

IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 128,129,130/2018
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

OBEDDY MUSOMBELA

1ST APPELLANT

PHILSON MASUWA

2ND APPELLANT

GODFREY LUPINDA

3RD APPELLANT

VS

THE PEOPLE

RESPONDENT



Chisanga JP, Kondolo and Majula, JJA
On 22nd January 2019 and 20th February 2020

For the Appellants : *Ms. E. I. Banda – Senior Legal Aid Counsel,
Legal Aid Board.*

For the Respondent : *Ms. C. Soko – Senior State Advocate, National
Prosecutions Authority.*

JUDGMENT

MAJULA JA, delivered the judgment of the Court.

Cases referred to:

- 1. Mwewa Murolo vs The People (2004) ZR 2007.*
- 2. Mushemi vs The People (1982) ZR 71.*
- 3. Mwabona vs The People (1973) ZR 28.*
- 4. George Musupi vs The People (1978) ZR 271 (SC).*
- 5. Ilunga Kabala & John Masefu vs The People (1981) ZR 102*
- 6. Douglas Mpofo & Washington Magura vs The People (1988-1989) ZR 24*

7. *John Timothy and Another vs The People (1977) ZR 394.*

Legislation referred to:

Penal Code, Chapter 87 of the Laws of Zambia

Criminal Procedure Code, Chapter 88 of the Laws of Zambia

Firearms Act, Chapter 110 of the Laws of Zambia

The appellants were tried and convicted by the High Court for the offence of aggravated robbery contrary to **section 294(2)** of the **Penal Code**. The particulars of the offence were that the trio on unknown dates but between the 14th and 15th day of March, 2017 at Solwezi in the Solwezi District of the North Western Province of the Republic of Zambia, jointly and whilst acting together, whilst armed with a pistol did steal 1 laptop, 1 laptop bag, 2 pairs of ladies shoes, 1 desk top computer, 1 monitor, 2 binders, 1 laminator, 1 blackberry cellphone 9300, 36 medals, 2 pairs of tracksuits, 1 canon camera, 8 packets of sugar, 2 pairs of Adidas shoes, 1 perfume and 1 tray of buns, all together valued at K40, 534.16, the property of Kansanshi Foundation and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Billy Kaumba, in order to obtain or retain the said property or to prevent or overcome resistance to its being stolen.

The prosecution evidence was anchored on the testimony of 9 witnesses. The summary of the facts from the key witness Billy Kaumba (PW3), a security guard under Cobra Security, was that on the 14th of March, 2017, he was assigned to work with the 1st

appellant at Kansanshi Foundation. The two were manning gate number three. The 1st appellant instructed Billy Kaumba to be stationed at the back gate while he would be at the front one. At around midnight, the 1st appellant went out for about an hour without informing Billy Kaumba. Shortly after his return, this witness saw two people standing at an ant hill about 15 metres away. Before he could rush to report to his supervisor, the 1st appellant called out to the two persons asking them who they were. The assailants then approached them and one of them pointed a gun at Billy and threatened to shoot him if he said anything. The four then went to the offices situated on the premises where the assailants opened a window and asked Billy and the 1st appellant to get inside. They locked them in the toilet while packing office items in a sack. When they had finished packing, Billy and the 1st appellant were released from the toilet. The 1st appellant and Billy then volunteered to help carry the sack for the intruders out of the premises. The two carried the sack up to Solwezi bridge where the robbers told them to return.

Billy told the Court that the whole ordeal lasted for about 2 hours. He however could not identify the assailants because they wore masks, but recalled that one was huge and the other was of medium height.

When the two returned to Kansanshi Foundation, they explained to their superior what had transpired and the matter was subsequently reported to the Police. The following day, the Police

searched their homes and later detained them including their supervisor. PW3 and the supervisor were released the same day.

Crucial evidence also came from Johnson Mbimbi (PW8) who testified that he was approached by Police officers one morning at around 11:00 hours, requesting him to avail them with the 2nd and 3rd appellant's cell phone numbers. In the vehicle was the 1st appellant who was known to the witness. Johnson Mbimbi recalled that the 1st appellant had used his phone to make some phone calls and so the police were able to retrieve the numbers and call the 2nd and 3rd appellants. Johnson Mbimbi spoke to the 3rd appellant and agreed to meet them at Chawama Secondary school where the two appellants were subsequently apprehended.

After their apprehension, the 3rd appellant in the company of the 1st and 2nd appellant led the police to the recovery of various stolen items including a desktop computer, a binder adidas shoes and ladies safety boots The said items were found hidden at Solwezi Trades grounds and Rodwell Mwepu School. Later on the same day, the 2nd appellant led the Police to the recovery of the firearm which was hidden at an unknown house.

A forensic examination of the firearm by Mathilda Buciku a ballistic expert, revealed that it was in a good working condition and was capable of loading, firing and ejecting 9mm cartridges of its caliber.

In their defence, the appellants denied any involvement in the aggravated robbery. The 1st appellant's testimony was similar to that of Billy Kaumba regarding what happened when they were attacked around midnight on the 14th of March, 2014. He denied knowing Johnson Mbimbi but testified that he was with the Police when the 2nd and 3rd appellants were apprehended. He denied leading the police anywhere but admitted that the sack recovered from the 'leading' was the same sack he was made to carry on the night of the attack.

The 2nd and 3rd appellants defence was that they were at their home doing laundry when Police approached them looking for a person called James. When they did not give a satisfactory answer as to the whereabouts of James, they were beaten and apprehended. They both denied knowing the 1st appellant and Johnson Mbimbi before the incident.

After examining the evidence on record in its entirety, the trial judge found the three appellants guilty of the offence of aggravated robbery. She found the fact that the 1st appellant led the Police to Johnson Mbimbi who had the 3rd appellant's number which led to the apprehension of the 2nd appellant and the recovery of the goods the same day could only lead to one conclusion; that the 1st appellant acted jointly with the 2nd and 3rd appellants to commit the crime. She added that the denial of the evidence of leading which led to the recovery of the goods and the gun by the 2nd and 3rd appellants could not be sustained.

The appellants were convicted for the charged offence and sentenced to death by hanging. Disenchanted with the decision of the court below, the appellants have appealed to this court advancing the following ground of appeal:-

The learned Court below erred in law and in fact when it convicted the appellants on the subject offence in the absence of proof beyond reasonable doubt given the nature and quality of the evidence.

At the hearing of the appeal, Ms. Banda relied entirely on the heads of argument. In support of the sole ground of appeal, Ms. Banda submitted that the prosecution did not prove the ingredients of the offence beyond reasonable doubt as stipulated in **section 206** of the **Criminal Procedure Code** as well as the case of ***Mwewa Muroso vs The People*¹**.

Counsel observed that the evidence of the prosecution witness was contradictory, inconsistent and unreliable. She pointed out that Inspector Musonda Mashilipa in his testimony told the court that on 15th March, 2017, he retrieved the three appellants from custody so that they could lead him and three other officers to the stolen property. She forcefully argued that this evidence contradicted the evidence of PW9 who testified that he was led by the 2nd and 3rd appellants to the recovery of the stolen items in the company of 6 officers.

The other inconsistency Ms. Banda highlighted was that Inspector Musonda Mashilipa stated that the 3rd appellant led the police and opened the house where a firearm was recovered, whereas Constable Derrick Ngandu testified in the court below that it was the 2nd appellant who opened the house. Counsel contended that the evidence of these two officers who were together is contradictory and it was therefore unsafe for the trial court to rely upon it. We were referred to the case of ***Mushemi vs The People***² where it was held that the judgment of the trial court faced with conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others.

Moving on to Billy Kaumba, Ms. Banda submitted that this witness initially testified at page 47 of the record of appeal that during the attack he was ordered to enter the toilet with the 1st appellant. That he however changed his story at page 58 and stated that it was only him who was ordered to enter the toilet. Counsel noted that this fact should have made the court below aware that he was a witness with a possible interest of his own to serve and warned itself on relying on his evidence without something more. She cited the case of ***Mwabona vs The People***³ where it was held that the evidence of a biased witness should be treated with caution and suspicion and failure to regard him as such is a misdirection on the part of the court which may lead to a conviction being quashed.

Turning to the evidence of PW8, counsel recalled that this witness testified in the court below to the effect that after the police

checked his phone, they found the number for the 3rd appellant and that was how they used the phone to call the 2nd and 3rd appellants and subsequently apprehend them. Ms. Banda submitted that the truthfulness or otherwise of this statement could have been established if the prosecution had brought the network printouts of the two phones for Billy and the 3rd appellant. She argued that the failure to do so was a dereliction of duty on the part of the police which makes the explanations of the appellants more probable.

In concluding her submissions, Ms. Banda argued that the firearm which was used in the robbery was not fired at the crime scene and it was never sufficiently described by either PW3 or the 1st appellant. She stated that it was therefore difficult to attribute the pistol exhibited in court as the weapon that was allegedly used in the robbery. She pointed out that PW9's evidence at page 126 was that the police recovered a brown pistol while PW3 described it as black. We were accordingly urged to allow the appeal and quash the conviction.

In response to the appellants submissions Ms. Soko, who made oral submissions, begun by conceding to the contradictions highlighted by the appellants. Relying on the case of ***Mushemi vs The People***² Ms. Soko argued that in order for the set standard to succeed, the contradictions must be substantial. She argued that the ***Mushemi***² case should be distinguished from the present case on the basis that the evidence in the former case essentially supported the evidence of the appellant hence his acquittal.

She further argued that the inconsistencies in the present case pertaining to the number of officers that were present during the recoveries and which of the accused persons opened the door were minor and to a certain extent the 1st appellant corroborated them. She vehemently argued that the same do not discard the fact that the 1st appellant led to the apprehension of Johnson Mbimbi who placed on record damning evidence against the appellants. She vociferously argued that Johnson Mbimbi further led the officers to the apprehension of the 2nd and 3rd appellants who subsequently led to the recovery of the pistol among other items.

We have carefully considered the evidence on record, the judgment of the court below, the sole ground of appeal and the arguments from both Counsel. The major grievance of the appellants is that they were convicted of the offence of aggravated robbery in the court below in the absence of proof beyond reasonable doubt owing to the contradictions noted from some prosecution witnesses. The second issue raised is that the trial court failed to warn itself on relying on the evidence of Billy Kaumba who could have been classified as a witness with a possible interest to serve. Lastly the appellants contend that it is doubtful as to whether the pistol that was recovered from them is the exact firearm that was used in the robbery considering that no bullet was discharged at the material time.

Regarding the contradictions highlighted by the appellants as to whether it was 6 or 4 police officers who accompanied the

appellants to the recovery of the stolen items or whether PW3 was placed in the toilet together with the first appellant, we consider these to be minor contradictions which do not discount the fact that a robbery took place at Kansanshi Foundation and subsequently the stolen property was, shortly thereafter, recovered from the appellants. In any case these two facts were corroborated by the 1st appellant in his defence as rightly observed by the learned state advocate. We therefore decline the invitation to assail the conviction of the appellants on the basis of minor contradictions alluded to by the appellants.

On the issue of handling suspect witnesses who may have a possible interest to serve the judgment of Baron DCJ in the case of ***Musupi vs The People***⁴ contains the following observations at p. 215:

“This Court, in Machobane vs The People(5), and so far as we are aware in all the cases in which the matter has been discussed, has been careful to refer to “a witness with a possible interest” or “a witness who may have a purpose of his own to serve.” And Lord Hailsham in Kilbourne (2) in the passage cited above used the expression, “where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence.” All these extracts make it clear that the critical consideration is whether the witness does not in fact have an interest or purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or

because of the particular circumstances of the case, may have a motive to give false evidence. Once in the circumstances of the case this is reasonably possible, or in the words of Lord Hailsham “can reasonably be suggested,” the danger of false implication is present, and must be excluded before a conviction can be held to be safe. One does not hold such witnesses to be accomplices; one approaches the evidence of witnesses in the same way as he approaches that of accomplices.”

From the authorities, Billy Kaumba could be classified as a witness with his own interest to serve as he was also apprehended as a suspect for the subject offence. Therefore, his evidence needed to be corroborated. There is however, sufficient corroborative evidence on record as earlier alluded to which dispelled any motive to falsely implicate the appellants. The fact that a robbery took place and later the recovery of the stolen items from the appellants was established by other independent witness including the 1st appellant. In the circumstances, we are of the view that though Billy Kaumba could be said to be a suspect witness, his evidence was adequately corroborated. We, therefore, find this issue to be bereft of merit and it is, accordingly dismissed.

The fact that an aggravated robbery took place at Kansanshi Foundation between 14 and 15th March, 2017 where several items were stolen is not in dispute. There is evidence on record that the police apprehended A2 and A3 after they traced calls made by A1 to them. Upon being apprehended at Chawama Secondary School A2

gave directions to the officers and led them to Solwezi Trade Grounds where a desktop computer and binder which were hidden in the grass were recovered. A3 then led them to Rodwell Mwepu area where a sack was found by the stream with assorted stolen items. The trip did not end there, they were next taken to a house opposite the stream. A2 opened the house and a brown pistol, HP Laptop, laminator, perfume, a blackberry phone and canon camera were retrieved.

The recovery of these items which were stolen together with the pistol can only lead to the inference that the pistol was the same one that was used in staging the robbery. It is such an odd coincidence that the appellants namely A2 and A3 were in the forefront of leading the police to different places where assorted items which had been stolen were recovered including the pistol. We find that this is supporting evidence that it was the same pistol linked to the crime. We have considered the case of ***Ilunga Kabala & John Masefu vs The People***⁵ where the Supreme Court guided that:

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true in this connection is no explanation.”

A2

The evidence linking A2 to the offence is that of him having led the police to Solwezi Trades and Rodwell Mwepu School respectively, where various items that had been stolen at Kansanshi Foundation

had been recovered. Three witnesses gave evidence in relation to A2. Johnson Mbimbi (PW8) a boiler maker testified that when he was confronted by the police requesting him for phone numbers for A2 and A1 he expressed ignorance. He was interrogated further and his phone was confiscated by police who proceeded to conduct a search of phone numbers stored on it. They found A3's phone number whereupon Johnson Mbimbi was instructed to call A3 and arrange for a meeting.

According to Johnson Mbimbi, when he called A3 both A2 and A3 answered and they agreed to meet. Subsequently he met A3 who was in the company of A2 at Chawama secondary school where he was waiting with police officers. It was at this sting operation that A2 was apprehended with A3.

The other evidence is that received from Musonda Mashilipa (PW2) who was one of the police officers that investigated the matter. He categorically stated that it was A3 who led the officers to Solwezi Trades school and showed them where some items were hidden. Among the items found was a desktop computer Hp, monitor, CPU, white binder and laminator. Thereafter A3 led them to Rodwell Mwepu school grounds, a distance of approximately one kilometer opposite Solwezi Trades school. At a small bush items recovered included 2 packets of 2 kg sugar, 3 tracksuits, medals and a pair of ladies boots.

According to Musonda Mashilipa in the same afternoon, A2 and A3 volunteered to lead them to where the firearm was hidden. It was

his further evidence that they proceeded to Rodwell Mwepu under the direction of A3 who led them to a house near a mosque. Upon arrival A3 picked some keys under a stone near the door. He opened the door and went to a morris chair in the living room where he retrieved a black pistol which was hidden in a hole in the chair. Additional items were recovered such as a grey Hp laptop, canon camera, blackberry phone and some perfume.

PW9 another police officer gave evidence regarding who was doing the leading. He stated that it was A2 and A3 who led them to Solwezi Trades school and that it was A3 who started pulling out the items that were in the grass. When they were proceeding to Rodwell Mwepu school, A3 was the one who was giving them directions. And when they were taken to the house where the gun was recovered, it was A3 that led them to that particular house. The interesting twist we noted regarding his evidence was that A3 led them to the house and that A2 was the one who allegedly opened the door to the house.

It is clear to us in light of the foregoing that the only evidence linking A2 to the offence is the phone call made to A3 which resulted in him going to Chawama school with A3. There is contradictory evidence regarding the leading. Musonda Mashilipa (PW3) stood firm in his evidence that it was A3 who appeared to be the team leader in the operation. That A3 led them to all the three places Solwezi Trades, Rodwell Mwepu and the house near the mosque where various items identified were recovered. He also asserted that at the house it was actually A3 who picked up the keys under a stone, opened the

door and retrieved a gun under a morrise chair. On the other hand Pw9 contends that A3 led them to all the three places but that it was A2 who picked up the keys and opened the door to the house. We find this hard to believe given that it was A3 doing the leading throughout. It sounds strange that he would lead them to this particular house and A2 would be the one in the forefront to pick up the keys and open the door.

The trial judge in dealing with the aspect of leading as narrated by the two police officers Musonda Mashilipa and Derrick Ngandu said the following at page J20 to J21:

“PW2 and PW9, the two police officers clearly explained how the leading was done and it was accused specific. According to the evidence of PW2, it was the third accused who gave the police directions leading to the recovery of stolen property at Solwezi Trades school grounds and Rodwell Mwepu school grounds near a stream. The second and third accused then led the police to a house just next to opposite the stream where the gun was recovered. The recovery of the stolen items at the places where the accused led the police forms a reliable and solid foundation upon which an inference of guilty can be drawn.”

The trial judge did not in our considered view deal with the contradictory evidence of Musonda and Derrick.

Further the Supreme Court has guided in the case of **Douglas Mporu & Washington Magura vs The People**⁶ that two people cannot do the leading when they observed as follows:

“Where a number of accused persons are alleged to have led the police to where incriminating evidence is found it is essential for the trial Court to ascertain what is exactly meant by ‘leading.’ Except in the most exceptional cases only one person could do the actual leading and evidence should be advanced to show which of a number of persons alleged to have done the leading did in fact have the guilty knowledge.”

Where there is contradictory evidence, the court is duty bound to resolve it in favour of the accused. In this particular case, the evidence incriminating A2 is contradictory and we are thus inclined to resolve this in his favour. We thus find that the threshold for proof beyond reasonable doubt for the conviction of A2 has not been met, and we accordingly acquit him forthwith.

A1 and A3

Turning to A1 and A3, the evidence on record reveals that they participated in the offence. The explanation by the accused denying that they led the police to recovery of the items does not hold water because it is inconceivable that the police dreamt where these items were hidden or staged the robberies and falsely accused the appellants. We dismiss the explanation.

Firearm

We move to address the issue whether the firearm recovered with the stolen items was a firearm within **section 3** of the **Firearms Act**. In the case of ***John Timothy and Another vs. The People***⁷ it was held:

- (i) *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, Cap 111, i.e. That it was a lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.*
- (ii) *The question is not whether any particular gun which is found is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.*

Although the trial Judge found that:

“I am satisfied that the exhibit firearm P1, is the firearm that the accused carried on the material night and is the firearm that was pointed at PW3”

There was no evidence however, that the firearm pointed at the victims of the robbery was a firearm within the Firearms Act. We note that it was not tested by the ballistic expert to ascertain whether

it was capable of firing. Therefore, it was not proved that the pistol was a firearm as defined by law.

The net result is that we set aside the conviction of A1 and A3 on a charge of aggravated robbery contrary to section 294(2) for reasons advanced in this judgment. We substitute it with a conviction of aggravated robbery contrary to section 294(1) of the Penal Code. We sentence A1 to a term of 25 years imprisonment with hard labour and A3 we sentence to 20 years imprisonment with hard labour. The reason why we have given them different sentences although they committed the same offence is that A1 was a guard at the premises and was in a position of trust and given the relationship between himself and the role that he played as an insider we find it befitting that he gets a stiffer penalty.

Turning to A2 in light of our finding that there was insufficient evidence to link him to the commission of the offence, we quash his conviction and set him at liberty forthwith.



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F.M. Chisanga
JUDGE PRESIDENT



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M.M. Kondolo
COURT OF APPEAL JUDGE



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B.M. Majula
COURT OF APPEAL JUDGE