IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 26,27,28,29/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E E N :

AMON MOYO	**1ST APPELLANT**
NYAMBE MUNGANYA	**2ND APPELLANT**
DICKSON LUKWESA	**3RD APPELLANT**
MAXIMO GIFT MUKANAKA	**4TH APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Majula, JJA
On 28th June, 2018 and 10th August, 2018

For the1st, 3rd & 4th Appellant : Ms E. I. Banda – Senior Legal Aid Counsel
For the 2nd Appellant : Ms. I. E. Suba of Messrs Suba, Tafeni & Associates
For the Respondent : Mr. P. Mwale – National Prosecution Authority

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J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Mwewa Murono Vs. The People (2004) ZR 2007**
2. **Mushala and Others Vs. The people (1978) ZR 58**
3. **Zulu and Others Vs. The People (1978) ZR 227**
4. **R. Vs. Turnbull (1976) 3 ALL ER 549**
5. **John Timothy and Another Vs. The People (1977) ZR 394**
6. **Nkumbwa Vs. The People (1983) ZR 103**
7. **Bright Katontoka Mambwe Vs. The People SCZ No. 8 of 2014**
8. **Gilbert Chileya Vs. The People (1991) ZR 33 (SC)**
9. **Kalebu Banda Vs. The People (1977) ZR 169 (SC)**
10. **Yohani Manongo Vs. The People (1981) ZR 152 (SC)**

11. **John Mkandawire and Others Vs. The People (1978) Z.R. 46**
12. **Machobane v The People 1972 ZR 101 (CA)**
13. **Mhango & Others v The People 1975 (SC)**
14. **Mukwakwa v The People 1978 ZR (SC)**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

The Appellants were charged for the offence of aggravated robbery contrary to **Section 294 (1) and (2) (a) of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence allege that the Appellants on 26th January, 2005 at Kabwe in the Kabwe District in Central Province of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with a firearm, did steal from Emmanuel Zulu 1 Toyota Corolla, registration number ABD 3303, K45, 000.00 cash all valued at K24, 045, 000.00 the property of Gladius Mwemba Mugwagwa and at or immediately before stealing did use actual violence to the said Emmanuel Zulu in order to obtain or overcome resistance to the said property being stolen.

In brief, the evidence by the prosecution at trial was as follows; Emmanuel Zulu, PW2, was employed by PW1 as a taxi driver to drive her motor vehicle, a Corolla, registration number ABD 3303. PW1

instructed her son, PW3, to accompany PW2 during the course of his work. Both PW2 and PW3 testified that on 26th January, 2005 they were booked by an unknown man. The customer requested to be taken to Chisamba, near Safari Lodge, to see his pregnant wife. In Chisamba, the customer made several attempts to get directions to the place he was supposed to go. The customer used PW3's mobile phone to make and receive calls. The customer eventually asked PW2 to park the vehicle on the side of a road where a man whom the customer claimed to have been his brother in law stood. Upon parking the vehicle, 3 other people emerged from the bush. A gun was pointed at the driver, PW2, by one of the persons and he was asked to leave the vehicle.

According to the evidence before the lower Court, PW2 was taken to the bush, threatened with death, slapped and his clothes were torn. PW2 and PW3 were both tied up while the robbers left with the Corolla. The assailants also went away with PW3's phone, shoes and money amounting to K45, 000.00.

After the robbers left, PW3 managed to free himself before untying PW2. They proceeded to Kabangwe Police Station where they reported the attack and robbery. At the police station, both PW2 and

PW3 stated that they would be able to identify the assailants and gave descriptions of the assailants to the officers. Later, at an identification parade, PW2 and PW3 identified the 3rd and 4th Appellants as the assailants.

PW4, Gillian Nabwengwa, a farmer in Namwala testified that the 2nd Appellant, in the company of a person named Patrick Kasamu approached him and offered to sell to him a white Toyota Corolla registration number ABA 3309 and a pistol. PW4 bought the pistol from the 2nd Appellant after officers at Namwala Police station verified that the pistol was genuine and registered in the 2nd Appellant's name.

Despite having paid a deposit towards the corolla, the transaction was not completed because the 2nd Appellant failed to produce the registration documents relating to the Toyota Corolla. Aside from the above reason, unknown persons had approached PW4 demanding payment of the balance for the Toyota Corolla. PW4 got suspicious and took the car to Namwala Police Station where it was collected by the 2nd Appellant. PW4 instead bought a canter from the 2nd Appellant.

PW4 identified the 1st and 2nd Appellants as the persons that went to his house selling the corolla and a pistol. He added that he was able to remember them as they had spent 3 days at his house. PW4 described the corolla as being white in colour, with grey seats. PW4 identified the vehicle sold to him which now bore a different number plate.

PW5, an officer at Namwala Police Station, confirmed that PW4, Patrick Kasamu and the 2nd Appellant had come to the Police Station on 15th February, 2005 in respect of a sale of a Corolla motor vehicle and a pistol. The 2nd Appellant was unknown to PW5. Upon query of the registration documents pertaining to the motor vehicle, the 2nd Appellant informed him that the documents were in the custody of a person in South Africa. PW5 advised that the sale of the vehicle could not be concluded without the registration documents.

With regards the firearm that was being sold, PW5 stated that he looked at the certificate pertaining to the firearm which was genuine. PW5 told the Court that the Corolla vehicle that PW4 had returned to the police station was collected by the 2nd Appellant. PW5 added that he later saw a similar Corolla as the one that had been on sale by the 2nd Appellant. This time it bore a different number plate

namely, AAP 1854. The Corolla was being driven by a manager of a co-operative. PW5 informed the officer in- charge about his suspicions and the said vehicle was impounded.

PW6 was Benson Nkolola who testified that he bought a Toyota Corolla AAP 1854 in March, 2005 from the 2nd Appellant. The 2nd Appellant had with him a White Book in the name of Moses Nasilele, an Insurance cover and a letter by Moses Nasilele authorising the 2nd Appellant to sell the vehicle on his behalf. This vehicle was later impounded.

PW7, a Sub. Inspector, conducted the identification parade at which PW2 identified the 4th Appellant while PW3 was able to identify both the 3rd and 4th Appellants as having been present when the vehicle was stolen from them. She maintained that the identification parade was conducted properly and there was no complaint by the 3rd and 4th Appellants.

PW8, an employee at the Road Traffic and Safety Agency (RTSA), testified that he was asked to verify 3 registration marks for vehicles namely ABD 3303, ABA 309 and AAP 1854. Registration marks ABD 3303 and ABA 309 were on the electronic system while AAP 1854 was on the manual system. The records at RTSA showed that

registration mark ABD 3303 belonged to PW1 whilst AAP 1854 was registered in the 2nd Appellant's name. Both were similar in make, colour, engine type and engine numbers. Registration mark ABA 309 was registered to a person called Rukero Moresh. He added that the registration marks all related to a Toyota Corolla.

PW9 testified that sometime in March 2005, he went with the 2nd Appellant to Namwala. The 2nd Appellant had informed him that he intended to sale his vehicle, a Toyota Corolla. It was white in colour and bearing Registration Number AAP 1854. The car was subsequently sold to PW6. PW9 told the Court that the 2nd Appellant had a letter of authority to sale the vehicle on behalf of a person called Moses Nasilele. Further, that there was an Insurance cover from Zambia State Insurance Company relating to the vehicle in question. PW9 added that the white book was in Moses Nasilele's name.

PW10's (the arresting officer) evidence was that his investigation revealed that the master mind behind the robbery was in fact the 1st Appellant. He followed up the 1st Appellant to Livingstone where he had been arrested for another offence. According to PW10, the 1st Appellant informed him that he was not part of the group that stole

the vehicle in question. He and the 2nd Appellant were merely given a car by the 3rd and 4th Appellants to sell on their behalf.

PW10 told the Court that the information he obtained from the 1st Appellant led to the capture of the 3rd and 4th Appellants who were later identified by PW2 and PW3 at an identification parade as having taken part in the aggravated robbery. Further, that after interrogating the 3rd and 4th Appellants; they admitted having stolen the vehicle in question and given it to the 1st and 2nd Appellant to sell on their behalf.

It was PW10's testimony that the recovered motor vehicle, registration number AAP 1854, had similar engine and chassis numbers as the vehicle that was stolen save for a difference on the last digit on the engine number, which appeared to have been altered from 9 to 7. PW10 told the Court that he did not follow up on the whereabouts of Moses Nasilele as his search at the Road and Traffic Safety Agency revealed that the car bearing Registration Number AAP 1854 was registered in the 2nd Appellant's name.

The 1st Appellant, in his defence, out rightly denied having taken part in committing the subject offence. He told the Court that it is for this reason that he was not identified at the identification

parade by PW2 and PW3. He further denied receiving a vehicle from the 3rd and 4th Appellant to sell on their behalf. He further told the Court that he did not know the 3rd and 4th Appellants prior to them being jointly charged with the subject offence.

The 1st Appellant admitted knowing the 2nd Appellant, a car dealer, who would often travel to South Africa to buy vehicles and spare parts for sale. He denied having sold a stolen car with the 2nd Appellant.

The 2nd Appellant, in his defence, confirmed that he knew the 1st Appellant. He stated that it was in fact the 1st Appellant who called him and informed him that he was selling a motor vehicle bearing Registration Number AAP 1854. The 1st Appellant drove the vehicle to Choma and asked the 2nd Appellant to sell it on his behalf as he was in the business of selling vehicles. The 1st Appellant came to Choma with Moses Nasilele the owner of the vehicle.

It was the 2nd Appellant's testimony that he eventually sold the car received from the 1st Appellant to PW6. He added that he had earlier sold a vehicle bearing Registration Number ABA 309 to PW4. He had bought the said car from a person in Livingstone. He went on

to state that he sold his pistol to PW4. He denied being involved in the aggravated robbery.

Both the 3rd and 4th Appellants denied being involved in the aggravated robbery or knowing the 1st and 2nd Appellants. They both testified that they had issue with the manner in which the identification parade was conducted and made their discomfort known to the officer who conducted the parade. In addition, the 3rd and 4th Appellants could not recall their whereabouts on the material day.

The learned trial Judge having considered the evidence found that the prosecution had proved its case against all the Appellants to the required standard. He found as a fact that PW2 and PW3 were indeed robbed of a motor vehicle. With regards the identity of the perpetrators, the trial Court was of the view that the identification made by PW2 and PW3 was reliable and devoid of any dangers of honest mistake.

The lower Court found that the evidence of PW4 and PW5 implicated both the 1st and 2nd Appellants to the subject offence. The Court found that the 1st Appellant was in the company of the 2nd Appellant when the vehicle was being sold to him. The vehicle turned

out to have been the same vehicle that was stolen from PW2 and PW3. The vehicle was identified by PW1, PW2 and PW3. Further, that the gun purchased from the 2nd Appellant was identified by PW3. The Court held that the 2nd Appellant knew that the vehicle he was selling was stolen and the firearm that PW2 and PW3 claimed to have been used to the threaten them was in fact his. The Court consequently, convicted all the Appellants for the subject offence and sentenced them to death.

Being dissatisfied with the decision of the Court the 1st, 3rd and 4th Appellants raised the following grounds of appeal that;

1. **The learned trial Judge erred in law and fact when he convicted the 1st Appellant on insufficient evidence which fell below the standard required by law.**
2. **The learned trial Judge misdirected himself in both law and fact accepting the evidence of PW2 and PW3 by failing to test the 'identification' of the 3rd and 4th Appellants with the greatest care.**
3. **In the alternative, the learned trial Judge erred in law and fact in convicting the appellants of armed robbery in the absence of proof beyond reasonable doubt that the weapon in question was a firearm under the Firearms Act Chapter 110 of the Laws of Zambia.**

The 2nd Appellant on the other hand advanced the following grounds of appeal;

1. **The Honourable Court below erred in law and fact when it found the 2nd Appellant guilty of the offence of aggravated robbery as there was no evidence whatsoever connecting him thereto.**
2. **The Honourable Court below erred in law and fact when it failed to appreciate the fact that;**
   i. **There was no evidence connecting the 2nd Appellant to the Firearm that was used during the robbery and indentified by the Complainant;**
   ii. **There was no evidence adduced to the effect that the 2nd Appellant's gun met the description of a firearm within the Firearms Act, Chapter 110 of the Laws of Zambia.**
3. **The Honourable Court below erred in law and fact when it failed to find that the prosecution/police was guilty of dereliction of duty having failed to follow up the lead of the person who gave the vehicle in issue to the 2nd Accused for the purpose of having it disposed off.**

The 1st, 3rd and 4th Appellants filed heads of argument and argued in ground 1, that the trial Court fell in grave error when it convicted them on evidence that did not meet the required standard in criminal law. We were referred to the provisions of **Section 206 of the Criminal Procedure Code**, and the case of ***Mwewa Murono Vs. The People*** [1] regarding the standard of proof in criminal matters.

It was contended that the trial Court misdirected itself when it found, at page J74, that the 1st Appellant was acting in common purpose with the Appellants on the mere fact that he was not incarcerated at the time the robbery occurred. Further, that there

was no indication on the record that the 1st Appellant was present at the scene of the crime as PW2 and PW3 did not identify him at an identification parade. The appellants further contend that it was a misdirection by the trial Court to rely on the uncorroborated evidence of PW4, who claimed that the 2nd Appellant had been with the 1st Appellant when he was selling the car. Further, that even if PW4's evidence was correct, there was no proof that the 1st Appellant had witnessed the sale of the motor vehicle by appending his signature to the sale agreement.

The Appellants argued that PW5 did not mention that the 2nd Appellant had been with the 1st Appellant when he went to sale the car in question. In a nutshell, the Appellants contend that there was no evidence that linked the 1st Appellant to the subject offence.

In ground 2, the Appellants argued that the identification of the 3rd and 4th Appellants by PW2 and PW3 was flawed and unreliable. PW2 could not have properly identified the 4th Appellant considering the fact that the 4th Appellant was allegedly tying up PW2 and the fact that PW2 and PW3 were removed from the vehicle at different times.

According to the 1st, 3rd and 4th Appellants, PW3 did not give any description to the police regarding the attackers. We were referred to the cases of ***Mushala and Others Vs. The people*** [2] and ***Zulu and Others Vs. The People*** [3] where the Court noted that even in cases of recognition, as opposed to identification of a stranger, there is a possibility of mistaken identity. The Appellants further argued that there were no odd coincidences that would have rendered the identification by PW2 and PW3 proper as observed in the English case of ***R. Vs. Turnbull*** [4].

Ground 3 was argued in the alternative. The Appellants contended that there was no direct evidence that a gun was used during the robbery. Further, that the recovered gun that was connected to the 2nd Appellant was not subjected to any ballistics examination to ascertain whether or not it was a firearm within the meaning of Section 2 of the **Firearms Act**. We were referred to the case of ***John Timothy and Another Vs. The People*** [5] where the Court held that to establish a case under Section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act.

The Appellants argued that the gun in question was not fired at the scene, it was also not described by PW2 or PW3 to the Police. In addition, that there was no evidence proving that the recovered firearm was in fact the one that was used during the robbery. Our attention was drawn to the cases of ***Nkumbwa Vs. The People*** [6] and ***Bright Katontoka Mambwe Vs. The People*** [7] where the Court stated that it is unsafe to uphold a conviction on a charge of armed aggravated robbery where there is no direct evidence of use of a firearm.

The 1st, 3rd and 4th Appellants urged the Court, in the alternative to uphold the appeal, quash the conviction, set aside the sentence and substitute it with a conviction of ordinary aggravated robbery under **Section 294 (1) of the Penal Code.**

The 2nd Appellant filed heads of argument dated 27th June, 2018. It was contended that the 2nd Appellant was not identified by the complainants as having taken part in the commission of the subject offence. Further, that the firearm found with the 2nd Appellant is a common firearm. PW2 did not specify any special features of the firearm he allegedly saw. In addition, the firearm that

was produced in Court was not linked to the robbery nor establish that the 2nd Appellant took part.

With regards the motor vehicle, the 2nd Appellant argued that he was selling the said vehicle on behalf of a person called Moses Nasilele. Further, that there is evidence on record that the said vehicle belonged to the Moses Nasilele and was only given to the 2nd Appellant to sell it on his behalf.

The 2nd Appellant submits that the above explanation was reasonable and met the threshold required to discharge a burden in a case of recent possession. It was argued that the police did not make an effort to trace the alleged seller of the vehicle, Moses Nasilele, to establish whether or not he was a fictitious person. We were referred to the cases of ***Gilbert Chileya Vs. The People*** [8] and ***Kalebu Banda Vs. The People*** [9] where the Court opined that failure to bring before Court evidence that is available to the police raises an assumption that had it been produced, it would have been in favour of the accused.

The 2nd Appellant contends that the police failed to trace the said Moses Nasilele despite being availed with his residential and postal addresses. We were referred to the case of ***Yohani Manongo Vs.***

The People [10] in which the Court stated that where evidence of recent possession is used as corroboration, it is not necessary for the Court to draw an inference of guilt of an accused person owing to such possession. We were urged to allow the appeal as the case against the 2nd Appellant was not proved beyond reasonable doubt.

The Respondent in its heads of argument does not support the 1st Appellant's conviction for the subject offence as a principal offender. It stated that PW10 told the Court that informers reported to him that the person behind the robbery was the 1st Appellant. Further, that the 1st Appellant informed him that he had no hand in the robbery but that the 3rd and 4th Appellants were responsible for the robbery and in fact gave him the vehicle in question to sell. Information obtained from the 1st Appellant led to the capture of the 3rd and 4th Appellants who were later identified by PW2 and PW3. In addition, PW4 testified that the 1st Appellant had been present when the 2nd Appellant was selling the car.

According to the Respondent the evidence against the 1st Appellant reveals that he was an accessory after the fact as defined under **Section 397 (1) of the Penal Code.**

With regards the identification of the 3rd and 4th Appellants by PW2 and PW3, the Respondent argued that there was ample opportunity to properly identify the 3rd and 4th Appellants as the robbery took place in broad daylight. Further, that the 3rd Appellant was only identified by PW2 making the identification that of a single identifying witness. The 4th Appellant was identified by both PW2 and PW3. We were referred to the case of ***John Mkandawire and Others Vs. The People*** [11] on the evidence of a single identifying witness and treatment thereof.

It was argued that the identification of the 3rd and 4th Appellants was supported by the evidence of PW10 who testified that the 3rd and 4th Appellants admitted having stolen the vehicle and led PW10 to the scene of the crime.

According to the Respondent PW4 testified that he bought a firearm from the 2nd Appellant which firearm was identified by PW3. The firearm and vehicle was recovered. It was immaterial whether or not the firearm was subjected to ballistic examination as it was successfully registered by PW4.

When the appeal was heard on 28th July, 2018, Counsel made viva voce arguments to augment their written submission which

were filed into Court. Counsel for the 1st Appellant reiterated that the 1st Appellant was not linked to the subject offence, although she conceded that the 2nd Appellant testified in the lower Court that the 1st Appellant gave him a vehicle to sell.

Counsel for the Respondent conceded that there was no evidence to prove that the firearm that was recovered was the same one that was used during the robbery. Further, no ballistic examination of the recovered firearm was ever conducted. The vehicle and firearm were recovered and that there was evidence before Court regarding the fact that the robbers used a firearm to threaten the victims. Counsel argued that this was an odd coincidence.

It was argued that there was no dereliction of duty on the part of the police as the information received regarding the whereabouts of Moses Nasilele was general information which the police is not expected to investigate.

In reply, Counsel for the 2nd Appellant argued that the police were given a postal and residential address which was sufficient for them to make a follow up on the whereabouts of Moses Nasilele.

Counsel for the 1st, 3rd and 4th Appellants reiterated that since the firearm that was produced in Court was never subjected to a ballistic examination it was not a firearm within the definition under the Firearms Act. She urged the Court to interfere with the sentence should the court be of the view that the 1st, 3rd and 4th Appellants took part in the commission of the subject offence.

We have considered the appeal, the evidence adduced in the court below, the arguments advanced and the authorities cited. The 1st, 3rd and 4th Respondents have raised 3 grounds of appeal on the issue of insufficient evidence, identification and whether the alleged weapon was a firearm within the **Fire Arms Act, Chapter 110** of the laws.

The 2nd Appellant in his appeal raises the issue of the firearm and dereliction of duty by the Police in failing to follow up the lead of the person who gave the vehicle in issue to him.

We shall first address the issues raised by the 1st, 3rd and 4th Respondents, whether there was sufficient evidence to convict them. The evidence that connects the 1st Appellant to the offence is by PW10. PW10 testified that upon receiving information from an informant, he travelled to Livingstone where the 1st Appellant was

in detention on unrelated matter. The 1st Appellant informed him that he and A2 were given the motor vehicle to sale by the 3rd and 4th Appellants. This led to the apprehension of the 3rd and 4th Respondents.

PW4 also testified that at the time that A2 sold him the vehicle, he was in the company of the 1st Appellant. They both stayed with him for a couple of days. In addition, the 2nd Appellant testified that the 1st Appellant brought him the car to sale.

The evidence by A2 against A1 is that of an accomplice, it must be corroborated before reliance is placed on it or accepted by the court. We refer to the case of ***Machobane v The People*** *(12)* where it was held that;

> **"While a conviction on the uncorroborated evidence of an accomplice is competent as a strict matter of law, the danger of such conviction is a rule of practice which has become virtually equivalent to a rule of law. The court must warn itself of the danger of convicting on evidence not corroborated by other independence evidence."**

The record will show that A2's evidence against A1 was corroborated by PW4's evidence, he stated that the 1st and 2nd Appellants went to his home at the time that A2 sold the vehicle in issue to him.

It is trite that corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime, evidence which implicates him or confirms. In the case of ***Mhango & Others v The People*** [13], it was held that;

> ***"Where the evidence is purely that of an accomplice, it should not be relied upon in the absence of corroboration, save for special and compelling grounds."***

A1 in his defence denied knowing A3 & A4 though he knew A2 as a car dealer. PW10 had also testified that A1 led to the apprehension of A3 and A4.

Having analysed the evidence in the court below, we are of the view that A1 was a participant in the offence and committed the subject offence. He was in possession of the motor vehicle a few days after it was stolen. We are satisfied that the trial Judge was entitled to come to the conclusion that he was in possession of the car not as a recipient, but as one of the robbers. There was therefore sufficient evidence beyond reasonable doubt to convict the 1st Appellant.

The 2nd issue raised by the 1st Appellant is whether the weapon in question was a firearm under the **Firearms Act, Chapter 110** of the Laws of Zambia. The Appellants were also charged under

Section 294 (2)(a) of the Penal Code. In the case of ***John Timothy and Feston Mwamba vs The People*** [5], the Court held that;

> ***"to establish an offence under Section 294 (2)(a) of the Penal Code, the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act Chapter 110 namely a lethal barrelled weapon capable of discharge or adopted for discharge of a short."***

The court went on to state that the question is not whether any particular gun found alleged to be connected with robbery is capable of being fired, but whether the gun seen by the eye- witnesses was capable.

The evidence before the court shows that the recovered pistol (firearm) identified by the PW3 was not subjected to ballistic examination, to lead to a conclusion that it is a firearm within the meaning ascribed to it under the **Firearms Act**. Though a firearm was used in the robbery, there was no shooting involved.

We are of the view that the learned trial Judge erred when he held that the gun used in robbery was identified by PW3. The prosecution did not lead evidence that the firearm allegedly used was capable of being fired. We therefore, hold that it would be unsafe for the court to uphold the conviction under **Section 294 (2) of the Penal Code.**

In respect of the 3rd and 4th Appellant, the evidence against them is the identification by PW2 and PW3 at the parade. The evidence in respect of identification was that PW2 and PW3 were attacked during the day around 15:00hours. PW2 identified A4 as the person who tied up PW3. In cross examination, PW2 stated that he had opportunity to look at the physical features of the attackers. Though he was slapped and threatened he was able to identify the assailants. That the ordeal lasted about 20 minutes. After being tied up, he was untied to help start the vehicle, then tied up again.

PW3 testified that he was able to identify two of the assailants A3 and A4, the one who tied him up and the one who slapped the driver (PW2). He was seated in the back seat and able to observe the assailant who slapped the driver for about 3 to 5 minutes. He had further observed the one who tied him up.

He had stood outside whilst PW3 was seated in the car when PW2 was carried away. PW3 had observed him for about 10 minutes. At the time of the incident, the sun was still out. A3 was the person who slapped the driver whilst A4 was one that had tied him up. Under cross examination, PW3 testified that though he was pulled

out of the vehicle and slapped, he was still able to observe the assailants and saw them clearly.

In identification cases, the issue is one of reliability. It is not in issue that the circumstances which the offence was committed were traumatic. See the case of ***Mukwakwa v The People*** [14]. From the evidence on record, we are satisfied that the trial Judge was entitled to come to the conclusion that the quality of identification was good and the danger of mistaken identification was removed. The identification was satisfactory. The incident occurred during the day. Both PW2 and PW3 were able to identify A3 and A4 after having observed them for some time. There was further some link connecting the 3rd and 4th Appellants to the offence. The evidence by PW10, that A1 had informed him that the offence was committed by A3 and A4.

We therefore hold that A3 and A4 were properly identified and the learned trial Judge was on firm ground.

In respect of the argument relating to the dereliction of duty by the Prosecution, the alleged failure to follow up the lead on the person who gave the vehicle to the 2nd Appellant, we are of the view that there was no dereliction of duty.

Counsel for the 1st, 2nd and 3rd Appellants in the alternative argued that, there being no direct evidence that the identified pistol was a firearm within the meaning of the Act, the court below erred by convicting them under **Section 294 (2)(a) of the Penal Code**. Further that the sentence imposed be set aside and substituted with a conviction under **Section 294 (1) of the Penal Code**.

Having earlier held that there was no evidence adduced to prove that the weapon was a firearm within the meaning ascribed under **Section 2 of Cap 110**, the learned trial Judge erred by convicting and sentencing the 1st, 3rd and 4th Appellants under the **Section 294 (2)(a) of the Penal Code.** We therefore set aside the conviction under **Section 294 (2)(a**) and substitute it with a conviction under **Section 294 (1) of the Act.**

In respect of the 2nd Appellant, the evidence adduced was by PW4, who testified that he was sold a Corolla ABA 3309 by the 2nd Appellant. The transaction fell through because no documents were availed in respect of the vehicle. This evidence was confirmed by PW5 a Police Officer who stated that PW4 was sold a vehicle by the 2nd Appellant. He queried the whereabouts of documents and was told they were with a person in South Africa.

PW6 also testified that he was sold a Corolla AAP 1884 by the 2nd Appellant in March 2005. The White book was in Moses Nasilele's name.

PW8 had accompanied A2 to sale the vehicle to PW6 on behalf of Nasilele.

In his defence, the 2nd Appellant stated that the 1st Appellant had requested him to sale a motor vehicle AAP 1884. The said vehicle was brought by the 1st Appellant to Choma. A2 subsequently sold it to PW6. A2 denied committing the offence.

It is not in issue that the 2nd Appellant was not identified as a part of the people who attacked PW2 and PW3. His explanation was that A1 gave him the vehicle to sale. This was corroborated by PW4 who said at the time of the sale, A2 was in the company of A1. A1 agreed that he knew the 2nd Appellant as a car dealer. PW9 had accompanied the 2nd Appellant when he sold the vehicle in issue to PW6.

Since the 2nd Appellant was only linked to the offence by the possession of the stolen car, the learned trial Judge should have considered and ruled out the possibility that the 2nd Appellant was

just a receiver of stolen property knowing it to have been stolen. Having been found in possession of recently stolen property, the trial court ought to have considered whether the only reasonable inference is that he stole the item in question and whether there was another explanation for the 2nd Appellant being in possession of the stolen property.

The 2nd Appellant proffered an explanation that he was given the vehicle to sale. In the circumstances of this case, the explanation by the Appellant is plausible.

Section 289 A (1) of the Penal Code provides that;

"Any person who-
(a) takes, conceals, sells, or otherwise disposes of a motor vehicle or any part of it with intent to defraud any person; or
(b) knowing or believing that a motor vehicle is stolen, dishonestly receives such motor vehicle or undertakes or assists in its retention, removal disposal or realisation by or for the benefit of another person or arranges to do so;
commits an offence and is liable, upon conviction, to a fine of not less than twenty-eight thousand penalty units but not exceeding fifty-six thousand penalty units or imprisonment for a term of five years or to both."

There is evidence that the 2nd Appellant initially sold the stolen car to PW4. It bore the number ABA 309. When he sold it to PW6 it bore the number AAP 1854.

There is evidence that the 2nd Appellant initially sold the car to PW4. At the time it bore the registration number ABA 309 and he had no documents for it. Some days later, he withdrew the car and resold it to PW6 and this time it bore the number AAP 1854. From this evidence it is clear that he was acting dishonestly when he was selling the motor vehicle.

We are satisfied that though the charge of Aggravated robbery was not proved against him, the evidence proves that he fraudulently dealt with a motor vehicle.

For the above reason, we will set aside the conviction under **Section 294 (1) and 294 (2)(a).**

We substitute it with a conviction of fraudulently dealing with a motor vehicle under **Section 289 A (1).** We impose a sentence of 5 years with effect from date of his arrest.

In conclusion, ground 3 of the appeal by the 1st, 3rd and 4th Appellants succeeds. We accordingly hereby set aside the conviction and sentence under **Section 294 (2)(a)** and substitute it with conviction under **Section 294 (1)** and impose a sentence of 25 years Imprisonment with effect from date of incarceration.

In respect of the 2nd Appellant, we hereby set aside the conviction and sentence under **Section 294 (1)** and **(2)(a)** of the **Penal Code** and substitute it with a conviction under **Section 289 A(1)** and impose a sentence of 5 years with effect from date of his arrest.

Dated the 10th day of August, 2018

.....

C.R.F. Mchenga

DEPUTY JUDGE PRESIDENT

COURT OF APPEAL

.....

F.M. Chishimba

COURT OF APPEAL JUDGE

.....

B. M. Majula

COURT OF APPEAL JUDGE