IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 103/2020

(Criminal Jurisdiction)

BETWEEN:

FRANCO CHOONGO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Kondolo, Makungu and Majula, JJA
On 19th February 2021 and 26th February 2021

For the Appellant : Mr. B. Banda, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. S. Zulu, State Advocate, National Prosecution Authority

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JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Mwanza vs The People (1976) ZR 154 (HC)*
2. *Geoffrey Muyoka vs The People (1986) ZR. 34.*
3. *Shamwana & 7 others vs The People (1985) ZR. 41 (SC)*

1. INTRODUCTION

1.1 This appeal emanates from the decision of the Subordinate Court sitting at Monze. The appellant was charged with the offences of robbery, indecent assault, and unlawful wounding.

After a trial, he was acquitted of the charge of unlawful wounding but convicted of robbery and indecent assault. He was subsequently sentenced to 3 years imprisonment with hard labour (IHL) for robbery and 18 years IHL for indecent assault by the High Court (before Judge C. Zulu).

2. EVIDENCE IN THE COURT BELOW

2.1 The prosecution evidence in support of the charge was anchored on four witnesses namely; Mwiinde Kandombaila (PW1) Pastor Mwiinga (PW2), Inspector Siantebele Sipo, and Sergeant Kwibisa.

2.2 The evidence of Mwiinde Kandombaila who was the victim of the indecent assault was that on 16th August, 2017 she reported for work as a bar sales lady around 08.30 hours. Around 14.00 hours she noticed the appellant arrive at the bar. He then went to the counter and bought beer and pool tokens.

2.3 Around 22.30 hours she closed the bar and took a walk home. When she reached near a clinic, she noticed someone following her behind. As he drew near, she recognized him as the appellant whom she had previously known for 12 months prior to that day.

2.4 The appellant then asked her how much it could cost him for a short time? She construed the question as an invitation to

have sexual intercourse. She responded by telling him to get lost as her husband was waiting for her at home.

2.5 Infuriated with her response, the appellant slapped Mwiinde on her right cheek. He then told her that he would kill her if she did not sleep with him. A tussle ensued. The appellant then pole-axed her to the ground in an attempt to remove her skinny jeans. She screamed for help and shortly thereafter, Pastor Mwiinga came to the scene and asked the appellant what he was doing. He then grabbed her bag and ran off.

2.6 The incident was reported to a police officer who was on patrol duties and a search for the appellant was immediately launched.

2.7 According to Pastor Mwiinga, he had gone to watch a football match which was being played by Real Madrid and Barcelona at the nightclub. After the game, he decided to walk home, and along the way, he heard someone shouting for help. When he reached the scene where the lady was shouting, he found the appellant on top of Mwiinde Kandombaila slapping her. He subsequently assisted Mwiinde to find a police officer so she could report the incident.

2.9 Inspector Siatebele Sipo, the police officer who was on patrol on the fateful night confirmed receiving a report of the incident from Mwiinde Kandobaila and Pastor Mwiinga. He also observed the injuries that Mwiinde sustained as a result of the

attack. He also confirmed apprehending the appellant and conveying him to the police station.

3. THE DEFENCE

3.1 In his defence the appellant distanced himself from the commission of the offence. His version was that he was at Tusole bar on the material day where he bought beer and a token for pool from Mwiinde Kandobaila. After losing the game, he left the place and proceeded to another night club where he was eventually apprehended by a police officer much to his surprise.

4. THE DECISION OF THE TRIAL COURT

4.1 The trial court analysed the law pertaining to the three offences the appellant was charged with namely robbery, indecent assault, and unlawful wounding.

4.2 Regarding the offence of robbery section 292 of the Penal Code which provides the definition for robbery was examined and he was of the view that after the appellant was identified, the attack on the victim fell within the ambit of section 292 aforecited. The offence of robbery was found to have been established.

4.3 Turning to whether or not the felony of indecent assault had been proved in line with section 137(1) of the Penal Code as amended by the Act No.15 of 2005 and Act No.2 of 2001 and

after scrutinizing the case of ***Mwanza vs The People***[1] the court held that the appellant's acts fell within the deposition of indecent assault.

4.4 With respect to the charge of unlawful wounding the provisions of section 232 and section 4 of the Penal Code were adverted to, the court was of the view that the evidence before it did not reveal that the appellant had used any weapon to inflict that injury on the victim in order to satisfy the requirements under section 4 of the Penal Code. Consequently, the appellant was acquitted on the charge of unlawful wounding.

5. GROUND OF APPEAL

5.1 The appellant was dissatisfied with the judgment of the court below and mounted the present appeal which was inspired by one (1) amended ground of appeal expressed as follows:

> *"The learned trial Judge erred both in law and fact to convict the appellant on a charge that was bad for duplicity."*

6. APPELLANTS ARGUMENTS

6.1 When the matter came up for hearing on 19th February 2021. The appellant counsel began by observing that the appellant was charged with three counts of offences of robbery, indecent assault, and unlawful wounding. He was subsequently

acquitted of the offence of unlawful wounding and convicted for robbery and indecent assault.

6.2 He argued that the three counts were bad for duplicity on the basis that the conviction on counts one and two amounted to two punishments for one substantive offence of robbery. He went on to submit that there was one victim and in both instances there was some element of violence.

6.3 Mr. Banda further observed that in count three there was also an attempted rape which made the count bad for duplicity. On the basis of the foregoing argument's Mr. Banda urged us to set aside the lower court's decision.

7. RESPONDENT'S ARGUMENTS

7.1 In opposing the appeal, Mr. Zulu with leave of court indicated that he would make oral submissions at the hearing of the appeal. The kernel of his submission was that there was no duplicity in this matter in view of the fact that the facts and ingredients for each count were different although there was one victim. He gave an example of cases where an accused may be charged with murder and aggravated robbery but no issue of duplicity arises.

7.2 During the question and answer session that followed, Mr. Zulu conceded that the violence that was used in relation to the charge for robbery was with an intention to rape the

victim. He meant that the conviction for robbery could not stand.

7.2 With these brief submissions, Mr. Zulu called upon the court to dismiss the appeal.

8. CONSIDERATION AND DECISION OF THE COURT

8.1 We have carefully scrutinized the evidence before us and the arguments in support of the sole ground of appeal.

8.2 The appellant is grossly unhappy with his conviction on the charge of indecent assault on the ground that it is bad for duplicity. In a nutshell, his argument is that the appellant was charged with three counts which stemmed from the same facts and issues. It is contended that the conviction of robbery and indecent assault amounted to two punishments for one substantive offence of robbery.

8.3 It is imperative to examine what duplicity entails. The case of ***Shamwana & 7 others vs The People***[3] springs to mind as it extensively discussed the issue of duplicity. The following passage at page J54 of the said Judgment is instructive:

> *"In plain English, the word duplicity means doubleness, insincerity, or double dealing. In law it means the charging of two or more separate offences in the same count. Thus, where two or more offences are charged in the same count of an indictment, the indictment is, to that*

extent, bad for duplicity. As we observed in ***Mwandila vs The People*** *at page 176, the law relating to duplicity is intended to avoid subjecting an accused to an unfair trial, so that he may know exactly what case he has to answer."*

8.4 What emerges from the foregoing is that the charging of two or more separate offences in the **same count** would amount to duplicity. The authority does not stop the prosecution from charging an accused with separate counts if the evidence discloses different or separate offences. In any case section 135(1) of the Criminal Procedure Code provides as follows:

> *"Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of a series of offences of the same on in similar character."*

In this case the allegations where that the appellant indecently assaulted the complainant and in the course of that attack robbed her. The two offences were founded on the same facts and therefore meet the threshold in section 135 (1) of the Criminal Procedure Code to have the two the charges placed in the same information.

8.5 Reverting back to duplicity, guidance has been given that one ought to examine the count itself as read with the particulars

of offence and see whether two or more offences have been charged in one count then only would it be considered bad for duplicity. The apex court in the aforecited ***Shamwana***[3] case held that *"duplicity is a matter of form, not of evidence, and as such, it must be gathered from the count itself."*

8.6 We have scrutinised the counts the appellant was charged with. In count one he was charged with robbery and count two indecent assault. They are separate offences and the prosecution were entitled to charge them separately in difference counts. They did not charge the appellant with the offences in one count and, therefore, the question as to whether these counts were bad for duplicity does not arise. We are thus satisfied that the argument that the counts were bad for duplicity does not have a legal leg to stand on and is accordingly dismiss the sole ground of appeal.

8.7 Before we conclude, we find it imperative to look into the conviction of robbery for reasons that will become clear notwithstanding that it was not raised as a ground of appeal.

8.8 The definition of robbery as set out in legislation, section 292 of the Penal Code is as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being

stolen or retained, is guilty of the felony of robbery and is liable on conviction to imprisonment for fourteen years.." (underlined for emphasis)

8.9 What can be gleaned from the above is that, a person appropriates property belonging to another with an intention to permanently deprive them and in so doing uses or subjects the person to force.

8.10 It must be pointed out that robbery and theft have similar characteristics. A quick glance at the definition of robbery, as it is given by Sir William Staundforde, is thus:

"..a felonious and violent taking of any money or goods from the person of another, putting him in fear."

8.11 The elements of theft on the other hand are simply taking of someone's personal property or money, without permission with the intention of permanently depriving the owner.

8.12 There is considerable overlap between the offences of robbery and theft in that the elements are the same, save for one major difference; in the case of robbery, the primary difference is that it involves force or intimidation in the taking of the property from another.

8.13 Turning to the case at hand, it is a fact that the appellant grabbed the bag from the victim, the critical question, is was there force or threat of force used in the taking of the bag?

8.14 After scrutinizing the record, we hold the view that the force or threat of force used by the appellant was to facilitate the sexual assault and not to steal the handbag.

8.15 The critical element required for a case of robbery to be made out which is that of force or intimidation being used to steal the handbag was not made out. The criteria not having been met to satisfy the offence of robbery, we set aside the conviction and sentence, and substitute the conviction with that of theft. The appellant is sentenced to three (3) years imprisonment with hard labour for theft.

8.16 In sum we dismiss the appeal and uphold the sentence of 18 years imprisonment with hard labour for indecent assault.

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M.M. Kondolo

COURT OF APPEAL JUDGE

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C.K. Makungu

COURT OF APPEAL JUDGE

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B.M. Majula

COURT OF APPEAL JUDGE