IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 92,93,94,95/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JOE MULEYA	**1ST APPELLANT**
JUSTIN KAVWEMA	**2ND APPELLANT**
FRANCIS SIKOMBE	**3RD APPELLANT**
EUNICE MWAALA	**4TH APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 15th October and 22nd November 2018

FOR THE APPELLANTS: MRS. S. C. LUKWESA, SENIOR LEGAL AID COUNSEL

FOR THE RESPONDENT: MRS. A. K. MWANZA, SENIOR STATE ADVOCATE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. *Haonga and Another v the People (1976) ZR 200*
2. *Francis Mayaba v The People (1999) S.J.Z. No. 5 page 34*

Legislation referred to

1 *The Penal Code Chapter 87 of the Laws of Zambia*

This is an appeal against the Judgment of the High Court on a matter that was referred to it by the Subordinate Court of the 1st Class for the Choma District for sentencing.

The brief facts of the case in the Subordinate Court were that on 15th August 2016, following the General Elections of 11th August 2016, the winning candidate was declared sometime in the afternoon.

In the ensuing excitement by the supporters of the winning and losing presidential candidates, a mob, presumably from the losing candidate's party, galvanized itself and burnt a structure used as a workshop and store by PW1 and his sons PW2, PW3 believed to be supporters of the winning candidate's party.

The Appellants were arrested and charged with arson for which they were convicted and sentenced to the minimum mandatory sentence of 10 years imprisonment each by the High Court.

They raised three grounds of appeal namely that;

1. *The learned trial Court erred in law and in fact when it accepted the inconsistent evidence of PW2 and PW3 with regard to the 3rd Appellant's presence at the scene.*
2. *The Court below misdirected itself in law and in fact when it convicted the Appellants in the face of lingering doubts, which*

could have been resolved in favour of the Appellants therefore warranting their acquittal.

3. *The Court below erred in law and in fact in convicting the Appellants on uncorroborated evidence of witnesses that are relatives and who in the circumstances of the case may have had motive to give false evidence.*

Before dealing with the appeal before us, we note from the record that when the matter came up for sentencing procedure, the learned Judge entertained submissions by the defence that sought an order to set aside the conviction thereby turning the process into that of an appeal.

This was an error as the High Court on sentencing does not sit as an appellate court but merely as a sentencing court.

This is so because Section 218 (3) of the Criminal Procedure Code provides as follows;

> ***"When any person is brought before the High Court in accordance with the provisions of Sub-Section (2) the High Court shall proceed as if he had been convicted on trial by the High Court".***

In any criminal proceedings, what follows a conviction is mitigation and sentencing. So the High Court, proceeding as the convicting Court cannot entertain arguments against conviction before the sentence is passed.

Having said that, we now revert to the appeal before us and rather than confine ourselves to the grounds of appeal, we shall review the Judgment in light of the evidence before the trial court to determine the validity of both the conviction and sentence.

On perusal of the record, it is clear that the key prosecution witnesses as to the identity of the people who set PW1's workshop ablaze are PW2 and PW3, who are not only brothers but also the sons of PW1, the owner of the burnt workshop. The fact that the workshop was burnt is not in dispute and the only issue that the trial court needed to resolve was the identity of the perpetrators.

Given that the crime was committed by individuals who were part of a large mob wielding stones and sticks, it was extremely crucial for the trial court to satisfy itself thoroughly as to the proper identification of the four Appellants as the individuals who either collectively set the workshop on fire, or formed a common intent to set the workshop on fire.

The evidence of the two witnesses is that they abandoned their workshop when the hostile mob started throwing stones at it but that they stood and watched from a distance.

The testimony as to what role each Appellant played is crucial and whereas PW2 said that the 1st and 2nd Appellants approached the 4th Appellant who gave them the grass broom used to torch the

workshop. PW3's testimony is to the effect that it was the 3rd Appellant who carried the grass broom that was used to torch the workshop.

This variance in the testimonies of the two key witnesses as to the identity of the perpetrators was glossed over by the trial court. We however, find it very critical to the identity of the perpetrators given the hostile atmosphere and the large number of people that attacked the workshop.

At page 84 of the Record of Appeal from line 7 in the Judgment, the trial Court made the following statement;

> ***"It might be imperative at this point to revert to my earlier observation on the inconsistent statements made by the two witnesses relating to how the broom was lit and determine whether it would affect their evidence regarding the identity of the accused herein...."***.

The Court went on to cite a holding in the case of *Haonga and Another v the People*[1] to resolve the issue.

The holding states as follows;

> ***"Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore, it does not follow that a lie on a material point destroys the credibility of the witness on other***

points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused".

The trial court then went on to state as follows;

"It is my considered view that the evidence of the identity of the perpetrators can stand alone from the evidence relating to how the broom was lit".

From where we stand, the issue of how the broom was lit is as important as the issues of who carried the broom and who actually torched the workshop.

As we indicated earlier, the identity of the perpetrators is crucial in a criminal trial. Whereas the identity of individuals as a result of prior knowledge of who they are may not be in dispute, connecting them to the offence requires careful evaluation of all the relevant evidence no matter how minute.

In this case, not only did the two key witnesses give conflicting evidence as to the mode of lighting the broom but also on who actually carried the broom to the workshop.

Although the Haonga case cited above deals with a witness not being truthful on one aspect not to be believed on another similar issue, we note that in the case before us, it is not whether or not

one or both witnesses lied. It is the fact that given the circumstances of this case, there was a very high possibility of mistaken identity as to who did what from that mob.

In their testimonies, the two witnesses were very categorical on their knowledge of the Appellants and on how they stood in a place where they saw everything that was happening from the time the mob arrived up to the time their workshop was torched.

The trial court should therefore, not have trivialized the contradictions between the two witnesses as to the identity of who got the broom and how the broom was lit and by who.

Even though the evidence of the two witnesses did not need corroboration, two witnesses speaking to the same facts must speak in unison as to what they saw. Any contradictions should create a doubt in the court's mind as to the accuracy of their testimony. At the same page, 84 of the Record of Appeal starting from line 32 into page 85 line 2, the trial court had this to say;

> ***"Misstating how the broom was lit when there is undisputable evidence that the workshop was eventually gutted cannot justify discrediting the evidence pertaining to the identity of people who gutted the workshop".***

In arriving at the above conclusion, the trial court had already made up its mind that it was the Appellants who had torched the

workshop. This was notwithstanding that the witnesses had contradicted each other on who had carried the broom. But most importantly, is the question whether or not there was sufficient evidence that it was the four Appellants who actually torched the workshop.

The evidence that the trial Court relied upon to convict the 1st Appellant is that rendered by PW2 to the effect that he approached the 4th Appellant and collected a broom from her. His evidence is that he saw the 1st and 2nd Appellants and Mike torch the workshop. He however did not explain how three men lit the broom and torched the workshop together. There is no suggestion that the two Appellants held the broom together and torched the workshop.

Indeed, it is common cause that the workshop was burnt by people who were part of the mob but the evidence before the trial court does not sufficiently reveal the individual who put the fire to the workshop.

We need to stress this point that in offences perpetrated by mobs, the trial courts must convict suspects only on clear evidence identifying the specific role they played in the commission of the offence.

The 2nd Appellant is in the same situation as the 1st as no evidence points at him as having torched the workshop.

PW3's evidence is that the mob that burnt the workshop was chanting forward!, forward!, on a day that was highly politically charged but that other than singling out the 3rd Appellant as the one who carried the broom from the 4th Appellant, he generalizes that the 1st and 2nd Appellants torched the workshop.

In the case of *Francis Miyanda v The People*[2], the Supreme Court of Zambia held as follows;

> ***"The facts of this case did not support a conviction of murder because quite apart from the element of provocation and drunkenness negativing intent to kill, this was a case of mob instant justice and there was no evidence to show that the appellant or the juvenile delivered the fatal blow that caused the death".***

It was the trial court's duty to ask the witnesses to specify, who in particular held the lit broom and torched the workshop if, as it appears, the advocates for both parties failed to elicit that evidence from the witnesses.

It's not good enough for a witness to say "they" when referring to specific individuals out of a mob. In the case of Haonga (supra) the Supreme Court of Zambia held inter-alia, that;

> ***"Where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it***

is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design."

The Appellants were jointly charged with arson contrary to Section 328(1) (a) of the Penal Code and the offence is set out as follows;

"Any person who willfully and unlawfully sets fire to-

(a) Any building or structure whatever whether completed or not.... is guilty of a felony and is liable on conviction, to imprisonment for a term of not less than ten years and may be liable to imprisonment for life".

The operative words for the offence to be committed are willfully and unlawfully.

It must therefore be proved beyond all reasonable doubt that an accused is that person who exercised his will unlawfully to set the building on fire. It would appear to us that the trial court failed to consider this aspect of the law as stated in *Haonga* as if it had, it would have found that none of the Appellants was singled out as having torched the workshop.

The Appellants have also raised the issue of whether or not PW2 and PW3 should have been treated as witnesses with a motive to give false evidence for being brothers and directly affected by the loss.

We wish to state that it has never been a principle of criminal law that a person who is the victim of a crime should be treated as one

with a motive to give false evidence. This would be a strange proposition as victims of a crime except in sexual offences involving minors have never, as a matter of law, been required to have their evidence corroborated.

We have already indicated that the danger that the evidence of PW2 and PW3 posed was that of a high possibility of inaccuracy due to the prevailing circumstances and not deliberate lies in their testimony.

We now address the issue of the witnesses. The evidence before the trial court is that none of the Appellants was apprehended from the scene. In fact, it is not in dispute that the 1st Appellant was apprehended by PW2 the following day at his place of business while the 2nd Appellant was apprehended at night near his home. The 3rd Appellant was apprehended by Zambia National Service officers in the afternoon of the 15th August after the mob had dispersed.

With the varying evidence of the two brother eye witnesses with one saying he did not see the 3rd Appellant at the scene and the other stating that he was the one who collected the broom from the 4th Appellant, the trial court did not have sufficient evidence that the 3rd Appellant participated in the torching of the workshop.

The 4th Appellant was apprehended the following day from her stall in the market. What is however, baffling is that none of the police officers and Zambia National Service officers who physically apprehended the Appellants was called by the prosecution.

As for the 4th Appellant, the only testimony against her is her having allegedly given the broom that was used to torch the workshop to whoever torched it.

The evidence is however, clear that this Appellant only sells vegetables and not brooms. Secondly the evidence is conflicting as to who she gave the broom. But even assuming that she gave the broom to the person who used it to torch the workshop, we do not find anything in the evidence that the trial court relied upon to connect her to the arson.

There is no evidence that she took part in the torching of the workshop and neither did she go to the workshop. The trial court should have known that unless there was evidence of a common intent between her and the people who burnt the workshop giving a broom to another person, who in turn used it to torch the workshop does not make her a participant in the crime in terms of either Sections 21, 22 or 23 of the Penal Code Chapter 87 of the Laws of Zambia.

For ease of reference, Section 21 categorizes people who are deemed to be principal offenders by virtue of what they do or fail to do in the commission of an offence. Section 22 relates to persons who form a common intention to commit a crime while Section 23 relates to counseling another to commit a crime.

We find nothing in the evidence before the trial court that connects the 4th Appellant to the arson under any of the cited Sections of the law. In our view, the trial court should have considered the fact that the environment at the time was chaotic and given the contradicting evidence rendered by the two key witnesses, the proper identification of the true culprits was not possible. For instance, in his testimony at page 15 of the Record of Appeal starting from line 5, PW3 gives a very general picture of what he saw in the following words;

> ***"They later set the workshop on fire after others incited them to put the workshop on fire. They were then given brooms made of sticks so that they should burn it. Accused 4 is the one who gave them the broom. Though there were plenty of brooms. I saw her pick one broom and give him..... Then accused 3 helped in bringing the broom for burning. That is how they burnt the workshop".***

He goes on to say from line 14 of the same page;

> ***"A short while later officers from ZNS arrived at the scene. Some people ran away whilst others were apprehended. They***

apprehended a lot of people. Among the people that were apprehended there were apprehended the same day. That's accused 4, accused 3 and accused 2".

As already indicated, the 4th and 2nd Appellants were not apprehended by ZNS officers from the scene. As for the 3rd Appellant he was apprehended by ZNS officers later and not from the scene. So this is a clear indication that neither PW2 nor PW3 was able to testify with certainty as who torched the workshop.

It would appear to us that in a politically charged environment, the law enforcement officers needed to present some individuals before the court and the four Appellants happened to be the ones even though they did not have cogent evidence against them as the ones who torched the workshop out of a large crowd of people.

The trial Court was easily carried away by the testimony of the two witnesses which if it had carefully reviewed would have turned out to not being up to the requisite standard of probity in a criminal trial.

Finally, we noted that in his assessment of the evidence, the learned trial magistrate sought to use flows in the defence witnesses' evidence to found a conviction against the Appellants. The analysis of each Appellant's evidence occurs from page 85 to 90 of the Record of Appeal. The conclusion drawn by the learned

magistrate in each case is that the evidence was an afterthought and as such, incapable of raising a reasonable doubt.

Our view is that had the trial court properly evaluated the evidence given by the prosecution, as we have pointed out, it would have been unnecessary to look for a reasonable doubt from the evidence given by the Appellants in their defence. Weaknesses in the defence case do not strengthen a weak prosecution case

For the aforestated reasons, we uphold the appeal and quash the conviction and sentence accordingly in respect of all the Appellants and order that they be set at liberty forthwith.

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J. CHASHI
COURT OF APPEAL JUDGE

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F. M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE