lodge known

as Makeni Executive Lodge in Kanyama. The following morning, around 06:00 hours, he left for town. As he was passing by a place known as Mobil, he heard a gunshot and then saw a motor vehicle speeding towards him. The vehicle hit him and he, then, fell in a ditch. After the vehicle had passed, a mob descended on him, thinking that he had fallen from the motor vehicle. They beat him up until he lost consciousness. He only gained consciousness at the University Teaching Hospital. From there he was taken to Lusaka Central Police station where he was charged for this offence.

The trial court considered the prosecution's version of what transpired as against the appellant's version and was persuaded to accept the testimony of PW1 and PW2 that; the appellant was among the assailants; that he was the one who was in possession of the firearm; that he was the one who had ordered PW1 into his shop; that he was the one who was the last to leave the shop as he was covering his accomplices; that he was the last one to get into the vehicle, and that he was the one who fell from the vehicle as it sped away.

The court rejected the accused's story that he was hit by the speeding car and fell in a ditch; describing it as a yarn span by a desperate man grasping at straw.

The court therefore convicted the appellant and sentenced him to death.

Before us the appellant filed two grounds of appeal, namely;

(i) that the learned trial judge erred in law and fact when she convicted the appellant of the offence of armed aggravated robbery in the absence of proof that the weapon in question was a firearm under the **Firearms Act, Chapter 110** of the **Laws of Zambia**, and;

(ii) that the learned trial judge fell in grave error when she allowed prejudicial evidence of a previous conviction to go on the record of the court when the trial for the offence in this case was still subsisting or going on.

On behalf of the appellant, learned counsel, Mr Muzenga, filed written heads of argument which he relied on entirely.

Arguing the first ground, Mr Muzenga pointed out that although the assailants were said to have been armed with a gun, they did not fire it; and the gun was not recovered. Counsel pointed

out that the only reference that the learned judge made to the firearm was in her finding that both PW1 and PW2 identified the appellant as the one who was in possession of the firearm. Counsel argued that the question for the trial court should not have been whether or not a firearm was used in the robbery but whether the firearm so used was a firearm as defined under the *Firearms Act.* For that proposition counsel referred us to the case of **Timothy and Mwamba v The People**[1]. We shall refer to that case shortly. Counsel also referred us to the case of **Jonas Nkumbwa v The People**[2] where we held that it was unsafe to uphold a conviction on a charge of armed aggravated robbery where there was no direct evidence of use of firearms. In particular, counsel quoted the following passage from the judgment which says;

"As we have already stated, there is an allegation that two of the robbers were armed with firearms. There was no direct evidence of the use of firearms as they had not been fired nor were they subsequently found and tested to be firearms within the meaning of the firearms *Act.* As Mr Mwanachongo properly observes, they may have been imitations. In the premises we find that it would be unsafe to uphold a conviction on a charge of armed aggravated robbery."

With those authorities, counsel argued that the use of a firearm was not established to the required standard and that, therefore, the conviction for armed aggravated robbery could not stand.

Mrs Mwansa, the learned Deputy Chief State Advocate conceded to this ground of appeal.

The State having conceded on this ground, we will not seriously belabour the point which the appellant has already made in his argument. We shall just briefly augment the point made by the appellant and, in so doing, explain how the use of a firearm which has not been recovered can be established. To do so, we quote a passage from our judgment in the case of **Timothy and Mwamba V The People**[1]. The following is what we said in that judgment;

"It is immaterial whether the gun that was found a mile away from the complainant's house was the one that was actually used in the robbery. In such cases the question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This could be proved by a number of circumstances even if no gun is

ever found. For instance, if the gun was actually fired, the hearing of the shot and the finding of the spent bullet could provide the proof necessary to bring the weapon seen within the definition of a firearm, and there may be many other ways to provide such proof. Despite the learned commissioner's misdirection that the gun found was the gun carried by the robbers because the magazine fitted it, there is a proper finding of fact that the magazine and the live rounds had been carried by the robbers. It is inconceivable to us that any robbers who set out with an imitation gun or one that could not be fired would carry with them a magazine and live rounds. The finding of the magazine with two live rounds on the path taken by the robbers when they ran away must lead to the irresistible conclusion that the automatic weapon seen by prosecution witnesses 1 and 2 in the hands of one of the robbers was capable of firing the live rounds found in the magazine."

The foregoing passage is self-explanatory. Suffice it to say that in this case the witnesses testified that they saw the appellant carrying a gun. That evidence, of itself, was not sufficient to prove that the gun which the witnesses saw was a firearm as defined by the *Firearms Act*. Had the witnesses said that the appellant fired some shots from that gun, that would have proved that the gun was a firearm within the definition of the *Act*. The proof would have even been stronger had some empty cartridges been picked at the scene.

Therefore, we agree with both learned counsel that, in this case, the prosecution did not prove that the gun which the prosecution witnesses saw was a firearm within the *Firearms Act*. Consequently, the first ground of appeal succeeds.

In the second ground, Mr Muzenga took issue with the fact that the prosecution in cross-examination of the appellant asked him questions about his previous convictions. According to Mr Muzenga, this was contrary to the provisions of **Section 157** of the **Criminal Procedure Code, Chapter 88** of the **Laws of Zambia**, particularly **subsection (vi)** thereof. That provision states:

> **"(vi) a person charged and called as a witness, in pursuance of this section, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character,..."**

The sub-section provides three exceptions. However we shall not cite those exceptions because none of them existed in this case. Mr Muzenga charged that the object of the prosecution's cross-examination of the appellant on his previous convictions was; to discredit him; to show that he had previously committed an offence

for which he was convicted and; that both objects were intended to show that he was a criminal and, thus, capable of committing the present offence and, indeed, even committed it. According to Mr Muzenga, this greatly prejudiced the appellant and greatly influenced the mind of the trial court in entering a verdict of guilty.

To support his argument that the court's mind was influenced by that evidence, Mr Muzenga referred us to the following passage in the trial court's judgment which says;

> **"The accused does not deny that he was near or around the scene of crime but in a testimony that can only be authored by a desperate man grasping at straw, the accused span a yarn that he was a victim of circumstances who happened to be on his way to town when in fact not."**

In further support of his argument, Mr Muzenga pointed to the trial court's failure to recognize the absence of evidence proving that the gun seen by the prosecution witnesses was a firearm within the *Firearms Act* and argued that this was because the trial court's mind was heavily clouded by the prejudice against the appellant resulting from the questions that were asked of him.

Mr Muzenga argued that, in the circumstances, the appellant did not have a fair trial. Accordingly, he urged us to set aside the conviction and acquit the appellant or, at least, order a re-trial.

In response to the appellant's argument in this ground, Mrs Mwansa argued that infact it was the appellant, himself, in his evidence in chief who introduced the issue that he was a victim of circumstances; this prompted the prosecution to ask him questions on that issue which led to his being asked questions as to whether he was a victim of circumstances in the previous conviction. Learned counsel, further, argued that, in any case, the appellant was entitled not to answer those questions but he elected to answer them, anyway.

It is not in dispute that the prosecution in cross-examination of the appellant did ask him questions relating to a previous offence for which he was convicted by the High Court on the 28th April, 2014 and sentenced to death. We agree with Mr Muzenga that according to the provisions of **Section 157(vi)** the appellant ought not to have been asked questions on that conviction. What is of prime importance, however, is whether the trial court was influenced by those questions in arriving at its decision.

As evidence of the purported influence Mr Muzenga has referred us to the sentiments expressed by the trial court when it rejected the appellant's defence. We wish to state that the trial court's sentiments were rather harsh and uncalled for, especially in a criminal case where an accused person has no burden to prove his innocence at any given stage of the proceedings. We wish to take this opportunity to advise trial courts to desist from making derogatory remarks about any defence advanced by an accused person because, under our legal system, an accused person is entitled to put forward any defence he pleases; the fact that the trial court considers it to be weak should not be the subject of ridicule. Having said that, however, we shall shortly consider whether those sentiments were evidence of the influence that the disclosure of the previous conviction had on the trial court; with the result that the court convicted the appellant solely on that bias.

Mr Muzenga has also pointed to us the trial court's failure to recognize the absence of evidence proving that the gun seen by the prosecution witnesses was a firearm within the *Act* and argued that this was further evidence of bias on the part of the trial court,

resulting from the introduction of a previous conviction during cross-examination of the appellant.

To that argument, we wish to state that, indeed, the ground of appeal challenging the trial court's finding that the gun seen by the witnesses was a firearm within the *Act* has succeeded. However, during argument on that ground, Mr Muzenga referred to the cases of **Timothy and Mwamba V The People**[1] and **Jonas Nkumbwa V The People**[2]. In both cases, the trial courts had wrongly found that the guns allegedly used were firearms within the *Act*. Can it be said that those courts fell into that error because they were biased? We do not think so. However, the fact that those courts fell in error shows that the error, itself, is one that any trial court can fall into. Therefore, in this case the trial court's error was not evidence of the influence that the disclosure of the previous conviction may have had on its mind.

We now come back to the conviction. Was the court biased because of its knowledge of the appellant's previous conviction?

The judgment of the trial court shows that before accepting the prosecution's evidence that the appellant was one of the assailants, it evaluated the credibility of the prosecutions' witnesses

on, one hand, and the appellant on the other. The court even went on to consider whether the prosecution witness Given Mulenga (PW2) was a witness with an interest to serve and ruled that she was not. In the end, the trial court believed the prosecution's evidence that the appellant was one of the assailants as against the appellant's evidence that he was not. In our view, such a meticulous approach to resolving a contested issue cannot be undertaken by a court that is biased. The view we take, therefore, is that the trial court arrived at its conviction via an unbiased approach and, therefore, its sentiments about the appellant's defence, though unfortunate, were not evidence of any bias that may have arisen from the disclosure of the appellant's previous conviction during trial.

Therefore, the second ground of appeal fails.

However, the success of the first ground means that the conviction for armed aggravated robbery under **Section 294(2)** of the **Penal Code** cannot stand. We, accordingly, set it aside, together with the sentence of death. We substitute it with a conviction under **Section 294(1)** of the **Penal Code**.

As regards the sentence, we take cognizance of the fact that the appellant was part of a number of assailants. That fact removes the case from the category which deserves the minimum mandatory sentence. We therefore impose a sentence of 20 years imprisonment with hard labour with effect from the date of the appellant's arrest.

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E. N. C. Muyovwe

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE

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J. K. Kabuka

SUPREME COURT JUDGE