IN THE SUPREME COURT OF ZAMBIA

SC2 APPEAL NO. 124 OF 1997

HOLDEN AT NDOLA

:

(Criminal Jurisdiction)

AARON CHIBWE MUSHILI Appellants

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L'ES BROPES

Respondent

Coram: Bwaupe, D.C.J., Chaila and Chirva JJs at Ndola on Bed Masch, 1998 and 14th July, 1995.

For the Appellant : Mr. S.W. Chirambo, Principal Legal Aid Counsel

For the Respondent: Mr. J. Mwanakatwe, Principal Semior State Advocate

JUDGMENT

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

The appellants were charged with one count of Aggravated Robbary contrary to section 294(1) of the Penal Code Cap. 146. The particulars allers that the hypellants on 29th day of December, 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 four pairs of shoas, one camera, one wrist watch, three radio casestes, car keys, one suitcase, three pairs of long trousers, and K12,000.00 cash altogether valued at K608,500.00 from the person of Spiro Kally and at or immediately before or immediately after the time of such stealing used or threatened to use actual violence to the caid Spiro Kally, in order to retain or obtain the said property and upon their convictions they were sentenced to 20 years imprisonment with hard labour with effect from the date of their acrest.

The prosecution evidence was to the officit that at about 20.00 hours on 29th December, 1991 the completinant, PWL was at his house and he was about to leave to go and pick up his son from his friend's nome.

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He switched off the television set, closed the kitchen door and closed the burglar same and all the lights outside and inside the house were on and as he went to his car, he saw two gentlemen coming. He identified these men as the two appellants. He described one being tall and the other one short and which they came, the tall one started beating him and tied him up and he stanted bleeding from the nose. He identified this particular mentleman as the first appellant. It was also said the cocond appellant joined his friend in beating him up. After that the went into the gouse where they took the items indicated in the information. He said that after shey had taken these items they went away. As a regult of the assault on him one booth came out and he was treated at Kitwe Central Hospital. He identified later on a suitcase, a camera, a pair of shoes, two pairs of trousers and a radio. These had been recovered by the police.

PW2 is a police officer who testifled that she conducted an identification parade on 20th January, at Kitwe East Police Station where the appallants were suspects and were put in a line of thirteen people and at the parade the complainant identified the second apparant of the one was beau and robbed him and at the parade there were no complaints by the Second appellant.

We also a police officer testified that on 29th December, 1952 he was on duty at NKana East Police Station and whilst on duty he received some information from visilantees that there were some men with suspected scolen property. Upon hearing this he went to the direction riven as to where this group of people were going and after five minutes on paw the group of people were going and after five minutes on paw the group coming with items in their possession. They were about five people and that at the place where he saw them there were some electric lights. He recognized the first man as a local man whom he knew before and that this has the first appellant.

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On confronting them these men dropped some property namely, the radio cassettee, one camera, two pairs of trousers, one pair of the child's shoes. He identified these items recovered as those produced in court which were identified by the complainant as those stolen from him a shore while before they were recovered by PM3.

The lass prosecution witness was a police officer who accessed the appellants after getting some information. Both appellants denied the charge. Upon being out on their defence one first appellant denied that on the 291.1 December, 1001 no way at the house with his buscer Pauline Musnili and that is about 11.00 nours his young prother came oy the name of Snip dusiil(. He can' With a Undio chasabte and that this young brother invited him to go to his place for How Year's celebrations and he had with sim this radio cassette when they dent to all house and that on the why they met a police officer and mnis solice officer started ascung them as no where they got the radio chasetuc. Ship shawered that he bought the madio becaution and he had receipts with him and produced them. He stated further that the polles officer suggested that this radio cassette be went at the police station because it was not safe to keep it in the compound and that this police officer took the rudio cassette and went with it at the police station. They were let to go and and on 30th December as and his slater Pauline Went back to Ericts house and they stayed there for three days and after that they went back to their nome. Then on 26th January, 1992 he was in a tarven around 19.00 hours and whilst there he was apprenended by police officers and later on out on an identification parade and later annested for the subject offences. He denied robbing the complainant. We denied that the radio cassette which was with Grid was stolen as Drid hid the possipts. The Struct a part of the defined by the complete dire to be beneficial the rudio exceette is queetion was his and that is it the biller from his under his date loss is a soluted by une funct appellant and pass the receipes to get she allow by wre pairs that chemalons datbes to produce blem is to her.

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The last ground was that the second appellant was wrongly identified on an irregular identification and up by PWL. He submitted that the identification in a colice cell was improper and therefore the identification of the second appellant should be disregarded. On somtence he submitted that as more property was recovered and the appellants were first offenders, 20 years imprisonment with bard labour was severe.

In reply Mr. Mwanakerwe supported the convictions and said the evidence against the appellants was overwhelming and further that the proceedings cannot be said to be a nullity as no plea was taken. The ommission to take ples if any was not prejudicial to the appellants has they were aware with the offence for which they are charged. On the lasue ' of identification it was submitted that both appallants were properly identified by PWL. The possibility of anhonest mistake did not arise as PWI had ample opportunity to observe these assailants. He identified the populiants at the identification parade. Although it had been said that the identification was unfair, there was no evidence led to make this identification parade unfair. Both appellants were seen in possession with stolen proparty shortly after the robbery. They were seen by PW3 and when he challenged them, they dropped the property and as he had known the appellants before and no too had the apportunity to observe the appellants because of the electricity of the lights, the Identification of the appellants could not be faulted.

We have seriously considered the evidence on record, the judgment of the learned trial judge and also the submissions made by the learned counsel in this court in support of their cases. We had a serious look at the evidence of PWI under which the circumstance he was attacked. It is clear from his evidence that security lights around this house were on and he was able to see the two people come and two people beat him and in the process he lost one tooth.

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any other method and fair method should be used to request the complainants or any other witnesses to try to identify the suspects. We are satisfied that the circumstances of this case, the evidence is overwaelming against both appellants and appeals against convictions are dismissed.

Coming to sentence; the attack on the complainant Was brutal. He lost a tooth in the process and with such b beating, the appellants deserve more than the minimum prescribed statutory sentence. We, therefore, see nothing wrong either in principle or in law, the sentence of 20 years imprisonment as imposed on the appellants. The appeal against sentence is also dismissed.

B.K. BM2ube DEPUTY_CHIEF_JUSTICE

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M.S. Chaila SUPREME COURT JUDGE

D.K. Chirwa SUPREME COURT JUDGE

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