IN THE HIGH COURT FOR ZAMBIA **HP/231/2016**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

THE PEOPLE

VERSUS

OBVIOUS SUMMERTON MWALITETA

EVANS MUKOBELA

MACMILLAN SHIMUKONKA

LASWELL PHIRI

EMMANUEL MUMBI

Before the Hon. Mr. Justice M.D. Bowa in Open Court on 8th August 2017

For the State *G Zimba Principal State Advocate NPA*

For the Accused : *A. Kasolo, W. Muhanga and S Mbewe from AKM legal Practioners; K. Mweemba from Keith Mweemba advocates, G Phiri from PNP advocates,*

RULING ON CASE TO ANSWER

Cases referred to:

1. *Mwewa Murono vs. the People 2004 ZR 207*
2. *Njapau vs. The People 1967 ZR 95*
3. *The people v Makowela and Toyabunga 1979 ZR p 29*
4. *Hahuti vs. the People 1974 ZR 154*
5. *Emmanuel Phiri vs. the People 1978 ZRL p79*
6. *Yoariz Malongogo vs. the People 1981 ZR P151.*

7. *Robertson Kalonga v the People*
8. *Senseta vs. the People 1976 ZR p184*
9. *Phiri v the people 1973 ZR p50*
10. *People vs. Principal Resident Magistrate ex parte, Faustine Kabwe & Aaron Chungu SCJ No 17 of 2009*
11. *Kabukala Abu Tambwe & Shafico Hachi v The People_[1987] ZR 15*
12. *David Zulu v the People (1977) ZR 151.*
13. *Mutambo & Five Others vs. the People (1965) ZR 15*
14. *In Day vs. Regina (1958) R and Y 731,*
15. *1962 1 ALL ER 446*
16. *Saidi Banda v The People selected judgment No. 30 of 2015*
17. *Katebe v The People , 1975 ZR 13*
18. *Winfred Sakala v The People (1987) ZR 23*
19. *Mutale and another v The People 1995/97 ZLR at page 227*

Legislation referred to

The Penal code Cap 87 of the Laws of Zambia section 284(1) and 22

The Criminal Procedure code cap 88 of the Laws of Zambia section 206 and 291(1)

The accused persons stand charged with 3 counts of Aggravated Robbery C/S 294 (1) of the Penal Code Cap 87 of the Laws of Zambia. The allegations in the first count were that the accused herein on the 14th day of August 2016 at Lusaka, jointly and whilst acting together with other persons unknown did steal a handbag and K350. 00 cash altogether valued at K750. 00 the property of ELINA NYIRENDA and at or immediately before or immediately after such stealing did use or threaten to use actual violence on the named ELINA NYIRENDA to obtain or prevent or overcome resistance from its being stolen or retained.

In the 2nd count, the State allege that the accused on the 14th of August 2016 at Lusaka jointly and whilst acting together with others unknown did steal a Black Berry mobile phone valued at k4000.00 the property of EMMANUEL SIMBEYE and at or

immediately before or after such stealing did use or threaten to use actual violence to the said Emmanuel Simbeye in order to obtain, or prevent or overcome resistance from its being stolen or retained.

In the 3rd count the State contend that the accused persons on the 14th day of August 2014 at Lusaka jointly and whilst acting together with others unknown did steal Statements of the Announcement of Results (Gen form 12) from ROY KUSEKA the property of ELECTORAL COMMISSION OF ZAMBIA and at or immediately before or immediately after such stealing, did use or threaten to use actual violence to the said ROY KUSEKA in order to obtain, or prevent or overcome resistance from its being stolen or retained.

All accused denied the charges. The State called a total of 15 witnesses on behalf of the people. I remind myself that as a general rule the burden of proving every element of the offence charged and the guilt of an accused lies throughout a criminal proceeding on the prosecution. An Accused person has no legal obligation whatsoever to prove his innocence. The standard of proof expected to be discharged by the State is proof beyond a reasonable doubt.

The combined evidence of the prosecution witnesses was that on the 14th August 2016, the Electoral Commission of Zambia (ECZ) was receiving various documents from Returning Officers for the Presidential Election which were to be transmitted to the National totaling center at Mulungushi International Conference Center in Lusaka. Acting on the instructions from the ECZ, PW1, PW2, PW3 and PW4 in the company of 2 other Returning Officers, flew from

Ndola to Lusaka using a Zambia Air Force aircraft to deliver the material. Their plane touched down at City airport at 11:20 hours. Two vehicles picked up the 6 Returning officers that were on that flight. Shortly after they made their way to the ECZ officers from City Airport, drama unfolded.

The first vehicle driven by PW5 carrying PW1, PW2 and PW3 was blocked by a vehicle that reversed into the road from the ECZ car park. This was followed shortly after by a minibus with tinted windows. Another vehicle a Toyota Mark II with Reg No ABZ 1919 also blocked the Land cruiser that the ECZ officials were on from its rear. A number of men disembarked from the bus and unleashed an attack on the occupants of the vehicle. Pepper spray was used during the attack and PW1, PW2 and PW3 sustained injuries during the process of the scuffle that ensued and in their quest to run for safety. A box containing electoral materials was taken by the assailants. Some personal effects and cash belonging to PW2 and PW3 were also stolen in the process as well.

The assailants sped off in the bus upon realizing that there was an armed police officer that emerged from the vehicle that was being attacked. The Toyota Mark II was however abandoned at the scene with its keys in the ignition. PW5 secured the keys and picked up a phone and a UPND key holder from the vehicle. He also removed the license plate and the exhibits were subsequently handed over to the arresting officer.

PW11 Inspector Phiri, was at the ECZ premises at the time and rushed to the scene of crime after the assailants had left. He mounted a check point and started stopping vehicles leaving the direction of the attack with a view of apprehending possible suspects. One such vehicle stopped was a Range Rover driven by A1. Inspector Phiri recognized AI and one of the passengers as being the former provincial minister and a former Commissioner of police for Western Province Mr. Siandenge respectively. They denied carrying any of the suspects involved in the attack and A1 pointed to a black BMW that was parked in the ECZ car park as possibly belonging to one of the attackers. Inspector Phiri testified further that Mr. Siandenge told him they had witnessed the incident and would file a report to the nearest police station. The officer allowed them to leave on this understanding.

Later other police officers arrived at the scene. A vehicle driven by A2 in the company of A3, A4 and A5 also arrived and parked near the scene of crime. The occupants got out of the car whilst apparently looking at the abandoned Toyota Mark II with A2 in particular, speaking on the phone as he looked on. The officers present who had observed the 4 arrive became suspicious of their conduct, questioned and later detained them for the subject offence.

The arresting officer also arrived at the scene and was detailed about the sequence of events by Inspector Phiri. PW11 also handed over the car keys for the abandoned vehicle, the cell phone, key holder and licence plate retrieved from the vehicle. The BMW

identified as possibly belonging to a suspect by A1 and the abandoned vehicle were towed to Central police and kept as exhibits.

The phone retrieved from the car at some point before the handover to the arresting officer rang and the caller ID indicated the call was from one COMPOL Sianedenge. This suggested to the officers that COMPOL was short for Commissioner of Police Siandenge and aroused suspicion as it meant in their view, that he knew the owner of the vehicle that was involved in the attack. Investigations from the Road Traffic and Safety Agency (RATSA) revealed that the owner of the abandoned vehicle was one Fred Hamamba. Further investigations from Airtel and MTN confirmed that there was communication on the day of the attack between Mr. Siandenge and Mr. Hamamba and further between A1 with Hamamba. There was also communication between Siandenge and A2. The arresting officer also testified that the BMW that allegedly belonged to one of the assailants turned out to belong to an ECZ IT officer (PW10) who was working within the ECZ headquarters building at the time of the attack.

He testified further that there was no report ever made by A1 and Mr. Siandenge to any police station nor has Hamamba ever turned up to claim his vehicle. Both Siandenge and Hamamba are reportedly fugitives and the police have offered a reward to the public for information leading to their apprehension. The arresting

officer therefore made up his mind to charge and arrest all the accused persons for the subject offence.

At the close of the Prosecution's case, the Defence opted to give viva voce submissions. Mr. Mweemba kick started the submissions by referring me to authorities that set down the principles that a court should consider in determining whether a case to answer has been established or not. Notable among them was the case of ***Mwewa Murono vs. the People***[1] and ***Njapau v the People***[2] ***The people v Robby Tayabunga***[3] ***and Hahuti vs. the People***[4]

The Defence suggested that the investigations in this matter were selective and consequently in breach of article 118 (2) (a) of the Constitution which prohibits discrimination. In this regard counsel argued that the call records indicate there was communication with several other persons who were themselves not investigated. The court was reminded of the evidence of PW6 who testified in cross examination that he was going to arrest anybody whom he suspected to be from the opposition UPND at the scene as further proof of such discrimination.

It was further submitted that none of the victims knew who the assailants were and that there was no identification parade that was ever conducted. The court was referred to the evidence of the arresting officer who testified in cross examination that the accused did not commit the offences in the 3 counts laid. Further that the witness admitted that A2, A3, A4 and A5 only came to the scene after the incident had taken place. It was submitted further that

none of the accused were found with the stolen items or weapon or instrument to bring them into the spotlight of the offence.

The Defence submitted further that the State had failed to establish the ingredients of the offence against A1 as there is no evidence he was with anybody during the attack. According to them, the issue of violence and threats was also not proved. The Defence also argued that the police officers had an interest to serve in the matter and therefore the evidence required corroboration which was absent in the sense discussed in ***Emmanuel Phiri vs. the people***[5].Further, that an alibi was raised at the police station by A2, A3, A4 and A5 who stated they were nowhere near the scene of the crime at the time of the attack. It was submitted in this regard, that the arresting officer was duty bound to investigate the alibi which he did not do. The court was urged to resolve this lapse in favour of the accused.

It was argued further that it is requirement in criminal law for the State to show not only that an offence has been committed, but that the said offence was committed by the accused .The Defence contended that the State had failed to do so in this case as the persons who committed the offence are unknown.

Mr. Kasolo supplemented the submissions by referring the court to the case of ***Malolongo vs. the People***[6] in which the Supreme Court held that the failure to conduct an identification parade by the police amounted to a dereliction of duty to be resolved in favour of the accused. He argued further that the failure to lift fingerprints

which could have placed the accused at the scene of the crime if proved also amounted to a dereliction of duty. The case of ***Robertson Kalonga vs. the People***[7] was cited for the proposition as stated by the Supreme Court that:

"Failure to lift fingerprints is a dereliction of duty by police which raises a presumption that such fingerprints as they were did not belong to accused"

It was argued further that the evidence tested through cross examination revealed that the nature of the communication between A1, A2 and the alleged fugitives in this case was not disclosed. It was also suggested that there was fabrication of evidence by the police. In particular that the evidence of PW3 Mr. Simbeye indicated that a statement was taken from him on the 28th August 2016 in Ndola whilst the signature he appended on it indicated the statement was taken on the 14th of August 2016. Further that the arresting officer Mr. Shonga indicated that PW3 sustained a deep cut in the leg when in fact not. The case of ***Senseta vs. The People***[8] was relied on in support of the proposition that the fabrication of prosecution evidence is fatal to a prosecution case and must have the effect of weakening such a case.

Mr. Phiri summed up the Accused submissions and argued that the police having failed to obtain fingerprints, conduct an identification parade or obtain CCTV footage, it must be assumed that had they done so and produced this evidence, it would have

been favourable to the accused. The Kalebu Banda case Supra was cited in aid. Lastly the court was referred to the case of ***Phiri vs. The People.***[9] in which the Supreme Court held that the courts must act based on evidence before it and must not fill in the gaps by making assumptions adverse to the accused. It was submitted in reliance of this authority that this court cannot make assumptions of what the nature of the calls ware, nor that it was Fred Hamamba that was driving the abandoned vehicle at the scene of crime. It was conclusively counsel's prayer that the accused should not be placed on their defence and be acquitted accordingly.

In response the State rely on the case of the ***People vs. Principal Resident Magistrate ex parte, Faustine Kabwe & Aaron Chungu***[10] for the proposition that for the court to find a case to answer it must merely appear to the court that a case has been made out against the accused. It was Mr. Zimba's position in this regard, that such finding is based on the courts feeling or impressions and appearance of the evidence. Counsel submitted further that in terms of section 294 (1) of the Penal Code, the fact that there was more than I assailant in number and violence was used qualified the attack to be Aggravated Robbery. The case of ***Kabukala Abu Tambwe & Shafico Hachi v The People***[11] was used in aid of this proposition.

It was argued that there is undisputable evidence in the case at hand that there was more than one attacker. Further that evidence confirms that the personal items and ECZ materials were stolen by

the assailants. There was also uncontroverted evidence in his view that violence was used by way of use of pepper spray.

Counsel acknowledged that there was no direct evidence on the identity of the offenders. Reliance was therefore being placed on circumstantial evidence. In this regard, counsel submitted that an analysis of the Airtel call records (P12) the MTN call records (P14) and Bio data (P13) confirms there was communication between A1, A2 and the 2 named fugitives in close proximity to the commission of the offence and thereafter.

Further that, before the crime was committed, A1 is seen driving into the precinct of the crime scene in the company of one of the fugitives Mr. Siandenge and remained there. They leave the scene monetarily and return soon thereafter. They remain there and are only seen leaving after the crime is committed. They do not report any incident they told pw11 they had witnessed, to the nearest police station as promised. Counsel submitted further that following the commission of the crime, Hamamba's vehicle (P4) is found abandoned at the scene and Hamamba takes refuge and has not claimed the vehicle. Mr. Zimba invited the court to consider whether it can be argued that the initial communication between A1 and fugitive Hamamba and Mr. Siandenge with A2 had no connection with them being within the crime scene.

Mr. Zimba submitted further that the States position was that the parties communicated among themselves and agreed to meet at ECZ, monitor the movement of the ECZ motor vehicle and attack it

in order to steal the electoral material. He also urged the court to rule out as coincidence the parties being at the scene and the circumstances leading to the apprehension of the accused.

In response to arguments raised on the failure to hold an identification parade, the learned Principal State advocate submitted that the circumstances of the case rendered positive identification on impossibility. Conducting an identification parade in such circumstances would therefore serve no purpose and a failure by the police to conduct one did not amount to a dereliction of duty.

Counsel argued that the circumstantial evidence at hand in this case has attained the degree of cogency to permit only on inference of guilt as outlined in the case of ***David Zulu v the People***[12] (1977) ZR 151.Mr. Zimba further referred the court to section 22 of the Penal Code and the case of ***Mutambo & Five Others vs. the People***[13] (1965) ZR 15 to argue that there was common purpose disclosed on the facts and evidence before court. He concluded the State's submissions by stating that a prima facie case has properly been made against the accused.

The Defence filed in written submissions rather belatedly in which they more or less restated their earlier oral arguments. It was pointed out that the court should not consider the submission by the State that A1 was seen driving with Mr. Siandenge before they left and came back later as this was not supported by the evidence before court. Further that an inference of guilt was not the only one

possible based on the circumstantial evidence relied on which invariably must be resolved in favour of the Accused.

These were the submissions received from the parties.

I have considered the evidence led by the prosecution to this stage of the proceedings. I have also duly considered the elaborate submissions from both parties to whom I am indebted. The legal principles and considerations to take into account in establishing whether or not a prima facie case has been established are well settled. Both sides referred me to the appropriate authorities dealing with the subject. The starting point would be section 206 of the criminal procedure code which is expressed in the following terms

"206 If at the close of the evidence in support of the charge it appears to the court a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him"

The import of section 291(1) of the CPC which has provisions relating to trials before the High court is essentially the same. The court is required to make a finding at the close of the prosecution case whether or not based on the evidence led to that point a case is sufficiently made out to require an accused to make a defence.

The applicable test is the be found in the case of ***The People vs. Njapau*** [2] where it was held:

"A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved or when the prosecution evidence has been so discredited by cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it"

In Day vs. Regina [14], Spencer Wilkinson CJ concluded that the words "a case is made out sufficiently to require him to make a defence" cannot be equated with "a case sufficient to warrant a conviction". This quote aptly reflects the unquestionable legal position that there is no need to establish the case has been proved beyond reasonable doubt at this stage. In the ***PRACTICE NOTE (2)*** published in 1962[15] Lord Parker CJ settled the principle that if a reasonable tribunal can convict on the evidence so far laid before it then there is a case to answer and a court is entitled to put an accused on his defence.

If on the other hand at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficient to require him to make a defence, the court should dismiss the case and acquit the accused.

In Mwewa Moreno vs. the People[1] the Supreme Court stated that the provisions of section 206 and 291 of the CPC are mandatory and if an accused were to be convicted as a result of an error of the trail court in thinking there is a prima facie case then the conviction cannot stand.

Taking the above into consideration, the ingredients for the offence of aggravated robbery as prescribed under section 294(1) require the State to establish that:

1. A person armed with an offensive weapon or instrument,

2. or being in the company of with one person or more,

3. steals anything,

4. and at the time of such stealing either immediately before or after uses or threatens to use violence,

5. in order to overcome resistance of the item being stolen or retained.

From the above it can be discerned that the offence can be committed by a person acting alone whilst armed with an offensive weapon or instrument or acting in the company of another or more, use or threaten to use violence in the process of stealing something from a victim to ensure their mission to steal is accomplished.

Based on the evidence led so far I find that it is not in dispute that on the morning of the 14th of August 2016, Roy Kuseka (PW1) Elina Nyirenda (PW2), Emmanuel Simbeye (PW3) and PW5 Enoch Chitambala were the victims of an attack between City Airport and the ECZ car park. I find that there is evidence of the victims having been sprayed with substance that was intended to overcome resistance and that in the process some personal effects, money and election materials as specified in the Information before court were stolen by the assailants. I have no difficulty in finding that there was more than one player in the attack and that violence was

used in the process of stealing the named items from the victims within the meaning placed in section 294(1) of the Penal code. The only question that falls for my determination is whether a prima facie case has been established to suggest that the Accused were part of the assailants either directly or by common purpose as contended by the State.

From the outset, there are a number of arguments that were raised by the Defence in their submissions that I must dispel. The Defence suggest that the investigation in this matter was discriminatory on account of PW6's evidence in cross examination to the effect that he would have arrested any UPND member he found near the scene and secondly, also because of the arresting officer's admission that he did not investigate all the numbers that the suspects communicated with on the day of the attack.

There is nothing in the evidence as I see it that suggests any such discrimination. PW6 explains that that his basis for targeting UPND members was the information he received that it was suspected cadres from the named political party that were involved in the attack. In addition, it would be rather ambitious in my view, to expect the arresting officer to have cast his net so wide to investigate all the numbers in the call records under the circumstances of this case when he had a targeted audience he felt was connected to the crime. An argument on inconclusiveness of the investigation would have been perhaps the more appealing than

the suggestion of discrimination which I find no evidence of in the facts before me.

Another argument raised by the Defence was that the officers in this matter had an interest to serve hence requiring corroboration of their evidence. I disagree. I find nothing in the evidence led so far to suggest that any of the officers involved in this case fell in the category of witnesses who might have an interest to serve or motive of giving false testimony. The requirement for corroboration therefore does not arise in this case nor is there any need for me to warn myself on any danger of relying on their evidence.

Thirdly, the Defence suggests that there was false testimony given about precisely when the witness statement was taken from PW3 and also regarding the extent of the injuries sustained. I find that the reasons for the discrepancies was sufficiently explained both by PW3 himself and the arresting officer who indicated that a number of statements had to be obtained from the witnesses on account of the fact that he could not get detailed ones from them on the day of the attack.

It was also suggested that the failure by the police to conduct an identification parade was a dereliction of duty which ought to be resolved in favor of the accused. I agree with the State that the evidence disclosed and circumstances of this case were such that there was no opportunity for identification of suspects. All the witnesses involved during the attack testified that the invasion happened very quickly and that they were sprayed with a substance

they suspected was pepper spray so they did not have the opportunity to observe their assailants. It was indeed never their contention during trial that they were able to identify the assailants. It was not necessary in the circumstances to have a parade and as such I find that the failure to hold one cannot amount to dereliction of duty in this case. I am also not prepared to find that there was a dereliction of duty to avail the CCTV footage for the simple reason that the evidence before me is that the coverage did not extend to the ECZ car park and the scene of crime.

That said, the question remains what evidence is there to connect the accused to the crime? The State concedes there is no direct evidence implicating the accused and that the case rests on circumstantial evidence. The principle laid down in the ***David Zulu*** case cited by the State has been restated by the Supreme Court in several cases over the years but more recently in the case of ***Saidi Banda v The People***.[16] In this case the Supreme Court stated:

"We however wish to restate the law as regards circumstantial evidence by adding that this form of evidence, notwithstanding its weakness as we alluded to in the David Zulu case, is in many instances probably as good, if not even better than direct evidence."

The court went on to adopt the passage by Lord Heward, Chief Justice of England in **PL Taylor and Other v R**, where at page 21 he states;

"It has been said that the evidence against the applicants is circumstantial; so it is, but circumstantial evidence is very often the

best. It is evidence of surrounding circumstances which by undesigned coincidences is capable of proving a preposition with the accuracy of mathematics."

The Supreme Court went on to state that:

"In order for circumstantial evidence to be relied upon, the circumstances from which the inference of guilt is to be drawn must be cogently and firmly established. These circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else."

There is no question therefore, about the admissibility of circumstantial evidence and how effective it is subject to meeting the test laid out by the Supreme Court. In applying that test to the case before me firstly as against A3, A4, and A5, the evidence led was that they arrived at the ECZ car park premises on the 14th of August 2016 in the company of A2 who was driving the vehicle they were in. The police officers present at the scene became suspicious that they were part of the group that attacked and robbed the ECZ officials because of their demeanour and the fact that they were looking at the abandoned Toyota mark 11 exhibited (P4) from where they parked. The 3 were also in the company of A2 whom the telephone records confirm had communicated with the now at large, Mr. Siandenge. The question is, does this association and their presence at the scene take the case out of the realm of conjecture and lead to the inescapable conclusion that they were possible accomplices in the attack?

It is not in dispute that they arrived after the crime had taken place. PW 6, PW11 and the arresting officer Assistant Superintendent Siame concede to this fact in cross examination. Furthermore, the defence raised an alibi when cross examining the arresting officer who admitted that A3, A4 and A5 stated that they were at some other place when the attack was taking place. The officer also admitted he did not investigate or follow up the alibi. In ***Katebe v The People*** ,[17]the Supreme court held 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 and that there is no onus on the accused person to establish his alibi. The court further held that it is a dereliction of duty for an investigating officer not to make a proper investigation of an alleged alibi.

The failure by the investigator to negative the alibi in this case and the fact that it was conceded in his evidence that A2, A3 and A5 arrived after the attack creates a doubt in my mind about their involvement in the crime. The telephone records confirming communication between A2 and Mr. Siandenge remain just that, notably, communication between the 2 and does not cumulatively considered with other evidence tend to implicate A3, A4 and A5 in any material sense.

I have also noted from the evidence that A2, A3 and A5 were not found with either the stolen items or spray canister that was used in the attack. I cannot in the circumstances draw any inference of their involvement in the aggravated robbery and I resolve the

lingering doubt created in their favour. I therefore find that A3, A4 and A5 have no case to answer and I acquit them and set them at liberty forthwith.

I now turn to consider the evidence against A1 and A2.The State contend that the accused culpability is determined by the doctrine of common purpose as set out in section 22 of the penal code Cap 87 of the Laws of Zambia. For ease of reference Section 22 of the Penal Code provides that:

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

The Supreme Court had occasion to consider the effect of the section in the case of ***Winfred Sakala v The People[18]*** in which it held that

" the section 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 these confederates have done is a probable consequence of the prosecution of unlawful common design. In this regard, liability will attach for any confederates criminal act which is within the scope of the common unlawful purpose and this will be so whether the act was originally contemplated or not. Where the act was not originally contemplated, an adventurer will only be relieved of liability if the criminal act of his confederates fails wholly outside the common purpose."

In this case before me, I find that the perpetrators of the crime had formed a common intention to target an ECZ vehicle to steal ECZ electoral materials. PW5 Enoc Chitambala stated that the attackers specifically demanded for ballot papers they alleged he was carrying in the vehicle he was driving. I also find the use of force and subsequent theft of the victim's property and money was the probable consequence of the mission which was to steal.

There is however as I have said, no direct evidence of any of the accused having been a part of that group although they could in theory be held liable for the offence even though they did not physically take part in the attack. Such evidence would be for instance the revelation that they took part in the planning or co-ordination of the attack. The State point to circumstantial evidence to establish this connection and in particular refer to the following.

1) *A1's presence at the ECZ car park whilst in the company of Mr. Siandenge who is reportedly on the run.*

2) *A1's phone call to Fred Hamamba shortly before the time the offence is known to have happened.*

3) *The communication between Siandenge and Hamamba on the day of the attack.*

4) *The further communication between Mr. Siandenge and A2 on the day of the attack and A2's appearance and circumstances surrounding his apprehension at the ECZ car park.*

5) *The fact that the abandoned Toyota Mark II turned out to be Hamamba's who is also now reportedly on the run.*

6) *The representation that A1 made about the BMW parked at the ECZ car park to PW11*

7) *The fact that no report was ever made to any police station about the attack by A1 and fugitive Siandenge as indicated they would to PWII at the time he confronted them.*

The State argues that these factors taken commutatively should lead the court to infer that A1 and A2 were involved in the commission of the offence charged. In essence that A1 and A2 were at the vicinity to monitor an orchestrated attack on an ECZ vehicle to steal election material. The question I ask myself is, can this be the only inference that I can possibly draw?

It is not in dispute that A2 arrived at the scene after the occurrence of the crime in the company of A3, A4 and A5.He, like A3, A4 and A5 raised on alibi which was not followed through by the arresting officer. The only evidence implicating A2 is therefore the phone call that was made to him by Siandenge on the day of the attack and that he was apprehended within the vicinity of the crime where he apparently displayed arrogance to the police and unusual courage in parking next to a police vehicle whilst looking on at the abandoned Mark II according to PW6 AND PW11.

There was no evidence adduced on what the nature of the communication with Mr. Siandenge was, and there is nothing to

rebut the alibi that was raised by A2. Both PW6 and PW11 who were involved in his apprehension confirm the vehicle he was driving arrived after the attack. There is no evidence to show he was a part of the robbers nor were any of the stolen items found on him. The Fact that A2 displayed arrogance or unusual courage in parking next to the police as contended by PW6 and PW11 cannot, even when considered with other available evidence lead me to the conclusion he was involved in the crime. I do not in such circumstances believe a reasonable tribunal could in the event of the A2 electing to remain silent convict on the basis of the evidence led against him so far and I must resolve the resulting doubt created in his favour.

Turning to A1, I find as a fact that he was at the ECZ car park in the company of former Commissioner of police Siandenge on the 14th August 2016. I also find as a fact that he called Fred Hamamba prior to the attack on the 14th August 2016. The nature of that communication is unknown. The arresting officer acknowledged in cross examination that he did not lift fingerprints from Hamamba's abandoned vehicle at the scene. There was further no evidence led by the State confirming who the owner of the phone recovered from the vehicle was or importantly, that it belonged to Hamamba. In the absence of such evidence, there is nothing conclusive to suggest that Hamamba was driving the vehicle himself or that he was in the vehicle. The Court of Appeal in the case of ***Phiri v The People***[9] cited by the defence observed that:

"The courts are required to act on evidence placed before them. If there are gaps in the evidence, the courts are not permitted to fill them by making assumptions adverse to the accused."

I cannot in these circumstances assume that Hamamba was at the scene of crime or that he was communicating with A1 and Siandenge from there in furtherance of the aggravated robbery. I take judicial notice of the fact that on the 14th of August 2016, the country was awaiting the Presidential election results. As such I find that there was nothing strange about representatives from political parties and other stakeholders being found at the ECZ premises to monitor the announcement of results or attend to others elections related business.

PW8 a guard from Magnum Force on duty at ECZ testified that A1 had in fact approached the ECZ main entrance on that date and asked if his party president Mr. Hakainde Hichilema had been there. Furthermore, PW11 also acknowledged in cross examination that there were several cars that were parked in the car park belonging to different people on the day. It is therefore possible to infer that A1 was at the ECZ car park pursuing elections related business being a known politician himself.

Evidently from the above discourse, it is possible to draw more than one inference from the facts and as a consequence I am not satisfied that the evidence led implicates A1 in a manner that points to nothing else but his guilt.

In the case of ***Mutale and another v The People*** [19] the Supreme Court restated the now firmly established principle in the criminal law that

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

I see nothing in the evidence before me to exclude the inference, favourable to the accused. I also find that the arresting officer's evidence was discredited in material respects particularly the reservations he expressed about the culpability of the accused for the offences charged. He also acknowledged not following through raised alibis or lifting fingerprints even where it was possible to do so.

In sum therefore and for the avoidance of doubt I find that the State has not established a case sufficiently to warrant the court to put A1 and A2 on their defence and I acquit them and set at liberty forthwith. The State is informed of its right of appeal.

Dated at Lusaka the 8th day of August 2017

M.D. BOWA
JUDGE.