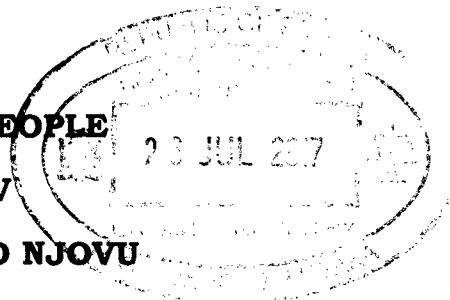


IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/52/2017

THE PEOPLE
V
DALITSO NJOVU



BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26th DAY OF JULY, 2017

For the State : *Mrs P. Mulenga, Principal State Advocate, NPA*

For the Accused Person : *Mrs P.S.Mumbi, Charles Siamutwa Legal Practitioners, for Legal Aid Board*

J U D G M E N T

CASES REFERRED TO:

- 1. *George Nswana V The People 1988-1989 ZR 174***

LEGISLATION REFERRED TO:

- 1. *The Penal Code, Chapter 87 of the Laws of Zambia***

The accused person in this matter stands charged with three counts. In the first count he is charged with the offence of aggravated robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Dalitso Njobvu on 14th June, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons

unknown, and whilst armed with a knife, and a sharp instrument did steal from Elias Mutale Mwansa a motor vehicle, namely Toyota Corolla registration number BAA 2834, valued at K45, 000.00, the property of Rita Mwale, and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to the said Elias Mutale Mwansa, in order to obtain or retain, or prevent or overcome resistance from its being stolen or retained.

In the second count the offence is aggravated robbery contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Dalitso Njobvu on 3rd September, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, and whilst armed with knives and screw drivers did steal from Daniel Ntentemuka a motor vehicle namely, Toyota Vitz registration number BAD 5438 valued at K40, 000.00, the property of Daniel Ntentemuka, and at or immediately before, or immediately after the time of such stealing did use or threaten to use actual violence to the said Daniel Ntentemuka in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

In the last count the offence is aggravated robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Dalisto Njobvu on 13th September, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, and whilst armed with a knife and sharp instruments did steal from Nevers Mwiinga a Toyota Spacio registration number ADC 2117, valued at K25, 000.00, the property of James Banda, and at or immediately after the time of such stealing did use or threaten to use

actual violence to the said Nevers Mwiinga in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

The accused person denied all the charges, and the matter proceeded for trial. The State called fourteen witnesses, while the accused person remained silent in his defence, and called no witnesses. The first witness was Lazarous Chiyayika. He testified that Daniel Ntentemuka, his childhood friend and a taxi driver, had approached and asked him to assist him purchase a vehicle. That he had advised him to purchase a vehicle overseas, as being a taxi driver, he needed to start with a new vehicle. That PW1 has used his details to import the vehicle, being a silver Toyota Vitz, but he never physically saw the vehicle, as at the time it came into the country, he was out the country on duty.

It was however his evidence that Daniel had called him whilst he was out of the country, saying that the vehicle needed to be registered, and that is how he had told him to get the documents from his house, and have it registered in PW1's name, and the change of ownership would be done later. That thereafter PW1 was informed that the vehicle was registered, and that around September 2016, when PW1 was preparing to come back to Zambia, Daniel had called him stating that he was in hospital, as the vehicle had been stolen.

When cross examined PW1 told the court that the proof that he had of the existence of the vehicle, was that it was registered in his name. He also told the court that the vehicle exists as he went to Kabwe to see it after it was recovered.

The second witness was Elias Mutale Mwansa, a taxi driver. PW2 testified that on 14th June, 2016 around 21:15 hours he was at the taxi rank at East Park Mall, outside the vehicle, when a gentleman approached him and asked him the fare to Nyumba Yanga. When PW2

stated that it was K80.00, the gentleman had volunteered to pay K100.00, and as they got into the vehicle, the gentleman had told him that he had two friends at Acacia Park, and he went to collect them.

That on his return, the gentleman sat in the front seat, while his two friends sat in the back. With regard to the visibility at East Park rank, PW2 testified that there is a billboard that lights up the area and the road, and that there are fluorescent tubes and smaller bulbs on the walls. Further that when he spoke with the gentleman they were very near each other, and were facing each other. They spoke for about four minutes.

It was also PW2's testimony that they used Thabo Mbeki Road from Acacia Park and when they reached Kalingalinga Filling Station PW2 bought fuel and they proceeded to Nyumba Yanga. He told the Court that when they reached Cross Roads Mall, the gentleman in front had asked him to pass in front, and that he would show him where to turn. That when they reached the turn at Nyumba Yanga Police Post, the gentleman asked him to turn left, and they left the tarmac into a gravel road. He further testified that they reached the gate at Cooperative College, and they stopped. PW2 stated that the gentleman asked him if he had airtime in his phone, and when PW2 agreed and gave him the phone, the gentleman had stepped out of the vehicle and went to speak on the phone.

It was stated that the gentleman was outside for about ten minutes, and he was able to see him as there were lights at the gate, and PW2 remained chatting with the gentleman's two friends who sat at the back of the vehicle. PW2 had then told one of the gentleman's two friends that he was on duty and their friend had delayed by talking on the phone, and that is how one of the friends had disembarked from the vehicle, and

followed him. That thereafter PW2 saw the gentleman enter the gate as he talked on the phone, and the two then came back. The gentleman who had booked PW2 sat in the back seat, while the friend who had gone out to call him now sat in the front seat.

That the gentleman who had booked PW2 grabbed him by the throat demanding to be given money, and PW2's wallet. That they struggled as the man grabbed his neck, and the person who sat in front grabbed him by the bomber he was wearing, and squeezed him. He stated that they struggled until they got out of the vehicle, and PW2 pushed the man who had sat in front, and they both fell outside. That even the man who had booked him went outside, and he got stones saying that he would kill PW2. However the struggle continued, and the man who had booked him tripped him, and PW2 fell down.

That that is how the man who had booked him told his friends that they should go and leave PW2 behind, and they got into the vehicle and drove off. Further in his testimony PW2 stated that he then got up and walked up to road, and went and reported the matter to Nyumba Yanga police station, where he was issued a medical report, and taken to Woodlands police.

He continued stating that from there an officer of Woodlands police took him to the University Teaching Hospital (UTH), where he was treated, and he returned the signed medical report to the police. He identified the medical report, and it was marked 'ID1'. PW2 told the court that on 30th June, 2016 he was called to Woodlands police in the morning, where he was asked to identify his attackers from an identification parade that had been mounted there.

His testimony was that there were between 8 to 10 people on the identification parade, and he identified the person who had booked and

attacked him among them. He identified the accused person as the person that he identified. PW2 testified that the vehicle that was stolen from him was a Toyota Corolla registration number BAA 2834.

In cross examination PW2 told the court that he was squeezed on the neck, and hit on the head. That the medical report shows that he had a laceration on his shoulder, and he stated that this was so as after they struggled, he was stabbed on the shoulder, and bled. That he had forgotten to state so in his evidence in chief. He further testified that it was the accused person who stabbed him, as he felt him remove something, and stab him.

He agreed having described the accused person to the police as being a bit tall and light in complexion, as well as stout. PW2 told the court that he had not forgotten the accused person although he had walked right past him in the court room when asked to identify him, stating that the accused person had faced down when he had walked past him, and moreover there were a lot of people in the court room.

PW3 was Rita Mwale. She testified that she is the owner of the motor vehicle Toyota Corolla registration number BAA 2834, pearl in colour, which operates as a taxi. She stated that on 15th June, 2016 around 06:00 hours she received a phone call from her driver's friend who informed that her driver Elias Mwansa had been attacked the previous night around 21:00 hours, and was stabbed with a screw driver, by people who had booked him, and that he was at the hospital.

She identified the white book for the vehicle, and it was produced and marked as 'P2'. It was PW3's testimony that after the driver was discharged from the hospital he had gone to her house and explained that the vehicle was stolen together with his phone, wallet, driving licence and money. She gave the value of the vehicle as K45, 000.00.

Further in her evidence, PW3 told the court that on 20th June, 2016 she was phoned by a police officer of Kanyama police asking her if she had lost anything, and she told him that her vehicle had been stolen. He had asked her to go there and identify a vehicle that they had recovered. That when she went there she found her vehicle, but it had no number plates, but the road tax and fitness discs were still on the windscreen of the vehicle. She confirmed that the vehicle was hers by virtue of the discs on the windscreen, and the registration details of the vehicle. PW3 identified and produced the vehicle and it was marked 'P3'.

In cross examination she read the engine number off the vehicle as 4AE-FE1587, and the chasis number as AE1145026762.

Enock Mpofu a mechanic of Makeni was PW4. He stated that he operates from Kwashuka in Makeni, and that on 17th June, 2016, around 14:00 hours a client had taken a vehicle to the garage, and had informed him that the vehicle was not changing gears, and that the gear box should be removed. That after PW4 removed the gear box, he had asked the man who had taken the vehicle there where the replacement gear box was, and he was informed that someone had it.

PW4 testified the man had called someone who had told them that they should go to Simoson Hotel, and there they were directed to a place behind Simoson Hotel where they found a vehicle pearl or silver in colour, parked off the road. The man had told him that they should remove the gear box from the vehicle that they had found, and that they could do so at a nearby house where he lived at his uncle's house. When asked by PW4 why he wanted to remove a gear box from a new vehicle, the man had responded that he wished to replace the engine in the vehicle with an ordinary one.

Further in his evidence PW4 stated that he insisted that he could not open the vehicle as it was new, unless the man gave him his uncle's phone number, and the man had called his uncle, but the call did not go through. That he had also asked the man why the vehicle had discs on the screen and no number plate, and the man had answered that the number plate had been removed during the campaigns. He continued stating that he had told the gentleman that they should go to the garage to remove the gear box, and he asked the man that he works with that he drives in the same vehicle with the gentleman who had taken the vehicle so that the gear box could be fitted, and PW4 would drive behind them.

That as they drove to the garage, PW4 had phoned the Criminal Investigations Officer (CIO) Munsanje of Kanyama police raising concerns over the vehicle the man had gone with, and Munsanje had advised PW4 to chat with the man as he found his way there, so that he could find him. It was his evidence that after fifteen minutes the police had arrived, and the man on seeing them, started running away, but he was chased, caught and apprehended. He was not cross examined.

PW5 Charles Banda is a police officer of Woodlands police. In his testimony he stated that he is a scenes of crime officer, and he told the court that he holds a certificate in crimes scenes obtained from Lilayi police training college, and had also been trained in statistics, record keeping, forensics, evidence collection and had done a basic course in criminal investigations. That he has been a police officer for nineteen years, and had been in the crimes scene department, for about six years.

With regard to the matter before court, he testified that on 30th June, 2016 around 11:00 hours, he was asked to attend to an identification parade for an aggravated robbery case in which the suspect was Danny Zulu Dalitso Njobvu. He stated that there were ten men on the parade,

and the suspect was informed of his rights to change clothes and position on the parade, as well as to have his relatives present during the identification. The suspect stood in position 8 from left to right, wearing a blue and purple striped sweater, and he later changed position, and stood in position 7 from left to right. That thereafter the witness Elias Mutale was called in and he identified Danny Zulu Dalitso Njobvu who stood in position 7 from left to right whilst wearing a dark blue sweat shirt.

PW5 told the court that photographs of the identification were taken, and the witness was sent away to allow the men on the parade change clothes and position. However as the suspect refused the second parade to go ahead, the parade was dismissed at 11:25 hours. He further stated that he compiled a report and a photographic album of the pictures taken during the identification parade. The same was identified and produced, and it was marked 'P4'.

PW5 took the court through the photographs in the album testifying that on the first page is the report, while the second page is a photograph showing the general parade with 10 men on it including the suspect in a purple and blue sweat shirt, in position 8 from left to right. That on page 3 is a photo of the ten men, this time with the suspect in position 7 from left to right wearing a dark blue t-shirt.

He also stated that on page 4 is a photograph showing Elias Mutale identifying the suspect in position 7 from left to right, while the last page is an index of the photographs. PW5 identified the accused person as Danny Zulu Dalitso Njobvu.

When cross examined PW5 told the court that the identification parade took twenty five minutes, and that in that time the suspects were arranged, and told of the purpose of the identification parade being

mounted, as well as their rights. He agreed that during that time, photographs of the identification were taken. PW5 could not recall how long the witness took to identify the accused person. He stated that how long an identification parade took depended on the number of witnesses called to identify the suspects. It was his testimony that he did not ask the witness what had enabled him identify the accused person.

That he was not aware that the suspect was described in the identification statement as a bit tall, a bit light in complexion, and stout.

PW6 was Masauso Phiri, also a police officer of Woodlands police. He told the court he had received the docket of aggravated robbery in which Elias Mutale Mwansa had complained that the Totoya Corolla that he was driving, was stolen from him in Nyumba Yanga area. That PW6 had instituted investigations by sending wireless messages to all police stations in Zambia to be on the lookout for the stolen vehicle.

He explained that on 19th June, 2016 around 09:00 hours he had received a phone call from Kanyama police who informed him that a vehicle fitting the description given by Elias Mwansa as stolen, had been recovered after a suspect had been apprehended. That he went to Kanyama police where he found the vehicle with no number plate on it, but the road tax disc and fitness discs on the vehicle were for registration number BAA 2834. That both the suspect and vehicle were handed over to him.

It was also PW6's evidence that his further investigations had involved submitting the registration number of the vehicle to the Road Transport and Safety Agency (RTSA), which established that the vehicle belonged to Rita Mwale. He recorded a statement from her, and the suspect, whom he came to know as Dan Zulu, but that further investigations had established that he is Dalitso Njobvu. PW6 told the court that the

suspect did not give him a satisfactory response, and he charged him with the subject offence.

Under warn and caution in English language, which he understood better, he had given a free and voluntary reply denying the charge. It was also stated that an identification parade was conducted at Woodlands police where Elias Mutale identified the accused person as the person who had stolen the vehicle from him. He also told the court that a medical report was issued to Elias Mutale so that he could be treated at UTH, as he was injured. The said medical report which had been identified and marked as 'ID1', was produced and marked as 'P1'.

He also identified 'P2' as the white book for the vehicle, stating that when he compared the details on it, with what was on the vehicle recovered, they tallied. He further identified 'P3' as the vehicle that was recovered, stating the number 4A-FE1587 is part of the engine number of the vehicle, but that it is not completed to avoid theft, and that the rest of the number is on the block of the vehicle.

The seventh witness was Vincent Muleya another police officer of Woodlands police. PW7's evidence was that on 7th July, 2016 he had reported on duty on from 18:00 hours to 08:00 hours the next day. He stated that he took over all the enquiries duties, as well as all the suspects that were in custody, and all was well, and the cell building was intact.

However between 22:00 and 23:00 hours one of the shift personnel Mwenda was patrolling the police premises when he shouted in vernacular that thieves had ran away. That PW7 got his AK47 rifle and rushed to the cell building, and there he discovered that the burglar bar of the cells had been removed by bringing it down. He further testified that the cells were opened to see if any suspects had ran away, and on

checking the occurrence book for the names of the suspects, it was discovered that three of them had ran away, among them Dan Zulu.

It was added that it was discovered that an axle or other means was used to cut the burglar bar, and that the occurrence book has since gone missing.

In cross examination PW7 told the court that he first saw Dan Zulu at Woodlands police when he was taken there, and he had told him that those were his names. His description of Dan Zulu was a person who was a bit tall, slim and humble, as well as a bit light in complexion. PW7 stated that if the other officer had described him as a bit stout, that was his description, and that description depends on a person's observations, and that it may change. In conclusion he told the court that Dan Zulu could have been taken there in the same month of July.

Daniel Ntntemuka was PW8. He testified that he is a taxi driver but that the vehicle that he used to drive was stolen from him on 3rd September, 2016. As to how the vehicle was stolen, he testified that on the material day around 19:00 hours he went to work at last stop of the bus stop rank of Mtendere station, with his Toyota Vitz registration number BAD 5438, silver in colour. He stated that the vehicle is registered in his friend Lazarous Chiyayika's name, who helped him to buy it, as he had no idea how to go about it.

PW8 further testified that he did not manage to register the vehicle in his names, as when the vehicle arrived, Lazarous was out on duty, and he had told PW8 to register it in his Lazarous' names, and that change of ownership would be done later. He identified the white book, and it was also produced and marked 'P5'. That he worked well until 24:00 hours when he was booked by a person to go to Cabs Mall Night Club within Mtendere Compound.

That after he had dropped off that person and he had paid the fare, and was about to drive off, a person approached him asking to book the vehicle. The person had told him that he was with two friends, one of whom was very drunk, and that they lived near Heroes stadium, near Save Our Souls (SOS). It was further his testimony that they proceeded to Heroes stadium but he asked the person who had booked him for directions, as he does not know the area well. That the person had sat in the front passenger's seat, and they had chatted. That on reaching the main road at Heroes stadium, and they had moved short distance, the man told him to turn left, then right shortly thereafter.

He stated that after turning right and driving a short distance the man told him they had reached their destination, and PW8 had slowed down the vehicle and braked. He testified that upon stopping, the man had grabbed the gear lever and put it on park, then punched PW8. Then one of his colleagues who sat in the back seat held him by the neck. PW8 also told the court that he was beaten with fists as he sat whilst strapped in the seat belt, and when he saw that he was getting injured he loosened the seat belt, and got out of the car. It was his evidence that he fell down, and the three men left the vehicle and kicked him on the head, and he was stabbed with screw drivers on his back.

Then the person who had booked him asked his friends for a knife, and PW8 thought he would be killed, and he got up and ran away. He heard the person who had booked him shout to his friends that PW8 had ran away, and that is how they got into the vehicle and drove off. PW8 then got the phone from his pocket and phoned his brother, who told him to get a taxi, and that on doing so the taxi driver had told him that they should first report the matter, and they went and reported to Northgate police.

There he was given a document which he took to Levy Mwanawasa hospital where he was treated, and admitted for observation, and advised to report the matter to Matero police. He continued with his testimony identifying the medical report that was issued to him, and it was marked 'ID6'. That upon being discharged PW8 had reported the matter to Matero police, and it was only on 29th November, 2016, that he was phoned by Lazarous Chiyayika (PW1) and informed him that he had been phoned by police in Kabwe, who told him that the vehicle had been recovered, and he should go there to identify it, as well as his attackers.

He told the court that he went to Kabwe Central police with Lazarous Chiyayika and two of his brothers, and there he was asked to describe his vehicle and his attackers, and he was taken to the room where he found the person who had booked the vehicle when he was attacked him with two other persons. PW8 explained that the man was asked who he knew amongst PW8, Lazarous Chiyayika and PW8's two brothers, and the man had stated that he knew PW8 adding that he had booked him, then dumped him at Heroes stadium, after stealing the vehicle.

He went on to state that on returning from Kabwe, they had passed through Matero police and informed the police of the developments. The next day he went to Central police where he was shown five photographs, and asked to identify his attacker, and that he had picked him out of one of the photographs. He stated that the police had told him that they were looking for him, and they would go and pick him up from Kabwe. PW8 also told the court that he went back to Kabwe with the police officers, and he had to buy tyres for the vehicle, as when he had found the vehicle in Kabwe, it had other tyres, no road tax discs, and fitness discs, and no number plate. In conclusion he told the court that the vehicle together

with the man who had booked him, and his two colleagues were brought to Lusaka.

PW8 in cross examination testified that the person who booked him had a beard, and was of medium complexion, and medium height.

Evans Chansa was PW9, a police officer of Matero police. This witness testified that on 5th September, 2016 he was on duty at Matero police when he was assigned a case of aggravated robbery in which Daniel Ntntemuka of Mtendere compound in Lusaka had complained that he was booked in the night by three men who attacked him and robbed him of his vehicle, a silver Toyota Vitz valued at K40, 000.00.

As part of his investigations he had summoned Daniel Ntntemuka who told him that he could identify the person who had booked him, and Daniel had also given him the medical report that had been issued to him following the attack. That during the course of the investigations he had received a report that the stolen vehicle had been recovered in Kabwe, and that a suspect had also been apprehended.

He also testified that he had gone to Kabwe and returned with the stolen vehicle and the suspect, and that upon interviewing the suspect, he came to know him as Dalitso Njobvu. That Dalitso Njobvu had denied having attacked Daniel Ntntemuka, and stealing the vehicle. That he had however charged and arrested him with the offence of aggravated robbery, and under warn and caution he had given a free and voluntary reply denying the charge. PW9 identified the medical report that was issued to Daniel Ntntemuka, and it was produced and marked 'P6'. He also identified the Toyota Vitz, and it was marked 'P7' on production.

PW9 further identified 'P5' as the white book for the vehicle, and the accused person as Dalitso Njobvu. He was not cross examined.

PW10 was Richard Chisasa a police officer of Kanyama police. PW10's evidence was that on 17th June, 2016 he had reported for work at around 08:00 hours, and during the course of his investigations he was informed by the Deputy CIO that he had received a report from a member of public in Makeni area that a person was selling a vehicle at a give-away price. That PW10, the Deputy CIO, Sergeant Chambwa and police reserve constable Ngambi went to Makeni, and upon reaching the house in Makeni they found the owner of the house talking to one person. He stated that when the person saw them he ran away, but they apprehended him with the help of members of the public.

On apprehension he had taken the man to Kanyama police, and a vehicle registration number BAA 2834 was recovered. PW10 further in his testimony told the court that he interviewed the man who was apprehended, and he came to know him as Dan Zulu. Dan had explained that the vehicle belonged to his brother who lived in Woodlands, but PW10 did not believe him, and sent wireless messages to all police stations.

He stated that Nyumba Yanga police had responded informing him that the vehicle had been stolen from a taxi driver in the area, and later Detective Sergeant Phiri of Nyumba Yanga police went and picked up the vehicle, and the suspect. PW10 told the court that he had been able to identify the suspect when he ran away and was apprehended by members of the public, as he had seen him when he was talking to the owner of the house.

Further that he did not believe the suspect when he told him that the vehicle belonged to his brother of Woodlands, as he was offering it for a sale at a low price, and he did not have any documentation for the vehicle. However the road tax and fitness discs on the vehicle showed the

registration number of the vehicle as BAA 2834, and it did not have a number plate. He identified the accused person as Dan Zulu.

It was PW10's evidence in cross examination that the suspect ran away immediately they disembarked from the vehicle, but that he saw his face before he ran away. Moreover he had closely followed him when chasing him, and did not lose sight of him. He told the court that the suspect wore a black pair of trousers, though he could not recall the top that he wore. It was his evidence that it was possible to forget the shirt that he wore, but recall his face.

In re-examination PW10 testified that he took about three minutes before disembarking from the vehicle.

PW11 was Nevers Mwiinga, a taxi driver. He told the court on 13th September, 2016 he knocked off in the evening, and was heading home after refueling at Kobil Filling station in Mtendere around 20:00 hours, when he saw two people at Mtendere bus stop who asked him if he was driving a taxi. That when he had agreed the two men had told him that they were going to Chamba Valley, and the taxi fare was agreed at K90.00.

Further in his testimony PW11 stated that they started off for Chamba Valley using Kamloops road, and when they reached Chamba Valley, the person who had sat in front got off, and the person in the back seat grabbed him by the neck, and drew a knife. That the one outside went to PW11, opened the door and pressed a knife on his stomach, and the two dragged him into a drainage by a wall fence. He stated that they got the K200.00 that he had, and his phone, and one of them went back inside the vehicle and started driving slowly, while the other one pressed a knife on him.

He also testified that when the one driving sped off, the one who was pressing a knife on him let go of him, and he jumped over the wall fence for Chamba Valley school. PW11 explained that he got up and started screaming for help, and went to the gate of the wall fence, and he saw the man inside, but he jumped over the wall fence again. That a person had gone to the gate and PW11 had explained what had happened, and the person took him to Kaunda Square police where he reported the matter.

However the police there told him that they did not have transport to take him, and he went to the road where he flagged down a vehicle, and it dropped him off at Kalingalinga police, and he walked home. He stated that the next day he went and informed the owner of the vehicle what had transpired, and together they went back to Kaunda Square police where PW11 gave a statement, and they visited the scene. PW11 told the court that the owner of the vehicle was James Banda, and he had driven the vehicle for three months, prior to its being stolen. The registration number of the vehicle was stated as ADC 2117, and PW11 testified that the make of the vehicle was a Toyota Spacio, silver in colour.

In cross examination it was his testimony that one of the two men who had booked him wore dark glasses, and he had a lot of side bends. That the other was short, dark in complexion, and wore a black t-shirt, and he stated that he did not have a lot of time to observe them.

James Banda was PW12. He is the owner of the Toyota Spacio registration number ADC 2117. His testimony was that on 13th September, 2016 between 22:00 and 23:00 hours his wife had received a phone call, and she had asked him to answer the call, especially that the caller had asked for the owner of the Spacio vehicle. He noted that the

caller identity was showing the number saved as "*Madam Spacio*", and his wife had told him that it the driver, Mwiinga's number.

PW12 explained that he was told that the vehicle had been involved in a robbery, and he was asked where the vehicle was. He had told the caller that the vehicle was with the driver, and the next morning the driver had gone and explained what had happened. That from there the driver went with PW12's wife to Chamba Valley, and thereafter it was quiet. He gave a description of the vehicle that was stolen stating it was a Toyota Spacio, silver in colour, registration number ADC 2117, and that it had a broken part on the driver's window, as when the keys had been locked inside the vehicle, they had broken the window.

PW12 identified the white book for the vehicle and it was marked 'P8' on production. He stated that the vehicle was recovered two months later in the Kasisi area and when PW12 went there he found that it had no tyres, and the lights were missing from it. That some parts had been removed from the engine, as well as the radio, although it still had a number plate. He had been able to identify the vehicle on the basis of the number plate, the vehicle's colour, and the broken window at the driver's side. The vehicle was towed to central police. This witness was not cross examined.

Ackson Phiri a police officer of the Anti-Theft of Motor Vehicles at Lusaka Division was PW13. It was his testimony that on 28th November, 2016 he had reported on duty at 07:30 hours, when he was allocated a docket of aggravated robbery in which Nevers Mwiinga had reported that in September, 2016 he was robbed of a Toyota Spacio, silver in colour, registration number ADC 2117, in Chamba Valley by two people who were armed with knives.

PW13 learnt that there was a suspect in police custody over related offences, and he had interviewed him, and came to know him as Dalitso Njobvu. That Dalitso had led him to his former residence in Ngombe Township commonly known as Kasisi near St Faustina Catholic church, where they found the vehicle. He like PW12 stated that it had no lights, front suspension, and engine parts were missing. Further the vehicle had no tyres.

He stated the chasis number of the vehicle as AE111-6046091, and the engine number as 4A-M103477. That when a search was conducted at RTSA it revealed that the vehicle belonged to James Banda of Lusaka, and was reported stolen on 13th September, 2016, by two people armed with knives. He confirmed that the vehicle was towed to Lusaka Division where it was parked, and he warned and cautioned the suspect who remained silent.'

That the suspect was charged and arrested, and PW13 also testified that the vehicle does most move, and most of its parts were sold to Chibangu, who in turn sold them to other people. PW13 told the court Dalitso had led him to Chipata Compound to a shop where he said he had sold most of the parts for the vehicle, but only two wheel drums were recovered. He identified the vehicle and produced it, and it was marked 'P9'.

It was PW13's evidence in cross examination that Meki was also interviewed in connection with the matter, and that Meki and the accused person were transferred from Kabwe. He told the court that the accused person led him to the vehicle, and he therefore stole it. Further that he was the thief, as he led police to the shop where he sold parts of the vehicle, and to the scene in Chamba Valley. PW13 testified that the shop that the accused person led him to was for Chibangu, but he did not charge Chibangu. This was on account of the fact that the accused

person led him to the stolen vehicle, and the shop where he sold the parts.

He further stated that Chibangu would be charged for being in possession of stolen property. It was stated that the driver of the vehicle when interviewed had told PW13 that he could not identify his assailants. That the accused person had refused to give a statement.

The last prosecution witness was Pickson Botha, a police officer. He testified that on 16th November, 2016 he had received a report of a theft case from Henry Simukwanya of Lukanga Township in Kabwe that a rear tyre was stolen from his vehicle which was parked at his house. That investigations were instituted, and PW14 recovered the tyre from a taxi driver called Moses Mwanasunga who told him that a person driving an unregistered Toyota Vitz, silver in colour, had sold him the tyre.

It was PW14's evidence that on 17th November, 2016, Dalitso Njobvu was apprehended, and upon being warned and cautioned, he had led police to four houses in Lukanga Township where he had been stealing tyres. That Dalitso also led them to Shamabanse Compound within Kabwe where the Toyota Vitz that he was said to have been driving was recovered. He stated that Dalitso had told him that the vehicle was his, but he later changed, stating that it belonged to his uncle in Chibombo. It was stated that they did not find the car keys for the vehicle, and were informed that Dalitso's wife had ran away with them, but they were later recovered.

That using the chasis number of the vehicle, they conducted a search at RTSA which revealed that the vehicle belonged to Lazarous Chiyayika of Lusaka, and upon obtaining his phone number PW14 had phoned him. He told the court that Lazarous Chiyayika had informed him that the vehicle was stolen from Daniel Ntentemuka after he was attacked by

thieves at Heroes stadium in Lusaka. PW14 stated that thereafter police officers from Lusaka had sometime in November, 2016 travelled to Kabwe, and that the police officers upon arrival at Kabwe police, had recognized the suspect, stating that he had escaped from lawful custody in Lusaka.

Further in his testimony, PW14 explained that the suspect had volunteered to show police what he had done in Lusaka, and asked that he be taken in peace. In conclusion he stated that the vehicle when recovered had no number plate, road tax or fitness discs.

PW14 in cross examination told the court that it was the fourth time that tyres were reported stolen, and people had informed him that the person selling the tyres was driving a Toyota Vitz, and that he was new in Kabwe. That informants at car washes had informed PW14 that the person was from Shamabanse Compound.

As to the description of the person selling the tyres, PW14 stated that he was told that the person was a bit light in complexion and a bit tall with a beard, and that the person had told them that he was from Tanzania. PW14 agreed that the persons who had bought the stolen tyres were picked up, but he stated that they were later released after the person who had stolen them was apprehended. That PW14 was convinced that the tyres were stolen as Dalitso led them to where they were stolen from.

He denied that the taxi driver who went with police to Kabwe from Lusaka had entered the office, stating that he had remained outside seeing the vehicle. That however when he did enter the office, the taxi driver had identified the accused person as his assailant, stating that he was with two other people when he attacked the taxi driver.

The accused person remained silent in his defence.

I have considered the evidence. It is a fact that Elias Mutale Mwansa on 14th June, 2016 reported to Woodlands police that a Toyota Corolla registration number BAA 2834 that he was driving as a taxi was stolen from him by persons who had booked him, and then attacked him around 21:00 hours.

It is further a fact that the said vehicle was recovered in Makeni area where a person alleged to be the accused person in this matter had taken it to a mechanic so that the gear box could be removed from it.

It is a fact that when recovered the vehicle had no number plates but only road tax and fitness discs.

It is also a fact that Daniel Ntenteuka on 3rd September, 2016 reported that he was attacked by persons who had booked him whilst he was driving a Toyota Vitz registration number BAD 5438, from Mtendere Township to an area near SOS, and upon reaching there had attacked him, and stole the vehicle.

It is a fact that the said vehicle was recovered in Kabwe after the accused person allegedly led police to Shamabanse Compound where it was recovered. That when recovered the vehicle had no number plate, road tax and fitness discs.

It is a fact that Nevers Mwiinga a taxi driver reported that on 13th September, 2016 he was booked by persons from Mtendere to Chamba Valley, whilst he was driving a Toyota Spacio registration number ADC 2117, belonging to James Banda, who attacked him and thereafter stole the vehicle from him.

It is a fact that the said vehicle was recovered from Ngombe Compound in an area called Kasisi after the accused person allegedly led the police

to its recovery. It is a fact that when recovered the vehicle had its number plate, but had parts of it removed.

The question is whether it has been proved beyond all reasonable doubt that it is the accused person who committed the offences. In all three counts the accused person stands charged with aggravated robbery. Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia defines aggravated robbery as;

“(1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, 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, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.

In count one PW2 testified that the accused person who was in the company of two other persons booked him from Acacia Park at Arcades stating they were going to Nyumba Yanga on 14th June, 2016 around 21:00 hours. That when they reached Cooperative College the men told him that they had reached, and that the accused person who had booked him and had sat in the passenger’s seat in front had asked to use the phone, and had disembarked from the taxi as he did so.

That on his return he had entered the car, and grabbed PW2 by the throat demanding to be given money. That the other two men had joined

in the attack which saw them come out of the vehicle. That after PW2 fell the men had got into the vehicle, and had driven off with it.

That after he had reported the matter to Woodlands police, he was issued a medical report so that he could be treated for the injuries he had sustained during the attack. His evidence was that later after the vehicle was recovered, he was called to identify his assailants at an identification parade, where he identified the accused person.

PW4 a mechanic of Makeni stated that a man had taken the vehicle to him so that he could remove a gear box from there as it had a problem. That the man had called another person who told them to go to Simoson Hotel where they found a new vehicle, and PW4 wondered why the man wanted to remove a gear box from it. PW4 had also testified that he had asked the gentleman to go to the garage, and when they proceeded there, PW4 had called police officers at Kanyama police, as he was suspicious of the man. PW4 had also told the court that man had ran away when the police officers had arrived, but he was apprehended. PW4 was not cross examined and his evidence is therefore credible.

Further his evidence was confirmed by PW10 who is one of the police officers of Kanyama police that had followed up on the report made by PW4 on his suspicions concerning the man. PW10 had identified the accused person as the person who had ran away after police went to PW4's garage, and he was taken to Kanyama police where PW6 is said to have picked him up together with the vehicle that had been recovered, and taken him to Woodlands police.

The evidence linking the accused person to the offence is that on 17th June, 2016 he was found in possession of the vehicle that was stolen from PW2 on the night of 14th June, 2016. This was three days after the vehicle was stolen, and the question is whether the doctrine of recent

possession can be invoked in this matter? In the case of **MARTIN MUPETA AND JOHN CHANDA V THE PEOPLE SCZ/137/2012** the Supreme Court when considering the question held that ***“the period within which the presumption can operate varies according to the nature of the article stolen. Three months would be sufficiently recent for a motor vehicle. But for such articles as pass from hand to hand readily like a cell phone, one month would be a long time, but seven days would be sufficiently recent”***.

Going by the authority above, the accused was in recent possession of the vehicle, and the question is whether an inference of guilt on his part can be drawn from his possession of the said motor vehicle?

In the case of **GEORGE NSWANA V THE PEOPLE 1988-1989 ZR 174**, the Supreme Court stated that ***“the inference of guilt based on recent possession particularly where no explanation is offered which might reasonable 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 cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer”***.

A perusal of the record shows that PW10 testified that the accused person on being interviewed had told him that the vehicle belonged to his brother of Woodlands. While the accused person in cross examining PW10 had alleged that he may have been mistakenly apprehended by the people that had chased the man who had ran away from PW4's garage,

when PW10 and other police officers had gone there, his cross examination of this witness did not shake this witness' testimony.

This was because PW10 had maintained that when the accused person had ran away, he did not lose sight of him during the chase. Further that he had seen him before he disembarked from the vehicle. The accused person did not challenge PW10 on the evidence that the accused person is said to have given for being found with the vehicle. This evidence is therefore credible, and I find that indeed the accused person did give an explanation for having been found with the vehicle Toyota Corolla pearl in colour, registration number BAA 2834, which PW3 confirmed belonged to her, as did the records for the registration obtained at RTSA, being 'P2', the white book for the vehicle, and was stolen from PW2 after he was attacked.

Then there is also the evidence of PW2 having identified the accused person as one of his assailants who thereafter stole the vehicle. PW5 the crime scenes officer of Woodlands police gave evidence pertaining to how PW2 identified the accused person at the identification parade. The photographic album 'P4' shows pictures of the identification that were taken. The accused person did not raise issue with the conduct of the identification parade.

Throughout the case the accused person only raised issue with him being described as a bit in light in complexion, as the photographs of him at the identification parade show that he is dark. Complexion of a person may change depending on the environment in which they are in, and in this case he had been custody when the identification was conducted, and factors such as no access to bathing facilities at police stations may have affected his skin tone. There is no evidence to show that PW2 hesitated in his identification of the accused person as his assailant, or

that there was some exposure of the witness to him before the identification which may have affected the identification. It is therefore my finding that PW2 properly identified the accused person as the person who had booked him and attacked him, and thereafter stole the vehicle from him.

It is too much of a coincidence that the accused person whom PW2 identified as his attacker and person who stole the vehicle he was driving, was the same person whom PW10 apprehended for being in possession of it, a few days after it was stolen. The accused person offered an explanation for being in possession of the said vehicle. The question is whether the said explanation is one which could be reasonably true?

In my view this explanation was not one which was reasonably true as registration documents for the vehicle show that it is registered in PW3's name. She has no relationship whatsoever with the accused person, as far as the record shows. PW2 had reported that it was stolen from him after he was attacked. Thus the only reasonable inference that can be drawn from the facts of the case is that the accused person did not come into possession of the vehicle innocently, as he was identified as the thief. He therefore stole the vehicle.

PW2 testified that the accused person and his two colleagues had attacked him, and in cross examination testified that he was stabbed with a screw driver on his shoulder. The medical report 'P1' supports PW2's evidence that he was stabbed with a screw driver on his shoulder, as it shows that he had a small punctured wound on his right shoulder.

It has not been disputed that the accused person in the company of two other people when they attacked PW2, and there is evidence that violence was used to steal the vehicle from him. Further the use of an object to

puncture PW2's shoulder shows that the accused persons were armed with an offensive weapon when they attacked and stabbed him on the shoulder as Section 4 of the penal Code defines an offensive weapon as;

"offensive weapon" means 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,"

The offence of aggravated is therefore complete, and I find the accused person **GUILTY** as charged in count one, and I **CONVICT** him accordingly.

In count two the accused person is alleged to have robbed Daniel Nttemuka of his Toyota Vitz registration number BAD 5438 on 3rd September, 2016, after he booked him at Cabs Mall night club in Mtendere to go to a place at SOS near Heroes stadium. That when they reached the place near Heroes Stadium the man who had booked him had grabbed the gear and put it on park, punched PW8, and that one of his friends had grabbed PW8 by the neck, and he was assaulted severely. When PW8 got out of the vehicle upon fearing that he would be injured, he was stabbed with screw drivers on his back, and he ran away.

That the vehicle was then driven off, and the next day he had reported the matter to Matero police. The medical report 'P6' shows that he sustained three stab wounds on his back. Then on 29th November, 2016, PW1 who had bought the vehicle on behalf of PW8 using his names, and the vehicle was registered in his names, was called by police from Kabwe and informed him that the vehicle had been recovered there.

PW1, PW8, and PW9 had gone to Kabwe where the vehicle was recovered. They had also found the accused person with two other people at the

police station there. PW14 who was a police officer at Kabwe police stated that the accused person was apprehended for stealing tyres in Lukanga Township in Kabwe, and upon being warned and cautioned had led him to Shamabanse Compound where the vehicle stolen from PW8 was recovered. That the accused person had told PW14 that the vehicle was his, but later changed stating that it belonged to his uncle in Chisamba.

PW14 had also told the court that the vehicle when found had no number plate. That he had used the chasis number of the vehicle to conduct a search at RTSA which revealed that the vehicle belonged to Lazarous Chiyayika.

The accused person did not dispute being in possession of the vehicle that PW8 had reported stolen. Thus the question is whether he came into possession of the said vehicle other than because of having stolen it? He was found in possession of the vehicle two months after it had been stolen. His explanation for possessing the vehicle as stated by PW14 is that initially it was his, then he later changed stating that it belonged to his uncle.

The evidence given by PW14 on the accused person's explanation as to how he came to possess the vehicle was not challenged when he was cross examined. I therefore find that this is the explanation that the accused person gave, and the question is whether this explanation is reasonable? To begin with the vehicle was found without the number plate, and road tax and fitness discs. The search conducted at RTSA revealed that it belonged to Lazarous Chiyayika, and he had registered it in his name on behalf of Daniel Nttemuka, on whose behalf he had purchased it.

The accused person gave conflicting stories as to who owned the vehicle, and this is a vehicle that had been reported stolen from Lusaka. It was

clearly not his, and he had no reason to be in possession of it. I note that PW8 is said to have identified the accused person at Kabwe police station but this identification cannot be said to have been proper, as there is evidence on record that shows that the police officers who had gone with PW8 to Kabwe had actually identified the accused person first as having escaped from custody and was wanted. This obviously affected PW8's identification of the accused person.

There is evidence on record given by PW5 that PW2 on 30th June, 2016 had identified the accused person at an identification parade conducted at Woodlands police, as his assailant and person who stole the vehicle from him on 14th June, 2016.

PW6 had testified that he had picked up the accused person from Kanyama police where he was in custody on 19th June, 2016, and had taken him to Woodlands police where he was detained. The evidence of PW7 was that on 10th July, 2016 he was on duty at Woodlands police from 18:00 hours to 08:00 hours the following day, when the accused person who was in custody escaped from such custody with two other people, around 23:00 hours after removing a burglar bar of the cells. The evidence of the accused person having escaped from such custody was not challenged, and it is therefore credible evidence.

Thus while the accused person was in police custody from 19th June, 2016 on charges of aggravated robbery which are non-bailable, he did escape from such custody on 10th July, 2016. Therefore evidence connecting him to this offence committed on 3rd September, 2016 cannot be discounted on account of him have been in police custody at the time, as he had escaped from such custody.

The evidence shows that the accused person is said to have led PW14 to Shamabanse Compound where the vehicle was recovered.

Possession is defined in Section 4 of the Penal Code, Chapter 87 of the Laws of Zambia as;

"possession", "be in possession of" or "have in possession".

(a) includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

By leading police to its recovery, the accused person knowingly had possession of the vehicle, as the evidence of PW14 shows that he led police to a house where he is alleged to have been living, and they found that his wife had ran away with the car keys. He was therefore in possession of the vehicle within the meaning of the definition in Section 4 of the Penal Code, as he did not dispute PW14's testimony that even the informants had told him that the suspect was driving an unregistered Toyota Vitz, which is the vehicle that he led police to recover, and the vehicle is the one that was stolen from Daniel Ntentemuka.

Going by all this evidence, the only reasonable inference I can draw is that the accused did not possess the vehicle as an innocent receiver or retainer, as his explanation over possession of the vehicle does not permit the drawing of such an inference, as it does not in the slightest so suggest. He was part of the three men that attacked and stabbed Daniel

Ntentemuka, and stole the vehicle from him. As the evidence shows that there were three men, armed with an offensive weapon being a screw driver, and used violence to attack Daniel Ntentemuka, the offence of aggravated robbery is complete.

The prosecution has therefore proved its case beyond all reasonable doubt, and I find the accused person **GUILTY** as charged, and I **CONVICT** him accordingly.

In the last count the allegation is that the accused person stole a Toyota Spacio registration number ACD 2117 from Nevers Mwiinga, the property of James Banda, which he drove as a taxi. PW11, Nevers Mwiinga told the court that two people had booked him from Mtendere to Chamba Valley on 13th September, 2016 in the night. The two had attacked him in Chamba Valley and held him at knife point, and had then driven off with the vehicle.

PW12, James Banda had confirmed that the vehicle was his by virtue of the white book for the vehicle, which was produced as 'P8'. PW13 who arrested and charged the accused person for the offence testified that he had interviewed the accused person whilst he was in police custody on 28th November, 2016, and he had led him to Ngombe Compound at a place known as Kasisi near St Faustina Catholic Church, where the vehicle was recovered. PW13 had also told the court that the vehicle had been stripped of its lights and some engine parts, and had to be towed to Lusaka division. Using the engine number and chasis number of the vehicle, a search was conducted at RTSA which established that the vehicle belonged to James Banda.

The evidence of PW13 shows that the accused person did not offer any explanation as to how he led him to the recovery of the vehicle. Therefore the question that arises is whether the doctrine of recent possession can

be invoked in this matter? The accused person is said to have led police to the recovery of the vehicle, and he therefore knowingly had possession of the said vehicle. This vehicle was recovered two months after it was stolen from Nevers Mwiinga. Going by the case of **MARTIN MUPETA AND JOHN CHANDA V THE PEOPLE SCZ/137/2012** cited above, where a period of three months was held to be sufficient period for one to be said to be in possession of a motor vehicle, the accused person was in recent possession of it.

The next question to be answered is whether he was an innocent possessor or retainer of the vehicle? PW11 testified that was unable to identify his attackers, and he therefore did not directly connect the accused person to the theft of the vehicle.

However the testimony of PW13 was that the accused person apart from leading him to the recovery of the vehicle, also led him to Chipata Compound to Chibangu's shop, where he is alleged to have sold most of the parts that had been removed from the vehicle.

There they had recovered two wheel drums for the vehicle. Chibangu did not testify before the court, but even in the absence of his testimony, PW13 did establish that the accused person led him to Chibangu's shop where he is said to have sold the stolen vehicle parts. When PW13 was cross examined he was asked on whether leading to the recovery of stolen items meant someone had stolen the items, he agreed. There is nothing in the evidence to suggest that the accused person was an innocent possessor or retainer of the vehicle, and the only reasonable inference I can draw is that the accused person was one of the two persons that had attacked PW11 after they had booked him, and stole the vehicle.

As the evidence of PW11 was that he was held at knife point when the vehicle was stolen, violence was threatened to be used on him during the theft, and the offence is complete. The prosecution has therefore proved the case beyond all reasonable doubt in count three, and I find the accused person **GUILTY** as charged, and I **CONVICT** him accordingly.

DATED THE 26th DAY OF JULY, 2017

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**