Appeal No. 140 of 1996

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA/NDOLA/KABWE

(Criminal Jurisdiction)

B E T W E E N :

LEVY MUMBA — APPELLANT

and

THE PEOPLE — RESPONDENT

Coram: Bweupe, DCJ, Chirwa, Lewanika, JJS.

21st October, 1997 and December, 1997

For the Appellant: L.C. Zulu of Shamwana & Co.

For the Respondent: Mrs. E.M. Chipande, Senior State ADvocate

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JUDGMENT

Lewanika, JS. delivered the judgment of the court.

CASES REFERRED TO:

1. YOANI MANONGO -V- THE PEOPLE, 1981, Z.R. 152.
2. BARROW AND YOUNG -V- THE PEOPLE, 1966 Z.R. 43.
3. TIMOTHY & MWANZA -V- THE PEOPLE 1977 Z.R. 394.
4. SITUNA -V- THE PEOPLE, 1982, Z.R. 115.

The appellant was convicted of the offence of aggravated robbery contrary to Section 294 (2) of the Penal Code. The particulars of the offence being that the appellant with others unknown on the 25th day of August, 1993 at Lusaka in the Lusaka District of the Lusaka Province of Zambia jointly and whilst acting together being armed with a gun did rob TOLVANENE MARIKA of a motor vehicle namely a Toyota Hilux van bearing registration NO. AAL 5688 valued at K27,000,000.000 the property of the said TOLVANENE MARIKA and at or immediately before or immediately after the time of such stealing did use or threatened to

use actual violence to the said TOLVANENE MARIKA in order to prevent resistance to its being stolen.

The evidence before the learned trial Judge in brief is that on 25th August, 1993 at about 10.30 hours P.W.1 (hereinafter referred to as the complainant) was driving to her place of work at the Zambia National Library for the Blind in Chilenje Township, Lusaka. She stopped the motor vehicle the subject matter of the offence, at the gate whilst waiting for the security guard to open the gate. Suddenly she saw a young man point a gun at her through the window on the driver's side. Another young man was approaching her from the back of the van. Although the van was stationary the engine was still running. The man pointing a gun at her, opened the door of the van and started pulling her out, she hooted and screamed to attract the attention of the public. She was pulled out of the van and ran into some bushes. Both assailants got into the van and reversed it. As they were reversing they hit into a stump of a tree and the van was stuck. One of them came out of the van and tried to pull it but failed and in the meantime members of the public came to the scene and started throwing stones at the two assailants. The two assailants abandoned the vehicle and fled from the scene whilst being chased by members of the public. The two assailants were apprehended by members of the public and the gun was recovered and they were handed over to the police. One of those apprehended was the appellant.

The appellant in his evidence before the learned trial Judge deposed that on the day in question at around 10.00 hours he left his parents' home in Chilenje to collect a friend in the same township so that they go to town. When he arrived at his friend's house he was informed that his friend had already gone to the train station. He then proceeded to the train station using a foot path. As he was

walking he heard people shouting, "thief, thief" and he saw a person coming towards him running very fast. He tried to block this person but he threw a punch at him and he stepped aside and let him pass. He then heard the hooter of the train at the railway station and knowing that his friend was waiting for him and that trains do not stop for a long time he started running towards the station to catch the train. He was wearing similar clothes to the person who was being chased and he was mistakenly apprehended by the people who were chasing that person. He tried to explain to them but they could not accept his explanation but was assaulted and taken to the Zambia Library for the Blind where he was accused of having robbed a white lady of a van whilst acting together with another person he found there.

The learned trial Judge did not accept his story but convicted him and sentenced him to death and he has appealed against the said conviction and sentence.

Counsel who appears for the appellant has canvassed the following grounds of appeal:-

1 That the court below misdirected itself to hold as it did that the prosecution had proved its case beyond reasonable doubt against the appellant as required by law.

In arguing this ground counsel for the appellant said that the trial court erred in fact when it made findings of fact on the existence of a fire-arm at the scene of the crime or shortly thereafter. He referred us to page J2 of the judgment where the learned trial Judge stated that, "I do not think this contradiction is material as to who had a gun, because it is established either of them had a gun and it was recovered during the chase within a short space of time from either of the assailants on the run." Counsel

however said that P.w.3, P.W.5 and P.W.6 gave conflicting testimony as to which one of the accused persons had a gun at the time that they were alleged to have been fleeing from the scene of the crime. Counsel said that in his evidence in chief P.w.3 had said that he followed the person who did not have a gun and under cross-examination he re-affirmed that he apprehended the assailant who did not have a gun. Under further cross-examination P.W.3 stated that he apprehended A.2. That therefore according to P.W.3, A.2 did not have a gun when he apprehended him.

That on the other hand P.W.5 had said in his evidence in chief that he "saw a young man running towards him with a gun in his hands....." That he ran towards this young man and in the company of three or four other persons struggled to get the gun from him. P.W.5 identified A.1 (the appellant) as the person he had seen with the gun. On the other hand, P.w.6 in his evidence also claimed to have apprehended A.1 with the assistance of other persons who had disembarked from the train. That P.W.6's evidence was that A.1 had no gun at the time that he apprehended him.

Counsel said that the learned trial Judge erred at law in not finding in favour of the appellant on the question of whether or not there was a fire-arm used in the alleged robbery. He said that the standard of proof in criminal matters is that of proof beyond reasonable doubt and that where there is reasonable doubt as to the facts on a material point, that doubt should be resolved in favour of the accused person. He referred us to our decision in the case of YOANI MANONGO -V- THE PEOPLE (1) on the point. He further said that the evidence of the prosecution witnesses raised a substantial doubt as to the existence of a fire-arm at the scene of the crime and that it also raises a doubt as to the identity of the assailants. He said

that P.W.3, P.W.5 and P.W.6 gave conflicting testimony as to which of the accused persons had a gun and which one of the accused persons they had participated in apprehending. He also referred us to the case of BARROW & YOUNG -V- THE PEOPLE (2).

Counsel further submitted that the learned trial Judge should have found as a matter of fact that there was no fire-arm at the scene when the appellant was arrested and that he is not the person who had taken part in the robbery. He referred us to the case of KALEBU -V- THE PEOPLE, 1977 Z.R. 169 at p. 174 where we said that "..... when evidence has not been obtained in circumstances where there was a duty to do so - and a fortiori when it has been obtained and not laid before the court and possible prejudice has resulted, then an assumption favourable to the accused must be made." He said that in the instant case the police neglected to take finger prints off the fire-arm that the prosecution alleged was used in the commission of the crime, when ordinarily one would expect to find finger prints on a gun that has been handled by an accused person. He said that the presumption in this matter is that finger prints that were to be found on the gun that was brought into court in evidence were not the prints of the accused and therefore the accused was not the person involved in the robbery.

Counsel for the appellant did not argue the second ground of appeal and abandoned it.

2. That the judgment of the trial court does not show on the face of it that adequate consideration had been given to all the relevant material before it favourable to the appellant.

In arguing this ground counsel referred us to the case of SITUNA -V- THE PEOPLE (4) where we said at p. 119, "the judgment of any trial court must show on its face that adequate consideration has been given

to all the relevant material that has been placed before it, and if no or insufficient consideration has been given to evidence, favourable to an accused person the verdict becomes assailable and an acquittal may result where none was otherwise merited."

He said that in the instant case it would appear that the trial court did not give adequate consideration to all facts that were favourable to the appellant. He said that he had already alluded to the fact that P.w.5 and P.W.6 gave conflicting evidence on whether or not the appellant had a fire-arm at the time they are alleged to have apprehended him. He said that the trial court neglected or failed to find in favour of the appellant. He said that the contradiction in the accounts of the prosecution witnesses regarding the person they apprehended renders credible the appellant's explanation that his apprehension was due to mistaken identity of the person the prosecution witnesses allege they arrested. That P.W.5 and P.W.6 are totally unreliable and their evidence was most wholly made up.

He further said that the learned trial Judge made wrong findings in holding that the evidence of P.W.3, P.W.5 and P.W.6 corroborated the evidence of P.W.2 and P.W.4. That at page J.2 of the judgment the trial Judge said "... there is enough corroborating evidence of independent witnesses P.w.3, P.W.5 and P.W.6 who apprehended him and the said pistol 'P1' found on him at the scene which forms an ingredient on the crime." P.w.3 did not say that he apprehended the appellant but said that the person he had apprehended was not in court. He said that furthermore P.w.3 did not say that the appellant had a gun at the time he was apprehended and that P.W.6 had testified that the appellant was not armed when he was arrested. He urged the court to allow the appeal and acquit the appellant.

In reply Mrs. Chipande for the respondent submitted that she supports the conviction and that the learned trial Judge rightly

convicted the appellant of the offence of aggravated robbery. She said that the fire-arm was recovered and that the contradictions in the evidence of P.W.5 and P.W.6 are immaterial because the evidence of P.W.2 and P.W.4 was that the appellant had in his possession a fire-arm before the robbery. And that the learned trial Judge accepted the evidence that a fire-arm was used and that the report of the forensic ballistics expert showed that this was a lethal weapon.

We have considered the arguments advanced by counsel for the appellant and for the respondent. Whilst it is true as submitted by counsel for the appellant that there were contradictions in the evidence of P.W.5 and P.W.6 as to who apprehended the appellant and as to which of the two assailants was armed with a gun it is apparent from the judgment that the learned trial Judge was alive to these contradictions and that he considered them and found them to be immaterial in the light of the other evidence on record. For our part we do not see what difference it would make whether it were the appellant or the other person who was armed with a gun as the evidence on record clearly shows that they were acting in concert. Counsel for the appellant has also overlooked the evidence of P.W.4 who deposed that he saw the appellant with a gun a few days before the robbery and who identified exhibit P.1 as the gun that he had seen with the appellant. As to the appellant's explanation that he was mistakenly apprehended for another person who wore similar clothes to his and was running away, this was rejected by the learned trial Judge and from the evidence on record we are unable to say that he was not entitled to do

so. We find no merit in the appeal against conviction which we dismiss and we cannot interfere with the sentence as it is mandatory.

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B.K. Bweupe
DEPUTY CHIEF JUSTICE

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D.K. Chirwa
SUPREME COURT JUDGE

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D.M. Lewanika
SUPREME COURT JUDGE