

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

HP/44/2018

THE PEOPLE

V

**BRYSON MIZINGA
COSTA MIZINGA**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26th DAY OF MARCH,
2018**

For the State : *Mr F. Sikazwe, State Advocate, NPA*

For the Accused Persons : *Mrs M. Mushipe with Ms T. Wamukwamba,
Mushipe and Associates*

R U L I N G

CASES REFERRED TO:

1. *Patel V The People* 1969 ZR 132
2. *Mutale V The People* 1973 ZR 25
3. *Nkole V The People* 1977 ZR 35
4. *Randee and Portee* 92.CR.APP.R.322

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
2. *Archbold 43rd Edition*

The two accused persons stand charged with two counts. In the first 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 Bryson Mizinga and Costa Mizinga on 18th April, 2017, at Lusaka in the

Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, and being armed with offensive weapons namely knives, did steal 1 Nokia cell phone, car keys and K340.00 cash, altogether valued at K490.00, the property of Ackim Nkhoma, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Ackim Nkhoma, in order to obtain or retain or prevent or overcome resistance to the items being stolen or retained.

In the second count the offence is unlawful wounding contrary to Section 232 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that Bryson Mizinga and Costa Mizinga on 18th April, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together and being armed with offensive weapons namely knives, unlawfully wounded Samuel Njobvu.

Both accused persons denied the charges, and when the matter came up for trial on 14th March, 2018, Counsel for the accused persons Ms Mukwamba applied that the two counts be separated as they were wrongly before the court. It was her submission that the second count that is triable by the Subordinate Court, should be tried by the Subordinate Court, and she relied on Section 135 (1) of the Criminal Procedure Code (CPC), as authority. That the said provision states that all offences whether felonies or misdemeanours may be charged in the same indictment if they are founded on the same facts or on part of a series of conduct of a similar character.

Further that Section 135 (3) of the said CPC the court is empowered at any stage of the proceedings if it is of the opinion that a person may be embarrassed in his defence by reason of being charged with more than one offence in one charge or information, or that for any other reason it is desirable that a person is tried separately for one or more offences in a charge or information, to order a separate trial.

Ms Mushipe submitted that at the time the accused persons were appearing before the Subordinate Court they were charged with aggravated assault and the record of those proceedings had not been availed to them. That the accused persons had been committed to this court for the offence of aggravated robbery and unlawful wounding, when it was clear that the offence of unlawful wounding is triable by the Subordinate Court. It was submitted that it was the contention of the defence that the indictment in this matter was bad and defective, as it prejudiced the constitutional rights of the accused persons.

That this was on the basis that firstly, the charge upon which the accused persons were indicted was different from that contained in the certificate of committal as well as the information. Secondly that the accused persons had been charged with a capital offence triable by this court, as well as another offence that is triable by the Subordinate Court. That if trial in the matter proceeded on the basis of that indictment, it would contravene Article 118 2 (a) (b) (c) and (e) of the Constitution.

Further in the submissions, it was stated that Article 18(7) of the Constitution is mandatory with no exception, and that the accused persons had a right to a fair trial. To this effect the case of **MUTALE V PEOPLE 1973 ZR 25** was relied on where the Supreme Court held that where an indictment is bad at law, the accused persons ought to be discharged or the offence indicted ought to be quashed. It was also stated that the information before the court was an abuse of court process, and the case of **NKOLE V THE PEOPLE 1977 ZR 35** was relied on stating that in that case it was held that in framing charges, the accused persons should be charged under correct sections of the law as it results in embarrassment to the accused person.

That pursuant to Article 118 of the Constitution, and the case of **PATEL V PEOPLE 1969 ZR 132**, the accused persons in this matter would be prejudiced and embarrassed in their defence as the information was irregular as it was amended without seeking the court's leave and from the Subordinate Court, and before committal the offences should have been severed or

separated. That the failure to give the accused persons the amended information had resulted in their failure to prepare for trial.

The case of **RANDEE AND PORTEE 92.CR.APP.R.322** was also referred to, submitting that in that case it was held that where an objection to an indictment was made on the ground of abuse of court process, the indictment must be quashed, and proceedings stayed. Further reference was made to Page 13 of **Archibold 43rd Edition**, and it was submitted that it is stated on the said page that indictments can be quashed if defective.

That in this case if the court proceeded with trial on the information in its current form, the offence of unlawful wounding would not be appealable to this court but to the Court of Appeal. It was prayed that the information be quashed for being bad and defective at law.

In response, Mr Sikazwe on behalf of the State submitted that contrary to arguments by the defence, the information before the court was not bad or defective. That the cases relied on by Ms Mushipe had given examples of bad indictments as those that did not disclose an offence or the law pursuant to which the charge had been brought, yet she had gone ahead to submit that the information in this matter was bad, as it disclosed an offence and the law had been cited.

As regards the submissions pertaining to the irregularity of the information before the court as it was amended before seeking leave of the court, Mr Sikazwe stated that there had been no amendment. That the CPC is clear on the procedure, and the Director of Public Prosecutions (DPP) issued a certificate of committal, and the accused persons were committed to the High Court. It was further submitted that Section 257 (2) of the CPC empowers the DPP to amend, alter, and include any offence disclosed by the facts.

With regard to the arguments that the accused persons will be prejudiced and embarrassed if the trial proceeds on the current information, it was stated that the defence had not demonstrated the said embarrassment or prejudice that

the accused persons would suffer. On the aspect of adequate preparation for trial, Mr Sikazwe stated that this could not be raised as Section 135 of the CPC allows for offences whether felonies or misdemeanours to be charged in the same charge if the said offences are part of the same series or are of a similar character. That in this case the two accused persons had been arraigned on an information which was founded on the same facts.

Therefore, the application was an attempt to derail the process and was frivolous and vexatious and lacked merit. Mr Sikazwe stated that the High Court has original and unlimited jurisdiction and the argument that the information was an abuse of court process could not stand as the accused persons were committed to the High Court, and the information was prepared, filed and served on the accused persons, and they were appearing before a competent court. Their rights as enshrined in the constitution had not been infringed, and they were entitled to a speedy and fair trial, and the State was ready to conclude the trial within the shortest possible time. He prayed that the application be dismissed, and that the trial commences.

In reply, Ms Mushipe submitted that they reiterated that procedure ought to be followed as the accused persons were charged with aggravated assault and they appeared before the Subordinate Court for explanation of the said charge. Therefore, it was procedurally improper for the State without amending the charge to issue a committal certificate for aggravated robbery, and that was their bone of contention. Further that the case of unlawful wounding should have been severed and tried before the Subordinate Court and the case of **HAKAINDE HICHILEMA** was authority as he was charged with treason and other offences of use of insulting language and not abiding by the road rules. That Magistrate Malumani had severed and separated the offences triable by the High Court from those triable by the Subordinate Court. It was also submitted that as the State did not follow procedure in this matter, there was prejudice that had been occasioned to the accused persons.

I have considered the application. The issue for determination before me is whether the trial in this matter can be had on the indictment before me. The contention by the defence was that firstly the accused persons appeared before the Subordinate Court charged with the offence of aggravated assault but were committed before this court for the offence of aggravated robbery without leave of the court being sought to amend the charge. Secondly, the question is whether the offence of unlawful wounding which is triable by the Subordinate Court should be tried by this court.

The argument by the State as already seen was that the High Court has original and unlimited jurisdiction to hear and determine criminal matters, and therefore the information is properly before the court, and that Section 135 of the CPC provides that offences be they felonies or misdemeanours can be charged in one indictment or information if they are founded on the same facts or form a series of conduct.

Section 135 of the CPC states that;

“135. (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge of or information if the offences charged are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.”

Further Section 136 of the said CPC states that;

“The following persons may be joined in one charge or information and may be tried together, namely:

(a) persons accused of the same offence committed in the course of the same transaction;

- (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;**
- (c) persons accused of different offences committed in the course of the same transaction;**
- (d) persons accused of any offence under Chapters XXVI to XXX of the Penal Code and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit either of such last-named offences;**
- (e) persons accused of any offence relating to counterfeit coin under Chapter XXXVII of the Penal Code, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence.”**

The High Court derives its jurisdiction from the Republican Constitution as amended by Act No 2 of 2016. Article 133 of the said Constitution establishes the High Court, and Article 134 sets out the jurisdiction of the High Court. It states that;

“The High Court has, subject to Article 128—

- (a) unlimited and original jurisdiction in civil and criminal matters;**
- (b) appellate and supervisory jurisdiction, as prescribed; and**
- (c) jurisdiction to review decisions, as prescribed.”**

Article 128. of the Constitution of Zambia Act No 2 of 2016 provides that;

“(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

- (a) a matter relating to the interpretation of this Constitution;**

- (b) a matter relating to a violation or contravention of this Constitution;***
- (c) a matter relating to the President, Vice-President or an election of a President;***
- (d) appeals relating to election of Members of Parliament and councillors; and***
- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.”***

Therefore the High Court has original and unlimited jurisdiction to hear any criminal matter subject to Article 128 of the Constitution. Section 11 of the CPC sets out the offences triable only by the High Court. It provides and I quote;

“11. (1) The Chief Justice may, by statutory notice, order that any class of offence specified in such notice shall be tried by the High Court or be tried or committed to the High Court for trial by a subordinate court presided over by a senior resident magistrate only Cases to be tried only by High Court

(2) No case of treason or murder or of any offence of a class specified in a notice issued under the provisions of subsection (1) shall be tried by a subordinate court unless special authority has been given by the High Court for such trial.”

The offences listed in the notice issued under Section 11 (1) of the CPC are as follows;

- “1. This Order may be cited as the Offences to be tried by the High Court***
- 2. The classes of offences specified in the Schedule hereto shall be tried by the High Court:***

Provided-

- (i) *that where the accused is a juvenile, and the case is required to be disposed of in accordance with the provisions of section sixty-five of the Juvenile Act, this Order shall not apply; and*
- (ii) *that this Order shall not apply in respect of offences committed prior to the 23rd day of March, 1973. Cap. 99*

SCHEDULE**(Paragraph 2)**

Offence	Section of the State	
	Security	Act
Contravened		
Espionage		3
Communication of certain information		4
Protection of classified information		5
Unauthorised use of uniforms, passes, etc.		6
Interfering with persons on guard at protected places		7
Harbouring		8
Attempted espionage		9

As can be seen from the marginal note to Section 11 of the CPC, it refers to offences that only the High Court can try. It follows therefore that the High Court has original jurisdiction to try any criminal offence as prescribed by Article 134 of the Constitution of Zambia Act, and it is the Subordinate Court that has limited jurisdiction in criminal matters. It consequently follows that where one or more offences be they felonies or misdemeanours are charged in an information before the High Court, such an information is competently before the court as the High Court has power to try those offences.

In this case the offence of aggravated robbery is not triable by the Subordinate Court while the offence of unlawful wounding is, and Mr Sikazwe submitted that these two offences arose out of the same facts, which fact was not disputed by the Defence. If anything trying both offences before the High Court would not prejudice the accused persons because if they were to be found guilty of both offences, they would in line with the principles of sentencing be sentenced to terms of imprisonment that would concurrently which would not be the same if the Subordinate Court were to try the offence of unlawful wounding, as the sentences would be determined by each Court.

As rightly submitted by Mr Sikazwe, the prejudice and embarrassment alleged by the Defence was not demonstrated. Had the charge against the two accused persons been only unlawful wounding, there would have been merit in having the offence tried by the Subordinate Court, as it is an offence that the court can try. Further, the reliance on the decision by the Magistrate to sever the charges triable by the High Court from those triable by the Subordinate Court cannot stand as the Subordinate Court had no jurisdiction to try treason going by Section 11 of the CPC. To the contrary the High Court has such jurisdiction, and I find that the information before me is neither bad nor defective, and the preliminary issues raised shall fail, and trial shall proceed on the information before the court.

With regard to the arguments that the information was amended without the leave of the court, Section 257 of the CPC states that;

“257. (1) The Director of Public Prosecutions may, after receipt of the authenticated copy of the record in a summary procedure case as aforesaid, draw up and sign an information in accordance with the provisions of this Code, which shall be filed in the Registry of the High Court.

(2) In such information the Director of Public Prosecutions may alter or redraft the charge or charges against the accused person or frame an additional charge or charges against him.”

Going by this provision, the DPP has power to alter or redraft the charge against an accused person or even frame additional charges after a certificate of committal is issued, and there was therefore nothing improper or irregular in reframing the charges preferred against the accused persons in this matter after they were committed to the High Court for trial, and the preliminary issue raised on that basis will equally fail, and trial in this matter shall accordingly proceed.

Delivered In Open Court at Lusaka the 26th Day of March, 2018



S. KAUNDA NEWA
HIGH COURT JUDGE