IN THE SUPREME COURT OF ZAMBIA SCZ Appeal No.12 of 1994

HOLDEN AT NDOLA

(Criminal Jurisdiction)

JOHN KABEKA Appellant

vs

THE PEOPLE Respondent

Coram: Sakala, Chaila and Chirwa JJJs on 7th June, 1994

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

For the Respondent: Mrs. M. Sitali, Assistant Senior State Advocate

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J U D G M E N T

Chirwa J.S delivered the judgment of the court.

The appellant was charged and convicted of aggravated robbery contrary to section 294(2) of the Penal Code. The particulars of the offence were that, he, on 26th October 1992 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed with a rifle did steal 93 x 6 metres chitenge materials and other goods valued at K372,000.00 the property of Sarah Chengwe and at or immediately before or immediately after the time of such stealing did use actual violence in order to obtain and retain the said property. Upon his conviction he was sentence to death.

Mr. Silva for the appellant has argued one ground of appeal namely that the learned trial judge erred in basing the applicant's conviction solely on the uncorroborated evidence of Maggie Nachilongo, PW3, as she was a witness with an interest of her own to serve.

2/...In expanding

In expanding this argument Mr. Silva high lighted the aspects of her evidence and conduct which makes her as an accomplice witness with her own interest to serve. Firstly, he pointed out that this witness was in police custody for one week, and thereafter two weeks in remand prison. Further in her evidence she admitted that she sold some of this stolen property and some property was found in her house. Further the gun was also found in her house and as the learned trial judge found her as a woman of loose morals, there were so many people staying in this house and the appellant unfortunately was found by the police in this house and as there is no corroborative evidence to support PW2 the learned trial judge erred in not holding this witness as an accomplice and as such there is no other evidence on which to base the conviction.

Mrs. Sitali for the State in supporting the conviction, conceded that the learned trial judge should have considered PW3 as a witness with interest of her own to serve, but she submitted that there was corroboration in this matter. Firstly, that at the time of the robbery, a gun was used and a gun was found in the house of PW3 which upon its examination was found to have been the gun that was fired at the time of the robbery. She submitted that this is some corroborative evidence. She further submitted that the way in which PW3 gave evidence clearly showed that she was not involved in this matter and also her evidence showed that the appellant exonerated her as being involved in this matter. This piece of evidence it was submitted was never challenged in cross-examination. Further she submitted that PW2 stated that she was robbed by about four people and also that PW3 stated that the accused in the company of three others left the house at night of the day of the robbery and they came back with the materials which were later identified as those stolen from PW2.

3/...We have considered

We have considered the evidence on record and also the submissions made in this appeal. We agree with both counsel that the learned trial judge ought to have treated PW3 as an accomplice or a witness with an interest of her own to serve. We have to consider the evidence further in this matter and see if there is any corroborative evidence or something more. We have noted from the evidence and it cannot be argued that the robbery took place in the early hours of 26th October 1992 and that the appellant and his colleagues came back to the house of PW3 in the early hours of 26th October 1992 with two sacks which later-on revealed to contain chitenge materials and these materials were later identified by PW1 as the property she left with Sarah Chilambe. Furthermore it cannot be argued that at the time of the robbery the firearm was used and the empty cartridge found on the scene proved to have been fired from the gun found in the house of PW3. We further note that when PW3 gave this piece of evidence that property was brought in by the appellant and his friends, and also when she said that when she was in the police custody, the appellant exonorated her, she was never challenged in cross-examination. We further note that it could be too much of a coincidence that PW2 testified that she was robbed by four people in the early hours of 26th October 1992 that the appellant should come back to the house of PW3 with the property stolen from PW2. Looking at the evidence on record, had the learned trial judge considered PW3 as an accomplice, he would still have reached the same conclusion he did and we are of the view that this is a proper case in which to use the proviso. Using this proviso we therefore find that there is no merit in this appeal. The appeal is therefore dismissed.

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SUPREME COURT JUDGE

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M.S. Chaila

SUPREME COURT JUDGE

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D.K. Chirwa

SUPREME COURT JUDGE