

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

HPA/18/2016

(Criminal Jurisdiction)



B E T W E E N :

JAMES KALWASHA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Before the Honorable Mrs. Justice M. Mapani-Kawimbe

For the Appellant : *Mr. K Muzenga, Deputy Director, Legal Aid Board*

For the Respondent : *Mrs. D.B. Shiyunga, State Advocate, National Prosecution Authority*

J U D G M E N T

AUTHORITIES REFERRED TO

Case Referred To:

1. *Sharma v The People* (1969) Z.R. 91
2. *Patterson Ngoma v The People* (1978) Z.R. 369
3. *Shamabanse v The People* (1972) Z.R. 151
4. *David Zulu v The People* (1977) Z.R. 151
5. *Joe Banda v The People Appeal No. 183 of 2013*
6. *Chipango and Others v The People* (1978) ZR 304

7. *George Musupi v The People* (1978) Z.R. 271
8. *Dorothy Mutale and Richard Phiri v The People* (1997) S.J. 51
9. *Mwape v The People* (1976) Z.R. 160 (SC)
10. *R v Exalt* (1866) 4F and F922
11. *Ilunga Kabala and John Masefu V The People* (1981) Z.R. 102 (S.C.)
12. *Yokonia Mwale V The People* (SCZ APP. NO. 258/2014)
13. *Gideon Hammond Millard V The People* (1998) S.J. 34 (S.C.)
14. *Adam Berejena V The People* (1984) ZR (S.C)

Legislation and Other Works Referred To:

1. *Penal Code, Chapter 87*

This appeal is against sentence and conviction. The Appellant was charged with the offence of obtaining money by false pretences contrary to section 309 of the Penal Code. The particulars of the offence alleged that the Appellant on an unknown date but between 17th and 19th December, 2012 at Lusaka in the Lusaka District of Lusaka Province, jointly and whilst acting together with others unknown did with intent to deceive or defraud obtain K30,000.00 cash from Garry Mubiana Subulwa by falsely pretending that he had some genuine pieces of diamond for sale when in fact not.

Four (4) witnesses led evidence on behalf of the prosecution.

PW1 Garry Mubiana Subulwa testified that on 17th December,

2012 he received a call from Mario, an uncle to the mother of his child who was at a guesthouse in Matero. Mario told him that he was selling precious stones and had travelled to Lusaka for the same. He did not find the buyer whom he had made the arrangement with. According to PW1, he went see to Mario with his friend and found him in the company of two men, one of Angolan origin called Pedro and another Zambian man, whose name he could not recall. At the guest house Mario asked PW1 to find him another buyer and to pay the expenses that Mario had incurred during his stay amounting to K5,000.00.

PW1 testified that he gave Mario the money in the presence of his friend, Pedro and the other Zambian man. The next day PW1 and his friend told Mario that they had found buyers who wanted to inspect the diamonds. Further, that PW1's prospective buyers had experience in dealing with precious stones. However, Mario told him that another buyer had expressed interest in the stones. He had arranged to meet that buyer at the Olympic Youth Development Centre (OYDC). Before going to OYDC, PW1 testified that Mario told him that the diamonds belonged to Pedro. Thereafter, PW1 his

friend, Mario and another person drove to the OYDC where they met the Appellant.

PW1 told the trial court that they met the Appellant in the vehicle. The Appellant had a brief case, containing US dollars and a diamond tester. Mario showed the Appellant the two diamond samples, which he tested. After testing the pieces the Appellant told PW1 and the others that only one piece tested genuine diamond while the other did not. He however, told them that both pieces were acceptable. Thereafter the Appellant offered to buy the two diamond pieces at US \$2,500.00 per carat.

PW1 stated that they had 5 carats of diamond. The Appellant asked if PW1 and Mario, had more diamonds to sell, to which they gave an affirmative response. They parted company with the Appellant and drove back to the guesthouse to brief Pedro about their meeting. Pedro refused to release the diamonds because he did not trust Mario, he also refused to meet the buyer because he did not have a valid immigration document. According to PW1 Mario interpreted the conversation between him, his friend and Pedro. After some persuasion, Pedro agreed to release the stones

on condition that PW1 and his friend paid him a surety amount of US \$5,000.00. PW1 and his friend went to withdraw money from the bank and paid Pedro. Afterwards, PW1 and his friend took the stones and called the buyer, who told them that he was stock taking items at a shop. Thereafter, the Appellant did not respond to PW1 and his friend's calls. Eventually Pedro, Mario and Appellant all switched off their mobile phones. Pedro and Mario disappeared from the guest house.

PW1 testified that he and his friend went to have the stones tested by another person who told them that they only had one genuine diamond piece, while the rest of the stones were counterfeit. PW1 and his friend decided to report the matter to the police. Almost a year after PW1 testified that his friend Frank apprehended one of the persons, who swindled them out of their money, at the Magistrates Court complex. Frank told PW1 that he took the person he apprehended to the police station.

PW2 was **Frank Gwaba** who told the Court how PW1 and himself met Mario, Pedro and the Appellant at a guest house in Matero. He also told the Court what transpired at the OYDC. He

testified that the Appellant had a brief case which had US dollars and a diamond testing machine. According to PW2 the Appellant held himself out as one who had exposure in the field of precious stones. The Appellant told PW1, PW2, Mario and the other Zambian that their stones were of good quality. He also told them that his superior would be very interested in buying them.

PW2 was however, apprehensive about the arrangement because the Appellant called him on his mobile phone, without giving him his number. He told the Court that he warned PW1 to tread with caution because of the Appellant's conduct. PW2 testified that after he and PW1 took the diamonds, the Appellant suddenly became evasive. He told the Court that he and PW1 paid the US \$5,000.00. He also testified that he apprehended the Appellant and took him to Ridgeway Police Post.

PW3 was **Patson Shila Kambikambi** a geologist at the Ministry of Mines. He told the trial Court that he tested the diamond samples that were submitted by Detective Sergeant Chishimba from Matero Police. He tested the diamonds using a refractor meter and a polar scope to ascertain the properties of the

gemstones. According to PW3 the stones that he examined turned out to be natural glam and not diamonds. PW4 was **Detective Sergeant Simon Elias Chishimba** who acted on PW1 and PW2's complaint of having been swindled out of K30,000.00 by the Appellant and other unknown persons. PW1 and PW2 were swindled on the pretext that they had bought five genuine diamond pieces. He testified that PW1 and PW2 were swindled at Kabuka guest house in Matero. Further, that PW2 apprehended the Appellant and took him to Ridgeway Police Post. PW4 testified that he charged the Appellant.

At the close of the prosecution case, the Appellant was found with a case to answer.

The Appellant called evidence from two witnesses. The Appellant testified as **DW1**. He told the trial Court that on 17th December, 2012, he received a phone call from a person who told him to go to the OYDC to test of some precious stones. When he got to OYDC he did not know the person who had called him. He made a call back to the number that logged on his phone to inform the person of his arrival. A person whom he did not know got out of a

vehicle and invited him in it. He found three other people in the vehicle and one of them produced two very small precious stones.

The Appellant testified that he weighed one stone which weighed 0.9 carats while the other was 0.5 carats. He used a diamond tester to test the stones and discovered that one piece was genuine while the other was not. The Appellant testified that he told the persons in the vehicle that the stones were too small. Thereafter, the Appellant parted company with them. In June, 2013 he went to see a friend who was appearing before the Magistrate's Court an unknown person accosted him and accused him of stealing his money. The person apprehended him and took him to Ridgeway Police Post.

Mary Banda testified as **DW2**. She told the Court that the Appellant her husband had not done anything wrong. It was her testimony that a certain man approached her husband when they were at East point bar accusing him of stealing his money. According to DW2, DW1 denied the allegation but the man insisted that he wanted his money. Thereafter, the man asked her husband for beer.

The Appellant advanced five grounds of appeal which are produced here below:

1. *The honorable trial court misdirected itself in law and in fact when it convicted the Appellant for the offence charged as the prosecution did not prove the alleged offences beyond reasonable doubt as required by law.*
2. *The honorable trial court misdirected itself in law and in fact when it proceeded to make a finding that it was satisfied that the State had proven the offence as charged against the Appellant in light of the meek and submissive prosecution evidence on the court's record.*
3. *The honorable trial court misdirected itself in law and in fact when it failed to resolve the lingering doubts in the Court's record in favour of the Appellant.*
4. *The honorable trial court misdirected itself in law and in fact when it proceeded to convict the appellant in the absence of any direct evidence linking the appellant to the commission of the offence.*
5. *The honorable trial court misdirected itself in law and in fact when it sentenced the appellant a first offender to twenty months simple imprisonment for the offence as the offence had not in the first place been proven beyond reasonable doubt as required by law.*

Both Learned Counsels for the Appellant and Respondent filed Heads of Argument. In the case of the Appellant, the Heads of Argument were filed on 12th September, 2016, while Respondent

filed Heads of Argument on 20th September, 2016. Both Learned Counsels placed reliance on the Heads of Argument.

In ground one, Learned Counsel for the Appellant argued that the Appellant never received money from PW1 and PW2. Further, that the Appellant was not the person selling the said diamonds. The Appellant was only called to examine two diamond samples that were given to him by the people who were transacting with him namely Mario, PW1 and PW2. Counsel then drew the Court's attention to that the particulars in the indictment which alleged that:

- a) the appellant was the one selling the stones in issue;**
- b) pretended that he had genuine pieces of diamonds when in fact not;**
and
- c) that he obtained thirty thousand Kwacha from PW1.**

Counsel contended that the evidence which was presented before the trial Court was quite clearly at variance with the allegation in the indictment. He submitted that the evidence of PW1 and PW2, was that the Appellant acted on behalf of the buyer. PW1 and PW2 testified that Pedro was the person selling the

diamonds and they paid Pedro K30,000.00. PW1 and PW2 told the trial Court that K5,000.00 was given to Mario way before the Appellant was mentioned in their evidence. The K25,000.00 was paid to Pedro on the day that the Appellant met PW1 and PW2. The Appellant was not present when PW1 and PW2 made the payment to Pedro and it was done without his knowledge.

Counsel argued that the prosecution's evidence before the trial Court did not prove the allegations in an indictment for a conviction to stand against the Appellant. Counsel called in aid the case of the **Sharma v The People**¹ to support his assertion. He further submitted that the pretence in the indictment was not proved as the Appellant was neither the seller nor did he obtain any money from PW1 and PW2.

Counsel for the Appellant charged that if the Respondent had laid evidence establishing that the Appellant was the seller and that he falsely represented to PW1 that the stones were genuine when in fact not; then PW1 would be required to believe him in order to buy the stones. He argued that PW1 did not believe the Appellant when he told him that the stones were of good quality because one stone

did not test genuine. He argued that PW1 and PW2 would have bought those stones, even without the Appellant's opinion, as they appeared to have made up their minds. In support of his assertion he relied on the cases of **Patterson v The People**² and **Shamabanse v The People**³ which espouse the principles on false pretence.

Counsel further, submitted that PW1 and PW2 went ahead to buy more stones from Pedro without having them tested. He questioned how the pretence by the Appellant who only tested two stones and confirmed the genuineness of one stone, could have operated on PW1's mind so as cause him to buy more stones, which were not tested.

In grounds two, three and four, Counsel argued that the trial Court relied on circumstantial evidence and it did not eliminate the danger of arriving at a wrong inference as enunciated in the case of **David Zulu v The People**⁴. He submitted that the facts of this case were not taken outside the realm of conjecture to a point where the Court could only permit an inference of guilt in the light of the Appellant's explanation. The explanation being that the Appellant

examined the diamond stones and gave his opinion on them to the people who were in the vehicle, after which they parted company. Counsel contended that the explanation given by the Appellant could have been reasonably true in the light of no other credible evidence rebutting it, as was held in the case of **Joe Banda v The People**⁵.

Counsel also argued that PW1 and PW2 were witnesses with a possible interest to serve and that their evidence required corroboration in order to be believed. Relying on the case of **Chipango and Others v The People**⁶, Counsel further argued that PW1 and PW2 could not corroborate each other as they had the same interest in matter. He also cited the case of **George Musupi v The People**⁷. In addition Counsel submitted that the learned trial Court did not weigh the evidence of PW1 and PW2 against the evidence of the Appellant and his witness in order to determine which one it should have believed, and providing reasons for so doing.

Counsel submitted that there was a lot of doubt in this case, which could have been resolved for instance if the prosecution had

adduced evidence from mobile service providers regarding the Appellant's activity report. It was his contention that such evidence might have sufficiently connected the Appellant to the allegation that he was working with the people who swindled PW1 and PW2. Citing the case of **Dorothy Mutale and Richard Phiri v The People**⁸, Counsel insisted that the only inference that could be drawn was that the Appellant was innocent.

In ground 5, Counsel argued that the sentence of one year eight months simple imprisonment handed on the Appellant was excessive for a first offender, considering that the maximum sentence for the offence was three years imprisonment. He submitted that the sentence imposed by the trial Court was more than half of the maximum prescribed and that it had the power to consider an alternative noncustodial sentence or to suspend the sentence altogether or part thereof. It was his position that the sentence imposed by the trial Court should come to this Court with a sentence of shock.

He concluded with a prayer to the Court to allow the appeal, quash the conviction, set aside the sentence, acquit the Appellant

and to set him at liberty. In the alternative he prayed to the Court to set aside the sentence of one year eight months imprisonment and in its place to impose a fairer penalty.

The thrust of the Respondent's arguments in response to ground one was that participation in one offence which is the result of a concerted design to commit a specific offence was sufficient to render the participant a principal offender. Counsel relied on the case of **Mwape v The People**⁹. Counsel further argued that it was odd that the Appellant's, Mario and Pedro's phones were all switched off at the same time considering that they were unrelated. She also argued that it was odd according to PW2 that the Appellant professed to have exposure in the field of precious stones.

Counsel submitted that in as much as the second stone did not test positive, the Appellant told PW1 and PW2 that both stones were acceptable. Counsel also argued that since Mario introduced the Appellant to PW1 and PW2, there was no need for them to distrust the Appellant. Counsel for the Respondent further submitted that if indeed the Appellant had not held both stones to be acceptable, how then could he the Appellant seek to buy a "fake"

diamond after having tested the stone? Counsel contended that the Appellant knew what he was doing and deliberately set out to mislead PW1 and PW2. She further contended that because of the Appellant's deception, PW1 and PW2 went ahead to buy more diamond stones to sell to the Appellant.

In response to grounds two, three and four of the appeal, Learned Counsel for the Respondent submitted that the learned trial Magistrate was alive to the requirements of circumstantial evidence. She argued that the circumstantial evidence in this case worked cumulatively in geometrical progression eliminating other possibilities, as the case was in **R v Exalt**¹⁰. She insisted that the Appellant who was introduced to PW1 and PW2 by Mario, the switching off of the mobile phones of the Appellant, Mario and Pedro after PW1 and PW2 Pedro him the money were all circumstantial. Further, the fact that the Appellant denied ever knowing PW2 seven months after their meeting all supported the circumstantial evidence.

Counsel submitted that the said strands of evidence put together strengthened the prosecution's case and compelled the

only rational hypothesis that only an inference of guilty could be accorded. On the Appellant's explanation, Counsel submitted that the learned trial Magistrate considered the same in the face of the other compelling evidence. She cited the case of **Ilunga Kabala and John Masefu v The People**¹¹ where the Supreme Court held that:

"It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true, is in this connection no explanation."

Counsel contended that the odd coincidences in casu corroborated the evidence of PW1 and PW2 and that the witness had no reason to falsely implicate the Appellant. Counsel denied that PW1 and PW2 were witnesses with a possible interest to serve and relied on the case of **Yokonia Mwale v The People**¹².

In ground 5, Counsel for the Respondent submitted that an appellate Court was not supposed to interfere with the sentence of the trial Court except where a sentence comes to it with a sense of shock. I was drawn to cases of **Gideon Hammond Millard v The People** and **Adam Berejena v The People**¹³. On sentencing Counsel contended that the trial Court was exceedingly generous

when it handed out its sentence against the Appellant and the sentence was not shocking. She concluded with a prayer to the Court to dismiss the appeal.

I am highly indebted to Learned Counsels for the parties for their submissions. I have given serious consideration to the grounds of appeal, the submissions and the record of proceedings. I note that Counsel on both sides relied on a plethora of authorities, suffice to state here that I shall refer to some of them in my judgment. I will also consider the grounds of appeal in the order that they were argued.

Section 309 of the Penal Code creates the offence that the Appellant was charged with. This section provides that:-

"Any person who, by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

False pretence is defined in section 308 of the Penal Code as follows:-

"Any representation made by words, writing or conduct, of a matter of fact or of law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

The offence of obtaining money by false pretences takes place when a person makes a false representation which induces the person the representation is made to, to part away with money. The issue raised in ground one of this appeal is whether the evidence of the prosecution proved the particulars of the offence that the Appellant was charged with. The particulars of the offence being that;

- a) the appellant was the one selling the stones in issue;**
- b) pretended that he had genuine pieces of diamonds when in fact not;**
and
- c) that he obtained thirty thousand Kwacha from PW1.**

According to the evidence of PW1 before the trial Court at page 8 of the record of proceedings, quoting the relevant portion only, PW1 testified that "**..The 4 of us got on a vehicle to go to the buyer.....We drove to Olympic Youth Development Centre in Matero, when we reached the OYDC, one called the buyer and**

he came. The buyer happens to be the accused. He was carrying a brief case, some dollars and diamond tester. Before we left the guest house Mario explained to me that the stones belonged to the Angolan Pedro.....He only released two stones.." PW1 further testified at page 9 of the record of proceedings, that "**..Mario told us that he (Pedro) was willing to release the stones on condition that we leave \$5,000 for surety which at the time was about K25 million. I requested my friend if he had that money. My friend agreed. He got the money from the bank and we left it with Pedro and we called the buyer.**"

The evidence of PW2 at page 11 of the record of proceedings, quoting the relevant portion was that "**....my friend Garry Subulwa came to my place saying he had been in communication with an friend from Sesheke who wanted to see him urgently.....we drove to....Matero filling station ...and my friend came back to tell me that his uncle came with someone with stones that he was selling.....Mario was with some purported Angolan called Pedro and another person. I was introduced to those people by**

my colleague who said they wanted market for precious stones..... I told my friend that I was uncomfortable.....however because we were dealing with an uncle we thought nothing fraudulent would come out of it.

At page 12 and 13 of the record of proceedings, quoting relevant portions PW2 testified that "**We went the 4 of us to OYDC.....I was told he came as the person sent to buy the stones on behalf of the actual buyer.....The people in the vehicle started influencing my friend saying if he had about 30 million, he could pay off Pedro the Angolan and get the stones to sell to the gentlemen interested....he (PW1) asked me for K25,000.00 and he said he had K5,000.00. I gave him cash and when we got to the guest house where Pedro had remained, his uncle started negotiations with Pedro to give him K30,000.00. Pedro agreed and was given the money...**"

The evidence of the Appellant at page 33 of the record of proceedings quoting relevant portions was that..." **I proceeded to Olympic stadium. I found 4 people in a vehicle. I did not know**

any of them.....They produced 2 very small pieces of stones...I got the diamond tester and I tested one and it was genuine. The other was not detected by the machine....We parted and went separate ways."

From my examination of PW1, PW2 and the Appellant's evidence, I find that the Appellant was not the seller of the diamond stones. According to the evidence of PW1 and PW2 the stones belonged to a Pedro. I also find that the Appellant only tested the diamond stones that were handed to him by Mario. He did not pretend to have genuine pieces of diamonds. He was also not the persons who was paid K30,000.00 stated in the particulars of the offence.

PW1 and PW2 testified that they paid Pedro K30,000.00. I therefore find merit in the Appellant's submission that the evidence before the trial Court was at variance with the allegations in the indictment. It is the position of the Criminal law that evidence adduced in Court must prove the allegation in an indictment in order for a conviction to stand. I am further obliged by the case of

Sharma v The People¹ where Chief Justice Skinner, sitting as High Court Judge had this say.

“The pretence laid in the particulars of offence is that the appellant falsely pretended that he was D. Clack, the designated payee of cheque no. 10829. The evidence was that an open cheque was presented to the bank employee. There was no evidence that the appellant whether expressly or by conduct held out that he was D. Clack. The prosecution must prove the making of the pretence laid and that proved is fatal. In the court below there was a considerable variation between the pretence laid and that proved.”

In my considered view the facts of this case are clear on the identity of the persons who sold diamonds to PW1 and PW2, namely Mario and Pedro and an unknown Zambian man. There is no confusion on the role that the Appellant played in the transaction that is PW1, PW2 and Mario met him at OYDC as a prospective buyer.

I therefore take the view that there was nothing odd about the circumstances of this case. As rightfully submitted by Counsel for the Appellant, had the prosecution adduced evidence from the mobile service providers; regarding the switching of Mario, Pedro

and the Appellant's phone at the same time then the issue of whether the Appellant was directly involved with the persons that dealt with PW1 and PW2 would have quite easily been resolved.

I therefore opine that the prosecution's evidence being at variance with the particulars of the offence the Appellant was charged with, exonerates the Appellant from his conviction. I wish to state that the second, third, fourth and fifth grounds of appeal were dependent on the outcome of the first ground of appeal. Having found that the Appellant was wrongly convicted of the offence he was charged with, there is no need to delve into their consideration.

I allow the appeal, quash the conviction of Appellant and set aside the sentence imposed by the lower Court. The Appellant is acquitted forthwith.

Leave to appeal is granted.

Delivered in open Court at Lusaka this 25th day of November, 2016.

M. Mapani-Kawimbe

M. Mapani-Kawimbe
HIGH COURT JUDGE