IN THE COURT OF APPEAL OF ZAMBIA Appeal No.123/2018
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N:

HENRY TAWANDA MUTANUKA APPELLANT

VERSUS

THE PEOPLE RESPONDENT

CORAM: Mchenga DJP, Chishimba and Mulongoti, JJA

On 26th March 2019, 28th March 2019 and 5th July 2019

For the Appellant: M. Marebesa, Senior Legal Aid Counsel, Legal Aid Board
For the Respondent: M.M. Bah-Matandala, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Peter Yotam Haamenda v The People [1977] Z.R. 184
2. Yoani Manongo v The People [1981] Z.R. 152
3. Hoking v Alilquist Brothers Limited [1944] K.B. 120
4. David Zulu v The People [1977] Z.R. 151
5. Sipalo Chibozu and Another v The People [1981] Z.R. 28

6. **Jonas Nkumbwa v The People [1983] Z.R. 103**
7. **Emmanuel Phiri and Others v The People [1978] Z.R. 79**

Legislation referred to:

1. **The Penal Code, Chapter 88 of the Laws of Zambia**

Introduction

1. This appeal emanates from the judgment of the High Court, (C. Zulu J.), delivered on 26th January 2018. By that judgment, the appellant was convicted of the offence of armed aggravated robbery and condemned to suffer capital punishment.
2. This appeal considers whether an inference of guilty, is the only inference that could have been drawn on the circumstantial evidence that was before the trial judge.

Charge before the trial court

3. The appellant, was arraigned on an information containing one count of the offence of aggravated robbery contrary to **section 294 (1) of the Penal Code**. The particulars of the offence alleged that on 25th January 2016, at Kabwe, in the Kabwe District of the Central Province of the Republic of Zambia,

jointly and whist acting together with others unknown, stole 1 Samsung Duos Phone and K10,000.00 cash, valued at K11,200.00, from Anwar Patel and at or immediately before or immediately after stealing, they used actual violence to Anwar Patel in order to obtain, retain, prevent or overcome resistance to the said property being stolen.

4. He denied the charge and the matter proceeded to trial

Evidence before the trial judge

5. On 25th January 2016, between 2am and 3am, Anwar Patel was with his family, in his house in Kabwe, when they were attacked by 3 masked men. The men were armed with a firearm and claw bars. Following threats, he gave them K5,000.00, but they demanded for more money. They drove him to his shop where K5,000.00 was collected from the till. The robbers then got his Samsung phone and fled.

6. In the same month, that is January 2016, the appellant approached Frank Sikutwa and offered to

sell him Anwar Patel's stolen Samsung phone, at K800.00. After negotiations, they agreed that Frank Sikutwa would buy it at K500, with an initial payment of K100. The phone subsequently ended up with Mavis Siwo, Frank Sikutwa's mother, who started using it.

7. In January 2017, Mavis Siwo was contacted by police officers who informed her that the phone she was using was stolen. She then led them to the apprehension of the appellant.

8. The appellant denied selling the phone to Frank Sikutwa. He claimed that Mavis Siwo had falsely implicated him in the robbery because her family was not happy with his decision to end a romantic relationship he had with her sister.

Findings by trial judge

9. The trial judge found that on 25th January 2016, Anwar Patel was robbed of a Samsung phone and K10,000.00 by three men he could not identify. He also found that the stolen Samsung phone was recovered from Mavis Siwo in February 2017. He considered the

possibility that Frank Sikutwa could have falsely claimed that he bought the phone from the appellant, but ruled it out after he found that he was a truthful witness.

10. He also noted that the appellant did not render any explanation of how he came by the phone. In the circumstances, the trial judge concluded that the only inference that could be drawn on the evidence that was before him, was that the appellant was one of the robbers who attacked Anwar Patel.

Grounds of appeal

11. Three grounds have been advanced in support of the appeal. These are:

11.1 The trial judge erred both in law and in fact when it convicted the appellant despite an inference of guilty not being the only one that could have been drawn on the evidence that was before him;

11.2 The trial judge erred both in law and in fact when he convicted the appellant on the basis of a phone that was not produced in court; and

11.3 The trial judge erred both in law and in fact when he condemned the appellant to suffer capital punishment despite him being charged under section 294(1) of the Penal Code.

12. We will deal with the 2nd ground of appeal first. Thereafter, we will deal with the 1st and 3rd grounds of appeal.

Failure to produce stolen phone in court

13. In support of the 2nd ground of appeal, Ms. Marebesa argued that in the absence of the stolen phone and the phone records, a conviction for the robbery in this case, was not competent. She then submitted that there was a dereliction of duty when phone records, which would have linked the appellant to the phone were not produced in court.

14. Ms. Marebesa then referred to the cases of **Peter Yotam Haamenda v The People**[1] and **Yoani Manongo v The**

People[2] and argued that following the dereliction of duty, the appellant should have been acquitted because the remainder of the evidence was not sufficient to offset the inference that he did not use the phone.

15. In response to the 2nd ground of appeal, Mrs. Bah-Matandala referred to the case of **Hockings v Ahlquist Brothers Limited**[3] and submitted that even if the phone was not produced in evidence, the trial judge was entitled to consider the testimony of the prosecution witnesses' reference to it.

Effect of not producing stolen phone

16. If we were to accept Ms. Marebesa's submission that without the phone, Frank Sikutwa's evidence that he got it from the appellant should not have been received, it would follow that in a theft related charge, no conviction would lie if the stolen property is not recovered. We don't think that should be the case. The recovery and production of stolen property in the course of a trial, only goes to

support the testimony of a witness. In cases where the testimony of a witness requires corroboration, the production of such property, may, provide the corroborative evidence. In our view, it is competent for a court to accept the testimony of a witness on an article that was not produced in court, if the witness is found to be credible.

17. In this case, there was evidence from the arresting officer that the phone which was recovered from Mavis Siwo was stolen from the police station in a break-in. In the circumstances, the trial judge was left with no option than to decide on whether a phone was sold to Frank Sikutwa by the appellant and whether the same phone was recovered from his mother, on the basis of the credibility of their accounts.

18. As regards there being a dereliction of duty on account of phone records not being produced, our view is that it was not the case. Even if the records could have shown that he did not use the phone, that could not have ruled out the fact that the appellant

had handled it. We are satisfied that the trial judge was entitled to find that the stolen phone was sold to Frank Sikutwa, even if was not produced in evidence on the basis of credibility by the witnesses. The 2nd ground of appeal therefore fails.

Inference of guilty not being the only inference

19. In support of the 1st ground of appeal, Ms. Marebesa referred to the cases of **David Zulu v The People**[4] and **Sipalo Chibozu and Another v The People**[5], and submitted that an inference of guilty, is not the only inference that could have been drawn on the evidence that was before the trial judge.

20. In response to this ground of appeal, Mrs. Bah-Matandala submitted that the appellant's possession of the phone, soon after it was stolen, led to only one inference, that he was a party to the commission of the offence.

21. In this case, the evidence implicating the appellant was that given by Frank Sikutwa, who can properly be described as a suspect witness. This is

because he had possession of the phone soon after it was stolen. In the case of **Emmanuel Phiri and Others v The People**[8], the Supreme Court held, *inter alia*, that:

(i) **A Judge (or magistrate) sitting alone or with assessors must direct himself and the assessors, if any, as to the dangers of convicting on the uncorroborated evidence of an accomplice with the same care as he would direct a jury and his judgment must show that he has done so. No particular form of words is necessary for such a direction. What is necessary is that the judgment show that the judge has applied his mind to the particular dangers raised by the nature and the facts of the particular case before him.**

(ii) **The judge should then examine the evidence and consider whether in the circumstances of the case those dangers have been excluded. The judge should set out the reasons for his conclusions; his "mind upon the matter should be revealed"**

(iii) **As a matter of law those reasons must consist in something more than a belief in the truth of the evidence of the accomplices based simply on their demeanour and the plausibility of their evidence - considerations which apply to any witness. If there be nothing more the court must acquit.**

22. The trial judge rightly found that Frank Sikutwa and his mother, Mavis Siwo, where suspect witnesses.

He ruled out the possibility that they could have falsely implicated the appellant after finding that they were truthful. This was not enough. In the absence of corroborative evidence, the trial judge should have gone further and looked out for "something more". He could not have ruled out the possibility of false implication solely on their demeanour, there was need for evidence confirming that they were telling the truth.

23. In the case of **Jonas Nkumbwa v The People**[7], the Supreme Court held that:

> **"Possession of stolen property simplicitor, does not inevitably lead to an inference that the appellant participated in the robbery, unless possession is so recent that there could have been no opportunity for the transfer of the property from another person into the appellants hands"**

In this case, the phone was stolen on the 25th of January 2016 and sold to Francis Sikutwa within the month. The exact day is not clear. It could have been on any day, between the 26th and the 31st of January 2016. Since the exact date is not known, we must work with a date most favourable to the appellant, that

is the 31st of January; that is 6 days after it was stolen.

24. Can it be said that the appellant's possession of the phone, six days after it was stolen, was so recent that there was no opportunity that it could have changed hands? In our view, had the trial judge considered the issue, and properly directing himself, he could have come to the conclusion that it is possible that the phone could have changed hands after it was stolen and the appellant, could, in fact, have been a receiver and not one of the robbers. This being the case, we agree with Ms. Marebesa that an inference of guilty, is not the only one that could have been drawn on the evidence that was before the trial judge. The 1st ground of appeal succeeds.

25. In view of our finding that an inference that the appellant was one of the robbers is not the only one that could have been drawn on the evidence that was before the trial judge, the 3rd ground of appeal,

which deals with the sentence for that offence falls off.

verdict

26. In the absence of evidence corroborating Frank Sikutwa's testimony, we find the conviction on a charge of aggravated robbery to be unsafe. The conviction is set aside and the sentence is quashed. We direct that the appellant be set at liberty forthwith.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

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F.M. Chishimba
COURT OF APPEAL JUDGE

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J.Z. Mulongoti
COURT OF APPEAL JUDGE