IN THE SUPREME COURT OF ZAMBIA

SCZ Appeal Nos. 64A & 64B of 1995

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

MIKE NOWAKONSHI
MUNANGA SOMPA — Appellants

vs

THE PEOPLE — Respondent

CORAM: Chaila, Chirwa and Muzyamba JJ.S.

25th July, 1995 and 1st October, 1996

For the First Appellant : Mr. R. Simeza of Simeza Sangwa & Associates
For the Second Appellant : Mr. A.L. Bwalya, Assistant Legal Aid Counsel
For the State : Mr. W. Wangwor, Principal State Advocate

J U D G M E N T

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

The appellants faced a charge 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 they on the 14th day of June 1994 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together with others unknown and being armed with a pistol, did rob John Sekamanje Bewele of a motor vehicle namely Toyota Hiace Reg. No. AAL 5714 valued at K8,000,000.00 and at or immediately after such robbery did threaten to use or used actual violence in order to obtain the said property. The appellants were duly convicted of simple robbery and were sentenced to 15 years imprisonment with hard labour.

The brief facts of the case were that on 14th June 1994 around 1930 hours John Sekamanje travelled from Lusaka to Kabwe by his mini bus. On arrival in Kabwe he went to visit his

friend at house No. 28 Uganda Avenue, but he did not find his friend. He went back to his vehicle, there he saw two young men on the side of the road. He heard a voice behind. He was confronted by two people. He was pointed with a pistol. He got scared by the man with a pistol and he was stopped and he was ordered to surrender the vehicle keys to which he did. He was ordered to lie down. The men rushed into the vehicle. He also ran away from the place. The bandits drove the vehicle towards Baines Motors to join Ndola road. He went to the police station to report the matter. In the morning he went to Central Police Station to Anti-robbery Squad where he made a statement. In the evening the police called him to the police station where he identified his mini bus. He testified that A2 was the man who had a pistol. The police lunched further investigations and arrested the two appellants.

The appellants have relied upon the following grounds:-

1. The learned judge in the court below erred in fact in believing the story of PW6 Det. Constable Bwalya Chishimba to link the second appellant to the alleged robbery.

2. The learned judge further erred in law and fact in holding that if the first appellant was involved then the second appellant was with him merely because PW5 - a taxi driver testified that on 14th June, 1954 around 18.00 hours he took the second appellant with another to Jabari Farm.

3. The learned judge in the lower court erred in law by holding that in this case it was not necessary to consider the elements of the offense of aggravated robbery save the use of firearm because there was no argument that PW1 was robbed under the threat of violence and the property stolen was a minibus which was recovered at Jabari Farm the home of the first appellant.

4. The learned judge in the court below erred in law in rejecting the defence of alibi raised by the second appellant simply because no prior notice with particulars of where the second appellant was at the material time, was given by the second appellant to the police to enable them establish or rebut such defence.

Mr. Bwalya counsel for the first appellant argued that the learned trial judge misdirected himself in disregarding the favours of the first appellant that the appellant was not seen at the scene of the robbery. The first appellant was away at his mother's house at the time of the robbery. He

further argued that the appellant was not identified at the parade and there was dereliction of duty on the part of the police. The police officer went to pick the minibus without lifting finger prints. If the police had done so the results were going to be in favour of the appellant. The appellant was not found in possession of the motor vehicle at the time when they went to the first appellant's premises. The two appellants were in town having a meal. The counsel further submitted that when the police found the neighbours they started firing in the process chased away the people who had brought the minibus. He further submitted that the two people who ran away left a bag and it was in that bag number plates were found. The search by the police was done without a warrant and in the absence of the appellants. There was no corroboration and he urged the court to acquit the first appellant.

On behalf of the second appellant Mr. Sangwa relied on the grounds already referred to. He backed his argument with very detailed and elaborate heads of argument. On ground one the learned counsel argued that the learned trial judge misdirected himself on relying on the evidence of PW6. He argued that PW6's evidence should have been supported by independent evidence from an independent witness. He has further argued that the court below should have treated the evidence of PW6 with caution and that PW6 had seriously contradicted himself. He has urged the court not to rely on the evidence of PW6 since it could not be safe to convict the appellants on that evidence. The counsel had further argued that the prosecution had not conducted proper identification of identifying the accused. He had further argued that finger prints were not lifted from the stolen minibus and that it would be unsafe to support the conviction of the appellant since there was no evidence or witnesses to link the second appellant to the offence. On the second ground the counsel has argued that there is no sufficient evidence to incriminate the second appellant by using the evidence of PW5. He has argued that it would be a grave mistake to confirm the second appellant's conviction by relying on the evidence of a taxi driver PW5. He has further complained that the learned trial

judge misdirected himself when he drew the conclusion that if A1 was involved and A2 was with him. On ground three the learned counsel argued that the prosecution did not prove that PW1 was threatened with violence at the time the offence was alleged to have been committed. The counsel further submitted that the learned trial judge misdirected himself when he failed to consider whether or not the taking of the minibus by the two appellants did amount to stealing within the meaning of the Penal Code. He has submitted tnat the taking was accompanied by an intent to deprive the owner of taking the property. As regards ground four the counsel for the second appellant argued that the learned trial judge misdirected himself by rejecting the defence of alibi which was submitted by the second appellant. Counsel has submitted that the finding of the learned trial judge totally ignored the evidence of the two appellants and DWs 1 and 2. He further argued that the learned trial judge erred in rejecting the second appellant's story and that the second appellant's story should have been believed.

Counsel for the State Mr. Wangwor in supporting the conviction of the first appellant submitted that the learned trial judge did not misdirect himself. The learned trial judge took all the relevant facts. It was not in dispute that A1 was not at the scene. The question of dereliction of duty on the part of the police was considered by the learned trial judge. He submitted that the first appellant was seen in the motor vehicle stolen the previous night. There were number plates found in the house. The first appellant should have given an explanation why he was seen in the motor vehicle. As regards the second appellant Mr. Wangwor submitted that the evidence was a bit weak to support a serious offence. A2 according to Mr. Wangwor's argument should be found with receiving.

Mr. Bwalya in reply submitted that the evidence of PW4 was contradicting. He was not sure of his evidence. Mr. Simeza in reply submitted that the evidence of possession and receiving is weak and urged the court to acquit the second appellant completely.

The learned trial judge after considering the evidence before him concluded that the two appellants committed the offence under section 294 (1) of the Penal Code. In his judgment the learned trial judge as regards A1 stated:-

> "On the fuel I have already alluded to this. However buying fuel a person does not tend to show that A1 had already been the culprit. The only linkage is the statement of PW3 that when he brought the petrol to A1 the latter put it in the same minibus. If that was so then A1 must have a hand in the stealing of it. Thus I do not see how the case of MASEKA V THE PEOPLE (1972) ZR p.13 should apply in the present case. I do not find the accused's explanation to be possible and reasonably true."

On the careful perusal of PW3's evidence, the evidence does not show that the fuel purchased by PW3 was put in the minibus seen at the farm by A1. PW3 said:- "I bought fuel. I came back and told him that I had bought the fuel and it was in the vehicle. I went back to my working place. I do not know where Micheal took the fuel. When I came in the afternoon I saw a strange vehicle. That is a minibus. It is white in colour. This is the modern minibus. It was parked next to the hammer mill." It is quite clear that the learned trial judge in linking A1 with the fuel misdirected himself. PW3 did not know where A1 took the fuel. There is however, the evidence of PW4. PW4 testified that on 15th June, 1994 he reported on duty at 0800 hours at Z.N.S. When he parked the tractor he saw the minibus, it was parked next to the hammer mill. The minibus was white in colour. There was someone in the minibus but it was at a distance but he recognised the one in the minibus it was Michael Nowakonski (A1). He did not recognise the other man with him. Then the police officers came around lunch hour. When he first saw it there were letters KB on the minibus but when he came back there was nothing. The label KB must have been rubbed off. He recognised the minibus he had seen on that date. From PW4's evidence A1 was seen inside the stolen minibus. A1 in his Explanation pleaded an alibi which was disapproved by the prosecution evidence.

We have considered the submissions of the learned counsel and the evidence on record. We are satisfied that the robbery

took place and the minibus was stolen in the robbery. The minibus was later found at a farm where A1 was staying. A1 was found inside the stolen vehicle. The proven facts showed that A1 was in possession of the stolen vehicle. The learned trial judge concluded through the evidence of PW3 that he was among the people who robbed the complainant. Although the learned trial judge misdirected himself by linking A1 to the offence through the evidence of PW3, we are satisfied through the evidence of PW4 that A1 was seen inside the stolen vehicle. A1 did not explain how he was found in the vehicle but gave defence of alibi. The learned trial judge should have gone further to consider whether or not the appellant was a receiver of the stolen vehicle. We are not satisfied that it will be safe to maintain conviction on the serious charge of aggravated robbery. The conviction is quashed and the sentence is set aside and in its place we find A1 guilty of receiving a stolen property. As for A2, as admitted by the State, the evidence against him is very weak. It will be unsafe to allow the conviction to stand. The conviction is therefore quashed and the sentence is set aside. The evidence does not link him to any lesser offence. The second appellant is therefore set free. The first appellant has been convicted of receiving. He is sentenced to 7 years imprisonment with hard labour with effect from the date of arrest.

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M.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE

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W.M. Muzyamba
SUPREME COURT JUDGE