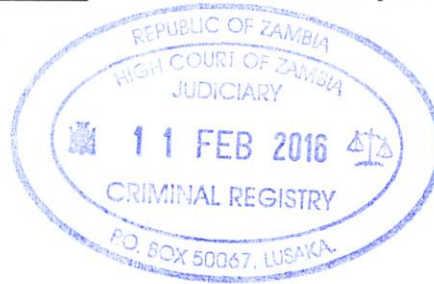


IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/91/2014



BETWEEN:

THE PEOPLE

VERSUS

JESTON KAUNDA

DAVID BANDA

MUSEKIWA TEMBO

JOSHUA KAMALEMBE

BEFORE : HON JUDGE G. C. M. CHAWATAMA

For the State :

For the Defence :

JUDGMENT

CASES REFERRED TO:

1. *Martin Mupeta and John Musonda v The People (SCZ/137/2012)*
2. *George Nswana v The People (1988-1989) ZR 174*
3. *The People v Chimbala (1973) ZR 118*
4. *Evaristo Bwalya v The People (1975) ZR 125*
5. *Bornface Chauluka Tembo V The People (1978) Z.R. 402 (S.C.)*
6. *Winfred Sakala V The People (1987) Z.R. 23 (S.C.)*

AUTHORITIES REFERRED TO:

1. *Section 21 (1), 22, 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.*

The accused persons stands charged on the information containing one count of **Aggravated Robbery** *Contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.*

The particulars of the offence are that **Jeston Kunda, David Banda Musekiwa Tembo and Joshua Kamalembe** on the 2nd May, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together and whilst armed with iron bars, did steal from **DUHABWANAYO GALLICAN** 20 crates of Breezer Beer, 4 cases of assorted wine, 50 crates of assorted lagers, 16 container of soyola cooking oil, 32×750mls of Zamanita cooking oil, 8 packets of sugar, 123 assorted body lotions, 3 spaghetti, 7 packets of Mongu rice, 4×37g of mayonnaise, 4 tins of bull brand Canned meat, 11 bottles of perfume, 7 balls of cotton wool, 23 bottles of fair and lovely, 7 blue band butter, 18 packets of long life milk, 1×120 Colgate, 3 boxes of batteries, 9 tablets of soap, 1 hair fertilizer cream, 38 packets of chill tomatoes, corn snacks and 2 cream powder, all valued at K48,000.00 the property of Duhabwanayo Gallican and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence in order to obtain, retain or prevent or overcome resistance of the said property to its being stolen.

The prosecution called six witnesses in support of their case.

PW1 was **Salati Soko** who worked at Good Price General Dealers the premises where the robbery took place. At the time he was with his colleague Sunday Chitiba. **PW1** recalled closing the shop at 22:00 hours. He was woken by Sunday at 01:00 hours who informed him that he had heard noise outside. The door of the room in which they were was opened. The room was dark.

According to **PW1** although the room was electrified there was no bulb. He was unable to see who entered the room neither was he able to tell the number of persons. It was his testimony that he was beaten while covered with a blanket. However he could not tell what was used to beat him. He was ordered not to look at those beating him and was threatened that if he did he would be killed. **PW1** stated that after that all he heard were sounds, sounds of people breaking metal, a car being driven stopping near the door whose engine continued to run, then another vehicle being driven off. After a while he heard two cars drive off.

PW1 recalled hearing a gun shot after which he heard someone inquiring who was there. He was asked to go outside. When he got outside he observed that the shop had been broken into. The people who arrived at the scene were police officers who asked him had what transpired. He gave the police his boss's telephone number. It was his testimony that when his boss arrived, **PW1** went into the shop where he observed that goods were missing.

Although he did not sustain any wounds **PW1** informed the court that he had body pains.

When cross examined **PW1** informed the court that he had no medical report to show to the court as evidence that he had been beaten.

PW2 was **Gallician Tuwabwanayi** the owner of Goods Price General Dealers. It was his testimony that on the 2nd May 2013 he received a telephone call from the police informing that his shop had been broken into. He went to the shop and found the shop open and the doors broken. It was his testimony that from his observation the two young men Salati and Sunday appeared to having been beaten.

Upon entering the shop he saw that assorted groceries, alcohol and shopping baskets were missing most shelves were empty. He took Salati and Sunday to the hospital for treatment. He later prepared a list of what was missing. **PW2** informed the court that after two days the police called him to the station in order for him to see what they had recovered and the people apprehended. He identified the items that were recovered by the police as belonging to him. He valued the items lost at K48, 000. A dispersal form was admitted in evidence. According to this witness his items were recovered from Chiboyla area at a place along Luangwa Road.

When cross examined **PW2** informed the court the items stolen from him are common and can be found anywhere.

PW3 was **Esau Banda** the owner of a Toyota Corolla Registration ACL 314. It was his testimony that he gave his car to his friend David Banda whom he identified as accused two in the dock. The purpose for which he gave him the car was for him to drive as a taxi. It was his testimony that on the 2nd May 2013 he received a call from Chilenje Police Station to report there. When he got there he was informed that his vehicle was used in a robbery. Meanwhile his friend David Banda was in cells.

When cross examined **PW3** informed the court that when he was called by the police they informed him that Banda had gone there to report that the car was stolen from him. His statement given to the police was shown to him and later admitted in evidence.

PW4 was **Kakalwa Muleya** a Detective Constable based in Chilenje. It was his testimony that on the 2nd May around 02:00 hours the police received information from a member of public who declined to give his/her details that criminals were breaking into a certain shop called Good Price General Dealers in Chalala. In the company of other police officers **PW4** went to the shop. It was his testimony that the grill door and main door were open. Groceries were scatted on the floor. He found two workers. **PW1** and Sunday whom he said were complaining of body pains. **PW4** was the one

who called **PW2** the owner of the shop. He was present when **PW2** established what had been stolen.

PW5 was **Constable Ronald Simuchebu** based at Kabwata police station. It was his testimony that whilst on patrol he and other officers came across a Toyota corolla driving in the opposite direction. The vehicle was beige in colour with registration number ACL 314. He became suspicious according to him because of the state of the car; the car he saw was overloaded. As the police vehicle turned the corolla sped off. The police gave chase after a distance the corolla stopped and two persons ran out of the vehicle.

According to **PW5** he and his colleagues stopped at a distance and only approached the vehicle after they were satisfied there was no one else in the car. He looked in the car and saw that there were assorted groceries such as soap and cooking oil etc. He learnt from Chilenje Police Post that they had been an Aggravated Robbery in their area. Chilenje Police Station then booked over the matter. It was his testimony that he would not be in a position to identify the people who ran out of the vehicle that night.

PW6 was **David Siloka** a Detective Inspector based at Chilenje police station. He received a report of aggravated robbery taking place. He learnt various groceries had been stolen from a shop in Chalala. He informed the court that two workers working at the shop were beaten by attackers. It was his testimony that David Banda reported that a vehicle he was driving a Toyota ALC 314 had

been stolen. **PW6** informed the court that the aggravated robbery report was made at 03:00 hours. David Banda reported at 05:00 hours that the vehicle he was driving had been stolen. The vehicle that had been reported stolen by David Banda was taken to Kabwata police station. It was his testimony that the owner of the shop that had been broken into identified the goods found in the car as belonging to him. It was from David Banda that **PW6** learnt that on that night he was in the company of Joshua Kamalembe. It was from David Banda that **PW6** learnt that he was hired by certain person at African braai bar, and that he in turn asked Musekiwa Tembo who was driving a Prima ADL 6923 to carry out the job with him.

According to **PW6** Tembo and David led him to a house in Chibolya Compound where some commodities had been delivered. Various groceries were recovered from this house. It was his testimony that they did not stay very long in Chibolya because they were experiencing gun fire directed at them. From the house he picked a number of persons. The person who featured prominently in the photo is said to have been identified by Tembo and Joshua as the person who had hired the cars from African braai. The fourth person was arrested after **PW6** learnt that he was in cells. **PW6** informed the court that he got this information from the other persons he had apprehended.

When cross examined **PW6** admitted that he did not include the fact that he was shot at nor that he recovered groceries at the time he apprehended Tembo. It was his testimony that he first received the complaint from the complainant, then David Banda's report on the missing vehicle. It was his testimony that when David mentioned other suspects he disbelieved his story about the vehicle being stolen.

DW1 was **Jeston Kunda**. It was his testimony that whilst in Kasumbalesa he received a call from his wife that there were some people selling groceries. Those people left the groceries at his home. Upon returning he found that his house was destroyed and the front door to his house damaged. **DW1** informed the court that he shifted to another area. From that time on he has not seen his wife. It was his testimony that he found himself at Central Prison whilst at another prison he learnt that he was a wanted man. When the police showed him photos he identified them as his. He admitted to being jointly charged with the other accused.

When cross examined **DW1** informed the court that he had a kiosks and identified two photos where he is seen in front of the kiosks. He denied reporting to the police that his house was ransacked. The reason advanced was that he was confused.

DW2 was **David Banda** a Taxi driver. It was his testimony that on the 1st May 2013 around 8:00 hours he received a call from Esau

Banda informing him that he should use his vehicle at night as a taxi. At 19:00 hours of the same day he met Esau Banda at African Braai who gave him the keys to the car. After two hours of work a friend called Joshua approached him and suggested that they should help each other in the work. **DW2** agreed the two worked up to the following morning. Two men approached them and spoke to Joshua. According to **DW2** Joshua informed him that the two men wanted to hire their vehicle to take them to Chalala where they wanted to pick up items which they wanted taken to the bus terminals at City Market. The two informed them that one car was not enough. According to **DW1** he got another car that was parked at African Braai. They went where the things that needed picking were. There they found a lady and two men. They found the goods they were to pick up. **DW2** opened the boot and the goods were packed. When **DW2** drove off and reached St Patrick at the traffic lights he crossed to go in front of a van coming from Zipas Road. The driver of the van begun to hoot. **DW2** informed the court that he wanted to slow down so that he could park. One of the clients got a pistol and threatened to shoot him if he stopped the car. He drove on, at Kamwala remand he stopped the car one of his clients took a knife and stabbed him on his arm. The witness showed the court a scar on his left upper arm. His friends ran and left him with the clients. The client with a pistol threw him out of the vehicle. He went to the police to report what had happened. The police refused to give him a medical report. He later learnt that the

car was found with stolen goods. He recalled that Joshua was found on the way to the police station.

When cross examined **DW2** informed the court that he did not find out why they were picking items at the side of the road. He stated that the picking up of the goods took place between 04:00 and 05:00 hours. It was his testimony that he learnt from his clients that they wanted to take the items to Luangwa on the bus. He admitted that after he parked the van he realized that the same was a Police Vehicle. It was his testimony that he did not stop the car out of fear of having a gun pointed at him. It was his testimony that the person who stubbed him was sitted behind him.

DW3 was **Musekiwa Tembo** a taxi driver. On the 1st May 2013 he went to work at African braai around 17:00 hours. Around 05:00 hours two men approached him wanting a taxi. **DW3** was informed by those men that they wanted to get their goods from Chalala and take them to City market. When they got to Chalala they found a woman and two men. The goods in question were found on the road side. The two men begun to pack the goods in the boot and **DW3** helped them. One of the men they found at Chalala got into the vehicle in the passenger seat and proceeded to city market. In the Kamwala area at the traffic lights this client asked that they should go to his house to get his wife and a bag. They drove to Chibolya and parked at a certain house. His client entered a house and came out with a slim woman and a small child. When the

client came to the car **DW3** was informed that the client's wife had decided that they would find another vehicle. **DW3** helped remove the goods from the boot of the car. He went back where they operated from. In the morning he went to the boss's house this is where he was apprehended from. It was his testimony that whilst in the company of the police his friend Joshua Kamalembe phoned him asking him to escort him to the police station. Joshua was asked to go to the old State House. Joshua was picked up from there and taken to the Police Station. **DW3** in the course of police investigation took them to the house where he had helped off load goods. The police who entered the house came out with the same lady he had seen when he dropped off his client.

When cross examined **DW3** informed the court that he had operated as a taxi driver for one year and three months. Although he noticed that where the goods were which they went to pick up had houses in the area he denied seeing Good Price General Dealers. **DW3** did not know the type of goods he loaded except that they were in cartoons. **DW3** agreed seeing accused two and accused four on the night in question at the African braai and then at Chalala. It was his testimony that he also booked by the same people who booked **DW2** and that like him they loaded goods in the boot of the car from Police. It was his testimony that at that time of the morning there were no people around. It was his testimony that he did not know that the goods were stolen.

DW4 was **Joshua Kamalembe**. He recalled going on the 1st May, 2013 at 17:00 hours to Africa Braai, The person who usually let him drive his car as a taxi did not turn up. He met David Banda and asked if he could work with him. It was this testimony that David also a taxi driver agreed to drive with him. He recalled being approached by two men. The two men wanted a taxi to help them carry goods from Chalala to the bus terminals. They proceeded to Chalala, there they found two men and one woman and a pile of goods. **DW4** and David Banda began to put the goods in the boot. They left with the two men who had approached them at Africa Braai. They came across a van on the way where a driver hooted at them. It was his testimony that his friend David Banda wanted to stop. One of the clients took out a gun and pointed it at David in the head and told him not to stop. When they reached Kamwala prison at the railway line he was surprised that the car stopped. David refused to drive on and begun to argue with the clients. **DW4** witnessed the stabbing of his friend. It was his testimony that he got out of the car and headed towards Kamwala South along the railway line heading towards home. He decided to phone his friend Musekiwa Tembo he asked him to escort him to the Police. **DW4** changed his mind about going home and headed to Chilenje Police. Musekiwa phoned him and asked him to go to the old State House that is where he was apprehended and taken to Chilenje Police.

When cross examined **DW4** informed the court that he saw Musekiwa at African Braai on that night. He admitted to following

the vehicle Musekiwa was in to Chalala. He admitted that both cars were loaded with goods. He denied knowing the owner of the goods. He informed the court that he informed the police that his friend David was stabbed. It was further his testimony that despite what they went through he did not tell accused three when he called him that the people who booked them were criminals.

I have examined the evidence on record. As usual, in all criminal cases, the burden of proof always remains with the Prosecution who must prove beyond reasonable doubt that the accused persons are guilty as charged. For the offence of Aggravated Robbery to be proven the Court must be satisfied beyond reasonable doubt that the accused persons are the ones who committed the offence and that the same facts falls within the ambit of **Section 294(1) of the Penal Code**. The penal provision states as follows:

“Any person who being armed with an offensive weapon or instrument or being together with one person or more, steals anything and at or immediately after the time of stealing it uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony of Aggravated Robbery and is liable on conviction to imprisonment for life and notwithstanding sub-section (2) of Section 26 shall be sentenced to imprisonment for a period of not less than fifteen years.”

The offence of aggravated robbery was defined by the Supreme Court in the case of ***Martin Mupeta and John Musonda v The People (SCZ/137/2012)***¹ as:

“Being occasioned whenever any person steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained whilst armed with any offensive weapon or instrument, or being together with one person or more. It must be established that a person stole something capable of being stolen whilst armed with an offensive weapon or instrument or being together with one person or more using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

In this case it was the testimony of **PW1** that on the night in question that he was woken up by his colleague who heard some noise outside. **PW1** then saw a number of people walk into the room. These people covered them with a blanket and beat them to the extent that **PW1** sustained wounds. He was ordered not to uncover himself or else he would be killed. **PW1** could hear the breaking of metal and the sounds of cars driving out. After this ordeal he managed to come out of his room and discovered that the shop had been broken into and goods were missing.

It is therefore not in dispute that whoever came to steal also beat up and threatened **PW1** for the purposes of stealing the goods or to avoid being caught during the operation. This is a case of aggravated robbery.

PW1 was not in a position to identify the people who staged the robbery because of the circumstances under which it was done. The

only evidence that is available on the identification of the accused was from the Police Officers. The evidence of the Police Officers rests on the doctrine of recent possession.

PW5 testified that while conducting a patrol, he saw the corolla registration number ACL 314, looking suspicious and was overloaded. The driver of the Corolla attempted to speed off but **PW5** gave chase and eventually the Corolla stopped at a distance. Two people run away from the car. When **PW5** approached the corolla there was no one but the car was full of groceries which were later identified as those stolen from Good Price General Dealers, where the robbery had taken place.

According to his own testimony **DW2** was the driver of the Corolla. His testimony was that he was in the company of **DW4**. The two drove in the same vehicle. They however, testified that **DW2** was unable to stop the vehicle because he was ordered by one of the clients whose goods they picked up from Chalala, that he should not stop, he would be killed if he stopped. According to **PW5** in his evidence which was not challenged, only two people run out of the car. Therefore, if **DW2** was in the company of **DW4**, then it was just the two of them and there was no client as alleged. Furthermore, if **DW2**'s intention was to report to the Police, he could not have run away from **PW5**'s group. He contradicts himself when he says he wanted to stop but then the client threatened to kill and then that when he stopped he went to the Police Station to report, leaving

Police Officers right in front of him. **DW2** does not state anywhere that he was suspicious of **PW5** and his group. Infact it was because he knew it was safe to stop that he would have wanted to stop at the risk of being killed by his, so called, clients. I find the explanation of the accused wholly unreasonable.

In the case of *George Nswana v The People (1988-1989) ZR 174²* the Supreme Court stated as follows concerning recent possession:

“The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant, not being in innocent possession was the thief or a guilty receiver or retainer.”

The evidence before me is that there were two vehicles involved in the robbery. **PW1** stated in his evidence that he heard the sound of two vehicles outside at the time of the breaking. It is not disputed that the goods which were stolen from Good Price General Dealers were carried in two vehicles. This was attested to by the accused persons except **DW1** who put up a defence of an alibi. The explanation of **DW3** who drove the second car was that his vehicle was booked by some people to carry groceries from Chalala to Chibolya. **PW6**'s testimony was that **DW1** was identified by **DW3**

and **DW4** as the person who booked their vehicles from African Braii.

Furthermore, the stolen goods were recovered from **DW1**'s house. **DW1**'s explanation was that he did not know the people who took goods to his house for sale. He further informed the court that he moved from that house where goods were recovered because the house was ransacked. In cross-examination he told the court that he did not report this incident to the Police because he was confused.

It was stated in the case of *Martin Mupeta and John Musonda Chola v The People (SCZ/137/2012)* that:

“For the inference of guilt based on recent possession to be sustained, there must be no likelihood that the goods might have exchanged hands because it is only then that there will be a consequent high degree of probability that the person in recent possession himself obtained them and committed the offences connected thereto. There should be no possibility that the accused might have come into possession of the stolen property otherwise than by stealing it.”

It is highly unlikely that the goods changed hands. **DW1**'s alibi was negated by his being identified by **DW2** and **DW3**.

In the case of *The People v Chimbala (1973) ZR 118^s* it was held, inter alia, that:

“The complainant’s evidence on identification negated the defence of alibi”.

It was stated in the case of *Katebe v The People (1975) 13* that where a defence of alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on an accused person to establish his alibi.

Therefore, there must be some evidence of the alibi, which in this case I do not have. **DW1** simply stated that he was in Kasumbalesa during the time of the robbery.

The case of *Evaristo Bwalya v The People (1975) ZR 125⁴* puts it even more clearly when the court stated the following concerning an alibi and identification:

- (i) ***On the question of identification, taken by itself the magistrate's comment would raise doubt as to his approach. It is not sufficient to be satisfied that a witness is honest; the court must be satisfied that the possibility of honest mistake has been ruled out.***
- (ii) ***The magistrate's comment concerning the alibi could be read as suggesting that there is some onus on an accused person to support an alibi. Such an approach is wrong. The law relating to the onus of proof of an alibi is that once evidence thereof fit to be left to a jury has been adduced the onus is on the prosecution to negative the alibi.***
- (iii) ***Simply to say "I was in Kabwe at the time" does not place a duty on the police to investigate; this is tantamount to saying that every***

time an accused says "I was not there" he puts forward an alibi which it is the duty of the police to investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been the duty of the police to investigate, but the appellant not having done so there was no dereliction of duty on the part of the police.

The identification of **DW1** by his co-accused raises an issue which I am alive to. Defence Counsel, has belabored, in his submissions, the point that the only evidence available on **DW1** was that of accomplices and there was need for something more, special and compelling for me to convict on this evidence. Counsel quoted the case of *Emmanuel Phiri and Others v The People (1978) ZR 79*.

I am further guided by the case of *Bornface Chauluka Tembo V The People (1978) Z.R. 402 (S.C.)* where it was held that:

The evidence of an accomplice or of a person with a possible interest to exculpate himself needs to be corroborated at least by evidence of "something more" which, though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger that the accused is being falsely implicated has been excluded I have addressed my mind to this issue and I am convinced from the evidence that there was something more.

Apart from being identified by the co-accused persons, **DW1** had his house searched and stolen goods were found. There was no lapse of time for me to believe that goods had changed hands.

Furthermore, it was odd that just after the Police had found goods at **DW1**'s house, he moved from that house.

The doctrine of recent possession as was held, inter alia, in the case of **Sydney Zonde, Aaron Sakala, Edward Chikumbi v The People (1980) ZR 337** applies to a person in the absence of any explanation that might be true when found in possession of the complainants property barely a few hours after the complainant had suffered an aggravated robbery.

The totality of the evidence before me leaves me with no doubt that the four accused persons formed a common intent to stage a robbery and actually carried out that intent and robbed Good Price General Dealers and while so doing did use or threaten to use actual violence in order to obtain, retain or prevent or overcome resistance of the property to its being stolen.

As it was held in the case of **Winfred Sakala V The People (1987) Z.R. 23 (S.C.);⁶**

Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design.

The following are within the term accomplices:-

- 1) *Participants in the crime charged, either as principals or accessories*

- 2) *Receivers of stolen property in respect of the trail of the thieves from whom they received the property.*
- 3) *Parties to crimes which are admissible as similar facts.*

Participants include procurers, aiders and abettors – **Section 21 (1) of the Penal Code states that:**

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence to be guilty of the offence, and may be charged with actually committing it, that is to say:-

- a) Every person who actually does the act or makes the omission which constitutes the offence.***
- 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.***
- d) Any person who counsels or procures any other person to commit the offence.”***

I am satisfied that the Prosecution have proved their case beyond reasonable doubt. I find accused one, two, three and four guilty as charged and convict them accordingly.

Right to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 11TH DAY OF FEBRUARY, 2016.


G.O.M CHAWATAMA
JUDGE