

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 118 & 119 of 1997

HOLDEN AT LUSAKA/KABWE/NDOLA

(CRIMINAL JURISDICTION)

CHRISTOPHER BWALYA CHIMANYA

and

CHARLES CHIPOYA

VS

THE PEOPLE

Coram: Bweupe DCJ, Chaila, Lewanika JJS

On 4th December, 1997

For the Appellant - Mrs. KAUMBA, Legal Aid.

For the Respondent - Mr. MWANAKATWE, Principal State Advocate.

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JUDGMENT

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**Bweupe DCJ delivered the judgment of the court.**

The Appellants were jointly charged with the offence of aggravated robbery contrary to Section 294 subsection 1 of the Penal Code. The particulars of the offence were that they, Christopher Bwalya CHIMANYA and Charles CHIPOYA on the 29th of July, 1995 at Kitwe in the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together and being armed with a gun did steal K37.5 million from Zambia National Commercial Bank Limited, the property of the said Zambia National Commercial Bank and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Emmanuel TEMBO, bank officials and customers, to obtain or retain the said property or to prevent or overcome resistance to the property being retained. They were convicted and each sentenced to 25 years imprisonment with hard labour.

The evidence as summarised by the learned trial Commissioner, PW 1 said that as the bank closed at 11.00 hours on the 29th July, 1995, he came

from his office, called 2 messengers from the kitchen and proceeded to the banking hall. He met a man who asked to be allowed to use the toilet. PW 1, the Bank Manager, directed him to the toilet. The Commissioner said that as to what happened thereafter, he required to look at the evidence of PW 2 and PW 3 both of whom appear to have been more alert than PW 1. From the evidence of both these witnesses, they saw the Manager PW 1 coming from the kitchen side followed by a man carrying a gun. The gun was visible. PW 1 in his evidence did not say what happened when Appellant 1 came from the toilet, just that something protruded under his jacket. Later he said he saw this same man carrying an AK 47 gun. The gun man was the same person who went to the toilet. When the gun man came from the toilet and got behind PW 1 with the gun, there was a reasonable time for PW 1 again to have a look at the gun man. PW 1 described the gun man as tall and light in complexion. He said that on the 14th of August, 1995, he identified the Appellant 1 at an identification parade from the description he had earlier given. The description fitted the Appellant 1. He said he also identified Appellant 1 from his voice as he said "lie down" to the people in the bank. The Appellant was right behind PW 1 when he said this.

In summing up the evidence of PW 4, a Police Constable described how he went to the bank on the 29th of July, 1995 just after the main door had been closed. When the bank door was opened, he and the other two men who were waiting to cash cheques entered and one who had come out followed them inside and produced a gun. He said he had sufficient good look at the two men he saw as to enable him to recognise Appellant 1 as Christopher Bwalya CHIMANYA and Appellant 2 as someone he also knew from Lilayi Police Training School in 1991. The witness also said that on 21st August, 1995 he was called to an identification parade and out of 8 men on the line up, he identified Appellant 1 as the one who threatened to shoot him at Zambia Commercial Bank on the 29th of July, 1995 and Appellant 2 having been together with him at the same time. He confirmed the identification as arising from the fact that he had known

Appellants 1 and 2 at Lilayi Police Training School when all three of them had been in training as police officers. Both Appellant 1 and Appellant 2 admitted in their own evidence that they had been in training school at Lilayi in 1991 as said by PW 4.

The Commissioner observed that PW 4 reported his recognition of Appellants 1 and 2 to fellow police officers immediately after the event. The court is therefore able to find that the identification of Appellants 1 and 2 as the persons who took part in the robbery using a gun on 29th July, 1995 at Zambia National Commercial Bank, Industrial Branch, Kitwe has been proved beyond reasonable doubt. From the evidence of PW 1, PW 2, and PW 4 therefore, the court found that the Appellants 1 and 2 together with a person or persons unknown stole from the Zambia National Commercial Bank the amount of K37.5 million.

The Commissioner rejected the evidence of Appellant 1 and Appellant 2 as it was not related to the events of people and places featuring in this case. Both Appellants gave an alibi. Appellant 1 also admitted that he was at Lilayi in 1991 but remembered PW 8 at Lilayi but not PW 4. Appellant 2 admitted that he was at Lilayi in 1991 with Appellant 1.

In her submissions the learned Legal Aid Advocate, Mrs. KAUMBA said the learned Commissioner misdirected himself by not treating the evidence of witnesses with caution. The Commissioner should have looked for corroborative evidence as there was a possibility that the Appellants were mistakenly identified by PW 1 and PW 4. There was evidence she argued, that the intruders instructed them not to look at them and in cross examination, PW 1 said that he was not sure about the man identified by voice at the parade. He only asked the Appellant to shout "lie down". She said he should have asked each one at the parade to shout "lie down." He could not therefore say positively it was the Appellant 1. The second Appellant was not identified by PW 1. He was identified by PW 4 who said he was confused. The Appellant was not found with any stolen property neither was the gun found with him. There was no evidence against the Appellants in the lower court at all.

The Appellants also appealed against sentence. Mrs. KAUMBA left the question of sentence to be considered by the court.

On the other hand, Mr. James MWANAKATWE, Principal State Advocates, supported the convictions which according to him were amply supported by evidence on the record. He said the Appellants were positively identified by PW 1 and PW 4 as persons who robbed the bank. The Appellants were together at Lilayi. He conceded that PW 1's identification was not reliable, but the Commissioner convicted them on the evidence of PW 4 who was with the Appellants at Lilayi. The Commissioner ruled out that there was such a mistake when he analysed the evidence. He said the robbery took place at 1100 hours and PW 4 had ample opportunity to observe both Appellants. PW 4 had known the Appellants prior to the incident. The Commissioner was therefore justified in finding that the offence was committed by the Appellants.

In reply, Mrs. KAUMBA said that since PW 1 was confused, the possibility of mistaken identity cannot be ruled out.

We have seriously considered the judgment of the court and submissions by both counsel. The question is whether or not the mistaken identification of Appellant 1 and Appellant 2 by PW 1 could be ruled out. The Respondent's counsel, Mr. MWANAKATWE has conceded that as PW 1 was confused, his identification of Appellant 1 could not be relied on. However, there was the evidence of PW 4 who was at the bank on the 29th of July, 1995. This witness said that he was with the Appellants at Lilayi Training School in 1991. Both Appellants admitted in their evidence that they were with PW 4 at Lilayi Training School in 1991. He identified the Appellants as those people who were at the bank and whom he was with at Lilayi Training School in 1991. We are of the view that the Appellants were properly identified at the identification parade by PW 4. We also confirm that the Commissioner was properly correct to make a finding that the Appellants were the ones who robbed the bank at the Industrial Branch, Kitwe and got away with K37.5 million. We have no reason why the Commissioner

can be faulted and we confirm the conviction. The Appeal is therefore dismissed.

The Appellants have also appealed against sentence. We have seriously considered the question of sentence and taken into account the circumstances under which this offence was committed. The sentences do not come to us with a sense of shock. The appeals against sentences are dismissed also.

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B.K. Bweupe  
DEPUTY CHIEF JUSTICE

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M.S. Chaila  
SUPREME COURT JUDGE

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D.M. Lewanika  
SUPREME COURT JUDGE