Appeal No. 163 (a) (b) (c) of 1997

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

B E T W E E N :

DAVIS CHALUSA — APPELLANT

ADAN CHALWE

SMART MWANSA CHANDA

and

THE PEOPLE — RESPONDENT

Coram: Chaila, Chirwa, Lewanika JJS

10th September and

For the Appellant: In person

For the Respondent: R. Okafor, Principal State Advocate

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J U D G M E N T

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**Lewanika, JS. delivered the judgment of the court.**

The appellant was jointly charged with others with the offence 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 he the appellant and others on the 21st day of January, 1996 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia jointly and whilst acting together did rob IRAM MWANJE of 9 rolls of suiting materials, 262 pairs of bed sheets, 2 wall clocks and 5 pairs of scissors altogether valued at K3,432,100.00 and at or immediately before or immediately after the time of such robbery, did use or threatened to use actual violence to the said IRAM MWANJE in order to obtain or retain the said property. Initially the appellant had been charged with four other accused persons but at the conclusion of the trial, accused A3 and A5 were acquitted whilst A1, A2 and the appellant who was A4 were convicted and sentenced to 15 years imprisonment with hard labour and the appellant appeals to this

court against conviction and the sentence. A1 abandoned the appeal at the hearing and A2 passed away before the appeal could be heard leaving the appellant who was A4. The evidence for the prosecution in brief is that on the night of the 21st day of January, 1996 between the hours of 01:00 and 02:00 the complainant who was in a group of security guards guarding Mukuba Textiles in the Industrial area of Ndola was attacked by a gang of people armed with pangas and iron bars. The complainant and the other guards were assaulted by this gang and thereafter, they were tied up and the gang then proceeded to break into the factory and stole the property set out in the indictment. The complainant sustained injuries which necessitated his admission in hospital and his evidence was that since all this happened in a room which was dark, he was not in a position to identify any of the assailants. P.W.1 the complainant and the other guards managed to untie themselves and they were able to phone the police at Masala who came to the factory and conducted a search of the premises and the surrounding area. In as far as the appellant is concerned the evidence against him was that on the day following the robbery namely the 22nd day of January, 1996 the appellant approached A3 with a request that he wanted to hire a vehicle in order to transport his sick child to the hospital. The appellant and A3 then set off in a vehicle owned by P.W.5 which A3 was driving and in which the appellant was the passenger. This vehicle proceeded to Mushili and went to a house where some items which were identified as having been part of the property stolen from Mukuba Textiles on the previous night were loaded in the vehicle. After these goods were loaded, the appellant A3 and two other men who were found at this house then proceeded to Mushili West but on the way they met a police vehicle and A3 stopped the vehicle and the appellant and the other two men ran

away leaving A3 alone at the place where the vehicle was stopped. A3 was apprehended by the police and subsequently gave a description to the police of the appellant and after investigations were carried out the appellant was apprehended by the police on the 3rd day of February, 1996 in Mufulira.

The evidence for the appellant was that on the day in question he got up in the morning and was informed by his wife that the child was sick. He then sought out A3 who used to drive a pirate taxi and hired him to transport the sick child to the hospital. On their way to the appellant's house, they found a person who stopped them and told the appellant that he wanted to hire their vehicle because he wanted to transport some goods. The appellant said that he was the one who negotiated with this person and they agreed to be hired because the appellant did not have money to buy fuel to transport his sick child to the hospital and he was hoping that the money that they would get from this person would be enough for them to buy fuel. They then drove to a house in Mushili and at this house they found two other men and these men loaded 7 rolls of suiting material and other items. They all then got into the vehicle and were on their way to Mushili West when they met a police vehicle and A3 stopped the vehicle and everyone in the vehicle got out and ran away except for the appellant. However, the appellant noticed that there was a crowd which had gathered and appeared to be hostile and so he also decided to run away as he feared that he was going to be attacked by this crowd. The appellant claims that he ran away to his house and took his child to the hospital and that it was only after a few days that he decided to go to Mufulira from where he was apprehended by the police.

The appellant has filed basically one ground of appeal and his argument is that the trial Judge erred in convicting him of the offence as he had given a reasonable explanation as to how he had come to find himself in that vehicle on the day in question.

Mr. Okafor who appears for the State supports the conviction and urged us to dismiss the appeal as there was overwhelming evidence against the appellant. We have considered the submissions made by the appellant and counsel for the State as well as the evidence on record. We note from the evidence on record that in less than 24 hours after the robbery occurred the appellant was found in a vehicle containing property which was stolen in the robbery and that when this vehicle was stopped, all the occupants of the vehicle except for the driver fled. The appellant gave an explanation to the trial Judge as to how he came to be in that vehicle. The explanation was considered by the learned trial Judge and the trial Judge did not accept it and found that the explanation was not reasonable. The trial Judge was entitled to do so, we also note from the evidence on record that there was evidence that the appellant had in fact previously worked for Mukuba Textiles whose factory was robbed. We find that there was no merit in the appeal against conviction which we dismiss accordingly.

Coming to the question of sentence we note that the appellant was sentenced to 15 years imprisonment with hard labour which is the minimum punishment for aggravated robbery. We note from the evidence on record that this robbery was carried out by a gang which was armed with pangas and iron bars and that a considerable amount of violence was used against the security guards who were guarding the premises. We do not think that this was an appropriate case for the imposition of the minimum sentence and we are accordingly interfering with this sentence. We will set aside the sentence of 15 years imprisonment with hard labour and in its place we substitute it with a sentence of 18 years imprisonment with hard labour with effect from the appellant's 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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D.M. Lewanika
SUPREME COURT JUDGE