

IN THE HIGH COURT OF ZAMBIA

HT/15/2010

HOLDEN AT MONGU

MONGU

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

V

PRINCE MWIYA MAIBA

1ST ACCUSED

SINYANI LIYWALI

2ND ACCUSED

BEFORE HON. JUSTICE DR. P. MATIBINI, SC. THIS 24TH DAY OF JUNE, 2010.

FOR THE STATE:

**MRS. M. K. CHITUNDU - STATE ADVOCATE,
DIRECTOR OF PUBLIC PROSECUTIONS
CHAMBERS.**

FOR THE ACCUSED:

**MR. O. NGOMA - SENIOR LEGAL AID COUNSEL
LEGAL AID BOARD.**

.....
JUDGMENT
.....

Cases referred to:

1. Abdula Bin Wendo and Another v R (1953) 20 E.A C.A. 66.
2. Nyambe v The People (1973) Z.R. 228.
3. Chimbini v The People (1973) Z.R. 191.
4. Chate v The People (1975) Z.R. 233.
5. Bwalya v The People (1975) Z.R. 227.

Legislation referred to:

1. Penal Code Cap. 87, section 294

Works referred to:

The accused are charged with the offence of aggravated robbery contrary to section 294 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence are that the accused on 21st June, 2009, at Akuna Matata in Kaoma District, jointly and whilst acting together did steal five mobile phones and cash in the sum of K110,000=00 from Bronnah Mweenba. The total value of the mobile phones and cash is K1,165,000.00. At the time of committing the alleged offence, the accused are alleged to have used violence, and some unknown sharp instrument to enable them overcome any resistance to the property, and the money being stolen.

The prosecution called four witnesses. The first prosecution witness was the complainant - Bronnah Mweemba. For convenience sake, I shall refer to her as PW1. PW1 testified that on 21st June, 2009, she was at her shop known as H.C.B Stationery. At around 19.40 hours, she decided to close the shop, and retire to her home. On her way home, she passed through some business premises known as Hakuna Matata Mini Mart. At that point, when PW1 looked back, she saw two men following her from behind.

PW1 testified that at the time there was a security light at Hakuna Matata Mini Mart, as well as at Mr. Antonio's residence. Of the persons that were trailing her, PW1 described one as being short, and the other, tall. And both were black in complexion.

As PW1 continued her journey home, she was suddenly struck on the head, and fell to the ground. As PW1 sought to stand up, she was struck again for the second time on the rear, and side of her head. As she fell down, the duo snatched her handbag.

PW1 testified that the handbag contained five mobile phones, a black purse, two national registration cards, and cash in the sum of K110,000=00. Of the two national registration cards, one belonged to her, and the other to her father. Out of the five mobile phones, two belonged to her - the other two to one Simataa, and the other to one to Mulenga.

After the attack, a lady by the name of Mercy, came to her aid, and assisted her hire a taxi to the Police Station. At the Police Station, a statement was recorded from PW1. Later, PW1 proceeded to the hospital where she was admitted. Whilst at the hospital, the wounds were stitched. And after two days, PW1 called a cameraman to take photographs of the stitched wounds. On the third day, PW1 was discharged from the hospital.

The following Monday, PW1 was visited by Police Officers, who informed her that they had arrested some suspects who were found with the items that were stolen from her. PW1 was thus required to report herself to the Police Station. At the Police Station, PW1 was shown the mobile phones that had been recovered. One of her phones still had her portrait on the screen saver. The other phone had the name "A.R. Simataa", inscribed on the screen saver. During the trial, PW1 identified the five phones which were marked as follows:- The Nokia 6103 was marked ID1; MTN ZTE phone as ID 2; the G Tide as ID3; the Nokia 2300 as ID4, and the Motorola V.171 as ID5.

In Court, PW1 was able to identify her purse embossed, "*Boss International*"; the two national registration cards belonging to herself, and her father. PW1's national registration card was marked ID6 and her father's ID7. PW1 was also able to identify the two photographs that were taken of her at the hospital. The two photographs were collectively marked ID9. Mrs. M.K. Chitundu - State Advocate, sought to produce the photographs as part of PW1's evidence. Mr. O. Ngoma – Senior Legal Aid Counsel objected, citing section 193 of the Criminal Procedure Code, Cap 88 of the Laws of Zambia in aid of his objection. Mr. Ngoma argued that before any evidence of photographic nature is adduced in evidence, it must be supported by an affidavit by a person who processed it, or alternatively such a person may be called to tender the photograph in evidence. Mr. Ngoma further argued that the photographs do not depict clearly the face of the complainant. As a result, the photographs, leave room for speculation as to the true identity of the person portrayed on the photographs.

In response, Mrs. M. K. Chitundu argued, firstly, that section 193 of the Criminal Procedure Code does not require PW1 to depose an affidavit because she is the person whose photographs were taken, and she has had custody of the pictures. Secondly,

Mrs. Chitundu argued that the second ground of objection was frivolous and vexatious, because the complainant can be clearly identified from the side view.

In delivering the ruling, I noted that section 193 of the Criminal Procedure Code is in the following terms:-

“Where any photograph is or may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit made by the person who processed such photograph shall be admissible in any evidence in such proceedings as proof of such processing, provided that the court in which any such document is produced may if it thinks fit summon such person to give evidence orally”.

I ruled, that the object of section 193, is to provide for the admission of an affidavit by a person who processes a photograph, with a view to supporting the admission of the photograph in evidence. The section does not however, in terms, prevent a complainant from adducing a photograph in evidence. It is for the trial court in my considered view, to decide at the end of the trial, what weight, if any, to attach to the photograph so admitted. The objection was therefore not sustained, and the photographs – ID9 were duly admitted in evidence.

During the trial, PW1 was shown a medical report marked ID10. ID10 attests to the fact that PW1 sustained two deep lacerations in the scalp measuring about 6 – 7 centimeters each. Finally, PW1 identified in court the accused person's as being the persons who robbed her on the material date.

During cross-examination, PW1 confirmed that he informed the police that one of the assailants was tall and the other short. PW1 also confirmed during cross examination that there was no identification parade conducted by the Police.

Purely for convenience, I will advert to the testimony of PW3, before that of PW2. PW3 was Kakoma Masialeti. PW3 lives in Longe area where he retails traditional beer. In his testimony, PW3 recalled that on 24th June, 2009, whilst in the village, he

was approached by a young man by the name of Prince Mwiya Maiba, who again for convenience sake, I will refer to as A1.

A1 came through to PW3's residence for a drink. He ordered and was served some beer. After drinking the beer, A1 informed PW3, that he had no money to pay for the beer that he had drank. A1 however intimated to PW3, that he had a phone, and that if PW3 was interested, he would sell it to him. In response, PW3 told A1 that he did not have any money to buy the phone. PW3 however suggested to A1 that there may be persons who would be interested in buying the phone, It is at that point that PW3 led A1 to one Patrick Mutti Kaumba, who again for convenience will be referred to as PW2. PW2 is a businessman and runs a shop in the Longe area, of Kaoma District.

When A1 and PW3, got to PW2's shop, they intimated to PW2, that they (A1 and PW3) had Phone to sell. PW2 replied that he had no money to buy the phones. In the course of the conversation with DW2, PW3 informed PW2 that A1 had drunk beer worth K5,000.00 without paying for it and therefore in bid to set off the debt, A1 decided to sell the phone in question.

At that point, PW3 testified that the phone was in the possession of A1. Eventually, PW2 decided to buy the phone at a price of K35,000.00. PW3 testified that the K35,000.00 was paid directly to A1. A1 in turn paid PW3, the K5,000.00. After the transaction was completed, A1 and PW3 parted company.

The following morning, PW3 testified that whilst he was in his house, he overheard A1 state that the money that he had realized from the sell of the phone, the previous day had been expended. A1 is then said to have approached PW3 to sell another phone at a price of K150,000.00 on his behalf. In return, A1 promised PW3 a commission of K20,000.00.

PW3 accepted the offer and proceeded with the phone to Boma in search of a buyer. When PW3 got to the Boma, he found some youngsters whom he showed the phone, and intimated to them that he was selling the phone. The youngsters showed interest in the phone, and advised PW3 that since the battery appeared to be low, they should have the phone charged in order to ascertain if it was in good working condition.

Suddenly, PW3 testified, he was surrounded by police officers who enquired from him where he had got the phone. PW3 informed the police officers that he was commissioned by A1 to sell the phone on his behalf. As a result, PW3 led the police officers to A1 who was at a beer party. PW3 testified that A1 confirmed to the police officers that the phone under the investigation was familiar. Later, A1 and PW3 led the police officers to PW2' s house to recover the remainder of the phones. PW3 identified the phones recovered from A1 in Court.

During cross examination PW3 confirmed that he received the K35,000.00 from PW2. After receiving the K35,000.00, he recovered his K5,000.00. Further, during cross examination, PW3 testified that he informed the police officers that A1 had drunk beer worth K5,000.00, and failed to pay for it. After A1 failed to pay for the beer, he volunteered a phone to be sold to enable PW3 recover his K5,000.00.

PW2 testified that he recalled the events of 24th June, 2009. He was approached by PW3 and A1. PW3 informed PW2, that A1 was selling a phone. PW2 testified that the phone was in possession of A1. PW2 further testified that initially the phone was offered to him at a price of K45,000.00. After bargaining, the price of the phone was reduced from K45,000.00 to K35,000.00.

The following day, PW2 decided to go to the Boma to have the phone charged. Whilst at Boma, PW2 was approached by Police officers who demanded that he should produce the phone that he had bought the previous day. The police officers were accompanied by PW3 and A1. At that point PW2 was informed by the police officers that he had bought a stolen phone. PW2 was able to identify the phone he bought in court as well as A1.

The fourth and prosecution witness was Collins Shachuya. For convenience, her will be referred to as PW4 . PW4, aged 32 years, is a police officer based at Kaoma Police Station, and is attached to the Criminal Investigations office.

PW4 recalls that on 22nd June, 2009, he was given a docket to investigate a complaint relating to aggravated robbery. The complainant was lodged by Bronah Mweemba, aged 28 of Kaoma Township. The complainant reported that on 21st June, 2009, at around 20.00 hours she was attacked at a spot near Hakuna Matata Night Club. Following the attack, she was robbed five mobile phones; a black wallet embossed "Boss International"; two national registration cards; and cash in the sum of K110,000.00. The total value of the property robbed was K1,695,000.00. During the robbery, PW4 testified that the complainant was assaulted, and sustained two deep injuries in her head.

At the time PW4 was assigned the docket, a medical report had already been issued and processed during the complainant's admission at Kaoma District Hospital.

On 25th June, 2009, PW4 was tipped by a member of the public that there was a person who was selling a mobile phone. Following the tip, PW4 apprehended PW3, and recovered the phone from PW3. On interviewing PW3, he discovered that he had been sent to sell the phone by A1 at a commission of K20,000.00. Following this disclosure, PW3 led PW4 to A1.

PW4 interviewed A1. During the interview, PW4 testified that A1 confirmed that he had requested PW3 to sell the phone on his behalf. In the course of the interview, PW4 testified that A1 also disclosed that he had total of five mobile phones. A1 further disclosed that one such phone had been sold to PW2. The second phone according to PW4 was recovered at Longe Lay Bye Market. Eventually, A1 led PW4 to a village in Kabongweshi area where he recovered three other phones from A1's house. While, in the Kabongweshi area A1 is said to have disclosed that he did not act alone. He acted in concert with one Sinyinda Lywali, who for convenience, I will henceforth refer to as A2. Whilst at A1's village, PW4 testified that he recovered from A1 a black wallet embossed "Boss International". The wallet contained two national registration cards belonging to the complainant and her father - Barnabas Munthumubi Mweemba. These items, PW4 testified, were found in A1's house. After the recoveries, A1 led PW4 to A2's house. Eventually A1 and A2 were apprehended.

After the recoveries referred to above, the complainant was called to the police station to identify the property that had been recovered. In the process, PW4 recorded a statement from the complainant. And PW4 also warned and cautioned A1 and A2. Thereafter, A1 and A2 were jointly charged for the offence of aggravated robbery.

PW4 confirmed during examination in chief that the identification parade was not conducted because the complainant had already seen the accused person at the police station. PW4 was shown the medical report and was also able to identify it. Eventually the medical report was tendered as part of PW4's evidence.

That was the case for the prosecution.

The defence comprised the testimony of A1 and A2.

A1 was as earlier on noted, Prince Mwiya Maiba. A1 testified that he was at the village of PW3 drinking beer, when he was approached by PW3 who had some mobile phones. A1 testified that PW3 requested him to sell for him three phones. Thereafter he would give him a commission. A1 testified that the commission was not specified. A1 testified that PW3 returned the other two phones. A1 was during examination in chief given an opportunity and did in fact identify the five phones.

A1 testified that later on he was surprised to see PW3 in the company of police officers. Thereafter, PW3 is said to have requested A1 to hand over the phones to the police officers. In response A1 testified that he led the police officers to his house and handed over the phones to the police together with the hand bag, a purse and national registration cards.

At the material time, A1 informed the police that he was given the phones by PW3, in the presence of Sinyinda Liywali - A2. A1 testified that he led the police officers to A2 in order to confirm that A2 was present when PW3 requested A1 to sell the phones on his behalf. A1 testified that after visiting A2 at home, A1 and A2 were subsequently apprehended and detained. A1 denied ever requesting PW3 to sell the phones on his behalf.

During cross examination, A1 confirmed that he wanted the court to believe that PW3 handed over the five phones and the bag to A1 as to sell on his behalf. A1 also confirmed during cross examination that the bag contained the five phones and the purse. During cross examination it was put to A1 that the bag was not given to A1 by PW3.

The second witness for the defence was A2 - Sinyinda Liywali.

A2 recalled that on 24th June, 2009, he saw PW3 selling beer at his house. DW2 testified that, that is the day PW3 gave the phones to A1. However, A2 confirmed that he did not witness the transaction clearly because he stood at a distance.

The next event that A2 recalled was that on 26th June, 2009, he was picked together with A1 and taken to the police station where they were detained. A2 denied stealing the phones in question.

During cross examination, A2 denied that A1 led the police officers to his house because A1 and himself were together involved in the robbery of 21st June, 2009. The reason why A1 led the police officers to his house, A2 testified, was to confirm that A2 witnessed the transaction between PW3 and A1. This was the case for the defence.

It is undisputed evidence that the complainant in this matter was a victim of aggravated robbery in which she suffered a loss of five mobile phones, cash in the sum of K110,000.00; a hand bag, a purse, and two national registration cards. The controversy or issue is; who committed the offence? There are two competing versions presented to me. One version advanced by the testimony of PW1 and PW3, is that the subject of offence was committed by A1 and A2. The other version presented by A1 alleges that the property that was recovered (mobile phones, hand bag, purse and two national registration cards) was in possession of PW3. Implicit in this version, is that the subject offence must have been committed by PW3.

The first version is in some respect dependent on the identification of A1 and A2 (as perpetrators of the alleged offence), by PW1.

Before I consider the evidence of PW1 on this point, it is necessary to discuss the law and practice relating to identification. A leading case on this subject is the case of Chimbini v The People (1973) Z.R. 191.

The facts in the Chimbini case were that the appellant was convicted of robbery. The case against him rested entirely on the complainant who said that she had known him before, and that she had recognized him as one of the assailants. In the course of the judgment, Baron J.P. made the following observation:-

“The case against the appellant rests entirely on the evidence of the complainant. It is always competent to convict on the evidence of single witness if that evidence is clear and satisfactory in every respect; where the evidence relates to identification there is the additional risk of an honest mistake and it is therefore necessary to test the evidence of a single witness with particular care; If the honesty of the witness is not sufficient, the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was day time or night time and if the latter, the state of light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made i.e whether there was confusion, fight or scuffle or whether the parties were comparatively stationary. Most importantly, it is important to consider whether the witness knew the accused prior to the incident, since there is the greatest difference between recognizing someone with whom you are familiar or at least whom you have seen before and seeing a person for the first time and attempting to recognize and identify him later from observation made in circumstances which no doubt charged with stress and emotion”.

The Supreme Court had again occasion to deal with the question of single witness identification in the case of Chate v The People (1975) Z.R. 233. In the course of the

judgment the Supreme Court relied on the East African case of Abdula Bin Wendo and Another v R (1953) 20 E.A C.A 66. The Court of Appeal for East Africa observed as follows at page 168:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness. But this rule does not lessen the need for testing with the greatest of care, the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification is well difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error”.

Thirdly, in the case of Nyambe v The People (1973) Z.R. 228, the Supreme Court made the following observation:

“There is perhaps no area in which there is a greater danger of honest mistake than in the area of identification, particularly, where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence. The witness should be asked to specify by what features or unusual marks if any, he alleges to recognize the accused, what was his built, what clothes he was wearing and so on. And the circumstances in which the accused was observed in the state of the light, the opportunity for observation, the stress of the moment; should be carefully canvassed.”

In summarizing the subject on single witness identification, I cannot do better than to quote from the decision of the Supreme Court in the case Bwalya v The People (1975)

Z.R. 227. In the *Bwalya* case it was pointed out that the honesty of the witness is not the issue. The Court must be satisfied that he is reliable in his observation and that the possibility of honest mistake has been ruled out.

Furthermore, the Supreme Court observed in the *Bwalya* case that in the case of an identification by a single witness, this possibility cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence or evidence such as distinctive feature or an accurately sitting description on which a court might properly decide that it is safe to rely on the identification.

Finally, it was stated in the *Bwalya* case that:-

“There are may be exceptional cases where the contact between the witness and the alleged culprit was so extensive and the opportunity for observation so favourable that an identification shortly afterwards would in effect be a matter of recognizing someone the witness had see before: In such an exceptional case, a court might well feel quite safe, once the integrity of the identifying witness was accepted, in concluding, notwithstanding the absence of any connecting link or other evidence such as we have referred to that there was no possibility of honest mistake.”

It will be recalled that PW1 testified that on the material date she knocked off at 19.40 hours. It was therefore at night. On her way home PW1 passed through a business premises known as Hakuna Matata Mini Mart. There was a security light at the mini mart as well as at Mr. Antonios residence. As regards the description of her assailants, PW1 described one as being short and the other being tall. Both, PW1, testified, were black in complexion. This is as far as the description of the assailants went by PW1.

On this rather bore description there is a risk that PW1 may have committed an honest mistake in identifying her assailants; it is always important to beer in mind that in cases of single witness identification, the question or issue is not one of credibility, in the sense of truthfulness, but one of reliability in observation, I do therefore not feel safe to bore conviction of A1 and A2 on the basis of the identification by PW1. There is need

for me to test the identification through some connecting link or generally speaking something more.

In bid to prove the something more, Mrs. M. K. Chitundu in her submissions dated 11th June, 2010, has canvassed the doctrine of recent possession. Mrs. Chitundu has argued in her submissions that the property which was stolen on the night of 21st June, 2009, was given to PW3 by A1, barely three days after the event. Mrs. Chitundu poses a question. How did A1 come in possession of the phones in such a short period of time?

Before answering the question by Mrs. Chitundu, it is necessary to place in a proper perspective, the doctrine of recent possession. When an accused person is in possession of property recently stolen, the Court may infer guilt knowledge, if gives no explanation to account for his possession or if the court is satisfied that the explanation offered is untrue (see R v Aves 1950 Cr App R. 169; 1950 2 ALL E.R. 330 per Goddard C.J.)

In the celebrated case of Fanwell v R (1954) 1 R and N 81, Clayden F.J. said at P. 84: C:

“The inference must be the only reasonable inference and if a person is in possession of property recently stolen and gives no explanation, the proper inference from all the circumstances of the case may be that he was the thief or broke in to steal and stole and was a receiver, or even dispute no explanation, cannot be said beyond reasonable doubt to be guilty. And if an explanation is given because guilt is a matter of inference, there cannot be conviction if the explanation might be reasonably true”.

The doctrine of recent possession as adumbrated above is clear. The problem however in this matter is that again, I am confronted with two competing versions as to who had recent possession of the property in issue. On one hand PW3 contended in his testimony that he was approached by A1 to sell initially one of the phones to enable him

defray a debt he had incurred when he bought beer from PW1 and later when A1 promised a commission of K20,000.00 if PW1 sold the second phone at a price of K150,000.00.

On the other hand A1 alleged that it was in fact PW3 who commissioned him to sell the phones. These two conflicting versions can only be resolved on the basis of credibility.

According to Phipson on Evidence, Seventeenth Edition, (Thomson Reuters Legal Limited 2010) paragraph 12 – 36 at P. 365:

“The credibility of a witness depends on his knowledge of the facts, his intelligence, his interestedness, his integrity, his veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the obvious matters affecting the weight of a witnesses evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case inquired into either in direct examination to enhance or in cross – examination to impeach the volume of his testimony. So all questions may be asked in cross examination which tend to expose the errors, omissions, inconsistencies, exaggerations, or improbabilities of the witnesses testimony”.

Similarly, according to the learned authors of Archbold, Criminal Pleading, Evidence and Practice, 2010 edition, paragraph 8 – 137 at page 1359:

“The credibility of a witness depends upon: (a) his knowledge of the facts to which he testifies; (b) his disinterestedness; (c) his integrity; (d) his veracity; and (e) his being bound to speak the truth by such an oath as deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. The degree of credit his testimony deserves will be in proportion to the jury’s assessment of these qualities”.

PW3 in this matter testified in a very forth right manner and in my view as a disinterested person whose Involvement and interest in the matter was to recover the K5,000.00 owed to him by A1.

I therefore find A1, PW3 to be consistent and to truthful.

At any rate the testimony of PW3 was corroborated by PW2, who bought the phone from A3 and A1. There was no motive in my considered view on the part of PW2 to deliberately and dishonestly make a false allegation against A1.

Although A1 alleged that it was PW3 who have the phone to sell on his behalf the finding of the handbag, purse and national registration cards at A1's house is an unexplained coincidence which ought to be taken into account in evaluating the veracity of his testimony. The inevitable inference to be drawn therefore is that A1 was not telling the truth that when alleged that he was commissioned by PW3 to the sell the phones.

I was also concerned throughout the testimony of PW3 about the absence of a strong reason for PW3 to invent a story against the A1.

According to PW4, When A1 was approached by PW3 and PW4 he disclosed that he acted in concern with A2.