

HOLDEN AT NDOLA

(Criminal Jurisdiction)

AARON CHIRWE MUSHILI  
ISAAC MWANZA

Appellants

vs

THE PEOPLE

Respondent

Coram: Bwaupe, D.C.J., Chaila and Chirwa JJs at Ndola  
on 3rd March, 1998 and 14th July, 1998.

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

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

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J U D G M E N T

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

The appellants were charged with one count of Aggravated Robbery contrary to section 294(1) of the Penal Code Cap. 146. The particulars allege that the appellants 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 shoes, one camera, one wrist watch, three radio cassettes, 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 Kully and at or immediately before or immediately after the time of such stealing used or threatened to use actual violence to the said Spiro Kully, 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 arrest.

The prosecution evidence was to the effect that at about 20.00 hours on 29th December, 1991 the complainant, PW1 was at his house and he was about to leave to go and pick up his son from his friend's home.

He switched off the television set, closed the kitchen door and closed the burglar bars 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 when they came, the tall one started beating him and tied him up and he started bleeding from the nose. He identified this particular gentleman as the first appellant. It was also said the second appellant joined his friend in beating him up. After that the men went into the house where they took the items indicated in the information. He said that after they had taken these items they went away. As a result of the assault on him one tooth 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 testified that she conducted an identification parade on 20th January, at Kitwe East Police Station where the appellants were suspects and were put in a line of thirteen people and at the parade the complainant identified the second appellant as the one who beat and robbed him and at the parade there were no complaints by the second appellant.

PW3 also a police officer testified that on 29th December, 1991 he was on duty at Nkana East Police Station and whilst on duty he received some information from vigilantes that there were some men with suspected stolen property. Upon hearing this he went to the direction given as to where this group of people were going and after five minutes he saw 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 man was carrying a radio cassette and this man was identified as the first appellant.

On confronting them these men dropped some property namely, the radio cassette, 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 short while before they were recovered by PW3.

The last prosecution witness was a police officer who addressed the appellants after getting some information. Both appellants denied the charges. Upon being put on their defence the first appellant denied that on the 29th December, 1991 he was at the house with his sister Pauline Musilli and that at about 11.00 hours his young brother came by the name of Eric Musilli. He came with a radio cassette and that this young brother invited him to go to his place for New Year's celebrations and he had with him this radio cassette when they went to his house and that on the way they met a police officer and this police officer started asking them as to where they got the radio cassette. Eric answered that he bought the radio cassette and he had receipts with him and produced them. He stated further that the police officer suggested that this radio cassette be kept at the police station because it was not safe to keep it in the compound and that this police officer took the radio cassette and went with it at the police station. They were let to go and on 30th December he and his sister Pauline went back to Eric's house and they stayed there for three days and after that they went back to their home. Then on 26th January, 1992 he was in a tavern around 19.00 hours and whilst there he was apprehended by police officers and later on out on an identification parade and later arrested for the subject offences. He denied robbing the complainant. He denied that the radio cassette which was with Eric was stolen as Eric had the receipts. The first witness was called by the prosecution PW1 and that the radio cassette in question was his and that it was taken from him under circumstances as described by the first appellant and that the receipts he had with him were taken by the police and therefore unable to produce them in court.



The last ground was that the second appellant was wrongly identified on an irregular identification set up by PW1. He submitted that the identification in a police cell was improper and therefore the identification of the second appellant should be disregarded. On sentence he submitted that as more property was recovered and the appellants were first offenders, 20 years imprisonment with hard labour was severe.

In reply Mr. Mwanakatwe 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 omission to take plea if any was not prejudicial to the appellants as they were aware with the offence for which they are charged. On the issue of identification it was submitted that both appellants were properly identified by PW1. The possibility of dishonest mistake did not arise as PW1 had ample opportunity to observe these assailants. He identified the appellants 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 property 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 he too had the opportunity 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 PW1 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.



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 overwhelming 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 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.

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B.A. Swende  
DEPUTY CHIEF JUSTICE

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M.B. Chaila  
SUPREME COURT JUDGE

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D.K. Chirwa  
SUPREME COURT JUDGE