

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

SCZ APPEAL NO. 76 OF 1996

B E T W E E N :

JABESI PHIRI

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Bweupe, DCJ, Chaila and Lewanika, JJS

3rd September, 1996 and 20th January, 1998

For the Appellant: Miss W. Henriques, Deputy Director, Legal Aid

For the Respondent: Mr. R. Okafor, Principal State Advocate

J U D G M E N T

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

This is the appeal by the appellant against a High Court judgment convicting him on two charges. The appellant faced two charges in the High Court. The first charge was aggravated robbery, contrary to Section 294(1) of the Penal Code of the Laws of Zambia. The allegation against the appellant was that on 11th November, 1990 at Lusaka, he robbed Mr. Justine Chombo of a radio cassette valued at K11,000 and used violence in so doing. The violence involved against the complainant was a pistol and iron bars. The second offence against the appellant was that of an attempted murder, contrary to Section 215(a) of the Penal Code. It was alleged that on 11th November, 1990 in Lusaka, the appellant attempted to murder Justine Chombo. The appellant was found guilty in respect of both charges and in respect of the first charge of an armed aggravated robbery, he was sentenced to death. For attempted murder, the

appellant was sent to life imprisonment.

The brief facts of the case were that on 11th November, 1990, around 2a.m. in Lusaka, the complainant was attacked at his home in Chawama Township. While sleeping in his house he heard a bang at the door. On enquiring who it was, he was told that it were the police. When he opened the door he saw three men. Three of them were standing at the door and the three of them entered the house. He saw one take a radio cassette and walked out. The one with gun shot at the legs of the complainant. The pellets broke both the upper and lower limbs. The complainant saw the accused through a hurricane lamp and he looked at the appellants face. All the intruders were not masked. The complainant said the cassette which was exhibited in the court was the one which was stolen from him and he had given it a description as silver in colour, ITT by make and it had the name Justine Chombo inscribed at the back of it. He produced the medical report of the injury he sustained during the attack. Another piece of evidence came from two PWs who told the court that two young men took the radio cassette for sale and the radio cassette exhibited was the one taken to him and that it was being sold at K3,600. He bought the radio cassette. After two weeks policemen went to his house, accompanied by two young men who sold him the radio cassette. He testified that the appellant was among the two young men who sold him the cassette. He confirmed that the cassette had the name Justine Chombo No.40 on it. The police investigated the matter and their evidence was that they acted on the report that there was a man in the compound called Jabes Phiri terrorising residents with a gun. The police went to the area to investigate the report. They got hold of the accused and requested him to produce the gun. The appellant voluntarily handed over the gun to them and it was a pistol which the appellant produced from the bedroom and handed it over to them. They

continued to investigate and recovered the radio cassette exhibited by the prosecutor. The police further investigated as to whom the radio cassette was sold. It was discovered that it was brought to a Mr. Musonda. The appellant gave an explanation of the circumstances which made him come into contact with Mr. Musonda who bought the cassette. He denied having given the gun to the complainant. The learned trial judge considered the case and came to the conclusion that the appellant was involved and that the appellant was durably convicted and sentenced. Miss Henriques has advanced two grounds of appeal. The first ground is that the learned trial judge erred in accepting the complainant's identification of the appellant in court as sufficient proof that the appellant committed those offences. The second ground is that the learned trial judge misdirected him on facts in accepting evidence of the two PWs that he bought the radio cassette from the appellant. Miss Henriques submitted that the appellant was identified by PW1 (complainant) in court. No identification parade was held by the police to identify the person or persons who had allegedly stolen the radio cassette. She argues that there was no reason why the identification parade was not held. She argued further, that the robbery was committed in a very short time and she referred us to the evidence of PW1. There was no sufficient light in the room and that there was no opportunity for the complainant to observe his assailants. She further argued that the complainant was in a distress when the robbery was committed and that the identification by the complainant in court could not be relied upon by the trial court. As regards the second ground, Miss Henriques argued that the evidence of PW2 that the person who bought the radio cassette showed that the appellant took no part in selling the radio cassette. On the question of the pistol, Miss Henriques argued that there was no evidence that the pistol was recovered from his home. We would like to point out on the question of the pistol the evidence of PW3. The Prosecution

Witness testified that on 7th July, 1991 he went on an operation with Detective Constable Daka. They were acting on the report that Jabes Phiri was terrorising Chawama compound. They went for him and they got him. He voluntarily handed over the pistol. He was cross examined on this issue and the witness maintained that the appellant gave him a pistol which was exhibited in court. We do not, therefore, concur with Miss Henriques' submission that there was no evidence of the pistol's record from the appellant's home. There was clear evidence that the pistol was recovered from the appellant. Mr. Okafor, the Principal State Advocate has submitted that there was no identification parade but he has charged that is not a useful piece of evidence. He has argued that the learned trial judge relied heavily on the evidence of PW1 who had given the description of the assailant. He has argued further that the house was a small one with a hurricane lamp and that the complainant clearly observed the man with a gun. The complainant made a clear observation of the matter. He has further argued that the man was found with a gun and he was wondering whether this was an odd coincidence. He has further argued that the same man was involved in the sell of the stolen radio cassette. He has argued that when the radio cassette was stolen there were three men and that when it was being sold there were three men. These were odd occurrences and these justified the convictions.

The learned trial judge in convicting the appellant relied mainly on PW2 and PW3. The learned trial judge summarised the appeal as follows:

"In a case of aggravated robbery the prosecution may prove the charge against the accused either by evidence or by identity where the accused is identified by the victim or by onlookers or other persons who witnessed the commission of the alleged crime

of aggravated robbery, or by strong and coherent circumstantial evidence which enables the court to draw the sole inference that the crime was committed by the accused. In this case the state witness has talked of both methods. PW1, the complainant, told the court that the accused was the person who went to his house and robbed him of his radio cassette at gun-point. He added that in the process of the robbery the accused injured him, and produced a medical report to the court. He also showed the three wounds to court. In respect of circumstantial evidence the state evidence has shown that accused sold the radio cassette to PW2, Oswald Musonda".

On the direct evidence we have noted that the evidence came from a single witness. The courts are competent of convicting on the evidence of single witness, as well as certain tests are made. In the instant case, the judge relied heavily on what he called circumstantial evidence. He referred to the evidence on the radio cassette. He said, "How then did this radio cassette find itself in the possession of PW2, Oswald Musonda"? The answer to this question has been provided to PW2 and PW3. PW2 Musonda said that the accused and his friends sold the property to him. This piece of evidence has been supported by the policemen. PW3 stated that the accused himself led them to the house of PW2 to recover the radio. This is a strong, sound and coherent circumstantial evidence which connects the accused to the offence. The accused also does not deny seeing the radio cassette.

Miss Henriques has attacked this finding of the learned trial judge. From the tone of the judgment, the learned trial judge relied on the possession

of the stolen property to support the evidence of PW1. The evidence shows that the police did not hold an identification parade. Here we have a dock identification. The judge was competent to convict on the evidence of PW after he was satisfied that PW1 had ample opportunity in observing the appellant during the attack. The learned trial judge casually held that the question of the opportunity by the complainant that the learned trial judge linked the identity by the evidence of PW2 and PW3 with it was the accused who sold the radio. . . . The failure by the police to hold an identification parade was a dereliction of duty but of course it was not fatal to the prosecution's case. In his submission the learned principal state advocate invited us to take into account various odd coincidences. He relied heavily on the evidence of PW2 and PW3. The learned trial judge concluded that the appellant is the one who sold the radio cassette to PW2. This conclusion has drawn a sharp criticism from the defence counsel. I would like to refer to the evidence of PW2 Mr. Musonda. Mr. Musonda's evidence on the issue is as follows:

"on 24th March, 1990 two young men came to John Howard to have a hair cut and they said they had a brother who was selling a radio cassette. I was interested in buying the radio cassette. I did not know the men before. At 18.00 hours I saw the young brother of of the two men. He took out the ITT radio cassette and the boy said it was being sold for K3,600. I took the radio cassette away. After two weeks I saw the two men who sold me the radio cassette, they were in the company of Mr. Daka. I look around this court, I see the man in the dock to be one of the two men who found me at the John Howard market and who collected me from the house. (Witness points at the accused in the dock). The radio cassette I bought was ST565 ITT, grey or silver in colour and it has the name, Chombo Justine, near the batteries box".

In cross examination, the witness said:

" I went to the market to have a hair cut, then I heard about their talk of selling the radio cassette to the accused who is in the court and another man only collected me from the market and handed me over to their brother who sold i.d.1 to me".

There is a very forceful point in Miss Henriques arguments that the learned trial judge misdirected himself when he concluded that it was the appellant who sold the radio cassette to PW2. The evidence clearly shows that the transaction of selling the radio cassette to the complainant took place between the complainant and his friend. Later they took the complainant to their house and the young man took the radio cassette and gave it to PW2. The evidence of PW2 was in conflict with the evidence of PW3. PW3's evidence was that Oswald Musonda, PW2, told them that he bought it from the accused or the appellant, not the young man. The learned trial judge did not consider this conflict of evidence between PW1 and PW3 and the person who sold the radio cassette to PW3. We agree that the submission of Miss Henriques that the learned trial judge erred in concluding that the appellant sold the radio cassette to PW2. The evidence shows that the appellant and his colleagues mentioned to PW2 that somebody was selling a radio cassette and that later the young brother sold the radio cassette to PW2. In convicting the appellant, the learned trial judge relied heavily on the evidence of PW2 and PW3. He concluded that the evidence of PW2 collaborated with the evidence of PW1.

We have considered this misdirection carefully and we have considered whether we would apply a proviso. First, the identification by PW1 was a weak identification. The learned trial judge erroneously supported that evidence through the evidence of PW2. We are unable to apply a proviso in this particular

case. It would be unsafe to allow the convictions to stand that there is the question of the appellant's involvement with regards the radio cassette. We would allow the appeal against the convictions for aggravated robbery and attempted murder. The convictions in this respect of these two offences are quashed and sentences are set aside. We would, however, consider the appellant's involvement in respect of the radio cassette. The evidence of PW1 shows that the appellant and his colleagues who talked about the sale of the radio cassette and later they took him to their home where the radio cassette was handed over to him by their brother. It is clear that the appellant was aware and indeed knew where the radio cassette was kept and that it was being sold. The appellant was among the persons who received this stolen property. The evidence is clear that the appellant was guilty of receiving stolen property. We convicted the appellant with the offence of receiving stolen goods. As for sentences, this court has treated receiving of stolen property very seriously and we have in the past given maximum penalty provided for by law. The appellant is, therefore, sentenced to 7 years imprisonment with hard labour with effect from the date of the High Court judgment, which is 6th June, 1996.

B.K. Bweupe
DEPUTY CHIEF JUSTICE

M.S. Chaila
SUPREME COURT JUDGE

D.M. Lewanika
SUPREME COURT JUDGE