IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.115 OF 1993

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

SEASON SIWALE APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Gardner, Chirwa and Muzyamba, J.J.J.S.

4th November, 1993 and 7th December, 1993

For the Appellant : M.H.A. Samad, Senior Aid Counsel

For the Respondent : L. Muuka, 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.

Case referred to:

1. Lumangwe Wakilaba V The People SCZ Judgment No.4 of 1979

The appellant and Richard Ngoma were jointly charged with aggravated robbery Contrary to Section 294 (1) of the Penal Code, Cap. 146. Richard Ngoma escaped before trial commenced and the appellant was tried separately and convicted and sentenced to 20 years imprisonment with hard labour.

The particulars of the offence were that Richard Ngoma and Season Siwale, on 18th January, 1992 at Nakonde in the Nakonde District of the Northern Province of the Republic of Zambia, jointly and whilst acting together did steal 20,000 Tanzanian shillings in cash, the property of Robby Simbeye and at or immediately before or immediately after the time of such stealing did use actual violence to the said Robby Simbeye.

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He has now appealed to this court against both conviction and sentence.

Briefly the prosecution case was that on 18th January, 1992 around 19.00 hours the complainant was travelling on foot from Chiyanga to Chindi village to spend a night there. As he was about to cross a railway line he was attaked by the appellant and Richard Ngoma. They beat him up, handcuffed him and searched his pockets and took 20,000 Tanzanian shillings in cash. After that they removed the handcuffs and told him to go away and not to look behind or else they would shoot him. He went away and reported the matter to his brother and later to Tazara Police. The same night the appellant and Ngoma were arrested and searched and each found with 7,000 shillings. In addition, a pair of handcuffs was found in the appellant's house.

The defence by the appellant was that it was Richard Ngoma who searched the complainant and took his money. That the 7,000 shillings found on him was part of 10,000 shillings he realized from the sale of his 30 by 90 kilogrammes bags of maize. That he was beaten up and forced to admit the charge.

It is common cause that the appellant and complainant knew each other before and there was therefore no question of mistaken identity of the appellant by the complainant.

Mr. Samad argued the appeal on two grounds. First, that there was no evidence to corroborate the complainant's story. He argued that there was no medical evidence to support the complainant's evidence that he was attacked and robbed of his money. He further argued that the complainant told half truths and lied when he said that the appellant and Ngoma threatened to shoot him if he looked back because there was no evidence that they had a gun. That without a gun it was unlikely or impossible for them to have made such a threat. In response, Mr. Muuka argued that there was enough corroborative evidence. That the finding

of handcuffs on the appellant corroborated the complainant's testimony. He further argued that since Ngoma was wearing army uniform it is possible that he had a gun which the complainant did not see and therefore that it was likely that they threatened to shoot him.

We are quite satisfied that there was ample evidence to corroborate the complainant's evidence that he was attacked, beaten up, handcuffed and robbed of his money. The finding of money and handcuffs on the appellant was such corroborative evidence. As regards the threat to shoot him, there is evidence that Ngoma was wearing a military uniform. He might therefore have been carrying a gun in which event the threat was not unlikely or impossible. It cannot therefore be said that the complainant lied when he said they threatened to shoot him.

Second, that the learned trial judge misdirected himself by failing to conduct a trial within a trial. He argued that immediately the appellant repudiated the confession in his defence the court should have held a trial within a trial to determine the voluntariness of the alleged confession and that failure to do so was a misdirection. While conceding that the trial judge misdirected himself, Mr. Muuka argued that there was sufficient evidence on which the court could have convicted the appellant without having to rely on the confession and urged the court to apply the proviso to Section 15 (1) of Cap. 52.

We agree with Mr. Samad on this point. In Wakilaba (1) this court said:

> "It was therefore mandatory that, a preliminary issue of voluntariness having been raised by the appellant, the learned trial Magistrate should have conducted a trial within a trial notwithstanding that the issue was raised after the close of the prosecution case."

It is quite clear from this decision that a trial within a trial should be conducted to determine the issue of voluntariness of an alleged confession at any stage of

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the proceedings immediately an accused person alleges any impropriety on the part of the Police or person in authority. In this case, a trial within a trial not having been conducted and the issue of voluntariness not having been resolved the learned trial judge misdirected himself in having relied on the confession statement to convict and the question arises whether we can apply the proviso to Section 15 (1) of Cap. 52. As we have said earlier on, the appellant was well known to the complainant and he admitted being at the scene of the robbery and was found with part of the stolen money and a pair of handcuffs. There was therefore sufficient evidence on which the court could have convicted the appellant without having to rely on the confession. We would therefore apply the proviso and dismiss the appeal against conviction.

As regards sentence, we find no aggravating circumstances to merit a stiffer penalty than the minimum mandatory sentence. The sentence of 20 years imprisonment therefore comes to us with a sense shock. The appeal against sentence is allowed and we set aside the sentence imposed by the trial judge and in its place we impose the minimum mandatory sentence of 15 years imprisonment with hard labour.

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B.T. GARDNER
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE