

HOLDEN AT NDOLA

(Criminal Jurisdiction)

EDWARD PHIRI & RABBISON BANDA

Appellants

Vs

THE PEOPLE

Respondent

Coram: Bweupe, Acting Chief Justice, Sakala and Chaila, JJS.

8th December, 1993

Mr. H.J. Silva, Senior Legal Aid Counsel, for both appellants.

Mr. R.O. Okafor, Principal State Advocate, for the respondent.

J U D G M E N T

Sakala JS delivered the judgment of the court.

The two appellants were convicted of ordinary robbery contrary to Section 292 of the Penal Code. Initially, they were charged with aggravated robbery. The particulars of the charge initially were that the appellant and the two co-accused on 20th May 1989 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together robbed Joseph Yotam Bwanali, Darius Mwachifumpa and Musialela Mwiya a number of various items among them electrical, the property of Zambia Philips Electrical Limited and used force at the time of the robbery. During the trial one co-accused escaped from lawful custody while another died.

Briefly the case for the prosecution was that on the 19th of May 1989, PWS 1, 2 and another were on guard duties at Phillips Electrical Premises in the light industrial area in Lusaka when intruders entered the premises and handcuffed them using telephone cables and tied their legs using their coats and bundled them into a vehicle. The matter was subsequently reported to the police. Upon investigations by the police a number of stolen items were recovered some from the shops where the items were sold and some from the suspects' houses where they were kept. The investigations a year later through informers led to the apprehension of the appellants and their co-accused..

The fact that there was a robbery at Phillips Electrical was common cause.

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The first appellant denied on oath being involved in the robbery. The second appellant remained silent in his defence.

The learned trial Commissioner correctly identified the issue to be whether the two appellants were linked to the robbery as there was no direct evidence against them. The learned trial Commissioner found then that the warn and caution statement by the first appellant, as admitted, was free and voluntary after a trial, connected him to the offence although he denied it on oath. As regards the second appellant, the court found that he was linked to the offence by the circumstantial evidence of his arrest and the confession statement by the first appellant. The learned trial Commissioner further considered whether violence was used at the time of the offence. She found that there was no violence used and that the offence of aggravated robbery had not been proved and convicted the appellants of the offence of robbery contrary to Section 292 of the Penal Code and sentenced them to seven years imprisonment with hard labour.

On behalf of both appellants Mr. Silva submitted that there was one major ground against both convictions. The ground according to Mr. Silva is that there was no evidence linking the two appellants to the charge of aggravated robbery. Submitting on the case against the first appellant he contended that his warn and caution statement which incriminated him as participating in the offence was not evidence although accepted after a trial within a trial. He pointed out that although the warn and caution statement was admitted after the trial-within-a-trial there was, subsequently, in the main trial evidence given by the Principal Clinical Officer to the effect that he treated the first appellant of head injuries. He submitted further that there was no other evidence against the first appellant and that it was highly unsafe to convict him on the confession alone. As regards the second appellant he submitted that there was no evidence at all except a reference to him in the Warn and Caution Statement by the first appellant. He pointed out that it was a fundamental principle of the law of evidence that unsworn statement of an accused cannot be used against a co-accused. Mr. Silva pointed out that although the learned trial Commissioner did not indicate of circumstantial evidence against the second appellant, these circumstances were not spelt out in the judgment. He submitted that for these reasons the convictions were unsafe. He also pointed out that although the evidence of the Clinical Officer came at the end of the trial-within-a-trial, the learned trial Commissioner

never referred to it in her judgment.

On behalf of the State Mr. Okafor informed the court that the State was not supporting the convictions. As regards the first appellant he pointed out that the Warn and Caution Statement would not in this circumstances justify a conviction as it was not shown to be voluntary. As regards the second appellant he submitted that there was absolutely no evidence against him linking him to this offence. He also pointed out that PW6 the investigating officer's information from his informer who did not give evidence was not evidence at all.

We have very carefully considered the evidence on record and the judgment of the learned trial Commissioner as well as submissions by both learned counsel. A number of things went wrong in this case. In the first place the evidence clearly disclosed that there was violence but the learned trial Commissioner found that there was no violence and subsequently convicted the appellant of the offence of robbery. The Warn and Caution Statement of the first appellant although admitted in the trial-within-a-trial should have been considered again in the main judgment after there was evidence on record of the alleged injuries. This the learned trial Commissioner did not do. Further the evidence of the Warn and Caution Statement by the first appellant was no evidence at all against the second appellant. We agree with Mr. Okafor that in both cases there was no evidence whatsoever linking the appellants to this offence. For the foregoing reasons, we find it unsafe to uphold these convictions. The convictions are quashed, the sentences are set aside, both appellants stand acquitted.

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B.K. Bweupe,
ACTING CHIEF JUSTICE.

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E.L. Sakala,
SUPREME COURT JUDGE.

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M.S. Chaila,
SUPREME COURT JUDGE.