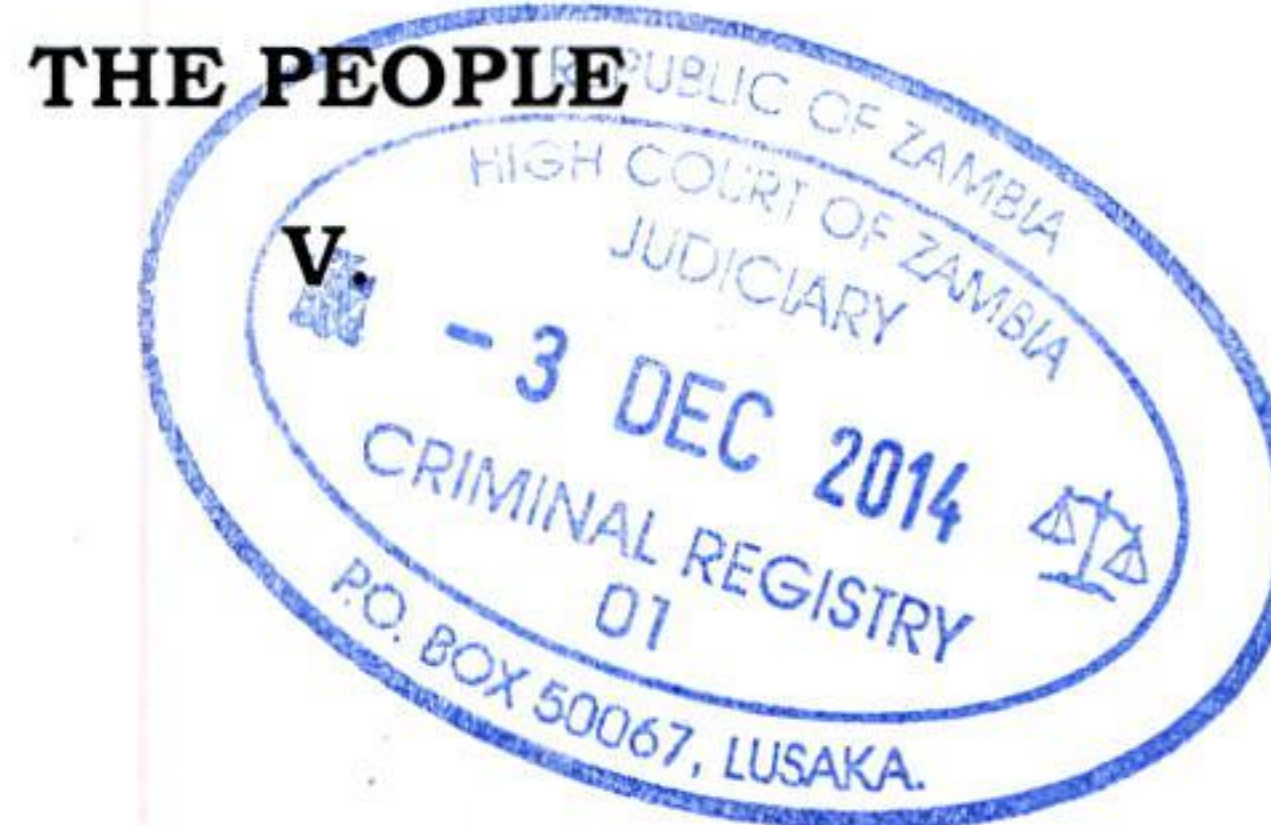


**IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA  
(Criminal Jurisdiction)**

**HP/61/2014**

**BETWEEN:**

**GIFT MWAMBWA  
JOHN CHINYAMA  
SILVESTER SIBBUNA  
NYUNDO MALOKOTELA  
WILLIAM PANDUKI**



**1<sup>ST</sup> ACCUSED  
2<sup>ND</sup> ACCUSED  
3<sup>RD</sup> ACCUSED  
4<sup>TH</sup> ACCUSED  
5<sup>TH</sup> ACCUSED**

*Before the Honourable Lady Justice F. M. Chisanga in Open Court.*

*For the People: Mr. R. L. Masempela, State Advocate.  
For the Accused: Mrs. Imbwae, Dove Chambers*

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**JUDGMENT**

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***Cases referred to:***

- 1. David Zulu vs The People 1977 ZLR P.151.**
- 2. Danny Zyambo vs The People 1977 Z.R. 53.**
- 3. Saluwema vs The People (1965) Z.R. 4.**

***Works referred to:***

- 1. Powell's Principles and Practice of the Law of Evidence Tenth Edition by William Blake Odgers and Walter Blake Odgers, Butterworth & Co 1921.**

The accused persons stand charged with the offence of aggravated robbery contrary to Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia. Particulars of offence are that Gift Mwamba, John Chinyama, Silvester Sibbuna, Nyundo Malokotela and William Panduki on the 2<sup>nd</sup> of November, 2013 at Lusaka in the Lusaka District of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with a pistol did steal one motor vehicle, Toyota Corolla

Registration Number ALF 9465 valued at K25, 000.00 the property of Benson Zimba and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to Benson Zimba in order to obtain or retain the thing or prevent or overcome resistance from being stolen.

The accused persons have all denied the charge and it behoves the prosecution to prove the charge to the required standard. The prosecution called three witnesses. PW1 was Mathias Phiri, a business man of George Compound. He testified that in October 2013, he owned a white Taxi, a Toyota Corolla, ALF 9465, which he bought from one Aaron Sikanyika at K25, 000.00 and has owned since 23<sup>rd</sup> November, 2012. He had hired Benson Zimba to operate the said taxi. On the 2<sup>nd</sup> of November, he received a report from the driver that his taxi had been stolen and further that the matter had been reported at Kabwata Police Station.

The driver explained to PW1 how he was hired by a man and woman going to White House in Garden. They got hold of him and tied him up and pointed a pistol at him.

PW1 and Benson Zimba then went to Kabwata Police Station where Benson Zimba was apprehended. PW1 later reported the matter to Central Police and left his details. A few days later, he received a phone call from an officer in Ndola informing him that his vehicle had been recovered but that it was in a bad condition. He then travelled to Ndola with his father and saw a Police Officer called Mr. Ndumbu. After producing the white book to show that the vehicle belonged to him, he was taken to where the vehicle was. It

was found in a house. The wall of the house was broken so that the car could fit. PW1 was able to identify his vehicle in its dismantled state as the engine number and the chassis number were compatible. He was informed that four of those found dismantling the vehicle had been apprehended. He then visited the suspects at the Police Station in Ndola and asked that the case be transferred to Lusaka. His father assembled the vehicle and had it towed to Lusaka. PW1 identified A1, A2, A3 and A4 as the suspects he saw in Ndola.

The court moved to view the motor vehicle. PW1 testified that he did not recover the keys. The vehicle was dismantled. The doors were fixed to the car with wires. The Chassis number is AE1105141138 and the Engine number 54AG653447. PW1 identified the vehicle.

In cross examination, PW1 testified that he was not with Benson Zimba at the time the vehicle was being stolen.

PW2 was Benson Zimba a driver of Lilanda Compound. He narrated how on the 2<sup>nd</sup> of November at around 20:00 hours, a man and woman booked the taxi, a Toyota Corolla ALF 9465 owned by PW1 which he was employed to drive. He was parked at Hungry Lion along Lumumba Road. He could not recall what those people wore as it was dark but the duo told him they were going to Garden House White Wallfence and he charged them K40. When he branched off Mumbwa Road, the man asked if he could buy a cigarette. When he parked, he noticed four people come towards the vehicle. One of them grabbed him by the neck while the others got in the vehicle and tied his legs, hands and neck. He was blind folded and beaten. He was then

driven and taken to Libala South where he was left tied to a tree. He shook himself off the tree, crawled a few metres and shouted for help. Someone came and helped him. He tried to call his boss but did not manage to go through. Police were called and they came and deposited him in his tied state into a van and ferried him to Kabwata Police Station. He was then untied and gave his statement. He obtained a medical report and was advised to go back to the police station the following day with the person who helped him. Before he could seek medical attention, he got in touch with the owner of the vehicle who suggested that they meet at the clinic so that they could go to the Police Station together. They later went to the Police Station where PW2 was put in cells. He was released after two days. A few weeks later, he was informed that the vehicle was found in Ndola.

When it was towed to Lusaka, PW2 was asked to identify the vehicle and he did so. He described it to the Court as a white Corolla, Registration number ALF 9465 with a Sony car radio inside.

PW2 told the Court that he was unable to identify his assailants as he was blindfolded. He only recalled someone with an axe and a knife. He never saw their faces.

In cross examination, PW2 testified that the incident happened at around 20:00 hours. It was dark and he was unable to see the faces of his assailants. He however recalled that he saw four men approach the vehicle after he had parked. They tied him up with ropes and used a seat belt to tie his neck. They then blind folded him. He stated that he did not know where the ropes came from. He was untied by police officers in the van and not the

people who helped him. He told the Court that he did not know the people who robbed him of the the vehicle.

PW3 was Ndumba Musole, a Detective Inspector service number 6580. He testified that on the 10<sup>th</sup> of November, he received information that there was a vehicle in Chief Chiwala area with no number plate. The said vehicle was in a house and some spare parts had been removed.

The following day he received information that the people who were seen dismantling the vehicle were by the road side near the Mining Plant looking for transport to an unknown place. PW3 then organized two officers and rushed to the place. When they reached the place, they found some four men to whom they introduced themselves, and cautioned them. PW3 asked them where they were lodging and A4 led them to a mud brick house in Chief Chawala's area. At the house, PW3 found a tent. When he removed the tent, he found a shell of a Toyota Corolla, white in Colour. When questioned over ownership of the vehicle, A2 told PW3 that the owner was not around. He checked the engine number and it was a 5A engine, number G653447.

The suspects were then taken to Ndola Central Police where they were interviewed as to the ownership of the vehicle. A4 revealed that the house to which he had led the officers belonged to his mother.

Using the engine number PW3 inquired for the owner at RATSA and was informed that the vehicle belonged to Mathias Phiri of Lusaka. He was given the phone number of the owner and he later got in touch with him. The owner confirmed that his vehicle was stolen and that the matter had been

reported to Lusaka Central Police. PW3 then sent a message to Lusaka division

On the 15<sup>th</sup> of November, 2013, PW3 was again informed that there was another suspect seen in Chief Chiwala's area. He rushed to the place and arrested A5 and detained him at Ndola Central Police Station.

PW3 narrated further that the owner of the vehicle then went to Ndola accompanied by some Officers from Lusaka. After confirmation through the white book that the vehicle belonged to PW1, it was assembled and towed to Lusaka. PW3 told the Court that photographs were taken at the scene by Sergeant Sichilima. He identified A1 as Gift Mwamba, A2 as John Chinyama, A3 as Sylvester Sibuya A4 as Nyundo Malokotela and A5 as William Panduki. He also identified the white book.

In cross examination, PW3 told the Court that there is no Police Post in Chief Chiwala's area except for officers who patrol the area. He could not disclose his informer to the Court. During investigations, his focus was on the owner of the vehicle. He did not meet PW2, the taxi driver. He testified that the accused persons did not inform him that they were looking for the person who had taken them to Ndola. He did he not conduct an identification parade.

PW3 identified the vehicle. He told the Court that all the doors, seats and wheels to the vehicle had been removed. The number plate too was not on the vehicle. They were packed in another room in the house. These were later taken to Ndola Central Police Station.

PW4 was Anthony Sichilima, Service Number 32615, Detective Sergeant by rank under Ndola District CID. He is specialised in finger prints, video recording and photographic evidence. He was trained at Lilayi Police College where he obtained a certificate in Fingerprinting, Photographing and Video Recording. He testified that late in the afternoon of the 12<sup>th</sup> November 2013, he accompanied the anti robbery squad under Ndola District to Chief Chiwala area to photograph a motor vehicle that was found in a certain house. It was believed that the vehicle was stolen from Lusaka. At the scene he took ten exposures that were showing the house and motor vehicle in different positions. Ten photographs were printed and labeled 1 to 10 in the photographic album. He identified the album as well as the photographs and tendered it as part of his evidence. He identified the vehicle as a Toyota Corolla white, in colour. He did not check the engine number.

In cross examination, PW4 testified that he saw the vehicle for the first time on the 12<sup>th</sup> of November, 2013. He could not identify it as when he photographed it, it was in a dismantled state.

PW5 was Spider Chola, Service Number 31512, Detective Sergeant based at Lusaka Division, Anti Robbery Squad. He testified that on 2<sup>nd</sup> November, 2013, whilst on duty, he was assigned a docket in which the complainant, Mathias Phiri had reported that his vehicle, Toyota Corolla ALF 9465 valued at K25, 000.00 had been robbed from his driver by some armed criminals.

Acting on this information, PW4 instituted investigations. He later received information that the said vehicle had been recovered in a dismantled state in Ndola and that some suspects had been apprehended. He proceeded to

Ndola and collected the vehicle as well as the suspects. Whilst in Ndola, he also visited the scene of the crime with PW1 where the motor vehicle was recovered in an unfinished house.

PW4 warned and cautioned the suspects who were already in custody and interviewed them. He came to know them as Gift Mwamba, John Chinyama, Silvester Sibuna, Nyundo Malokotela and William Panduki. He then jointly charged and arrested them for the offence of aggravated robbery. They all gave a free and voluntary reply denying the charge.

He told the Court that the details on the white book such as the engine number, the number plate and the colour of the vehicle tallied with the details on the dismantled vehicle.

PW4 went on to testify that the spare parts that were recovered were at Ndola Central Police while the frame of the vehicle before it was towed to Lusaka was in an unfinished house. When towed to Lusaka, the motor vehicle was in his custody. He identified the motor vehicle and produced it in evidence.

In cross examination, PW5 testified that the motor vehicle was driven by a taxi driver. He interviewed the taxi driver who explained to him the circumstances under which the vehicle was stolen. He testified that when he travelled to Ndola, he was accompanied by the complainant and some other officers. The taxi driver did not accompany him.

PW5 told the court that he was aware that an identification parade had been conducted although he was not at the parade. He also testified that it was



not the police that dismantled the vehicle. It was found in a dismantled state in an unfinished building. He stated that he interviewed the accused persons; each of them gave a statement. They mentioned one Michael Phiri but he was untraceable and none of the accused persons led the police to his apprehension.

In re examination, PW5 testified that the accused persons did not lead him to Michael Phiri and neither did they describe Michael Phiri to him. The details availed to him were insufficient for PW5 to investigate the said Michael Phiri.

The accused persons were found with a case to answer and put on their defence, they gave sworn statements.

Gift Mwamba, A1, of Kanyama Compound testified that on the 10<sup>th</sup> November, 2013, he was stranded in Ndeke Compound, Ndola. He decided to look for piece work at a certain farm. On his way back, a police vehicle stopped and three officers disembarked. He informed them that he was in Ndeke Compound having come from Lusaka. They then arrested him. At the Police station, he was not told anything. Four days later, he was transferred to Lusaka. To his surprise, a month later he was taken to Court with others he did not know. A4 and A5 then informed him that they were before court because they were found with a vehicle; allegations he was not aware of.

When asked how he got to Ndola from Lusaka, A1 told the Court that he was in Soweto drinking beer at A3's tavern in the company of A2 and A3 when one Michael joined them and bought them some beer. Michael asked them

to accompany him to Chisamba where he was going to collect money. The vehicle they were using was stopped at a road block but later released. In Chisamba, they continued drinking beer while Michael went to pick up his money. When he returned, A1 was too drunk to understand what had happened. The next morning, he found himself in Ndola at a Guest House in Main Masala. When he asked Michael what they were doing in Ndola, he told them that they would travel back to Lusaka that evening. The next evening, he left and never came back. They were left stranded and started looking for piece work to raise money to travel back to Lusaka.

In cross examination, A1 testified that they were four in number when they travelled to Ndola using Michael's vehicle. While in Ndola, he was spending nights in shops on the streets. When he was apprehended, he was with A2 and A3. He denied having led the Police officers to the recovery of the motor vehicle. He told the Court that he did not know the house where the vehicle was found.

DW2 was A2, John Chinyama, of Kanyama site and Service. A general worker, artist and carpenter. He testified that on the 10<sup>th</sup> November, 2013, he was in Ndeke Village as a visitor. He went out to look for piece work and on his way back to Ndeke village he was apprehended. When he queried the arrest, he was told that he would be informed at the Police station. He spent four nights in Police custody and was later transferred to Lusaka.

In cross examination, DW2 told the Court that he was a Lusaka resident. He travelled to Ndola on the 5<sup>th</sup> of November, 2013. He stated that they travelled in a cream vehicle from Lusaka to Ndola. He denied having led the

Police to the recovery of any motor vehicle. He told the Court that he did not know A4 and A5. When they got to Ndola, they spent a night in a guest house.

In re examination, DW2 told the Court that he recalled having accompanied Michael to Chisamba because he had promised to buy them some beer. He was however too drunk to remember how he got to Ndola.

Sylvester Sibbuna, A3, of new Kanyama was DW3. He owns a tavern in Soweto, Lusaka. He narrated to the Court how on the 5<sup>th</sup> of October, 2013 he opened his tavern for business up to 15:00 hours. There were many patrons. Michael then joined them. He was driving a taxi, cream in colour. the four continued to drink beer. At around 16:00 hours, Michael asked them to accompany him to Chisamba. In Chisamba, Michael ordered some beers for them but did not pay for them. He then left in his vehicle and returned after an hour with some spirits. When it started getting dark, he advised Michael to drive them back to Lusaka. He then fell asleep. He was later woken up to sleep in the vehicle and he did so. When he woke up, it was dark and the vehicle was speeding. When he asked where they were going, he was informed by Michael that they were headed to Ndola. He then started pestering him to drive them to Lusaka. Michael informed him that he would find transport for them to Lusaka as he had already made a programme for Ndola. They reached Ndola in the morning. He continued pestering Michael to take them back to Lusaka. Two days later, Michael left and never came back. They searched for him but could not find him. As they were left with no money, they decided to find some piece work on the 10<sup>th</sup>

November, 2013. On their way back, they met a police vehicle which picked them up and took them to Ndola Central Police. They were there for four days and thereafter transferred to Lusaka Central Prison.

DW3 told the Court that they were later paraded and someone identified them. When they were taken back to the cells, DW3 was then informed that they were apprehended because they were involved in a car theft. DW3 told the Court that he didn't know A4 and A5.

In cross examination, DW3 testified that the vehicle before court was not the vehicle they used to go Ndola. He said that he did not know anything about the theft and that he did not lead the Police officers to anywhere. DW3 suspected that Michael ran away because he was being pestered by them. After Michael had left them, they spent a night at a shoe repair stall.

He told the Court that the business he runs of selling opaque beer and spirits is a good business. When he was in Ndola, he failed to use the proceeds of that business to bring them back home as they were three in number.

DW4 was A4, Nyundo Malokotela, a charcoal burner of Chiwala area in Ndola. He told the Court that on the day he was apprehended, he was coming back from town when the bicycle chain broke down. He parked at a bar in Chiwala area to repair his bicycle. A Police vehicle stopped and some men disembarked. They entered the bar and then came out and approached him. They asked for his name and his residence. They asked him if he had a house in that area. He told them that he lived on a farm and that he had a

house which he had put on rent. He led them to the house he had put on rent and when they went to inspect it, he remained at the roadside. When they came back, they apprehended him and took him to Ndola Central Police. He was later taken to Lusaka Central Prison in the company of people he did not know. In Lusaka, he was part of the identification parade but was not identified.

In cross examination, DW4 testified that the only thing he did was lead the police to the house. When shown the photographic album, he stated that he had never seen the vehicle and did not know the colour. Concerning the house, DW4 told the Court that it was his parents' house but he was currently the one collecting the rentals from the tenant, Moses Phiri.

DW5 was William Panduki a miner of Ndola. He testified that on 15<sup>th</sup> November, 2013, he was working at Neekandh Lime when he received information from the security guard that police officers had been looking for him the previous day. Without wasting time, he reported to the police station with the security guard. He was asked for his details and also asked if he knew one Michael. He informed the officers that he used to meet him at the market. They asked him about a vehicle and informed him that they had four suspects connected to theft of the same vehicle. DW5 informed the officers that he had received Michael at around 13 to 14 hours. He asked DW5 a lot of questions concerning taxi business at the taxi rank in Ndeke. DW5 informed him that business was good as most people preferred taxis to buses. Michael revealed that he had a taxi he wanted to put on the rank. Michael also inquired if DW5 would find him a driver. He also talked about

selling the vehicle. It was a Toyota Sprinter, Cream White in colour with a manual gear box. It was not the vehicle he viewed in Court.

DW5 was then arrested and transferred to Lusaka three days later. In Lusaka, he was questioned and he told them what had transpired. Later on, four people were brought to him who he did not know. He was asked if Michael was one of them and he responded in the negative. DW5 told the Court that the day Michael approached him was the first time he was meeting him.

In cross examination, DW5 testified that he was apprehended alone. That he drove the vehicle he was given by Michael for two days but he did not look at the number plate closely. He reiterated that he did not know the four people he was jointly charged with.

In re-examination, DW5 told the court that he did not take Michael Phiri to the Police station because after two days, he got the keys and vanished.

DW6 was Esnart Panduki of Ndeke township Ndola, A5's wife. She told the court that she travelled to Lusaka by bus, and tendered her ticket as part of her evidence. She testified that she had been married to A5 for six years and that they lived in Ndola together. He was working at Neekandh Lime Limited in Chiwala in Ndola as a general worker. He stopped working on the 15<sup>th</sup> November, 2013. When he went for work that day, he never returned. DW6 looked for him but could not locate him until she went to the Ndola central Police where she was told that he was in Prison in Lusaka.

In cross examination, DW6 testified that she and her husband stayed in Ndeke and not Chiwala, but that the company that A5 used to work was situated in Chiwala area. She told the court that she was also not aware of any documentation that A5 was given at his workplace. Neither had she seen his payslip. It was therefore not strange for A5 to be found in that area. DW6 was not aware that A5 operated a taxi. She also testified that A5 was the bread winner and that she has one child with him.

DW7 was Kelita Nyundo, A4's mother a peasant farmer and charcoal burner of Chiwala area. She told the court that when she burnt charcoal, A4 would go and sell it in town. She testified that she had no relatives outside Ndola but that all her relatives lived in villages within Chiwala area. She told the Court that she built a house which she put on rent in order to get some income. That in October, 2013, a young man was renting the very house but because she was far away in Chilengwa, her son was the one collecting the rentals. She did not know what happened to the tenant.

DW7 testified that she did not know why her son was in the dock. She said that he had gone to sell charcoal one day and did not return. Two days later, she began to look for him when she was informed by some villagers that he had been apprehended.

In cross examination, DW7 testified that she and her son live on a farm in Chilengwa. That she was in control of her house even though her son was the one collecting rentals. She did not know the tenants who were in occupation of the house and neither did she know anyone by the name of Michael Phiri. She told the court that she loved her son but she would not

shield him if he was wrong. She also told the Court that her son did not know how to drive.

DW8 was Michael Ngosa of Pamodzi Township Ndola, an Assistant Operations Manager at Neekandh Lime Limited. He testified that A5 was employed by Neekandh Lime Limited on 30<sup>th</sup> October, 2013 as a casual worker. He was on a three months contracts. DW8 told the Court that A5 reported for a few days and later deserted on the 12<sup>th</sup> of November, 2013 and a letter of desertion was later written to him on the 18<sup>th</sup> November, 2013.

DW8 told the Court that A5 has not yet received his pay for the days that he worked as he was never seen from the 12<sup>th</sup> November, 2013. DW8 tendered the contract A5 signed at the point of his employment, a book used as an attendance register, the desertion letter dated 18<sup>th</sup> November, 2013 and A5's payslip as part of his evidence.

In cross examination, DW8 testified that he did not have any form of identification to show that he was the Operations and Production Manager at Neekandh Lime Limited but that he had the Director's business card. He told the Court that on 2<sup>nd</sup> November, 2013, A5 reported for work for the 06:00 hours shift. When they report, he explained, they are given a full day's ticket and when leaving, they are cleared by security personnel. Those that report at 06:00 hours finish loading the furnace by 14:00 hours and knock off.



In re examination, DW8 testified that the company was subpoenaed and that his director assigned him to appear before court and that he did not volunteer himself to testify.

This witness marked the close of the defence case. I have considered the evidence led by the prosecution, and the defence.

I find as a fact that PW1 was owner of a Toyota Corolla, bearing registration number ALF 9465, white in colour. This finding is premised on the certificate of ownership produced in evidence by the prosecution. Said certificate bears PW1's names, Mathias Phiri.

I further find as a fact that PW1 utilised the said motor vehicle as a taxi. Benson Zimba PW2 was employed as a driver. On 2<sup>nd</sup> November, 2013, PW1 received a report that the motor vehicle had been grabbed from PW2 by people who had booked the motor vehicle. PW2 was apprehended so that he could explain properly, but PW1 procured his release.

I further find as a fact that the motor vehicle in question was recovered. It had been stripped of some parts. It was identifiable because the engine number and chassis number tallied with that on the certificate of ownership. The vehicle was later assembled and towed to Lusaka. PW2 could not identify any of the people he says got the vehicle from him. The evidence connecting the accused persons to commission this offence is therefore circumstantial.

PW3, detective inspector Ndumba Musole testified that he and other officers went to Chief Chiwala's area on 11<sup>th</sup> November, 2013. They found A1, A2

and A3 by the roadside. Upon being asked where they were lodging, Nyundo Malokotela led the officers to the house where they were lodging. In that house was found the shell of the motor vehicle stolen from PW2, covered with a blue tent.

When this witness was cross examined, it was not suggested to him that A2 and A3 were apprehended on their way from Handyman's paradise, where they had gone to look for piece work. Nor was it suggested to him that Nyundo Malokotela was found by a tavern, repairing his bicycle. The law is that an accused person is required to advance his version during cross examination of prosecution witnesses. He is supposed to challenge the testimony in cross examination, and put across his version of events. Failure to do so means that the prosecution version is accepted. See **Powell's Principles and Practice of the Law of Evidence Tenth Edition by William Blake Odgers and Walter Blake Odgers, Butterworth & Co 1921.**

In this case therefore, A2, A3 and A4 having not challenged PW3's version as to where they were apprehended from, their claims that they were apprehended at places different from that mentioned by PW3 is an afterthought. It is a lie and I discount it as such.

PW3 said the stolen motor vehicle was found dismantled in Nyundo Maloketela's house which he said was his mother's. A1, A2 and A3 deny knowing anything about the vehicle. This was a lie. They did know something about the vehicle. The cross examination advanced on their

behalf confirms that they were connected to the vehicle in issue to the extent that they rode on it. I reproduce the questions put to PW3 for clarity.

**Q: And this unfinished building was not habitable from your observation?**

**A: My lady, I would say somehow it was habitable.**

**Q: Somehow, you are not sure. Okay, now, did you have an opportunity to talk to the accused persons?**

**A: Yes my lady, I interviewed the five accused persons.**

**Q: And they told you how their relationship was with the motor vehicle and how they had come in contact with the motor vehicle hadn't they?**

**A: My lady, each one of them had given his own statement.**

**Q: Each one of them had given his own statement, thank you. And in each of the statement they had given you each one had mentioned an individual, the same individual all of them called Michael Phiri didn't they?**

**A: They mentioned about that person.**

From this cross examination of PW3 and the answers elicited from him, it is beyond doubt that the accused persons were at one time in contact with the stolen motor vehicle. And they mentioned Michael. A1, said he accompanied one Michael to Ndola on the 5<sup>th</sup> November, 2013. He was with A2 and A3. I find as a fact therefore that A1, A2 and A3 rode on the stolen motor vehicle

to Ndola on the 5<sup>th</sup> November, 2013, two days after PW2 was robbed of the motor vehicle in question.

I further find as a fact that A1, A2, A3 and A4 were apprehended in the vicinity of the house where the stolen motor vehicle was. A4 said the house in which the motor vehicle was found belonged to his mother and was rented by one Moses.

The story relating to Moses has no ring of truth to it. Sufficient particulars of the said Moses were not given to the police so as to enable them investigate the issue. Moses's surname was not provided. Moreover, A4, who lives with his mother DW7, in a village far from the village where the house in which the motor vehicle was, has not explained what he was doing in that area, where he according to his mother, he does not live. I am not convinced that the said house was occupied by a tenant. The tenant is fictitious, and I discount the story as untrue. The position then is that the stolen motor vehicle was found in A4's possession. He was found in possession of a recently stolen vehicle. A1, A2 and A3 who had travelled on the stolen motor vehicle were found in the vicinity of the whereabouts of the stolen motor vehicle, which was being stripped of its parts.

The evidence connecting the accused persons to commission of the herein offence is circumstantial. In **David Zulu vs The People 1977 ZLR P.151**, the Supreme Court said,

***“It is a weakness peculiar to circumstantial evidence that by its very nature, it is not direct proof of a matter at issue, but rather, is proof***

*of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.*

Treatment of the fact of possession of stolen property by an accused person had been discussed in a number of cases.

In **Danny Zyambo vs The People 1977 Z.R. 53**, the Supreme Court said:

*“Inference of guilt cannot be drawn from possession of stolen property unless it is the only inference that can reasonably be drawn. Where an innocent explanation might reasonably be true a fortiori the inference of guilt is not the only reasonable inference. If an accused gives an explanation which might reasonably be true, he has, as a matter of law, satisfied the court that the case had not been proved beyond reasonable doubt and has discharged the obligation imposed on him.”*

The court of Appeal had earlier held, in **Saluwema vs The People (1965) Z.R. 4**, that:

*“If the accused’s case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.”*

In **Chabala vs The People 1976 ZLR P.14**, it was held, by the Supreme Court that:

- (i) *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, or was a receiver, or even, despite no explanation, cannot be said beyond reasonable doubt to be guilty.*

*(ii) It explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for the guilt is not the only reasonable inference.*

I now turn to examine whether the story advanced by A1, A2 and A3 could reasonably be true. The three accused persons say they were approached by Michael, at A3's bar. He asked them to escort them to Chisamba and they went with him. He plied them with drink whereupon they became drunk and were knocked out. It is not indicated the said Michael was drunk. This Michael, for no reason at all, and with no discernible benefit to himself, set off for Ndola with three fellows on what was for them an aimless trip. The question to be asked is, can it be reasonably true that a person would drive three men from Lusaka to Ndola, without their express consent, knowing fully well that he would have to fend for them as a result? I do not think so. It is said the said Michael was a taxi driver and I take it he was as a result engaged in the business of transporting people for reward. I am not persuaded a person engaged in business would conduct himself in the described manner, to his detriment and for no apparent benefit. What is surprising is that the accused did not even avail the police with sufficient details of the said Michael, for instance, where he usually operated from,

what his phone number was, and how he could be traced. If it were true the three had jumped into the motor vehicle merely at Michael's invitation as claimed, they would have known him sufficiently well enough to provide details that could lead to his apprehension. People do not invite total strangers to escort them to collect money. I find the explanation advanced by the accused persons cannot reasonably be true and discount it as a result.

As for A4, he has offered no explanation that can reasonably be true. People do not let their houses to tenants whose details they do not know. A reasonable Landlord would obtain his tenants' full names. I have already discounted the story relating to the fictitious tenant. Further, no explanation has been offered as to how the stolen motor vehicle ended up in the house owned by A4's mother DW7, over which A4 had control. A4 having had control over the house in issue, I conclude the vehicle was parked and stripped there with his consent. And people do not normally park motor vehicles in houses. It is clear that the motor vehicle was thus concealed to facilitate stripping it of its parts. That this is what was going on is confirmed by the fact that that the stripped parts were in the next room. The stripped vehicle was even covered with a blue tent, so as to conceal it.

Can it be said someone else parked the motor vehicle in A4's house without his consent? I do not think so. The vehicle was parked in that incomplete house for concealment. I greatly doubt a person bent on concealing the motor vehicle would put it in an incomplete house without the owner's consent, for fear of the vehicle being found by the owner of the house, who

would obviously report the matter to the police. It is not reasonable therefore that a vehicle would be parked in A4's house without his knowledge. I draw the inference that he was aware of what was going on all along, in his house.

As for A1, A2 and A3, their story is so unreasonable as to be untrue. A3 said he was a bar owner and business was good. He could have easily asked his wife, or even the person he had left in charge of the bar, to send him transport money. A person who was circumstanced as A3 could not reasonably do menial chores for food, and sleep in the stalls at the market. That cannot reasonably be true. As for his explanation that he could not abandon his two colleagues because they had no money, I do not believe that explanation at all. It would have been the easiest thing for him to assist his colleagues from money from the bar takings. People do not spend nights in the cold if they can help it.

I have discounted A1, A2, and A3's version relating to their travel to Ndola as untrue. On the totality of the evidence, I draw the inference that A1, A2 and A3 hang around Ndola because they had a vested interest in the stolen motor vehicle which they were stripping.

The vehicle was stolen from PW2 and was driven to Ndola to chief Chiwala's area and hidden in an incomplete house. It cannot be said it was abandoned, nor can it be said to have changed hands within a space of one week. Besides, the registration book was with PW1, and the vehicle could not be sold without production of the registration book. The vehicle having not been abandoned, nor changed hands, the only reasonable inference to be drawn on the facts is that A1, A2, and A3, all Lusaka residents came with

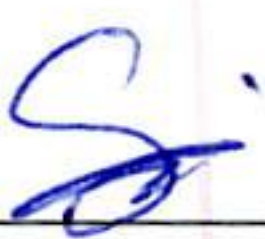


the stolen motor vehicle from Lusaka. A4 was equally involved in the scheme. It is odd that there would be 4 males in connection to the stolen motor vehicle when PW2 said he saw 5 males and one female attack him on the 2<sup>nd</sup> November, when the vehicle was snatched from him. It is too odd a coincidence, which coincidence bears out PW2's story. I discount DW7's testimony as untrue, as she did not accompany her son A4 at all times on the date of the theft.

I now turn to consider A5. Apart from driving the motor vehicle brought by Michael, there is no other evidence connecting A5 to commission of the offence. His explanation was that Michael asked him to drive the motor vehicle as a driver, and he drove the vehicle as requested. Can it reasonably be true that one could be asked to drive a taxi as explained? I think it is reasonably possible. Therefore A5's explanation can reasonably be true. That being the case, an inference of guilt is not the only one drawable regarding A5.

I therefore find A1, A2, A3 and A4 of the guilty of the offence of aggravated robbery as charged and convict them accordingly. I acquit A5 of the said charge and set him at liberty forthwith.

Dated the .....<sup>30<sup>th</sup></sup>.....day of .....<sup>September</sup>..... 2014.

  
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**F. M. CHISANGA**  
**HIGH COURT JUDGE**