MUBANGA MUTALE, ALEX SILWENGA AND THE PEOPLE

SUPREME COURT
CHAILA, CHIRWA AND LEWANIKA, JJ.S.
ON 10TH AUGUST AND 12TH AUGUST, 1999.
(S.C.Z. JUDGMENT NO. 25 OF 1999)
APPEALS NO. 124 AND 125 OF 1998

Flynote
Criminal Law – Aggravated Robbery Evidence – Identification – Differences between oral and documentary evidence - Criminal Procedure – Sentencing – to be done by convicting Court.

Headnote
The appellants were convicted of aggravated robbery and appealed. During the trial, the appellants had been charged with two juveniles who after the appellants had been charged the court made an order to have them sentenced by the Surbodinate Court.

Held:

(1) That the order to have the juveniles sentenced by the Subordinate Court was contrary to law and Nullity.

For the Appellants: Mr. V. Kachaka, Legal Aid Counsel.
For the Respondent: Mr. J. Mwanakatwe, Principal State Advocate.

Judgment
LEWANIKA, J.S.: delivered the judgment of the court.

The appellants were convicted of the offence of Aggravated Robbery contrary to Section 294 (1) of the Penal Code. The particulars being that the appellants together with two (2) others on the 25th day of November, 1996 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia jointly and whilst acting together and being armed with a gun did, rob Caiphas Malambo of K6,693,000.00 in cash and 1 television set altogether valued at K6,903,000.00 and at or immediately before or immediately after the time of stealing did use or threatened to use actual violence to the said Caiphas Malambo in order to retain the said property.

The evidence for the prosecution in brief before the learned trial Judge was that on the 25th day of November, 1996, PW.2 was at home at a village in the Kabwe District when he was visited by a man at around 15:00 hours who asked him for some water to drink. P.W.2 gave this man some water to drink. Later on in the evening at around 19:00 hours P.W. 2 was sitted with P.W.3 together with other members of his family having a meal outside his house when at around 19:00 hours he saw the same man to whom he had given water come with five (5) other men. P.W.2 said that this man and his friends, one of whom was armed with a gun demanded for money from him and thereafter they went into the house and took the money which was in the cupboard and after they took the money they fired the gun five items in the

air and also took a Television set which was in the house. Before they left they also assaulted P.W.3 and left with the money and the T.V. P.W.2 identified the 2nd appellant as the person who had visited him earlier in the day and asked for water and as the same person who had come later on in the evening in the company of his friends. P.W.2 identified the 2nd appellant at an identification parade which was held on the 5th day of December, 1996.

P.W.3 also identified another person at the same parade who was tried together with the appellants in the lower court.

The evidence of P.W. 4 was that his village is about 4 Kilometres from that of P.W. 2 and P.W.3 and that on the night of the 25th and 26th November, 1996 at around 04:00 hours he was awakened by the sound of a motor vehicle outside his house. At about 05:00 hours he got up from his house and went to check on the animals which were in the kraal and as he went out he saw a motor vehicle which he described as a yellow Peugeot 504 bearing registration number AAM 1451 and that there was one man who was sleeping in the vehicle whilst others were walking towards the vehicle. He asked them where they had come and where they were going and they told him that they had come to see a witch doctor but that unfortunately, the battery of their car had gone flat. They asked him if he could assist them to have the battery charged and he agreed to do so and after the batter was charged they drove off in the vehicle. Later on in the evening, he met one of the complainants who gave him a report concerning what had happened at their farm on the previous evening and gave him a description of a motor vehicle which had been involved in the incident and he informed one of the complainants who was P.W. 5 that in fact he had seen that vehicle and gave him the registration number. P.W.5 who had also seen the vehicle on his way from Mumbwa then went to make a report at the police post at Landless corner and the police circulated a description of the vehicle to all the stations. P.W.4 also attended an identification parade on the 5th day of December, 1996, at which he identified the 2nd appellant and another person who was tried with the appellants in the lower court as being among the people that he saw at his village on the day in question.

P.W.8 who was the arresting officer stated that he was requested to conduct investigations into a robbery which occurred on the 25th day of November, 1996 and that on the 27th day of November, he went to the scene of the crime where he interviewed the complainants who gave him a description of the motor vehicle that was used in the robbery and that he also recovered 5 empty cartridges from the scene of the robbery. P.W.8 circulated a description and registration number of the vehicle to all stations and on the 1st day of December, 1996, the 1st appellant was apprehended driving the vehicle in question and after interviewing the 1st appellant the 1st appellant led him to the 2nd appellant who was also apprehended and also to another house from where the stolen Television was recovered.

The evidence by the appellants in their defence is that the 1st appellant in his evidence said that he had travelled to Luanshya on the 16th day of November, 1996, to visit his father in law who was sick and that he was in Luanshya up to the 30th day of November, 1996. He said that he left Luanshya on the 30th November, 1996 and came back to his house where he was employed as a pirate taxi driver and that when he was apprehended on the 1st day of December, 1996, he was driving the vehicle bearing registration number AAM 1451 on behalf

of is employer as a pirate taxi. He denied having participated in the robbery on the 25th November, 1996 and he denied any knowledge of the 2nd appellant or the other persons that he was tried with. As for the 2nd appellant, he denied any knowledge of the robbery and said that he only knew the owner of the vehicle in question because the 2nd appellant was a carpenter and he used to make some furniture for the owner of the vehicle and that he was only arrested because one of the people that he had been tried with led the police to his house after he had been assaulted by the police. The appellants were sentenced to 15 years I.H.L. and they have appealed to this court against conviction.

Counsel for the appellants submitted in the first ground of appeal that the learned trial Judge had misdirected himself in law and in fact by finding that the 1st appellant led to the apprehension of the 2nd appellant and the other co-accused persons when the evidence on record showed otherwise. In support of this ground, Mr. Kachaka said that the 1st appellant in his defence gave an alibi to the effect that when the alleged offence is supposed to have been committed he was visiting his father in law in Luanshya. He said further that the evidence on record was that the 1st appellant was an employee of the owner of the vehicle as a pirate taxi driver and that when he was questioned about the vehicle he led the police to the house of the owner of the motor vehicle where they found the wife and that it was the wife who led the police to the house where the 2nd appellant and others were apprehended.

He said that as for the 2nd appellant the learned trial Judge should not have relied on the evidence of P.W. 2 and P.W.4 as P.W. 4 was not at the scene of the crime but only met some people during the day who had a broken down vehicle and that the 2nd appellant was only identified as one of the people seen during the day and that the evidence on record is that when the actual robbery occurred it was dark at night and he urged us to allow the appeals and set aside the convictions. In reply, Mr. Mwanakatwe for the respondent said that he supported the conviction of both the appellants as there was evidence against them which was over-whelming. He said that as for the 1st appellant there was evidence on record that it was the 1st appellant who led the arresting officer to Lusaka where the others were apprehended and from where the stolen Television was recovered. He also said that there is evidence on record that the 1st appellant was seen near the scene of the crime and also that there was evidence on record that the 1st appellant admitted the charge which evidence was not challenged at the trial. He said that as for the 2nd appellant he was convicted of the offence because he had been identified by P.W.2 as one of the people who had attacked the complainant. He submitted that from the evidence on record the trial Judge was fully justified in convicting the appellants and he urged us to dismiss the appeals.

We are indebted to counsel for the submission which we have taken into account in arriving at our decision and we have also considered the evidence on record. From the evidence on record, there is no doubt that a robbery took place on the 25th day of November, 1996, during the course of which a sum in excess of K6 million was stolen together with a Television. The learned trial Judge was not satisfied that a firearm within the meaning of the Firearm Act was used during the course of the robbery but he was satisfied that violence and threats of violence were used. The evidence on record is that prior to the robbery P.W.2 had been visited by a person whom he identified as the 2nd appellant at around 15:00 hours of the day in question.

The 2nd appellant was also identified by P.W.2 as being one of the people who came back later in the evening of that day and staged the robbery. The 2nd appellant was also identified by P.W.4 who was awakened in the early hours of the 25th and 26th of November, 1996, by the sound of a motor vehicle which he described as a yellow Peugeot bearing registration number AAM 1451. This was the same motor vehicle that the 1st appellant was driving on the 1st day of December, 1996, when he was apprehended and the evidence on record is that upon being apprehended the 1st appellant is the one who led the police to the house where the 2nd appellant and two others were apprehended and stolen T.V. recovered. We have considered the defence advanced by the appellants during the appeal and the arguments advanced by counsel on their behalf in the course of this appeal but we are satisfied that there was ample evidence on which the learned trial Judge convicted the appellants. We therefore find no merit in the appeal against conviction which we dismiss accordingly.

However, we wish to point out for the record that when we examined the case record of these proceedings, we discovered that the appellants had been jointly charged with this offence with two juveniles and that after convicting them the learned trial Judge sentenced the two appellants but for reasons best known to himself he decided to make an Order that the two juveniles should be sentenced by the Subordinate Court. This Order was contrary to the law and was a nullity and we have been adjourning this matter on a number of occasions to enable us to have the two juveniles who did not appeal to appear before us so that this Order can be corrected. However, it has since transpired that the two juveniles were sentenced by the Subordinate Court of the 1st Class for the Kabwe District presided by the Principle Resident Magistrate to (10) strokes of the cane on the 14th October, 1998. Our intention in calling for the attendance of the juveniles was for us to quash that Order so that the juveniles are sentenced by the court that convicted them. But as they have already been sentenced and in all probability the sentences already carried out no purpose would be served by our quashing the Order but we wish to bring it to the attention of the learned trial Judge that his Order was contrary to the law and was a nullity.

Appeal dismissed.
