

PATRICK CHITALU KAYAMBA AND ALBERT KAPOPO v THE PEOPLE

*Supreme Court
Chaila, Chirwa, and Iewanika, JJ
16th February, 1999 and 22nd August, 2000
(SCZ Judgment No. 32 of 2000.)*

Flynote

Criminal Law - Firearm - Definition thereof.

Headnote

The appellants were convicted of armed aggravated robbery and were sentenced to death. The particulars of the case were that the appellants on 5th October 1995, 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 Maxwell Kasonde of a motor vehicle, namely Toyota Registration Number ACC 6928 valued at K12,914,000 and at or immediately before or immediately after the time of stealing did use or threatened to use actual violence to the said Maxwell Kasonde in order to retain the said property or to prevent resistance to it being stolen. The facts as found by the learned trial Judge were not in dispute. The issue in the appeal is that the firearm used was not a firearm within the meaning of the Firearm Act Cap 110, of the Laws of Zambia.

Held:

The pistol was capable of firing and the pistol falls squarely within the definition of the firearm. (*Lunda v The People*, SCZ Appeal Number 64 of 1996 followed).

Legislation referred to:

1. *Penal Code Cap 87, s. 294.*
2. *Firearms Act Cap 110, s. 2.*

Cases referred to:

1. *Timothy and Another v The People (1977) Z.R 394.*
2. *Tambwe and Another v The People SCZ Appeal No. 155 of 1997.*
3. *Lunda v The People SCZ Appeal No. 64 of 1996.*

F. Nanguzgambo, Director of Legal Aid *for the appellants.*
V. A. L Kabonga, Assistant Principal State Advocate *for the respondent.*

Judgment

CHAILA, JS, delivered the judgment of the court.

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The facts as found by the learned trial Judge were not in dispute and the appellants before us have not disputed the facts. The facts are that the appellants on the said date at Kabwe, robbed Mr Maxwell Kasonde of a motor vehicle, already referred to and this vehicle was the property of ZCCM Kabwe Division and was being driven by Mr Kasonde. The appellants used violence and this violence was in a form of a firearm, which was a pistol No. PL 221. The pistol was known as TOKAREV of Calibre 7.762 mm manufactured in China. They were convicted under Section 294(2) of the Penal Code, Cap. 87 and they were sentenced to death.

Counsel for the appellants Mr Nanguzgambo has argued one main ground. The appeal is about the firearm. The issue in this appeal is that the firearm used was not a firearm within the meaning of the Firearms Act, Cap. 110 of the Laws of Zambia. The appeal is based upon the following ground:

The learned trial Judge erred by convicting the appellants for aggravated armed robbery contrary to Section 294(2) of the Penal Code Cap. 87 of the Laws of Zambia as the firearm in question was not a firearm within the meaning of the Firearms Act, Cap.110, of the Laws of Zambia and that the learned trial Judge should have instead convicted the appellants of ordinary aggravated robbery contrary to Section 294(1) Cap. 87 of the Laws of Zambia.

Mr Nanguzgambo's argument is based on the testimony of the forensic ballistic expert who testified that the gun in question was a pistol with a magazine with five rounds of ammunition. The pistol was examined and was found to be a Tokarev of calibre 7.762 mm manufactured in China. The mechanical condition was very good and it could load and fire all ammunitions in its calibre of 7.762 mm. The evidence showed that the five rounds of ammunition that were taken to the expert were of calibre 9 mm parabellum. Those were manufactured in South Africa. The evidence showed that the five rounds were live ammunitions which could be loaded and fired from only a 9 mm parabellum pistol and could not be fired in a 7.762 mm gun. The evidence further showed that the pistol is classified as a lethal weapon and that if loaded by 7.762 mm parabellum and fired, it could kill. Mr Nanguzgambo submitted that the rounds, which were found on the appellants, could not fire in a 7.762 mm gun. He argued that although the appellant had a gun per se, it was however not such a gun as it would not at a material time discharge ammunition which the appellants had. He argued that in a practical sense, therefore, that weapon could not be described as a firearm from which any shot, bullet, bolt or other missiles could have been discharged. He relied on the authority of *Timothy and Another v The People* (1). In that case the court said:

- (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, Cap. 111, i.e. that it was a lethal barrelled 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 eyewitnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found."

Mr Nanguzgambo submitted further that the gun found upon the appellants could not have

fired or been fired as the bullets available were completely of a different calibre and that problem of the bullets of a different calibre explained the failure by the appellants to use the said weapon as was evidenced by the testimony of PW1. The learned counsel maintained that the wide interpretation put on the meaning of a firearm by Section 2 of Cap. 110 has been narrowed by the judgment in the case of Timothy and Another v The People (1), already referred to.

He summed up his argument by stating that the court, in view of the authority cited, should have convicted the appellants with the offence of aggravated robbery contrary to Section 294(1) Cap. 87.

For the State, Mr Kabonga the learned Principal State Advocate in supporting the conviction has relied also on the case of Timothy and Another v The People (1). On the interpretation of the firearm, Mr Kabonga has submitted that the firearm in question was a pistol made to fire rounds of ammunition of 7.762 mm calibre. To him that pistol was a firearm within the meaning of the Firearms Act. He further argued that in this particular case, the pistol used was loaded with rounds of ammunition with 9 mm calibre. Mr Kabonga argued that the pistol used in this case was a TOKAREV 7.762 mm, which was manufactured and designed as a pistol capable to being fired with two rounds of ammunition measuring 7.762 mm. Mr Kabonga argued that although the appellants made a mistake to load that pistol with wrong bullets, the pistol remained a firearm. Mr Kabonga further argued that although it could not fire at that time, it qualified to be a firearm, and urged the court to uphold the convictions of the appellants. The case of Timothy and Another v The People (1) already referred to by both counsel has relied upon our judgment.

This case and its principles were fully discussed in our judgment in the case of Tambwe and Another v The People,(2) The Timothy case was a case, which underlined the need to prove that the weapon used was a firearm within the meaning of the Firearms Act. It is also a case, which affirmed that, other satisfactory evidence could establish the use of a firearm even if no gun is even found. In this case, counsel for the appellants has urged us to find that the pistol used does not come within the meaning of the Firearms Act.

The Supreme Court in unreported case of Lunda v The People, (3) dealt with the question of a pistol of 7.76 mm and ammunitions of 9 mm. In the Lunda's case, the appellant was charged with armed aggravated robbery under Section 294(2) of the Penal Code Act. The particulars were that the appellant on 6th September 1994, at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, whilst armed with a gun which was a pistol, stole K23,000 from Winston Kaunda. The appellant was convicted and sentenced to death.

The facts briefly, were that the appellant had hired a vehicle driven by the complainant from a taxi rank at about 20.00 hours in Mufulira. They agreed on the fare and the appellant directed the complainant where to go. The appellant was sitting in the front seat. They drove to some place in Kamuchanga and when they got near to the grocery shop, which was closed, the appellant asked the complainant to stop the vehicle. The appellant walked out of the vehicle and went to the driver's side and there he produced a gun and pointed it at the complainant.

The appellant ordered the complainant to switch off the engine and to leave the keys in the ignition. The complainant got out of the vehicle and was ordered to hand over all the money he had. The appellant ordered the complainant to throw the money to the ground and walk backwards. The complainant did so and the appellant took the money and ordered the complainant to drive away. The complainant refused to go and told the appellant that since he had taken all the money he could as well take the vehicle away. The appellant refused to drive the vehicle and instead warned the complainant that the gun he had was not a fake one. The appellant took out from his pocket some two bullets and loaded the gun. Then the

appellant moved backwards and started running away. The complainant did not give up, he followed the appellant and shouted "thief". The complainant was assisted by somebody he met and they chased the appellant. The appellant stopped and threatened to shoot them but the complainant and his assistant managed to get hold of the appellant and managed to apprehend him and took away the gun.

The evidence further showed that the appellant attempted to shoot at the complainant and his colleague but the pistol could not fire. The appellant was taken to the Kamuchanga Police Station where the gun was surrendered and the money was recovered from the appellant. The Police handed over the pistol and the ammunition to the ballistic expert. The ballistic evidence as found by the learned trial Judge is that the pistol had a magazine but the bullets handed to him were not of the right calibre. They have had been filed to fit the chamber. The calibre of the gun was 7.762 mm and the bullets were 9 mm parabellum. The gun was in good condition and it was a military firearm in terms of the Firearms Act and it was capable of firing. The High Court considered the evidence and found that the gun in question was a firearm within the Act. On appeal to this court, the appellant raised the issue of the gun and ammunitions and argued that the use of the firearm had been established. We considered the matter and we dismissed the appeal.

It can be observed that the facts in the present case are on all fours within the facts in the Lunda case (3). In both cases, the guns in question were pistols of 7.762 mm and the bullets were of 9 mm calibre. In the Lunda case (3) the evidence showed further that the bullets had been filed in order to fit the chamber but in both cases the pistols were loaded with wrong ammunitions. The definition of the firearm was fully dealt with in the case already referred to by both counsel, i.e. Timothy and Another v The People (1) . As we have already pointed out, it was affirmed by the Supreme Court decision in the Tambwe and Another v The People (2).

The issue, which Mr Nanguzgambo has raised, was dealt with again in the case of Lunda v The People (3) where we confirmed that the use of wrong bullets did not change the status of the firearm in question. The evidence in this case clearly shows that although the appellants used wrong ammunitions, the pistol was capable of firing and the pistol falls squarely within the definition of the firearm in the decided cases. The appeals against convictions are therefore dismissed. It will now be up to the executive when considering sentences of death to take into account whatever may be used on their behalf, including the fact that no one was actually killed or harmed by the gun used by the appellants. For our part, we simply dismiss the appeal.

Appeal dismissed