IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

HP/214/2015

BETWEEN:

THE PEOPLE

vs

SYDNEY CHALI	**ACCUSED 1**
FABIANO PHIRI	**ACCUSED 2**
LLOYD CHITEBULE	**ACCUSED 3**

Before Hon. Mrs. Justice M.S. Mulenga on the 12th day of February, 2016

FOR THE PEOPLE	:	MRS M. LUNGU, PRINCIPAL STATE ADVOCATE AND MS KACHAKA, STATE ADVOCATE – NATIONAL PROSECUTIONS AUTHORITY
FOR THE ACCUSED PERSONS	:	MRS W. MUNDIA, LEGAL AID COUNSEL – LEGAL AID BOARD

J U D G M E N T

Sydney Chali (A1) Fabiano Phiri (A2) and Lloyd Chitebule (A3) stand jointly charged with two counts of aggravated assault with intent to steal contrary to section 295 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of offence are that the three accused persons on the 20th day of September, 2014 at Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and armed with iron bars, with intent to steal did assault Pumulo Samatongo in count1 and Petros Zulu in count 2.

The accused persons all pleaded not guilty. The prosecution called five (5) witnesses in support of its case. PW1 Petros Zulu testified

that in 2014 he was working at his sister's restaurant at Makeni. On a date he could not recall, he was sleeping in the restaurant to safeguard it when he heard noises of the two guards outside shouting that they were being beaten. This was at around 01:00 hours. He peeped through the window and saw them being beaten. The door of the restaurant was then forcibly opened and a torch was shown or lit on his face. He saw about four people. They squeezed his neck and made him to lie down. They then used a shrub cutter and cut off a piece of his ear. He fainted and they left. When he regained conserousness, he rushed to inform the landlord who lived at about 200 meters from the premises. When he went back to the shop with the landlord, they found the police who stated that they had pick up some assailants. PW1 and the other two guards were taken to University Teaching Hospital (UTH) where they were admitted. The piece of his ear was sutured or stitched back. His medical report went missing in the process of shifting from the said place for fear of being attacked again. He was not able to see the attackers clearly as they broke the bulbs thereby making the place dark.

PW2, Detective Constable Douglas Banda, testified that on 20th September, 2014 at around 01:00 hours, he received a call from Constable Mwanza that there was a vehicle parked at the roadside complex, a place where they had experienced a lot of breakings. PW2 with other officers went to the area and at about 20 meters from the complex, they found a Toyota Noah registration number ALM 9761 parked and A3 alone inside as the driver. They asked A3 what he was doing and he stated that he was waiting for his girlfriend and was also using the same vehicle as a taxi. Shortly

after, a Toyota corolla registration number AVG 971 coming from the direction of the complex passed with lights off. They stopped the same and asked A2 why he was driving with lights off and he replied that the vehicle had a fault. They became suspicious and when they checked, they found that the lights were working and the vehicle was in good condition. They went with both A2 and A3 to the police station. On arrival, A3's phone rang and they put it on loudspeaker. A male voice asked A3 to pick them from where he had dropped them. PW2, A2, A3 and other officers used A3's vehicle. Whilst on the way the same person called and said they had failed to break in because they were disturbed by the guard. To his surprise, A3 went and parked at the same place they had earlier found him. Three men emerged from the shops and as they reached near the vehicle, they saw the police officers and then scampered in different directions. PW2 and his colleagues gave chase and managed to apprehend A1. At the vehicle, A2 identified A1 as one of the people he had dropped at the roadside near the shops. A1 said that A2 was lying and was one of them and not a taxi driver. They put A1 in front and he led them to the shops and pointed at one of the shops. He said he was with five (5) others during the attack. They found one shop with a damaged lock and inside were two security guards badly beaten and covered in blood. One of the guards was Petros Zulu. They found a shrub cutter (P1) at the door of the said shops and it had blood stains and there was blood at the door. The guards said they were attacked using on iron bar. Upon searching the Toyota Noah, they found an iron bar (P2) of about half a meter long. They took the injured to the hospital and the accused person to the police. The two vehicles were temporarily released to the owners and

when the same were requested for only the Toyota Noah was delivered to the police station and it is currently a non runner. The Toyota corolla was taken to the village by the owner's elder brother and it is also a non runner. He produced the photo of the Toyota Noah as P3.

Under cross examination PW2 stated that only A2 told them that he was a taxi driver while A3 said he was waiting for his girl friend and not a customer. PW2 did not get a record from the service provider concerning the telephone conversation between A3 and the unknown person but he heard the conversation as they had put the phone on loudspeaker. He did not have a picture showing the breaking implements in the car. No finger prints were lifted from the iron bar, P2, as the officers who take finger prints were out of Lusaka. He had no documentary proof of A1 leading them to the shop.

PW3 Victor Sekeleti testified that on 19th September, 2014 his friend A3 borrowed his Toyota Noah in issue to go to Nampundwe to take salaula. He advised A3 that the vehicle was not in very good condition. In the morning on 20th September, 2014 he got a phone call from his sister that his vehicle was parked at Makeni police. When he made inquiries the police told him it was impounded. PW3 said he bought the said vehicle from Felix Bakasa as per letter of sale, P4 and produced the certificate of registration (P5) in his name. Under cross examination PW3 stated that A3 was a taxi driver and a church mate. He gave the vehicle to A3 at around 10:00 hours on 19th September, 2014. He did not get cashing for the Nampundwe trip and A3 did not phone him on the night of his arrest.

PW4 Shaft Moonga narrated that he bought the Toyota corolla in issue in 2013. He produced a copy of the registration certificate P7 and stated that the original was misplaced due to shifting. That he gave the vehicle to A2 as a taxi driver to use it as a taxi since 15th August, 2014. The vehicle went missing from 20th September 2014 for three weeks. He was later told by a person that he was in the same police cell with A2 and that A2 had asked him to tell PW4 that his vehicle was at Makeni police. PW4 then went with A2's mother to see A2 at the police cells. He was later given the vehicle but his brother borrowed it to go to the village sometime in 2015 and the same has not been returned as it broke down there. He further produced four (4) letters of sale (P6). In cross examination PW4 stated that A2 was operating the vehicle as a taxi both during the day and night. The vehicle was in good condition when he was using it.

PW5 Detective constable Howard Kanini, the arresting officer, testified that he opened the docket for aggravated assault with intent to steal in which Pumulo Samatongo was the complainant who stated that he was attacked by six men outside Makeni complex. The complainant took the medical report, P8, indicating the injuries he had sustained. He found A1, A2 and A3 already in custody as suspects and the two motor vehicles, Toyota Noah and Toyota corolla, at the police station. He was also availed the two breaking implements being the shrub cutter P1 and iron bar P2. Under warn and caution, the three accused persons denied the charge. He was not satisfied with their responses and thus charged and arrested them for the subject offences. That he made efforts to trace the complainant for the court hearing but could not locate him. At his

former workplace, they stated that he stopped working after the attack. His residence in Kanyama could not be traced due to the absence of house numbers and his contact phone number was not getting through. Under cross examination PW5 stated that he did not retrieve finger prints from P1 and P2 as they were handled by several people. He did not see how the accused persons were apprehended as he was not present.

This marked the close of the prosecution case and the accused persons were found with a case to answer on the two counts. They all opted to give evidence on oath and did not call any witness.

Accused 1 testified that at around 01: 00 hours on 20th September, 2014 he was at his in laws' place called Sable in Makeni Konga area to see his sick son who was taken there by his wife. He had booked A2's taxi from Joe gate and A2 dropped him there at around midnight to 01:00 hours. He discovered that the child was very sick and he went out to get a taxi to take him to UTH. As he was going to the taxi rank, he saw a Toyota Noah moving slowly towards where he was coming from. As he was approaching driver, he was surprised to see people come out of the car holding guns. They got hold of him and said he was the one. They asked the driver of the Noah (A3) whether he was the one but A3 refused. After two days he was told that he was a suspect. He was later jointly charged with A2 and A3. This was after a guard, Siwala who was in cells told them that he was being forced to be the complainant in their case.

Under cross examination A1 said it was A2 who took him there and it was his first time to see A3. He stated that the testimony of PW2 was true on the aspect that he was apprehended between 01:00

hours and 02:00 hours on 20th September, 2014. That what was false was that he took PW2 to the scene or shop after being apprehended and that he phoned A3 to pick him up. That he never ran away before being apprehended. That when he was apprehended, he was told that he had beaten Siwala with intent to steal and the offence against Pumulo was made known to him after two days in cells.

Accused 2 stated that on 20th September, 2014 at around midnight, he was working at the Joe gate taxi rank in Kanyama when he was booked by two men one of whom was A1. He took them to Makeni area and when they reached a big tree, the one who sat in front told him to make a u-turn and stop. He asked for the fare but they told him that they were waiting for other friends who had booked another vehicle. After five (5) minutes, a Toyota Noah passed and also made a u-turn and parked behind him. The one who was seated in front said he was going to get money for the fare from his colleagues. The two then got off and went into the Noah which went and parked 100 meters in front of his car. He did not see how many people were in the Noah. He waited for about 15 minutes and then decided to go and approach the Noah to ask the driver if he had been paid. As he started driving, he heard noises of people fighting ahead of him. He did not know the place well as it was his first time to go there. As he approached the Noah he saw two men, one of whom had a gun step on a person. He got scared thinking that they were attempting to steal the car and he drove past. His lights were at low beam. At low beam, only one headlamp would light but both would light at full beam. It was not true that he was driving without lights. They flashed at him to stop and he stopped. He later came to know them

as police officers. They took him to police cells and later jointly charged him with A2 and A3 whom he came to know as the driver of the Noah. He added that some of the things he mentioned to the police were lies as he wanted to protect himself from the beatings they were inflicting on him when getting a statement. That it was a lie that he was present when they went to the scene.

In cross examination, A2 stated that A1 and his friend booked him to take them to Makeni Oriental road. That he did not drop A1 at a house and A1 did not mention going to a house. They told him to wait in the vehicle. That A1 would be lying if he said he approached the Noah when looking for a taxi

Accused 3 testified that on 19th September, 2014 he was booked by his usual customer, a truck driver, to take him home around 23:00 hours. After he dropped him and whilst at a filling station, he was booked by two men to take them to Makeni Konga. He charged them K60.00. They told him to make a u-turn and park behind the Toyota corolla they found parked along the road. One of the men went to the corolla and two men came out of the corolla and he concluded that they knew each other. He was paid K50.00 and one of them said his vehicle was comfortable and asked for his telephone number so he could book him in future and he gave him the phone number. Before he could start the vehicle, he was asked to take them a bit further ahead. He took the four men at a distance of about 100 meters from the corolla. The four men then dropped off near the bar as there were some bars on the left.

That after driving for a short time he received a phone call from the one who took his number stating that they had forgotten something

in his vehicle and requested him to get back and he did so. When he reached where he had left them he was told to wait a bit. After six (6) minutes a car came and two men, one of whom had a gun, told him to get out of the car. He told them what he was waiting for and it is a lie that he told them he was waiting for his girlfriend. He was then taken to the police. At the police his phone rang and they told him he was cheating them and that they would book another vehicle. He then went back to the scene with police officers and parked. The four men approached his vehicle and one (A1) got in and sat on the police officer and then shouted. The police officer held on to him and they both fell down. The other three men ran away. A1 then mentioned that they had beaten someone whom they had left in the restaurant. They held and asked A1 to go with them to the shops and asked A3 to light where they were going. At the shops A3 observed two people who were beaten and he assisted in putting them in the vehicle and they later went to the police.

In cross examination A3 testified that when asked, A1 stated that they did not steal but had beaten some people in the restaurant. That A1 was one of the two men that had initially come from the corolla. He dropped the four men near bars and the houses were further ahead. That A1's statement that he was coming from a house looking for a vehicle when he found A3's vehicle was a lie. That the police did not find any implement in his car. That he searched using the light and did not find anything as he thought someone had left a phone.

This marked the close of the trial and both parties relied on the evidence on record. The burden of proof is on the prosecution to

prove its case against the accused persons beyond reasonable doubt. Section 295 of the Penal Code provides that:

> **"295. Any person who, being armed with an offensive weapon or instrument, or being together with one person or more, assaults any person with intent to steal anything, is guilty of a felony and is liable on conviction to imprisonment for a period (notwithstanding subsection (2) of section twenty-six) of not less than ten years and not exceeding twenty years.**

The ingredients of the offence that have to be proved are that an accused person must be with another person or must be armed with an offensive weapon and there should be an assault of a third person with intent to steal. Offensive weapon is defined in section 4 of the Penal Code as:

> **"Any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article.**

In this case and particularly from the evidence of PW1, a cutter, P1, was used to cut his ear during the assault. PW2 and PW5 testified that one of the guards stated that a metal bar was used to inflict injuries on them. In this case the metal bar that was produced as P2 has not been connected to the assault of the three (3) people including PW1. PW2 stated that it was retrieved or found in A3's vehicle but A3 denied that the same was found in his vehicle. A3 however stated that when he left the scene, one of the men called him and stated that he should turn back as they had forgotten an item in the vehicle. A3 then checked where they were sitted thinking that had dropped a phone but did not see anything. Thus the only offensive weapon connected to the offence is the cutter, P1. It is also not in dispute that PW1 and the two guards were attacked or beaten by a group at least four (4) men.

From the facts on record, I find that PW1 and the two security guards were attacked by at least four men at around 01:00 hours on 20th September, 2014. PW1 had his ear cut with a shrub cutter P1 which was found on the door of his sister's shop. The door or lock was damaged by the assailants to gain entry to the shop where he was sleeping. The wound was sutured or stitched at UTH where he was admitted with the others. I further find that A2 and A3 were found in the Toyota Corolla and Toyota Noah, respectively near the scene of the attack and A1 was also apprehended near the scene.

PW1 could not identify any of his attackers and therefore the evidence against the accused persons is circumstantial evidence. In the case of **Chimbini v The People (1973) ZR 191** it was held that:

> **"Where the evidence against an accused person is purely circumstantial and his guilty entirely a matter of inference, an inference of guilty may not be drawn unless it is the only influence drawn from the facts."**

The evidence of PW2 and A3 is that A1 was apprehended after A3 received a call from one of the men he had dropped near the shops that he should go and pick them up. This conversation was puton loudspeaker and this was shortly after A2 and A3 were taken to the police station from the scene. Both PW2 and A3 stated that A1 was with three or four other men who were approaching A3's vehicle when he was apprehended and the others ran away. There are some variations in the evidence as to whether A1 actually entered the vehicle or was caught when he and his colleagues scampered up on seeing the policemen. However, this does not take away from the material evidence that A1 was apprehended in the said process. It is further the testimony of A2 and A3 that A1 was in A2's car with another man and when A3 arrived with two other men, A1 and the

other man left A2's vehicle and got into A3's vehicle which then took them near the shops at the same place where PW2 found A3. Further, A3 stated that when apprehended A1 stated that he was with other colleagues and that they had beaten up some guards but did not manage to steal. This supports the statement by PW2 on what A1 told them. PW2's further evidence that A1 led them to the scene where they found wounded men including PW1 is also supported by A3 who said he was told to light the way as the police and A1 walked to the shops.

The evidence of both A2 and A3 implicates A1 who is a co-accused. In the case of **Ivor Ndakala v The People (1980) ZR 180 (HC)** it was held that:

> **"When an accused makes an extra-judicial statement in the absence of a co-accused, it cannot be regarded as evidence against the latter accused, but when the accused goes in the witness box at the trial and gives evidence which incriminates his Co-accused, the evidence is admissible against the latter accused, and it may be regarded as evidence for the prosecution against him."**

It is therefore clear that the evidence of A2 and A3 against A1 is good evidence which is regarded as the prosecution evidence. The circumstantial evidence against A1 is cogent. The prosecution has thus proved its case against A1.

As regards A2 and A3, the prosecution evidence of PW3 and PW4 which is favourable to them is that they were taxi drivers. It is not in dispute that they took A1 and his colleagues to the scene where the incident happened and A3 was called by the assailants to go and pick them up. PW2 stated that the male voice on the phone mentioned to A3 that they had not managed to steal as they were disturbed by a guard. This evidence was denied by A3 who said the man only asked him to pick them from where he had dropped them.

PW2 also stated that A1 when apprehended stated that A2 was part of them and not a mere taxi driver. This was denied by A2 and A1 never made such a statement or assertion in his evidence in court.

The issue for determination is whether A2 and A3 were acting together or had a common purpose with A1 and his colleagues. Section 22 of the Penal Code provides that:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

Section 21 on principal offenders provides in part that:

> **"21.(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say;**
>
> **(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
>
> **(c) Every person who aids or abets another person in committing the offence."**

In the absence of further evidence, it cannot be said without reasonable doubt that A2 and A3 had a common purpose with A1 and his colleagues to assault PW1 and the other guards with intent to steal or that they aided or abetted them. In the case of **Mutale and Phiri v The People (1995/97) ZR 227 (SC)** it was held that:

> **"Where two or more inferences are possible it has always been a cardinal principle of criminal law that the court will adopt the one which is more favourable to the accused if there is nothing in the case to exclude such inference."**

Given the facts of this case, there is some doubt on whether A2 and A3 had a common purpose with the assailants. The doubt has to be resolved in their favour. The two possible inferences are that A2 and A3 had a common purpose when taking A1 and others to the scene

and the other is that they were merely booked as taxi drivers and were not party or had no knowledge about the activity A1 and others were planning to undertake. I have therefore taken the inference that is favourable to them. The prosecution has thus not proved the case against A2 and A3 beyond reasonable doubt.

I accordingly find A2 and A3 not guilty and acquit them of the two counts of aggravated assault with intent to steal.

With respect to A1, as already stated above, I am satisfied that the prosecution has proved its case against him beyond reasonable doubt. I find A1 guilty and convict him of two counts of aggravated assault with intent to steal contrary to section 295 of the Penal Code.

IRA

Delivered on this 12th day of February, 2016

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M.S. MULENGA
HIGH COURT JUDGE