

HOLDEN AT LUSAKA

B E T W E E N:

THE PEOPLE

State

vs

AARON CHIBWE MUSHILI

Respondent

Coram: Chaila, Chirwa and Muzyamba JJJs on 4th October
1994

For the People: Mr. S.A.G Twumasi, Acting Senior State
Advocate

For the Respondent: Mr. P. Vashist, Legal Aid Counsel

J U D G M E N T

Chirwa JS delivered the judgment of the court.

This is an appeal by the Director of Public Prosecutions against the acquittal of the respondent Aaron Chibwe Mushili on a charge of aggravated robbery. The respondent was charged of aggravated robbery contrary to Section 294 of the Penal Code Cap. 146. The particulars of this charge allege that the respondent on 1st day of October, 1991 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia jointly and whilst acting together with other persons unknown did steal one toolbox valued at K45,000 from one Robert Masumba and that at or immediately before or after the time of such stealing used or threatened to use actual violence to the said Robert Masumba in order to retain or prevent the said property from being stolen.

The prosecution led evidence and after the close of the prosecution case the learned trial Commissioner found that a prima facie case had been made against the respondent and upon him being put on his defence the respondent gave evidence in which his defence was that he did not commit this offence but was an innocent

passerby in that he had been at a film show in town and was going back home. On considering the totality of the evidence the learned trial Commissioner found that the evidence adduced by the prosecution was overwhelming against the respondent. However, he acquitted the respondent on the grounds that the warn and caution statements taken by PWs 5 and 6 were against the judges' rules and that they were embarrassing and prejudicial to the respondent.

We have looked at the evidence on record and we totally agree with his earlier findings that the evidence against the respondent was overwhelming and on this evidence he ought to have convicted the respondent. However, we view his acquittal based on the warn and caution statement as a serious misdirection. To begin with, the warn and caution statement recorded by PW6 was rejected after a trial within a trial and also the one recorded by PW5 was never led in evidence and therefore we do not see how the evidence which was rejected and never on the record could have been embarrassing and prejudicial to the appellant. And as this is the only ground of appeal upon which the State has appealed and on which the learned Counsel for the respondent correctly in our view, has had no response, we allow this appeal and we quash the acquittal of the respondent and we substitute a conviction based on the original charge of aggravated robbery. Coming to sentence, we have considered the mitigation put forward by the respondent's advocate and we also take into account that the injury inflicted on the complainant was not very serious and we consider that this is a case in which a minimum sentence would apply. The respondent therefore, is sentenced to 15 years imprisonment with hard labour from the date of his arrest.

.....
M.S. Chaila
SUPREME COURT JUDGE

.....
D.K. Chirwa
SUPREME COURT JUDGE

.....
W.M. Muzyamba
SUPREME COURT JUDGE