

BEN BWIKA

APPELLANT

VS

THE PEOPLE

RESPONDENT

Coram: Sakala, Chirwa and Lewanika JJS

18th November, 1997.

For the Appellant, Mr. M. Kondolo, Acting Senior Legal Aid Counsel.

For the Respondent, Mr. J. Mwanakatwe, Principal State Advocate.

J U D G M E N T

Sakala JS delivered the Judgment of the Court.

The appellant was ^{with} jointly charged two co-accused on one count of aggravated robbery. The particulars of the offence were that, on 11th December 1994, at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together and whilst armed with offensive weapons namely; knives and iron bars, did steal 1 television set, 1 video deck, 1 remote controller, 20 video tapes and K1,258,584.00 money in cash altogether valued at K2,116,584.00 the property of Zambia Consolidated Copper Mines, Luanshya Division, and at the time of the robbery used actual violence to Lazarous Kamungwe. The two co-accused were acquitted. The appellant was convicted and sentenced to 16 years imprisonment with hard labour.

The brief facts of the case were that on 10th December 1994, six men whilst armed with knives and iron bars, raided Chilimina Club located in Roan Antelope Mine Township in Luanshya. The men attacked the Security Guard on duty, Lazarous Kamungwe. They tied his hands from behind and threatened to kill him if he shouted. One of the men armed with a knife and iron bar, remained guarding over him while the others broke into the club

and stole the items the subject of the charge. After the Security Guard freed himself, he reported the matter to the Club Management and subsequently to the Zambia Police.

According to the evidence of the prosecution, on 17th December, six days after the robbery, the appellant approached PW7 and offered to sell him a television set which PW7 subsequently bought. The evidence was that during the transaction, PW7 gave his business card to the first appellant. The case for the prosecution was that in the course of the investigations a Warn and Caution Statement was recorded from the appellant in which he explained that the property had been brought to his house by a co-accused and his friends. The appellant and the co-accused remained silent in their defence.

The learned trial judge considered the prosecution evidence and noted that there was no direct evidence connecting the appellant to the offence charged apart from being found in possession of some of the stolen items during the robbery and the Warn and Caution Statement and the explanation to PW7. The learned trial Judge considered the evidence connecting each of the three accused persons including the appellant. The court found that the explanations given by the other two co-accused might reasonably be true in the circumstances and acquitted both of them.

In dealing with the case against the appellant the court found that about six days after the robbery, the appellant offered the television set for sale to PW7 in Kitwe. The Court noted that the appellant told PW7 that he had bought the television set at an auction sale and that he decided to sell it due to the problems that he was having. The learned trial judge also considered the Warn and Caution Statement admitted in evidence without objection in which the appellant explained that the television set was brought to his house by the co-accused and the friends. The learned trial judge considered the doctrine of recent possession and referred to a number of cases decided by this court. He noted that the doctrine basically states that if property has been **stolen** and that soon after the theft the appellant is found in possession then a finding

of guilty of theft is open to a court. The court set out the elements that had to be taken into account before finally drawing an inference that the accused stole the items. Thereafter the court considered the two explanations. The court found that there being contradictions in the two explanations they could not be true and that the appellant must have been one of the robbers.

On behalf of the appellant Mr. Kondolo strongly argued that the learned trial judge misdirected himself by relying on the doctrine of recent possession because there was insufficient evidence to support the conviction based on that doctrine. He contended that the evidence on record was that the television set was brought to the appellant by a co-accused and his friends. Mr. Kondolo submitted that the learned trial judge having accepted the explanation given by the co-accused it was a contradiction in terms to draw an inference of guilty by rejecting the explanation given by the appellant.

We have very carefully considered the submissions and the evidence on record and the judgment of the learned trial judge. There was indeed no direct evidence in this case. The appellant was in possession of the stolen property six days after the robbery. He gave two stories to explain his possession of the television set. The first story was that he had bought the television set at an auction sale and that he was selling it due to the problems he had. Few weeks later, after being apprehended by the police, he gave the second story that the property had been brought to him by a co-accused and his friends. In these circumstances the learned trial judge was entitled to consider the two explanations. We agree with him that the two explanations contradicted each other. In the circumstances of this case the two explanations could not be reasonably true. The learned trial judge was entitled to draw the inference that the appellant must have been one of the robbers. We agree with the finding. We find no merit in the appeal against conviction, the appeal is dismissed. As to sentence, the appellant was sentenced to 16 years imprisonment with hard labour. The evidence disclosed that in the course of the robbery by a gang

actual violence was used. A sentence of 16 years imprisonment with hard labour does not come to us with a sense of shock. The appeal against sentence is also dismissed.

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E.L.SAKALA,
SUPREME COURT JUDGE.

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D.K. CHIRWA,
SUPREME COURT JUDGE.

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D.M.LEWANIKA
SUPREME COURT JUDGE.