

IN THE SUBORDINATE COURT OF

IPG/033/2017

THE FIRST CLASS FOR THE LUSAKA

DISTRICT HOLDEN AT LUSAKA

(Criminal Jurisdiction)

THE PEOPLE v GEORGE BANDA & BRIGHT NGANDU

Before the Hon N. C. Simaubi on the 2nd June 2017

JUDGMENT

For the people : Mrs M. Kaumba, PP.

For the Accused : In Person

Legislation Referred To: Section 272, 300, 301 (a), 304 of The Penal Code Cap 87 of The Laws of Zambia.

Cases referred to

- 1) Chimbini v The People (1973) Z.R. 191
- 2) Muvuma Kambanja Situna v The People (1982) Z.R. 115
- 3) Shawaza Fawaz and Prosper Chelelwa v The People (1995) SCZ

The accused persons stand charged with one count of Burglary and theft contrary to sections 301 (a) and 272 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of the count allege that George Banda and Bright Ngandu (herein after A1 and A2 respectively), during the night of 15th February 2017, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with another person, with intent to steal, did break and enter into the dwelling house of Henry Mutambo and did steal from therein 1x computer and 1x MTN cell




phone valued at K2450.00 the property of Henry Mutambo. The accused persons pleaded not guilty to the count.

In all criminal matters, the burden of proving the case from start to finish rests entirely on the prosecution. There is no burden upon the accused to prove his innocence. If, after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the accused person, then he is entitled to the benefit of that doubt.

To establish the guilt of the accused, the prosecution must prove each and every ingredient of the offence charged. s. 301 (a) of the Penal Code is in the following terms:

301. Any person who-

- a) breaks and enters any dwelling house with intent to commit a felony therein; or
- b) having entered any dwelling house with intent to commit a felony therein, or having committed a felony in any such dwelling house, breaks out thereof;

is guilty of the felony termed "housebreaking" and is liable to imprisonment for seven years. If the offence is committed in the night, it is termed "burglary" and the offender is liable to imprisonment for ten years.

Section 4 of the Penal Code defines night in the following terms:

"night" or "night-time" means the interval between seven o'clock in the evening and six o'clock in the morning;

s. 300 of the Penal Code defines breaking and entering in the following terms;

300 (1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar flap, or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.

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(2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

(3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.

From the above, it can be seen that a person is deemed to have broken into a building once he opens a building by unlocking, pulling, or pushing any door, window or object meant to cover or close an opening. Entry thereof occurs once any part of his body or instrument used by him is within the building. To constitute the offence, the breaking and entry ought to have occurred between 1900 hrs in the evening and 0600 hrs in the morning. The criminal intent to commit a felony therein can be ascertained from the circumstances of the case. In this regard, the prosecution must establish:

1. That the accused broke;
2. And entered;
3. Into a dwelling house;
4. At night;
5. With intent to commit a felony therein; and
6. Took property of another person; and
7. That he did so without any lawful justification.

The prosecution called five witnesses in support of the charge. The accused testified on oath and called no witness. I will now review the evidence on record.



PW1, Henry Mutambo testified that on 14th February 2017 at around 2000 hrs, he left his family to go and attend a party. He told the Court that he only returned home on 15th February 2017 at around 0400 hrs. It was his testimony that on arrival, he found his wife awake and noticed that their Dell black and grey computer was missing. He told the Court that the computer and phone are worth K2450.00. In the morning, the matter was reported at Bob Blooms Police Post. Mutambo testified that he suspected Bright and George of having stolen the computer and so he went asked George to return the computer. A few days later, one Davy told him that one night, he saw George and Bright carrying the computer. In the morning, Mutambo took George to the police followed by Bright a day later where George told him that Bright planned the theft. He identified the two accused persons in Court.

In cross-examination by A1, Mutambo stated that he did approach A1 over the theft of the computer and that he asked him if he knew where it was. He conceded that he searched A1's house but found nothing. He maintained that he knew that it was the accused because someone told him.

In cross-examination by A2, Mutambo stated that the theft occurred at around 2200 hrs. He denied searching A2's house but maintained that someone saw A2 with the computer.

PW2, Yvett Muchinga, testified that on 14th February 2017 she went to bed at around 2130 hrs leaving her phone on the charger. She told the Court that her husband was not home and that she woke up at around 0530 hrs as she did not hear the alarm. It was her testimony that it was then that she discovered that her phone was missing. On going to the living room, she discovered that the contents of her hand bag that was initially in the bed room were scattered and the computer missing from its table. As she looked around, her husband, PW1 entered the house. She testified that



they discovered that the burglar bar on the sliding door was broken though the window was broken previously.

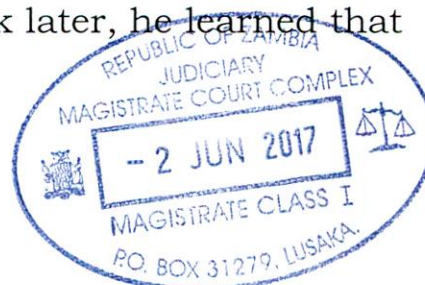
Muchinga testified that PW1 suspected George and Bright because they were the only ones that knew about the computer. They then went to George's house and found him sleeping. A check inside yielded no results. They then went to Bright's house but found nothing after a search. They then told other people of the theft and reported the matter to Bob Blooms Police Post where she valued all the property at K3900.00.

Muchinga testified that the next day, one Davy informed her that on his way from the University Teaching Hospital at around 0400 hrs, he saw George and Bright carrying a computer on the road in a blanket. The matter was then reported to police and the suspects apprehended. However, the phone and computer were never recovered. She identified the accused persons in Court as George and Bright.

In cross-examination by A1, Muchinga responded that she went to his home on three occasions over a two week period. She stated that Davy told them of what he saw a day after the theft.

A2 had no questions for cross-examination.

PW3, Daniel Siame testified that at around 0200 hrs on 15th February 2017, he was coming from a funeral and walking near Rocky Gardens. He told the Court that as he walked, he saw two people in front of him carrying a computer monitor, key board and CPU. He explained that though it was at night, he was able to see them due to the light coming from a tipper truck. He identified the two people he saw as Joseph and Bright in Court saying they still wore the same clothes they wore that night. He stated that Bright-A2 was carrying the monitor while Joseph carried the CPU and keyboard. He told the Court that he did not do anything but continued on his way. He testified that a week later, he learned that



Mutambo complained that his monitor, PC and keyboard had been stolen. He then went to Muchinga and told her and PW1 that Bright and Joseph stole their goods. He later helped to have Joseph apprehended after Bright was detained. He described the computer as black and grey in colour. Siame identified A1 as Joseph and A2 as Bright in Court.

In cross-examination by A1, Siame maintained that he was about 15m away from the accused when he saw them. He stated that though it was at night, he could not make a mistake as he knows the accused and their clothes.

In cross-examination by A2, Siame maintained that A2 had the monitor at the time he saw them and that he recognised his trouser. He stated that A2 responded that he sold the computer to one Isaac but that they did not find Isaac to apprehend him.

PW4, Det. Cons. Oliver Mushe Lishili testified that he reported for duties on 15th February 2017 at 0800 hrs. He was then allocated a docket of burglary and theft to investigate in which Mutambo complained that his house was broken into and a computer and phone worth K2450.00 stolen. Cons Lishili stated that Mutambo told him that one David Siame saw Banda and Ngandu at around 2200 hrs carrying the alleged stolen property. He told the Court that on 10th March 2017, he reported for duties and discovered that there were three suspects in custody namely Banda, Ngandu and one Isaac. He interviewed the trio and Banda and Ngandu told him that they entered Mutambo's house through the living room window which they found open. He testified that they told him that they entered and took the computer in the living room before going to the bedroom where they found Muchinga asleep alone. They took a phone which was under a pillow and went out. He testified that the accused told him that they wrapped the computer in a blanket from the sofa and went to sell to Isaac at around 2000 hrs.



Cons Lishili testified that he interviewed Isaac who denied meeting the accused persons on the material day. He further visited Isaac's work place where he confirmed that Isaac was working at the time the accused alleged to have met him. He then released Isaac on grounds of insufficient evidence. Cons Lishili then decided to charge and arrest the duo for the offence of burglary and theft. He identified the accused persons in Court and explained that nothing that was stolen was recovered.

In cross-examination by A1, Cons Lishili responded that he is not the one that apprehended the accused as he found them in custody. He responded that the person the accused said they sold the computer to is unable to come to court. He stated that he did not recover the computer from the buyer even though the accused led police to him.

In cross-examination by A2, Cons Lishili responded that the accused led police to the house and the person they allegedly sold the computer to. He stated that computer and phone were not recovered.

At this point, the prosecution closed its case and I found the accused with a case to answer. They elected to testify on oath and called no witnesses.

DW1, George Banda-A1 testified that on 11th February 2017, he was sleeping at home when Mutambo and his wife came. He told the Court that they searched his house without telling him what they were looking for. He told the Court that a week later, they again came at 0500 hrs and told him that they came last time because they heard that he had stolen their computer. He denied stealing their computer and told them that he keeps a lot of property at the farm. On 5th March 2017, he was apprehended. He told the Court that on 6th March 2017, a third person he did not know was detained in police custody. He told the Court that he was



beaten and tortured to reveal where the property was but that he did not know anything.

A2 had no questions for cross-examination.

In cross-examination by the prosecutor, he denied meeting Siame on 15th February 2017 or going to Mutambo's house. He further denied leading the police to any person. He argued that he was arrested on mistaken identity.

DW2, Bright Ngandu-A2, testified that on 6th March 2017, he was apprehended by Mutambo and taken to the police. At the police, he learnt that it was in connection with stolen property. He told the Court that Mutambo directed police to torture him until he disclosed where the property is but that he could not admit the theft because he did not know anything. He was later brought to court and told the Court that he is still surprised at being arraigned.

A1 had no questions for cross-examination.

In cross-examination by the prosecutor, he denied knowing David Siame. He told the Court that Mutambo told Siame to point at him. He stated that Mutambo said he would look for a witness. He denied stealing anything.

This was the evidence on record. The accused persons denied breaking into the house of Mutambo and taking his computer and phone for his wife. A1 told the Court that his house was searched and he was later arrested for the offence while A1 said he was apprehended and detained for the offence. The gist of their testimony is that they were nowhere near the Mutambo house and only ended up being arrested. As for A2, he sought to show that Mutambo brought a false witness in Siame who also gave a mistaken identity of him.



The totality of the prosecution evidence shows that no one saw the accused persons break and enter into the Mutambo house to take the computer and phone. However, Siame-PW3 testified that in the early hours of 15th February 2017, he saw the accused persons carrying a computer. He stated that Bright-A2 was carrying the monitor while Joseph carried the CPU and keyboard. It is evident that he referred to George as Joseph. Siame explained that he was able to identify the accused because there was light from a tipper truck and the accused still wore the same clothes. This was never disputed.

A2 raised the defence of mistaken identity by David Siame. PW2 is what is known as a single identifying witness. In the case of **Muvuma Kambanja Situna v The People (1982) Z.R. 115**, the Supreme Court held that:

- 1) *The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.*
- 2) *If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.*

Further, in **Shawaza Fawaz and Prosper Chelelwa v The People (1995)**, the Supreme Court held that:

In single witness identification, corroboration or something more is required.

As noted earlier, the offence occurred at night and neither PW1 nor PW2 saw anyone. However, Siame told the Court that he saw the duo on the road at night. The evidence of a single identifying witness must be closely examined by the Court before it can feel safe to convict. In **Chimbini v The People (1973) Z.R. 191**, the Court of Appeal stated that:



It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night-time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made (i.e. whether there was a confused fight or scuffle or whether the parties were comparatively stationary). Most importantly it is relevant to consider whether the witness knew the accused prior to the incident, since there is the greatest difference between recognising someone with whom you are familiar, or at least whom you have seen before, and seeing a person for the first time and attempting to recognise and identify him later from observations made in circumstances which are no doubt charged with stress and emotion.

Siame saw the accused at night as they walked ahead of him. He explained that he was able to identify them because of the light from a tipper truck and from the clothes that they wore; the clothes being the same ones they wore when he testified. I take judicial notice of the fact that tipper trucks generally emit a strong ray of light to allow one to see clearly. He was certainly relaxed as there was no immediate threat from them or anyone. The Court was not told if Siame previously knew A1 however, it is evident that he knew them for he helped to apprehend A1. There was no serious challenge to Siame's testimony by the accused who simply said he made an honest mistake. As such, I find that Siame knew the accused previously and that there was no possibility of an honest mistake.

PW4 testified that the accused led him to the person who they sold the computer to. This person was neither named nor called to testify. It is important that such a witness be availed to the Court to be examined if at all he bought the stolen goods and from the accused. Ordinarily, the failure to avail such a witness ought to be



fatal to the case of the prosecution. However, I have the testimony of the single identifying witness, Siame who saw the accused persons carrying the computer at night. For this reason, I am satisfied that it is the two accused persons that took the computer and cell phone from Mutambo's house.

There is no dispute that the theft took place at night at around 0300 hrs as per the testimony of PW2 and PW3. I find that the accused persons had no right of claim against Mutambo or his wife. It is evident that they broke and entered into the house for the burglar bar was found broken by PW2.

VERDICT

Consequently, I find that the case has been proved beyond all reasonable doubt. The accused persons, George Banda and Bright Ngandu are guilty of the offence of burglary and theft contrary to section 301 (a) and 272 of the Penal Code Cap 87 and I convict them accordingly.

gpc
DELIVERED IN OPEN COURT THIS 2ND DAY OF JUNE 2017

[Signature]

N. C. SIMAUBI

MAGISTRATE CLASS 1

