IN THE SUPREME COURT OF ZAMBIA SCZ APPEALS Nos 87, 88 & 89 OF 1998
HOLDEN AT NDOLA
(CRIMINAL JURISDICTION)

JUSTINE CHIBWE	1ST APPELLANT
ELIJAH KATUTA	2ND APPELLANT
MICHEAL MWELA	3RD APPELLANT
Vs	
THE PEOPLE	RESPONDENT

Coram: Ngulube, C.J., Sakala and Lewanika, JJS

7the December 1999

For the 1st Appellant: Mr. S.W. Chirambo, Deputy Director, Legal Aid

For the 2nd Appellant: Mr. K. Musongo, York Partners

For the 3rd Appellant: Mr. M. Chitabo, Chitabo Chiinga Associates

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

J U D G M E N T

Ngulube, C.J. delivered the judgment of the court.

The appellants were tried and convicted on a charge of armed aggravated robbery for which they were sentenced to undergo capital punishment.

The particulars of the offence were that they on 26th November 1996 at Mansa in the Mansa District of the Luapula Province of the Republic of Zambia while acting with another person unknown, while armed with a firearm stole over K32 million cash with property of Mansa Central Cigarettes Company at the time used or threatened to use violence to prosecution witness No.1.

The prosecution evidence established quite conclusively that sometime on the morning of the day in question an aggravated robbery took place. The four persons posing as customers were joined by others, one of whom was armed with what appeared to be a firearm. The customers together with the Manager PW.1 were bundled into an office and were tied up as well as gagged with cloths put in their mouths. According to

the prosecution witnesses each of the appellants participated in tying up and bundling the witnesses. The bandits then took the keys from one of the witnesses went and opened the warehouse and helped themselves to the money. There was evidence that within hours the appellants were all apprehended. According to the prosecution evidence the third appellant was caught first by a Mr. Aggripa Bwalya and it was alleged that he had a bag containing money which was over K6 million. The third prosecution witness who was an investigating officer testified that the 3rd appellant is the one who led the police to a house where the first appellant was found hiding in a drum. These two then led the police to the other appellants. The appellants' own accounts were that while they agreed that they were present at the robbery and participated in the robbery they were ordered to do so by the armed person and they felt constrained to co-operate on pain of death. Accordingly when ordered to tie up the workers and the customers, they obliged. Later on the gun man threatened to kill them at which point the appellants ran in different directions. The learned trial Judge did not accept these stories and convicted the appellants.

On behalf of the appellants' Counsel advanced a number of grounds of appeal. A ground common to all of them was that it was an error on the part of the learned trial Judge to have convicted the appellants on a capital aggravated robbery charge. It was pointed out that the evidence concerning the use of the firearm was insufficient. In particular Counsel pointed out that there was no ballistic expert's report and there was nothing in the evidence to show that the gun found was the gun used in the robbery or that it was a gun as required by the Section.

The learned Counsel for the State in submitting in support of the capital conviction requested the court to break new ground by getting the evidence which was missing in the trial. When his attention was drawn to the case of John Timothy and Mwamba Vs. The People which is reported in 1977 Zambia Law Reports page 394, Mr. Okafor invited this court to revisit that authority. We would like to take the opportunity to affirm that authority which is still good law. Reading through the head notes No.1 and 2 that case held:-

"i. To establish an offence under Section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act, then Cap 111 that it was a lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot;

ii. The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired but whether the gun seen by the eye witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found."

It is thus quite clear that on the authority and on the law as presently applied in this country the use of a firearm must be proved with a certain amount of care. This is as it should be since the infliction of capital punishment is a matter which cannot be taken lightly. It follows from what we have said that there was merit in the submissions by Counsel for the appellants, that it was wrong to find that the use of a firearm had been established to the required standard. That ground of appeal is allowed; the capital type of conviction will have to fall away and any conviction in this case will have to be for an ordinary type of aggravated robbery. That brings us to the second ground which was common to all the appellants and this was the issue of coercion in the commission of the offence.

We have examined the narrative by the eye witnesses of the events at the Cigarette Manufactures premises and the role ascribed to each one of the appellants. As Mr. Okafor quite properly observed the sequence of the events excluded a claim of coercion. For example we do not see that the first appellant if ordered to tie up witnesses should have felt compelled to kick the Manager, to kick him as described in the evidence and it was rather odd that all the appellants were suitably armed with ropes, knives and whatever else they were using. Indeed they all appeared to have gone along

freely to go and collect the money and did not try to forthwith report to the police or authorities as required by the Section of the Penal Code which introduces the defence of duress. It is quite clear that the arguments in this regard cannot be entertained. There was a curious argument and submission on behalf of the second appellant based on alleged inconsistencies in the times mentioned by the witnesses in their evidence. We considered the submissions to have been expletive and serving no useful purpose when it was common to both sides of the case that this robbery took place and the appellants participated in the robbery. From what we have said, we allow the appeal against the capital conviction which is quashed and in its place we substitute a conviction for ordinary aggravated robbery contrary to sub Section 1.

With regard to an appropriate sentence instead of the death sentence we have taken into account that this was a very nasty incident. There was a large gang and there was a lot of unnecessary violence. These factors warrant a sentence somewhat higher than the mandatory minimum. This we put at 20 years imprisonment with hard labour with effect from the date when the appellants were taken into custody. The appeal succeeds to that extent only.

M.M.S.WNGULUBE
CHIEF JUSTICE

E.L. SAKALA
SUPREME COURT JUDGE

D.M. LEWANIKA
SUPREME COURT JUDGE