J7

IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 103/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

STEVEN BWALYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **C.K. Makungu, F.M.Chishimba & M.M. Kondolo S.C J.J.A**
On 19th June, 2017 and 27th September, 2017.

For the Appellant: *Miss G.N. Mukulwamutiyo - Senior Legal Aid Counsel - Legal Aid Board*
For the Respondent: *Mrs. S.C. Kachaka - Senior State Advocate - National Prosecutions Authority*

JUDGMENT

C.K. MAKUNGU,JA delivered the Judgment of the Court.

Cases referred to:

1. *Mwape v The People (1976) ZR 160 (SC)*
2. *Mutambo v The People (1965) ZR 15 (CA)*
3. *Wilson Masauso Zulu v. Avondale Housing Project Ltd (1982) ZR 172*
4. *Zulu v The People (1977) ZR 151*
5. *Bwanausi v The People (1976) ZR 103*
6. *Dorothy Mutale and Another v The People (1997) SJ 51*
7. *Winfred Sakala v The People (1987) ZR 23 (SC)*

8. *Ilunga Kabala v The People (1981) ZR 102*

Legislation referred to:

1. *The Penal Code – Chapter 87 of the Laws of Zambia – Sections 22,200, 265(1),(5), 294(1)*

This is an appeal against conviction and sentence. The appellant was tried and convicted of two counts of aggravated robbery contrary to section 294(1) of the Penal Code Cap 87 of the Laws of Zambia and one count of murder contrary to section 200 of the Penal Code Cap 87 of the Laws of Zambia by the lower court.

In the first count, the allegations levelled against him were that on 1st September, 2014 at Mufulira in the Mufulira district of the Copperbelt province of the Republic of Zambia, jointly and whilst acting together with other persons unknown he stole assorted grocery items altogether valued at K1, 060. 00 from David Mutondo the property of Andrew Msiska and immediately before or immediately after such stealing, he used or threatened to use actual violence to the said David Mutondo in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

Particulars of the second count were that on the 1st day of September, 2014 at Mufulira in the Mufulira District of the Copperbelt province of the Republic of Zambia, jointly and whilst acting together with other persons unknown he stole two cases of castle larger, one case of mosi larger, and twelve bottles of Bols

Brandy, altogether valued at K580.00 from David Mutondo the property of Matildah Mwale and at or immediately before or immediately after such stealing, he used or threatened to use actual violence to the said David Mutondo in order to obtain or retain or prevent or overcome resistance to its being stolen or obtained.

Particulars of the third count were that on 1st September, 2017 in Mufulira, jointly and whilst acting together with other persons unknown, he murdered David Mutondo.

Upon conviction, on the 1st and 2nd counts he was sentenced to twenty years imprisonment with hard labour respectively with effect from the date of arrest which was 1st September, 2014. For the 3rd count, he was sentenced to death.

In brief, the prosecution evidence given by a total of eight witnesses was that on 1st September, 2014 around 02:30 hours, PW1 (Justine Luchembe) who was asleep in his house in Kalukanya Mufulira was awakened by loud noises emanating from Sara's shopping complex which was about 40 metres from his house. The said shopping complex houses two shops and two bars. He immediately proceeded to the complex with his 14 year old son Richard Luchembe (PW2) and his nephew Erick Chileshe. The trio carried iron bars. On arrival, they found the appellant standing inside a grocery shop called Grace of God which belonged to Andrew Msiska (PW4). Two other men were in the same shop. PW1 then closed the grill door and announced that they were police officers about to apprehend them. The accused

then pushed the grill door open and ended up fighting with PW1. During the struggle, they fell to the floor and two other men whom PW1 did not recognise came out of the shop. One of them fought PW1 before they both fled the scene. When the other two men left, the accused ran away for about 10 metres before he was apprehended again by PW1, his son and nephew who beat him up and forced him to lie down. PW2, Lubasi Makumelo (PW3) and others drove the accused to the police station. The visibility at the shops was quite good as some lights were shining from PW1's house towards the shops. When the police left with the accused, PW1, PW2 and Erick Chileshe together with the others checked around the building and found a pool of blood on the ground behind the shop. They also discovered that David Mutondo who had been guarding the premises was lying dead in another pool of blood about four meters away from the first pool of blood and fourteen meters from the shops. According to the postmortem report, the body of the late David Mutondo (89 years old) had a cut (5cm) on the forehead, the right socket was empty because the eye was removed and arms were broken. After opening the body, subdural hemorrhage was noticed in both hemisphere. The cause of death was subdural hemorrhage (head injury).

Further evidence by the prosecution was that the wooden door of the shop was broken into three pieces while the grill door was damaged on the hinges leaving the other side intact and it was opened.

It was also in evidence that the thieves had removed the merchandise from the shelves and put them in two 50 kg bags which bags were found in the corner of the shop. The groceries included bath soap, sugar, washing powder, tooth paste. The groceries were recovered and disposed of by the Magistrates court. The Speedy Decay Disposal Form was produced in evidence.

At the same shopping complex, there was a bar called Bobo's bar owned by Matilda Mwale (PW5) which was next to Grace of God shop and that bar was also broken into both from the front and back doors and the grill door was removed. Inside Bobo's bar, the fridge was damaged, two cases of castle beer, one case of mosi beer and 12 bottles of bols brandy were missing. All these were worth the sum of K580.00. These goods were not recovered.

There were no finger prints taken at the scene and no identification parade was conducted.

The defence evidence was given by the accused/appellant alone and it was to the effect that on 30th August, 2014 around 21:00 hours he went to Section 5 to collect K60 for work done from Brenda's father who only got back from work around 22:20 hours and paid him the whole amount. On his way back, he found three men with iron bars near Sara's shopping complex whom he took as police officers. They asked him where he was going but he didn't answer, so they started beating him. In the process, they stole his K60 and dragged him to the corridor of Grace of God shop. He then shouted for help and some people showed up.

He then ran away because he thought they had intentions of killing him. However, they apprehended him. He denied having broken into any shop or bar. He also denied having seen any bags full of groceries. He said he was not found with any implements or stolen goods. He added that he did not see the dead security guard. He also denied having had long dreadlocks at the material time.

The appeal is based on the following grounds:

1. *The trial Court misdirected itself both in law and in fact when it convicted the appellant of aggravated robbery when there was no evidence linking him to that offence.*
2. *The trial court misdirected itself both in law and in fact when it relied on weak circumstantial evidence to convict the appellant of murder.*

Both parties filed heads of arguments which they relied on at the hearing of the appeal.

In support of the 1st ground of appeal, it was submitted by the appellant's advocate Miss Mukulwamutiyo that in order to prove aggravated robbery, three elements have to be met and these are;

i. That the accused was armed with an offensive weapon.
ii. That something was stolen.
iii. That at or immediately before or immediately after the time of stealing it, violence was threatened or used against the complainant or property in order to obtain or

to prevent or to overcome resistance to its being stolen or retained.

She submitted that the prosecution did not prove beyond reasonable doubt that the appellant herein was armed with an offensive weapon. That there was a misdirection on the part of the trial judge when she held that the appellant and his friends were armed with iron bars. The evidence of PW2 shows that it was in fact PW1 and PW2 who were armed with iron bars and that this evidence was corroborated by the appellant's own evidence when he testified to the effect that he saw three men with iron bars who used the same to beat him.

She further submitted that there was no proof of the following:

1. *That the accused was found with stolen items.*
2. *That he was the one who put the groceries in the sacks.*
3. *That at the time the appellant arrived at the shops the security guard was alive.*
4. *That the appellant with other persons unknown had agreed to use violence against the security guard.*

She referred us to the case of **Mwape v The People** [1] wherein the Supreme Court held as follows:

> **"We consider that the second portion of Mr Anyaorah's proposition is a non sequitur, because there is nothing in the evidence to suggest that there was an agreement to use violence if necessary, or if there was, that the appellant was party to such agreement. The robbers may**

well have anticipated the presence of a guard, but they may have planned to effect entry into the premises only if they could avoid detection, and after blowing open the safe, to run away and specifically avoid contact with any guard or guards. It cannot, on the evidence, be assumed against the appellant that the plan was to use violence if necessary."

In conclusion, she submitted that there was no evidence on record to support the lower Court's finding that the appellant was guilty of aggravated robbery. She therefore urged us to quash the conviction on both counts of aggravated robbery.

In response to the 1st ground of appeal, the state advocate submitted at the outset that the state does not support the conviction for aggravated robbery because there was no evidence to disclose expropriation of any merchandise. She added that none of the witnesses were able to demonstrate that the robbers in the company of the appellant had left with some goods. Further that, PW5's testimony suggests that some of the liquor that was removed from Bobo's bar was at Msiska's shop i.e. Grace of God shop door at some point. She added that under the circumstances, the Court should have imposed a lesser charge on the appellant.

She went on to argue that she did not agree with the appellant's contention that proof of an offensive weapon is an element of aggravated robbery where two or more persons are involved. She beseeched us to comment on this.

In addressing the 1st ground of appeal, there is need for us to consider whether the appellant and other persons unknown had formed a common intention to commit the offence of aggravated robbery. In law, a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal. Section 22 of the Penal Code (1) provides:

> **"22. 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 its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

In the case of ***Mutambo and five Others v. The People***[2] a decision of the Court of Appeal of Zambia, it was held that:

> ***For the purposes of Section 22 of the Penal Code Chapter 87 a probable consequence is that which a person of average competence and knowledge must be expected to foresee as likely to follow from a given course of action."***

Although the learned trial judge did not refer to Section 22 of the Penal Code, she was on firm ground when she found on page 42 of the judgment that:

> **"....the accused and his friends contemplated and did in fact inflict harm on the security guard in this case.**

This showed their intent to deprive the owners of the shops in which they broke."

Applying ***Mutambo and Others v. The People***, the appellant who is of average competence must have foreseen that harming the security guard would follow from his team's course of action. We are therefore of the considered view that Section 22 of the Penal Code applies to the facts of this case.

On the issue whether or not the accused and his friends had iron bars, the judge found on page 41 of the judgment that there was firm evidence from PW1 and PW2 that the accused and his friends were armed with iron bars and that the accused was merely insinuating that prosecution witnesses (meaning PW1, PW2 and Erick Chileshe) were the ones who had iron bars. Our perusal of the evidence on record shows that PW1 in cross examination said he found the appellant with an iron bar. PW2 in answer to questions in examination in chief told the court that PW1, Erick Chileshe and himself had carried iron bars to the shopping complex at the material time. Since no iron bar was recovered from the accused, it is doubtful that he was in possession of one at the time of his apprehension. It is clear that the appellant did not merely insinuate that the said prosecution witnesses were armed with iron bars but he told the truth. Therefore the court misdirected itself.

In the case of **Wilson Masauso Zulu v. Avondale Housing Project Ltd** [3] the Supreme Court gave guidelines as to when

findings of fact of the lower court can be upset by an appellate court and this is what they said;

> **"The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts."**

Therefore in the present case we upset the said findings of the lower court for they were not made on the basis of the evidence on record. However, it is clear from the circumstantial evidence that some instruments or weapons were used to break into the shop and bar and to inflict the severe injuries upon the guard who consequently died. Therefore the trial judge cannot be faulted for deducing from the evidence on record that some offensive weapons were used by the accused together with others unknown to break into the building and harm the guard. From the fact that the other two intruders ran away, the only reasonable inference that can be drawn is that they ran away with the offensive weapons because none were found at the crime scene.

The trial judge rightly rejected the evidence of the accused that he was on his way home from collecting K60 from Bashi Brenda when he was accosted by some people who were armed with iron bars who took him to the corridor of Grace of God shop because as rightly found on page 49 of the judgment, the appellant was found and apprehended from the crime scene in the process of committing a felony.

On the issue whether or not the accused stole anything from the shop and bar which were broken into, the trial judge was on firm ground when she found that the accused and his colleagues stole the two sacks full of groceries, the brandy and beers because her findings were based on the law and the evidence on record. We are of the view that the findings were reasonable, therefore we shall not interfere with them. On page 41 of her judgment she referred to Section 265(1) of the Penal Code (1) which provides:

> **"Any person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any other than the general or special owner thereof anything capable of being stolen is said to steal that thing."**

She also referred to subsection 5 of Section 265 of the same Act which defines "*take*" in the following terms;

> **"A person shall not be deemed to take anything unless he moves the thing or causes it to move."**

In this case there was evidence from PW4 Andrew Msiska that he had left his merchandise displayed on the shelves the previous day but he found the shelves cleared and the assorted groceries packed in two sacks and placed in a corner inside the shop. The trial judge was therefore on firm ground when she found that the accused and his colleagues took the groceries in terms of section 265(1) and (5) of the Penal Code because they moved them.

There was also reliable evidence from PW5 Matilda Mwale to the effect that a case of beer, 2 cases of castle and 12 bottles of bols

brandy worth K580.00 were missing from her bar and that some of her alcoholic drinks were found at the entrance of Grace of God shop. This was cogent evidence of theft.

The appellant's argument that there was nothing to show that the appellant, acting together with others unknown used or threatened to use actual violence against the security guard does not hold any water because the evidence on record indicates clearly that violence was used against the security guard who has since died and that violence was also used against the property i.e. the grill doors and wooden doors that were broken. The definition of aggravated robbery under Section 294(1) includes:

> **"The fact that actual violence was used to <u>any person or property</u> to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained." (Underlined by the court for emphasis only)**

As regards the question whether in an aggravated robbery case under Section 294(1) of the Penal Code, there must be proof that the accused person was armed with an offensive weapon, our interpretation of the provision is that even where there is no proof that the accused was armed with an offensive weapon but the other factors included in that section are proved, aggravated robbery can be said to be proven.

For the foregoing reasons, we reject both the appellant and the states submissions that aggravated robbery was not proved beyond reasonable doubt in this case and hold that it was.

In addressing the second ground of appeal, counsel for the appellant submitted that there was no evidence connecting the appellant to the murder of the deceased. She went on to state that there was a misdirection on the part of the trial judge when she held that the circumstantial evidence was cogent enough to take the case out of the realm of conjecture without ruling out the alternatives. She in this regard relied on the case of **Zulu v The People** [4] wherein the Supreme Court held as follows:

> **"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.**
>
> **It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."**

Further that, in the case of **Bwanausi v the People** [5] it was stated as follows;

> **"Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of alternatives and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation."**

She contended that there was no evidence to show that the security guard was alive when the appellant went to the shop. Further that, even though the summary of the significant findings upon post-mortem examination of the deceased shown on page 198 of the record of appeal indicate that weapons of some sort were used to inflict injury on the deceased, the evidence on record clearly shows that there was no weapon found on the appellant neither was there any weapon found at the crime scene.

It was also submitted that the evidence of PW1 was to the effect that he found three people in the shop but that he did not tell the Court whether they had weapons or not. She contended that if they had weapons, they would have injured PW1 who appeared at the door alone. That there was no evidence that the appellant's clothes were stained with blood even though the evidence revealed that the deceased was found in a pool of blood. It is these factors that would have linked the appellant to the murder. She further stated that the totality of the evidence supports the appellant's position that he was merely passing by the shops and was not aware that there was a break in. The possibility of the deceased having been killed by other persons unknown was not ruled out, therefore the inference of guilt was not the only one reasonably possible. To fortify this, she relied on the case of **Dorothy Mutale & Another v The People** [6] where the Supreme Court held as follows:

> **"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that**

the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such an inference."

She concluded by stating that the circumstantial evidence did not take the case out of the realm of conjecture and as such the prosecution failed to prove the case of murder against the accused beyond all reasonable doubt and it was her prayer that the conviction be quashed.

In response to the second ground of appeal, the state began by stating that the matter was purely circumstantial but that the evidence adduced propelled the case out of the realm of conjecture. Miss Kachaka submitted that the evidence does not disclose the manner in which the deceased was murdered and by whom. However, it shows that the deceased was alive on the date of the attempted robbery and later found dead. It was submitted that the appellant gave evidence to the effect that he used to pass through the premises and that it was fair to make an inference that he was well aware that the premises were guarded by a night watchman. She stated that the appellant was apprehended whilst attempting to rob the premises guarded by the deceased in the company of other persons unknown. He and the said persons had formed a common design. That in executing such an enterprise, it was essential that access be attained irrespective of resistance. Further that, from the way access was attained into the premises the robbers were armed with breaking implements and were able to silence the watchman before breaking into the premises.

It was further submitted that assaulting the watchman was a probable consequence of deliberately setting out to steal property known to have been under his immediate personal care and protection. She in this regard placed reliance on the case of **Winfred Sakala v The People** [7].

Counsel concluded by submitting that the appellant was found at the premises around 01:30hrs where the security guard was found dead and attempted to flee the scene when he was approached by PW1 who introduced himself as a police man. These are odd coincidences which should be taken as evidence against him. To fortify this, she relied on **Ilunga Kabala v The People** [8] wherein it was held that it is trite law that:

> "**Odd coincidences, if unexplained may be supporting evidence.**"

Further that, these coincidences show that the appellant had the opportunity to commit the offence. That the only reasonable conclusion that could be drawn was that the appellant did participate in the murder.

As regards the second ground of appeal we do not accept the contention made by the appellant's advocate that considering that the security guard was in a pool of blood, the appellant should have had some blood on him. It is our position that it was not necessary for him to have had blood on him because we have already held in the earlier part of this judgment that there was a common purpose designed by the appellant and the other

persons unknown which means that he probably did not touch the blood but the ones who ran away. The odd coincidence alluded to by the state can actually be taken as evidence against the appellant.

The issue of murder was well articulated by the trial judge. We say so because, the evidence of PW1 clearly shows that the appellant was found and/or apprehended inside PW4's shop, but at the entrance, his colleagues who were also inside the shop managed to flee the scene. It was common ground that the shopping complex was guarded by the deceased. The appellant did not explain to the court exactly what transpired from the time he left Bashi Brenda's house to the time when the offence was committed. The appellant talked about the night of 30th August, 2014 between 18:00 hours and 22:30 hours. It seems to us he deliberately avoided discussing the events of that night between the time he reached the shopping complex and 02:30 hours when he was apprehended. It is a very odd coincidence that the appellant was found in the shop that had been broken into at such an odd hour. It is also odd that he attempted to run away when he was approached by PW1, PW2 and another who had introduced themselves as police officers. The judge properly held the odd coincidences against the appellant. The **Ilunga case** [6] applies.

From the judgment, it is clear that the judge was satisfied that the circumstantial evidence had taken the case out of the realm of conjecture so that it attained such a degree of cogency which

could only permit an inference of guilt. Clearly the judge did rule out any other alternatives. At page 44 of the judgment the judge rightly found *inter alia* that:

> **"It is not farfetched to say that the security guard was killed to prevent him from raising alarm as they committed the felony of aggravated robbery. That is why afterwards they went about breaking things in such a manner without fear such that people like PW1 were awakened by the racket they were making at that time they had eliminated the person who would have raised the alarm. I find that on the basis of the evidence before me a nexus between the aggravated robbery and the murder of the guard has been established." I am satisfied that the prosecution has established not only intent but the unlawful act of murder of one David Mutondo."**

The judges satisfaction that the accused in conjunction with the others murdered the guard in the course of committing the felony rules out the contention that there was no evidence that the guard was alive when the appellant went to the shop and that the deceased was probably killed by somebody else. We therefore accept the state's submissions as regards ground two. The cases of **David Zulu v. The People[3], Dorothy Mutale and Others v. The People[4]** and **Bwanausi v. The People[7]** were all considered by the lower court in reaching its decision. Both parties' attempts to detach the aggravated robbery from the murder are unacceptable under the circumstances.

For the foregoing reasons, we find no merit in both grounds of appeal and dismiss the appeal. The convictions and the sentences are hereby upheld.

Dated at Lusaka this 27th day of Sept 2017.

.....

C. K. MAKUNGU
COURT OF APPEAL JUDGE

.....

F.M.CHISHIMBA
COURT OF APPEAL JUDGE

.....

M.M. KONDOLO, SC
COURT OF APPEAL JUDGE