'IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.81 and 83 of 1993

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

B E T W E E N :

GODFREY M. NGOMA	1ST APPELLANT
BUPE MWABA	2ND APPELLANT
Vs	
THE PEOPLE	RESPONDENT

Coram: Sakala, Chaila and Muzyamba, J.J.J.S.
5th October, and 2nd November, 1993

For the Appellants : S.W. Chirambo, Senior Legal Aid Counsel

For the Respondent : E. Sewanyana, Assistant Senior State Advocate

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J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court

The appellants and one Teddy Chaya were charged with and tried for the offence of aggravated robbery contrary to Section 294(1) of the Penal Code, Cap.146 of the Laws of Zambia. At the conclusion of the trial Teddy Chaya was acquitted but the appellants were convicted of ordinary robbery contrary to Section 294 of the Penal Code, Cap. 146 and each sentenced to 15 years imprisonment with hard labour.

The particulars of the offence are that Godfrey M. Ngoma, Teddy Chaya and Bupe Mwaba, on the 13th day of September, 1991, at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together and whilst being armed with an offensive weapon, namely a pistol did rob Patrick Ngosa of K1,200 cash and at or immediately before or immediately after the time of stealing the said property did use or threaten to use actual violence to the said Patrick Ngosa in order to obtain the said property.

They appealled against conviction only.

The brief facts of this case are that on 13th September, 1991 between 22.00 and 23.00 hours the complainant, who was prosecution witness number 2, met three men on his way home from BPT tavern and robbed of K1,200. One of the three men pointed a gun at him and ordered him to empty his pockets and put the contents down while the other two stood at a distance of three metres away and said nothing. He emptied his pockets and put K1,200 down. Then one of the two men, black in complexion picked it up. He was then told to run away. He ran to the tavern and reported to PW.1 Joseph Nkole Mutamba and others who had earlier on received a similar complaint from another man and woman that they were robbed of K1,000 by men posing as Police Officers. Then the complainant, PW.1 and others decided to go and apprehend those people. They went and apprehended the first appellant. The other two ran away but were subsequently arrested and charged.

At the hearing of this appeal we allowed the appeal in respect of the second appellant and dismissed the appeal in respect of the first appellant and said we would give reasons later. We now give those reasons.

Mr. Chirambo argued the appeal on two grounds, first that the learned trial judge erred in law and misdirected himself in finding that the complainant was consistent in his story that he was robbed of K1,200 and that his evidence was quite plausible. He submitted that when the complainant reported to PW.1 that he was attacked, he did not say that his money was stolen. That he later concocted a story that his money was stolen. That since the appellant was not consistent in his story there was no theft and no robbery. He further submitted that the prosecution witnesses contradicted themselves on material issues. That whereas PW.1 said that when they went to the scene they found only one person namely the first appellant, PW.2 said that they found three people, apprehended one and

that the other two ran away. Further, that whereas the complainant said that when the first appellant was searched at the Police Station he was found with a National Registration Card, torch, handcuffs and a gun the arresting officer PW.4, Const. Kenneth Chihana did not say that anything was found on the first appellant. He argued that these contradictions were serious and should have been resolved in favour of the appellant.

In reply Mr. Sewanyana indicated that he did not support the conviction in respect of 2nd appellant. As for the first appellant he submitted that the evidence in support of the conviction was overwhelming. That the fact that the complainant did not tell PW.1 that his money was stolen did not amount to inconsistence.

We entirely agree with the course taken by Mr. Sewanyana by not supporting the conviction against the 2nd appellant because although the second appellant was present at the scene of crime he did not take part in the robbery. He just stood by. This is quite clear from the evidence of the complainant at page 6 of the record that the person who picked the money was black in complexion whereas the second appellant is brown in complexion. In our view, mere presence at a scene of crime without participation in the commission of the offence is not enough to found a conviction. It was for this reason that we allowed the appeal against conviction in respect of the second appellant.

With regard to the first appellant, we do not accept Mr. Chirambo's submission that the complainant was inconsistent in his story that money was stolen from him and that the learned trial judge misdirected himself on this issue. Although the complainant did not tell PW.1 that his money was stolen he told the Police, when they took the first appellant to the Police Station, in the presence of PW.1, that K1,200 was stolen from him. He repeated this to the arresting Officer, PW.4. Therefore the fact that, as rightly put by Mr. Sewanyana, he did

tell PW.1 that his money was stolen did not amount to inconsistence nor did it weaken the prosecution case.

We do not also accept Mr. Chirambo's submission that there were serious contradictions in the prosecution case. In our view, whether or not the first appellant was searched at the Police Station and found with some items or none at all and whether or not the appellant was alone when he was apprehended is immaterial. What matters is that he was identified and apprehended at the scene. Infact it is for this reason that Mr. Chirambo abandoned the third ground of appeal that there was no identification parade conducted by the Police.

Second, Mr. Chirambo argued that failure by the prosecution to call Mr. Sango Chama as a witness amounted to dereliction of duty on the part of the Police and that it must be assumed that if he had been called he was going to give evidence favourable to the appellant. We do not see how the omission to call Sango Chama as a prosecution witness amounted to dereliction of duty because in his evidence the first appellant said that Sango Chama left a paper bag at his house containing a gun, vegetables and fish and that he was apprehended by PW.1 and PW.2 on his way taking these items to Chama's house. This was a question of credibility and the learned trial judge rejected his explanation and in the light of the prosecution evidence on record we can not say that he was in any way wrong in his conclusion. We therefore agree with Mr. Sewanyana that the conviction of the first appellant was amply supported by evidence and it was for this reason that we dismissed his appeal.

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E.L. SAKALA	M.S. CHAILA	W.M. MUZYAMBA
SUPREME COURT JUDGE	SUPREME COURT JUDGE	SUPREME COURT JUDGE