IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.35 OF 1994

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

B E T W E E N:

BENARD DAKA APPELLANT

AND

THE PEOPLE RESPONDENT

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

26th July and 23rd August 1994

For the Appellant: W.L. Henriques, Senior Legal Aid Counsel

For the Respondent: W. Wangwor, Principal State Advocate

J U D G M E N T

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

The appellant was convicted of aggravated robbery contrary to Section 294 of the Penal Code, Cap. 146 of the Laws of Zambia.

The particulars of the offence were that Dennis Nyirenda, Benard Daka and Samson Mwila, on the 1st of August 1992 at Masaiti in the Ndola Rural District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and being armed with firearms, did steal six spanners, two calculators, two pieces of chitenge material, one torch and K370,000-00 cash altogether valued at K381,050-00 the property of Nchanga Farms and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Joel Mupunga the watchman in order to obtain or retain the property stolen or to prevent or overcome resistance to the property being stolen or retained.

The other two died before the trial commenced.

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

The facts of the case were that on 1st August, 1992 around 22.30 hours PW.2, Joel Mupunga was attacked by more than four people while guarding a workshop at Nchanga Farms in Ndola Rural. The thieves broke into the storeroom and blew the safe with explosives and got away with the items listed in the particulars of the offence. The matter was reported to the Police and investigations were carried out. On 3rd August, 1992 the appellant and the deceased were caught and searched and some of the stolen items, namely two calculators, a torch, six spanners, chitenge

J2/...

material and some cash were found on them. In addition they were found with ammunition and explosives for which they were tried and convicted by the Subordinate Court at Luanshya and each sentenced to 9 months imprisonment with hard labour.

Arguing the appeal on behalf of the appellant Miss Henriques advanced one ground of appeal namely that the learned trial judge was wrong to convict the appellant of aggravated robbery because the evidence did not support the charge. She submitted that PW.2, the Principal witness for the prosecution, Mr. Joel Mupunga contradicted himself both in examination in chief and in cross examination. That earlier on in examination in chief he said that the thief who held a gun ordered him to lie down and cover himself with a sack, which he did. Later he said that before the thieves left, one of them told the armed man to cover him with a sack, which he did and then left. She submitted that if infact PW.2 had earlier on covered himself with a sack then it did not make any sense that the thieves had to cover him again as they left the premises. She further submitted that in cross examination this witness had earlier on said that when the thieves entered he was in the goods shed and when he heard a bang from the direction of a combine harvester, he was lying down and not sleeping. Later on he said he was seated. He again changed and said when the thieves entered the storeroom he was hiding in the shed. She submitted that these were material contradictions which rendered this witness's evidence unreliable and which should have been resolved in favour of the appellant. That the lower court should have found that when the thieves broke into the storeroom and stole therefrom and left the guard was safely hiding in the goods shed and therefore that he was never subjected to any threats. She also drew the attention of the court to the evidence of PW.6, the investigating officer, Mr. Zimba who said he received a report of a break in and not robbery. At page 11 of the record PW.6 said:

> "I recall the 2nd of August 1992 when I received a report of a break in at Nchanga Farms and that two offices, one accounts office and the other stores office were broken into. It was further reported that one of the thieves had a gun."

At page 13 he said, in cross examination:

> "When it was reported at the Police Station it was reported as breaking into a building with intent to steal. However, when I visited the scene PW.2 told me he had seen a gun with one

J3/...

of the robbers. It could be Charles Mulisa or PW.2 who made the report. I can change the offence if more evidence is revealed. I changed the offence to aggravated robbery after I found them with ammunitions. This confirmed PW.2's report that he had seen one of them with a gun. In the first paragraph of my report I did not mention that PW. 2 was threatened with a gun."

She concluded by saying that the evidence of PW.6 supported her earlier submission that PW.2 was hiding and never subjected to any threats and urged the court to allow the appeal against the conviction for aggravated robbery and substitute a conviction for the lesser offence of store breaking.

In response Mr. Wangwor submitted that the evidence in support of the charge was strong. That the contradictions highlighted by Miss Henriques were not serious and that although PW.2 used the word hiding, this should not be construed literally. He further submitted that it was not uncommon for the Police to charge a person of a lesser offence while continuing with their investigations and later upgrade the charge if more evidence is found.

We have considered the submissions by both Counsel and the evidence on record and our immediate observation is that this case was poorly handled by the Police. If indeed the report was that PW.2 was held at gun point by one thief while the others broke into the store and blew the safe and stole the goods and the appellant and the deceased were later found with the stolen items, ammunition and explosives then we do not understand why in the first place the Police charged them with being in unlawful possession of ammunition and explosives and had them convicted and then charged them with store breaking and later upgraded the charge to aggravated robbery. We are inclined therefore to agree with Miss Henriques that the Police acted in this manner because the report they received was one of breaking in. PW.2 may have seen one of the thieves armed with a gun but this must have been at a distance and while he was hiding. We would therefore agree with Miss Henriques that the evidence did not support the charge of aggravated robbery. Had the learned trial judge taken into account the serious contradictions in the evidence of PW.2 we have no doubt that he would have come to a different conclusion. We would

therefore allow the appeal and quash the conviction and set aside the sentence. In its place we substitute a conviction of store breaking contrary to section 304 of the Penal Code, Cap. 146 and sentence the appellant to five years imprisonment with hard labour with effect from 3rd August 1992, the date of his arrest.

.....

B.T. GARDNER

SUPREME COURT JUDGE

.....

D.K. CHIRWA

SUPREME COURT JUDGE

.....

W.M. MUZYAMBA

SUPREME COURT JUDGE