

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

BOLINGO GESANDA MATONGE

Appellant

-v-

THE PEOPLE

Respondent

Coram: Bweupe, D.C.J., Sakala and Muzyamba, JJ.S.

On 8th June and 9th September, 1993

For the Appellant: Mr. J.P. Silva, Assistant Legal Aid Counsel

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

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J U D G M E N T

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Bweupe, D.C.J. delivered the judgment of the court

The appellant, Bolingo Gesanda Matonge, was tried and convicted on an information charging him with three counts of offences: Aggravated Robbery contrary to Section 294 (1) of the Penal Code. The particulars of Count one being that he, on August 1, 1991 at Ndola, jointly and whilst acting together with other persons unknown did rob Katson Sichalwe of one bicycle valued at K3,000.00. In Count 2 the particulars being that, he, on August 5, 1991 at Ndola jointly and whilst acting together with other persons unknown, did rob Luka Tembo of a bicycle valued at K5,000.00. The Third count alleged that, he, on August 20, 1991, jointly and whilst acting together with other persons unknown did rob Stashom Swala of one bicycle valued at K5,000.00. Following his conviction the appellant was sentenced to 18 years Imprisonment with hard labour on each count to run concurrently. He now appeals to this court against both convictions and sentences.

The appellant argued 5 grounds of appeal. He said the learned High Court Commissioner erred in basing the conviction on

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the public identification of the robbery victims; That no weaponry such as panga or gun or whip was found on the appellant as recorded; That no exhibit was recovered from him to make the identification too much of a coincidence except his own money K5,000.00; that the evidence of PW4 was not corroborated; All the Police should have done was to record a statement from a friend of PW4 who witnessed the incident. This failure is a clear indication that the appellant is a wrongman; that the Commissioner erred in law in dismissing the defence testimony as a pack of lies simply because he gave three different addresses but in law it says a person may cheat on matters not related to the case in issue and the address is not the subject of this case; and that the sentence of 18 years imprisonment with hard labour imposed is too severe considering the appellant's age and health.

Briefly the prosecution evidence was this: PW2, Kaston Sichelwe, a charcoal burner, who was a complainant in the first count, left his house in Kawama around 05.00 hours on August 1, 1991 to go and collect charcoal. At that time he was travelling on a Humber bicycle whose value he gave as K3,000.00. As he was getting in Kaniki area he was confronted by the accused who emerged from the bush wielding a machete (panga). The appellant aimed to strike PW2 with the Panga but he parried it with the axe which he had and the appellant's panga dropped as a result. Then another man emerged wielding a panga also. That other man tried to strike PW2 also with the panga. PW2 fled and stopped at a distance. A third man who had a gun also emerged with the gun. The three men then took PW2's bicycle. PW2 tried to go back but the armed man threatened to shoot him. As a result PW2 ran away and reported the matter to a Police Officer manning a road block. In the company of paramilitary Police Officers they went back to the scene but as they approached the appellant and his two friends fled crossing the border into Zaïre.

PW3, Luka Tembo, also a charcoal burner, a complainant in Count 2, left his house at about 9.30 hours on August 5, 1991 going to collect charcoal in Kaniki area. He was using his Humber bicycle valued at K5,000.00. When going he used the route through Chichele Plantation along the Railway line. As he was cycling he

was confronted by four men one of whom was the appellant whom he testified was the elderly man who got hold of him. The appellant had a panga or matchete and hit PW3 with it on the bridge of his nose and on his elbow. As a result PW3 began bleeding from the nose and while this was happening the three youngmen snatched the bicycle from him and went with it towards the Zaire border. When PW3 tried to follow them the appellant threatened to hit him with the matchete and threw stones at him. PW3 reported the matter to the Police and he was positive the appellant was the person who attacked him with a panga.

PW1, Complainant in the third count also said that on August 20, 1991 he left his house at 05.00 hours to go and look for charcoal to buy. He was at the time using a gent's phoenix whose value he put at K4,000.00. He was using the route between Kaniki and Kawama. As he was cycling he saw the appellant who was armed with a matchete or panga emerge from behind the anti-hill. The appellant rushed towards him yielding the matchete with which he tried to hit him. PW1 avoided it and in the process his bicycle fell down. Three more men then emerged from the bush armed with sticks. They also attacked him and one of them hit PW1 with a stick while the appellant hit him with a panga on the head. PW1 managed to get hold of a stick and hit the appellant on the head with it across his face thereby injuring him. PW1 fled and went to report to Chiefobu Police Station. PW1 was adamant and positively certain that the appellant was one of those who attacked and robbed him with his bicycle.

PW4 told the court that on September 19, 1991 he left his home around 05.00 hours to go to Kaniki areas who were armed with whips and pangas. The three men included the appellant. Two of the men attacked PW4 and his friend with whips. As a result PW4 shouted for assistance and luckily enough there were some men nearby who heard the shouts and rushed to the scene. Upon seeing this the appellant and his accomplices fled into the bush and disappeared in the thicket. Among those who came to their assistance were PW5 and PW6. When they came to the scene they started looking for the three men who disappeared into the thicket. They subsequently came out of the hiding and took to their heels. PW4 - PW6 gave



chase and managed to apprehend the appellant while the other two managed to escape. On apprehending the appellant they took him to Chifubu Police Station. PW4 said that on their way they passed through Kawama Township where PW1-PW3 were attracted by the noise people escorting the appellant were making. When PW1-PW3 went there they recognised the appellant as one of those who robbed them of their bicycles. PW4, PW5 and PW6 denied that the appellant was apprehended inside Zaire.

Appellant also gave evidence. He said that on the date in question he left his house at Kukangaba in Zaire for Sakanya border post with a view to buy cooking oil. He was about 200 meters inside Zaire from Zambia border when he saw some people with pangas - Two men, one armed with a panga and another with a hack-saw ran towards him. When he saw this he got frightened and decided to run away but before he did that one man came out of the bush and kicked him on his leg and fell down as a result. Another came and struck him with a panga on his face and he fainted as a result. The attackers got hold of him and took him across the border to Zambia where he heard people shouting "thief, thief, thief." Those people bound his hands behind his back and removed his T. Shirt. He was subsequently taken to Chifubu Police Station. He denied he stole any of the complainants' bicycles.

Mr. Silva, Assistant Legal Aid Counsel, argued and argued vividly that the circumstances under which the appellant was identified was unsatisfactory. He said the learned Commissioner erred on basing the conviction on the public identification by robbery victims which was contrary to the judges Rules. He said the evidence taken on its totality does not prove the guilt of the appellant beyond all reasonable doubt. The appellant was convicted on three counts of aggravated robbery allegedly committed on different dates. In each count there was only one witness who two months later saw a group of people shouting "thief, thief" and they identified the appellant. He said it was then the victims reported the matter to the Police on 20/9/91. He also attacked the evidence of PW4. He said if the appellant had attempted to steal PW4's bicycle he should have been charged with attempted robbery but he was not charged. The Police say there was insufficient evidence which means that even in this particular case there was insufficient

evidence. He said evidence given by the appellant was rejected as a pack of lies without considering whether or not PW1-3 were making an honest mistake. He said the evidence of PW4 which the learned Commissioner accepted had no relevancy to counts 1 - 3 in that the Police did not believe PW4's allegations. If the appellant had been charged with attempted robbery that alone would have strengthened the case for state.

Mr. Sewanyana, on the other hand, supported the conviction. He said there was strong evidence that warranted the convictions. Robberies took place during day light and the complainants and had ample opportunity to observe who their attackers were and immediately the appellant was apprehended they recognised him as the man who perpetuated the robbery. As to the complaints to the Police Mr Sewanyana said it is not true that PW1-3 did not report to the Police. He said PW2 reported to the Police at the Road block on 1st August, 1991, PW3 reported on 5th August, 1991 and PW1 on 20th August, 1991.

We have carefully considered the evidence on record, the judgment of the learned Commissioner and the submissions made before us by both the learned counsel for the appellant and the Respondent. And starting with the first part of ground one there is no dispute that PW1-PW3 were robbed of their bicycles in Kaniki area by a group armed with machetes or pangas on different dates respectively. There is also no dispute that the appellant was apprehended by PW4-PW6 when the appellant was trying to run away after he and two others attempted to rob PW4 of his bicycle. Appellant had a scar as a result of being hit with sticks. It is clear from the evidence of PW1-4, as the trial court rightly pointed out, that the appellant was apprehended almost ready handed near the scene which had become notorious for bicycle thefts. All items were stolen in the same manner and in the same area by a gang of three to six. The learned Commissioner meticulously analysed the evidence and covered all the salient points. We are unable to pin point any area where the reasoning of the learned Commissioner can be found faulted. The convictions, in our view, are proper as they are amply and adequately supported by evidence on record. We would dismiss the appeals against convictions.

As regard sentences the appellant complains that 18 years imprisonment with hard labour on each count to run concurrent is too long a day in prison considering his health and age. Taking into account that the complainants were threatened and robbed of their bicycles by a gang which was specialised in bicycle thefts 18 years imprisonment with hard labour does not come to us with any sense of shock. Nor can it be said to be wrong in principle. we confirm the sentence of 18 years on each count to run concurrently as directed by the learned Commissioner. Accordingly we would dismiss the appeals against sentences also.

B. K. Bweupe  
DEPUTY CHIEF JUSTICE

E. L. Sakala  
SUPREME COURT JUDGE

W. M. Muzyamba  
SUPREME COURT JUDGE