

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA AND LUSAKA

SCZ APPEALS NOS. 47-48
1994

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

APPELLANTS

Vs.

1. JULIUS CHIBUTA

RESPONDENTS

2. CHUMA NYIRENDA

CORAM: BWEUPE DCJ, SAKALA AND CHAILA, JJ
On 6th December, 1994 and 10th January, 1996.

For the 1st Appellant In Person

For the 2nd Appellant, Mr. J.F. Silva, Senior Legal Aid Counsel

For the State, Mr. Lwali, Assistant Senior State Advocate

J U D G M E N T

Bweupe DCJ, Delivered the Judgment of the Court.

The appellants, Julius Chibuta and Chuma Nyirenda were charged and tried with two others of Aggravated Robbery Contrary to Section 294 (1) of the Penal Code of which the particulars were that they, on the 9th day of April, 1992, jointly and whilst acting together and being armed with Fire Arms did steal property valued at one million, seven hundred and forty thousand seven hundred and thirty kwacha (K1,740,730), the property of Keith Mwanza by violence.

The facts as appearing on the record were these: ON the 8th April, 1992 at 19:00 hours, PW1 Keith Mwanza locked the outside gate of the yard of his house in Kitwe and went into the house with his family and secured the doors and windows and soon thereafter the household retired to bed for the night and went to sleep. At about 02:00 hours on the 9th April, 1992 the household was awakened by noises outside the house of voices and gunshots being fired. He did not see any guns. First the lights outside the house were put off from the outside source and stones were thrown at a house some of which broke the windows and the attackers entered the house. More gun shots were again fired. PW1 called the occupants of his house

to his bedroom and once inside locked the door. He did not see people enter the house but heard the noise of doors being broken down and people roaming in the inside of the house. Soon the thieves came to the locked bedroom door and they broke open the lock and entered. The thieves picked up blankets and covered the occupants of the house. Many items were removed from the house by the thieves. They were numbered as exhibits P1 - P20. The thieves then wanted to see PW1 but for some unknown reason he did not identify himself and they picked on Kaona Kalenda PW2. PW2 did not see the thieves but was hit with a missile of some kind which is variously described as a Panga and an Iron Bar. PW1 told the Court that someone of the thieves removed PW2's finger nails with the pliers but PW2 said that he was injured by a blow to the hand and the head. PW2 also stated that at this time a gun was also pointed at his head. PW2 who said that the lights were on was the only member of the household to be assaulted by the thieves or to be knocked about by them. He said that first he was covered by a Blanket and then removed from it and hit on the head and the hand.

PW3 said that during the bombardment of stones and shots being fired and windows smashed he saw several people outside in the yard but did not count them. He confirmed the assault on PW2. He did not see the items being stolen but just as did PW1 and PW2 they realised that they had been robbed after the thieves had left the house and all had gone quiet again.

The learned High Court Commissioner considered all the evidence and came to the conclusion that it was proved beyond all doubt that on the 9th April, 1992 House No. 601 Bulanglillo Township, Kitwe was the subject of an Aggravated Robbery and that in addition to extensive malicious damage to property belonging to PW1, PW2 & PW3 in the total value of K1.7m was stolen.

On the 9th April, 1992 at 16:00n hours, Police Officers PW4, PW6 & PW7 accompanied by PW1 and PW5 went to a Township in Kitwe called New Nkandabwe.

The Anti- Robbery Squad were also with them. As the Police entered New Nkandabwe in their vehicle a group of men rose up from a certain house which was unfinished and ran towards the bush (i.e. away from the Police Officers). The Police Officers gave chase

and as a result three men were shot dead by the Police and one man later named as Jullus Chibuta (ACD1) was caught and brought back to the Police vehicles. PW5, Mr. Longolongo did not go with the Police as they ran and watched those who ran away. His attention was attracted to one tall man who ran away as he jumped the ditches effortlessly. He said that he continued watching as the man was caught and brought back. He identified Jullus Chibuta, Accused 1, as that person. When they came back to the house from which the men had run away the Police Officers found the property in the unfinished house at New Nkandabwe on the 9th April, 1992 which were identified by PW1, the complainant, at Riverside Police Station on the 10th April, 1992. The property recovered were exhibit 1 - 16. Early the following morning, the Police Officers, PW4, PW6 and PW7 with others were led by Accused 1 to a house in Twapia Township in Ndola. There they found a Girl-friend of Accused 1, named Hilda Ngoma who had in her possession property which belonged to Keith Mwanza and which had been stolen on the 9th April, 1992. The items were: One track suit Top (Exh.7) One Jersey (Exh. 8) two trousers (Exh. 14) and one Bedsheet (Exh. 15). Hilda Ngoma told the Police in the presence of Accused 1 that she has received the property from Accd. 1. on 9th April, 1992 early in the morning in Kitwe.

On the 13th April, 1992 Accd. 1. led the Police again to a house at Chipulukusu Township in Ndola where Accd.2. Chuma Nyirenda was found and was wearing the jeans (Exh.13) and white socks (Exh.20). The Complainant identified these as part of the property stolen from his house on the 9th April, 1992.

In his Judgment the Learned Commissioner drew an inference from succession of events in this case so far as they related to the first accused that he was one of the persons who broke and entered the house of PW1 on 9th April, 1992 and who at 14:00 hours later was found running from a house with others which house contained the bulk of the stolen property. Twelve hours later Accd.1 led the Police to a house at Ndola Twapia where other property was recovered from his girl-friend.

As regards Accd.2 he was found in possession of a Jeans and white socks, four days after the event of robbery. Accused 2 said that the jeans which he was found wearing were bought by him.

The appellant filed two main grounds of appeal (a) that the conviction was against the weight of evidence and (b) that additional grounds would be submitted upon the receipt of the case record. Upon the receipt of the record the appellants filed additional grounds namely (a) that the learned Commissioner misdirected himself in law by accepting the evidence of PW4 and PW5. (b) that the court erred by accepting the evidence of leading the Police to Ndola where other items were recovered from the girl-friend of A1; (c) that the court misdirected itself by accepting a mere talk from a Police Officer that Hilda Ngoma told the Police in presence of A1, that she has received the property from A1 on 9th April, 1992 early in the morning at Kitwe without calling such witnesses.

We have considered the evidence on record as did the court below and the Judgment of the court below and we are of the view that the court below had no difficulty in coming to the conclusion that on the night of 9th April, 1992 the house of PW1 was broken into and property shown as Exh. P1 - 20 stolen therefrom. What is in dispute is that such items were stolen by the appellants and others unknown.

The evidence connecting the appellants with the commission of this offence according to the record was that after the offence had been committed round about 02:00 hours in the morning of the 9th April, 1992 at about 16:00 hours, a number of Police Officers PW4, PW6 and PW7 accompanied by the complainant PW1 and PW5 went to the township in Kitwe called New Kandabwe. The Anti Robbery Squad were also with them. As the Police entered New Kandabwe with the vehicle a group of men rose up from a certain house which was unfinished and ran towards the bush. The Police Officers did chase and as a result three men were shot at by the Police and one man later named as Julius Chibuta, appellant No. 1 was caught and brought back to the Police vehicle and in the unfinished house where that group of men ran from they found a number of items which the Police produced in Court as exhibits. The appellant 1, was then taken to the Police Station the following day the appellant 1, led the Police to a house in Twapia in Ndola which house belonged to appellant 1's girl-friend named Hilda Ngoma. On search of the house they found Hilda Ngoma in possession of some of the property which belonged to Keith Mwanza, PW1. the items were two trousers exh. 14, one

one track suit top exh. 7, one jersey exh. 8 and one bedsheet exh. 15. On being accosted, Hilda Ngoma told the Police in the presence of Acc.1 that she received the property from appellant No. 1, on 9th April, 1992 early in the morning in Kitwe.

The evidence that connected the appellant 2 with the offence was that on the 13th of April, 1992, the appellant 1, led the Police to the house at Chipulukusu township in Ndola where appellant 2, Chuma Nylrenda was found and was wearing the Jeans exh. 13 and white socks exh. 20. When accosted at that time the appellant 2, told the Police Officers that the property belonged to him and that he had bought them from a certain person.

In his grounds of appeal, the appellant No. 1, said that the Court was wrong in accepting the evidence of a Police Officer to the effect that a Police Officer was told by the appellant No. 1's girl-friend Hilda Ngoma that she got the items from the appellant No. 1 in the early morning of 9th April, 1992 at Kitwe. He argued that the Court erred in that it should not have accepted that evidence of the Police Officer without calling Hilda Ngoma. the Learned Trial Commissioner considered the point raised by the appellant No. 1 on that issue. We have said time and again that statement made by the witness in the presence of the accused person is admissible in evidence. The appellant 1 led the Police to the house of Hilda Ngoma at Twapla and that the items identified by PW1 were found in that house. It would be as observed by the Trial Commissioner, an odd coincidence that the property was found in Hilda Ngoma's house after being led to that house by the appellant No. 1 himself. We are satisfied therefore, that there was no error on the part of the Trial Commissioner to accept evidence by a Police Officer to the effect that Hilda Ngoma told them in the presence of accused 1 himself that she was given the property by the appellant No. 1 in the early morning of 9th April, 1992. We are also of the view that it would be an odd coincidence that certain items which were positively identified by the complainant PW1 were found in an unfinished house in Kandambwe where the appellant and other people had ran away. We are therefore satisfied that there was overwhelming evidence upon which the appellant 1 was convicted.

As regards appellant No. 2, he has argued that the Court was wrong in convicting him when he told the Police that he had bought

the property from a certain person and the Police's failure to take him there was fatal to the prosecution case.

We have considered appellant No. 2's argument and in the ordinary course of things, it would be a dereliction of duty on the part of the Police in not taking the appellant No. 2 to the person he said he had bought the property from. In this case however, we consider it to be an odd coincidence that the property positively identified by the complainant PW1 was found in the appellant No. 2's house after the Police were led there by the appellant No. 1. We hold the view that there was ample evidence upon which this appellant No. 2 was also convicted. This ground of appeal would not succeed. In the circumstances we are satisfied that there was no error on the part of the Trial Commissioner to come to the conclusion that he did. These appeals are without merit and accordingly they are dismissed.

B. K. BWEUPE
DEPUTY CHIEF JUSTICE