

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 117 OF 1993

B E T W E E N:

PATRICK KATYETYE

APPELLANT

Vs

THE PEOPLE

RESPONDENT

CORAM: GARDNER, SAKALA AND MUZYAMBA JJJS.,

16th November, 1993

Mr. M.H. Samad Senior Legal Aid Counsel appeared for the appellant.

Mr. W. Wangor Principle State Advocate appeared for the State.

J U D G M E N T

Gardner J. S. delivered the judgment of the court.

The appellant was convicted of aggravated robbery, the particulars of the charge being that he and another on the 20th of October, 1990 at Kitwe jointly and whilst acting together with other persons unknown did steal K300.00 from Gostave Mwila and at the time of such stealing did use actual violence.

The prosecution evidence was that of the complainant who said that he was walking home from a club when he was attacked by four men and beaten by them. K300.00 was stolen from him and he was able to catch one of the assailants by the leg. At this stage PW2 arrived and answered his call for help. The other assailants ran away, and PWs 1 and 2 took the man they had caught, who was alleged to be the first appellant, to the U.N.I.P. office. At that office the man ran away but not before his shirt was grabbed from him. The matter was reported to the police and PW3, the police officer on duty, said that he was called out and together with others he apprehended two men who were alleged to have taken part in the robbery.

At the trial the appellant gave evidence on oath, when he said he was passing by the scene where he was grabbed by three people who assaulted him but he was able to escape. He said that he himself made a complaint to a police station but there was no evidence from any police to confirm that this complaint was made. PW2, the man who had come to the assistance of the complainant, gave evidence that the appellant was well known to him, and, at the trial, he learned

trial judge accepted that the appellant was properly identified as the man who had been caught by the leg and had run away from PWs 1 and 2.

Mr. Samad on behalf of the appellant has argued that there was no need for an identification parade at which PW2 identified the appellant. We agree that in those circumstances the identification by PW2, as a person who knew the appellant well, rendered an identification parade unnecessary. Mr. Samad further argued that although the prosecution witnessess had been able to take the shirt from the appellant no money had been found, and if he had been taking part in the robbery he would surely have had the money on his person when he was caught. Mr. Samad argued that as the appellant was only passing by when he was caught by the prosecution witnessess he should not have been charged with robbery.

We are satisfied that there was ample evidence that the appellant was caught as one of the people who were attacking PW1. The question of identification is immaterial because the appellant himself agreed that he is the person who was caught at the scene. As to the suggestion that the appellant himself was a complainant of assault by the others, the learned trial judge having heard the witnessess was satisfied that the prosecution witnessess were to be believed about the circumstances of the apprehension of the accused. In arriving at that decision he did not misdirect himself in any way. There are no grounds upon which the appeal against conviction could succeed and that appeal is dismissed.

As to the sentence there was evidence that the appellant was twenty years old at the time of the offence and Mr. Samad drew our attention to the provisions of Section 27 (2) of the penal code. That section provides that where any person under the age of twenty-one years is convicted of any offence punishable by imprisonment for any term exceeding three months a court may in its discretion order him to be caned in addition to or in substitution for such imprisonment. Mr. Samad argued that this was an appropriate case for the exercise of such discretion.

Here, as in this case, the section under which a person is convicted provides for a mandatory minimum sentence, the words:- "shall be sentenced to imprisonment for a period of not less than" prevent the exercise of any discretion, and s. 27 (2) cannot apply. The appeal against sentence is also dismissed.

.....
B. T. GARDNER
SUPREME COURT JUDGE

.....
E. L. SAKALA
SUPREME COURT JUDGE

.....
W. M. MUZYAMBA
SUPREME COURT JUDGE