IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 145 & 146/2000
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

B E T W E E N:

NELSON MALELE
JABILI LUNGU

VS

THE PEOPLE

Coram: LEWANIKA . DCJ., CHIRWA, CHIBESAKKUNDA JJS
On 8th January, 2002 and 6th August, 2002.

For the 1st Appellant: Prof. P. MVUNGA of Mvunga Associates
For the 2nd Appellant: A.M. BWALYA, Principal Legal Aid Counsel
For the Respondent: J. MWANAKATWE, Deputy Chief State Advocate.

JUDGMENT

LEWANIKA, DCJ, delivered the judgment of the Court.

The Appellants were convicted of the offence of aggravated robbery contrary to Section 294 of the Penal Code. The particulars of the offence being that the Appellants on 14th December, 1995 at Katete in the Katete District of the Eastern Province of the Republic of Zambia jointly and whilst acting together and being armed with an offensive weapon namely an A.K. 47 rifle serial number 0B 3930 did steal one motor vehicle namely a Toyota Hilux Vanette registration number. AAM 6877 valued at K15 million the property of Sable transport and at or immediately before or immediately

after the time of such stealing, did use actual violence to Mathews MVULA to obtain or retain it. The Appellants were sentenced to death and they appeal to this court against the conviction.

The evidence adduced by the prosecution was that PW 8 the complainant, on 14th December, 1995 in the morning, was driving his employer's motor vehicle bearing registration No. AAM 6877 from the border with Mozambique. After crossing the Sadzu river he saw two men who were standing on the road in front of him waving him to stop. When he was about 50 metres from them, he saw one of them open a bag and take out a gun and pointed the gun at him. He applied emergency brakes and stopped the vehicle. The one with the gun remained in front of the vehicle whilst the other came to open the driver's door. He came out of the vehicle and pleaded with the two men to take the vehicle but spare his life. As he was walking away from the vehicle the man with the gun fired at him and shot him in the groin. He lost consciousness and when he came to, he found the motor vehicle was gone. He was conveyed to St. Francis Hospital in Katete where he was admitted for 30 days. He identified the 1st Appellant and

another one who was acquitted in the court below as the men who attacked him.

On the same day, at around 1700 hours PW 1 and PW 2 saw the two Appellants who had come to their village driving a motor vehicle bearing registration No. AAM. 6877. They asked PW 2 for directions to reach Nabwalya's area in Mpika District but he told them that they could not get there as they would not be able to cross the Lukusuzu or Luangwa rivers. They eventually left the vehicle in the custody of PW 2 and proceeded in the direction of Mpika on foot. On the following morning PW 2 went to the wild life camp to report to the authorities that some people had left a vehicle which he suspected to be stolen at his village.

PW 4 testified that on 15th December, 1995 at around 2200 hours he was having supper with his son when another son came with two visitors who said they had left their vehicle across the Lukusuzu river and wanted a place to spend the night. PW 4 offered them one of his huts to spend the night and offered them food. PW 4 who is a former soldier said that the two visitors smelt of gun powder. He said the two visitors had a bag with them.

He identified the visitors as the two Appellants. He said that the second Appellant told him that he wanted medicine to enable him and his friend not to be captured as they had shot a person. PW 4 assured them that he had the medicine which they required. PW 4 said that the second Appellant then opened the bag and produced a gun. He suggested to them that he keeps the gun and they agreed. He took the gun to a school for safe custody and he also kept the keys for the motor vehicle. He then informed a ward councillor to report the two Appellants to the authorities and kept the Appellants at his village for two days until they were apprehended by the police. He identified the bag, the gun, the ammunition and the keys that he had kept for the Appellants.

PW 7 the forensic ballistic expert gave evidence of having examined the gun and ammunition and opined that the gun was in good working order. PW 9, a police officer, gave evidence as to how he and other officers apprehended the Appellants from PW 4's village and PW 10 gave formal evidence of the arrest of the Appellants.

In their defence the two Appellants deposed that in December, 1995 they had gone to Chipata to visit one Alick MWALE a soldier at Gonda Barracks who was charged with them in the court below. They were staying with Mwale but they used to go to the emerald mines in the Mwanya area of Lundazi in the emerald mines where they sold tobacco and totapacks. During the course of their travels, they met PW 4 who told them that he was interested in hunting game animals but he had no gun. They told PW 4 that they could arrange to get a gun from Gonda barracks which they could lend him for a short time. The arrangement being that they would share the meat. They went back to Gonda barracks where they stole MWALE's gun from his house and went back to PW 4's house with the gun and gave it to him. The gun had no ammunition and they gave PW 4 K5,000.00 to go and buy bullets. They had not been driving and had gone to PW 4's village using lifts. On the following morning PW 4 went hunting but in the afternoon he was brought back to the village handcuffed in a group of people. The people also had the gun that they had lent PW 4 and they were taken to a Wildlife camp with PW 4 after being apprehended and assaulted. From the camp

they were taken to the police at Lundazi. They denied all knowledge of the vehicle and denied having robbed the complainant.

The learned trial Judge upon consideration of the evidence adduced before him was satisfied that the prosecution had discharged its burden of proof and convicted the Appellants.

Counsel for the 1st Appellant has filed two grounds of appeal namely:-

1. That there is no satisfactory evidence of identification at the scene of crime

In arguing this ground counsel submitted that the only evidence on record is that of PW 8, the driver who was robbed of the motor vehicle. He said that PW 8 only identified A.1 and A.2 in court. That this was unsatisfactory as it falls far below the requirements spelt out in our judgment in the case of NYAMBE VS THE PEOPLE, 1973 Z.R. 228. Further that the evidence of the ballistics expert is inconclusive as to whether the gun in question is the one that was fired at PW 8, the driver. His testimony and report does not state within which period prior to the robbery the gun would have been fired. He submitted that in the circumstances it cannot be held that this gun was indeed used and was at the scene of the crime. If it was at the scene of the crime, then it would have been used but the ballistics expert

does not make such a conclusion. Further that the eight rounds of ammunition collected in the game park and later taken to the ballistics expert do not suggest that any ammunition for the subject gun was used by firing a shot or shots at the scene of the crime. That the evidence of PW 5 who gave MWALE the gun does not mention of any number of rounds of ammunition. He submitted that if MWALE was given eight rounds of ammunition, then no round could have been used by the 1st Appellant or his accomplice. He said that there should have been evidence led to show a deficit in the rounds of ammunition given to MWALE.

2. That the learned Judge misdirected himself by not accepting the first Appellant's account or version as being reasonably possible although not possible.

In arguing this ground counsel said that the 1st Appellant put up a spirited defence and was not shaken in cross-examination. He said that the court ought to have believed him as there were no flaws in his evidence in chief which was put under cross examination. He submitted that what the 1st Appellant said may not be probable but is reasonably possible to earn him the benefit of doubt. He said that this was the principle set out in the case of SABWENA VS THE PEOPLE 1965, Z.R.L. at page 5.

Counsel for the second Appellant said that he was adopting the arguments advanced by counsel for the first Appellant but in addition he said that there was no evidence on record that finger prints were lifted from the stolen vehicle. That had finger prints been lifted, it would have shown that they belong to somebody else and not the Appellants. He urged us to allow the appeal.

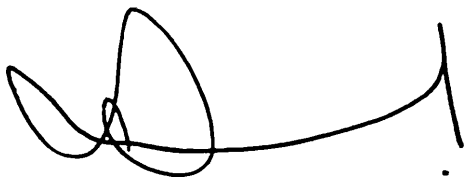
Counsel for the State said that he supported the convictions of both Appellants. He said that it was common cause that PW 8 was on 14th December, 1995 robbed of a motor vehicle by two bandits who shot him in the groin. He said that there was cogent evidence to support this conviction. He said that the motor vehicle was seen by PW 1 on the same day of the robbery being driven by the first Appellant whilst the second Appellant was the sole passenger. He said that there was also the evidence of PW 4 who provided lodging for the Appellants and kept the keys which turned out to be the keys for the stolen vehicle. He said further that the evidence on record is that the Appellants had given the firearm and ammunition to PW 4 who

identified them. He said that the ballistics expert confirmed that the firearm was a lethal weapon and that the complainant sustained gun shot wounds. He said that on the totality of the evidence the learned trial Judge did not misdirect himself in convicting the Appellants and urged us to dismiss the appeal.

We now turn to the grounds of appeal advanced by counsel for the 1st Appellant. Counsel is correct that the complainant only identified the two Appellants in court. But on the other hand the learned trial Judge in convicting the Appellants did not rely on the identification of the Appellants by the complainant. In fact the learned trial Judge makes no reference to it in his judgment. It is also correct that there was no evidence from the ballistics expert as to when the gun was last fired and no empty cartridges from the scene of the crime were picked for comparison to confirm or otherwise that they were fired from the same gun. But on the other hand, he did confirm that the gun was in good working condition and there was evidence that the complainant sustained gunshot wounds.

With regard to the second ground of appeal that the learned trial Judge misdirected himself by not accepting the first Appellant's account or version

as being reasonably possible although not probable. The two Appellants gave identical statements as to how they came to find themselves at PW 4's House. Their evidence was considered by the learned trial Judge who rejected their explanations in the light of the other evidence on record. The complainant was robbed and shot on 14th December, 1995 at about 1000 hours. On the same day at around 1600 hours to 1700 hours the two Appellants were seen by a number of witnesses driving the same vehicle. On the same day they entrusted the keys to the vehicle to PW 4 as well as the gun and ammunition. They also told PW 4 that they had shot a person and wanted medicine in order not to be apprehended. There was an abundance of evidence on which the learned trial Judge convicted the Appellants. The argument raised by counsel for the second appellant relating to the failure by the police to lift fingerprints from the motor vehicle does not deserve consideration in the light of the evidence we have referred to above. All in all, we are satisfied that the learned trial Judge was on firm ground in convicting the Appellants and we find no merit in the appeal which we hereby dismiss.



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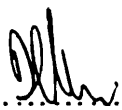
D.M. Lewanika
DEPUTY CHIEF JUSTICE



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D.K. Chirwa
SUPREME COURT JUDGE

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L.P. Chibesakunda
SUPREME COURT JUDGE