IN THE SUPREME COURT OF ZAMBIA **APPEAL NOs 157 (a), (b), (c)/2002**
HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

WEBSON CHINYAMA	**1st Appellant**
STEPHEN CHOLA	**2nd Appellant**
MUGARIA MPUMBUKANI	**3rd Appellant**

V

THE PEOPLE

Coram: Chirwa, Silomba, JJS and Munthali Ag. JS on 3rd March and 3rd November, 2004

For the 1st Appellant: In Person
For the 2nd Appellant: In Person
For the 3rd Appellant: Mr D Mupeta, Senior Legal Aid Counsel
For the People: Mrs J C Kaumba, Deputy Chief State Advocate

JUDGMENT

Chirwa, JS delivered the judgment of the Court:-

Cases referred to:

1. ALI and ANR v. THE PEOPLE [1973] Z.R. 232

The appellants, **WEBSON CHINYAMA, STEVEN CHOLA** and **MUGARIA MPUMBUKANI** (In this judgment referred to as 1st, 2nd and 3rd appellant respectively) were jointly charged with one other person who died during the course of trial with one count of aggravated robbery, contrary to Section 294 of the Penal Code, Cap 87. The particulars of the offence alleged that the appellants together with one other person on 12th April 2000 at Ndola, in the Ndola District of the Copperbelt Province of the Republic of Zambia jointly and whilst acting together and whilst armed with an AK 47 rifle, did rob **FEWDAYS CHINIKA** of 1 bicycle, 1 speaker, 1 video deck, 1 television set, 2 caps 1 wall clock, 1 suitcase, 4 pairs of shoes, 2 pairs of bed sheets, 4 blankets, 2 brief cases, 1 shortgun ammunition, 1 typewriter, 1 overall and 1 T-Shirt altogether valued at K1,294,000 and at or immediately before or

immediately after the time of such robbery, did use or threatened to use actual violence to the said **FEWDAYS CHINIKA** in order to obtain or retain the said property. They all pleaded not guilty but after trial they were all found guilty of the offence and sentenced to death. They have now appealed against both conviction and sentence.

The prosecution evidence was to the effect that the complainant on 12th April 2000 was at her house chatting with her son; at about 19:00 hours, three men came to her house and ordered her and her son to go inside the house where they demanded money. She was assaulted with a stick. Whilst in the house, she noticed with the help of a torch light which the attackers had, that one of them was armed with a gun. The attackers then collected goods named in the information. As they were getting out of the house, the complainant managed to escape and ran away. As she was running away, she was shot at but bullets missed her. The matter was eventually reported to the Police and the complainant was treated for the injuries received.

On 13th April, 2000 PW 6 was approached by two people he knew before who wanted to hire his truck to transport charcoal. These people were the 1st and 2nd appellant. The two appellants went to PW 6 on a red bicycle which was later identified by PW 2 as one of the properties stolen from the complainant. On being approached by appellants 1 and 2, PW 6 referred them to his son who usually used to drive the truck. His son is PW 4 who knew these appellants from far back as 1995. After arranging for the truck, the two appellants asked for K20,000 to use as transport to go and check on charcoal and they were given the K20,000 and they left the bicycle they came with, with PW 6 as security promising to get it back on the payment of K20,000. PW 4 took the bicycle to his house in Lubuto West in Ndola where in May

2000 he was approached by the Police in company of appellants 1 and 2. He was asked about the bicycle, he told the Police the circumstances under which he got the bicycle and later gave the Police the bicycle.

In the same month of April 2000 appellants 1 and 2 approached PW 5 with whom they live in the same village. Appellant 1 offered to sell a blanket to PW 5 at K20,000. PW 5 told appellant 1 that he did not have K20,000 at that time but gave K5,000 with the balance of K15,000 to be paid later. PW 5 took the blanket, the following day he was approached by Police who inquired about the blanket. He agreed having bought a blanket from appellant 1.

On 14th April 2000, PW 7, a Police officer received a report of attempted murder in which a **Mr Fungulwa** was a complainant who stated that he was shot at night by a group of people and that although it was at night he recognized three of them as they stayed in the same village. Acting on the reports, PW 7 visited the scene which was at 17 mile peg on the Mufulira/Ndola road. On information received he apprehended **Webson Chinyama**, who was co-accused in this case but died in the course of trial, together with appellants 1 and 2. A search in appellant 2's house resulted into discovery of a black box in which were found 1 TV set, one blanket, 1 pair of bed sheets, one white overall, one T-shirt and cap with the letters "**Auto World**" printed on them, 1 grey pullover, 1 pair of shoes, woollen cap. These items were identified by PW 2 as those stolen from the complainant on 12th April 2000. On further inquiries, 1st and 2nd appellants led PW 7 to a thicket where he recovered an AK 47 rifle with its magazine. The gun had one bullet in its chamber and the magazine had 14 rounds of ammunition. On asking the appellants, he was informed that they were given the gun by their friend who was a soldier in Congo D.R.

On 17th April 2000, in the afternoon, PW7 was handed over the 3rd appellant by Mobile Unit Police officers who had been handed over by Neighbourhood Watch members who had seen him loitering around the area where the AK 47 rifle had been recovered by the Police. On interviewing the 3rd appellant, PW 7 was informed by 3rd appellant that he was a soldier in Congo D.R. and that he was the owner of the AK 47 rifle and that he had given it to his friends who had borrowed for hunting and these friends were the 1st and 2nd appellants and that they had promised to give him a bicycle.

Further prosecution evidence was that the gun recovered through the lead of 1st and 2nd appellant was tested and was found to be in good working condition and was made in China and that the 15 rounds of ammunition recovered together with the gun were live and capable of being fired from the same gun. The appellants were then arrested for the subject offence. At the close of the prosecution case, all the appellants were found with a case.

In his defence, the 1st appellant denied the charge but admitted selling one blanket to PW 5 and that he sold it on behalf of **Ngosa** who wanted it exchanged with a 50 Kg bag of charcoal. He denied being with the 2nd appellant when the bicycle was left with PW 4 and 6. He denied being in a group that robbed the complainant.

In his defence the 2nd appellant told the court that he was apprehended by the Police on 15th April 2000 from his parent's farm and that although the Police searched the house, they recovered nothing and that he only saw the alleged property in Court. He denied approaching PW 6 to hire his truck and that he knew nothing about the red bicycle allegedly left with PW 6. He denied telling the Police that he got the gun from some one in the Congo. He denied being in the group of people who robbed the complainant.

In his defence, the 3rd appellant told the court that on 14th April 2000 he was on duty in the Congo D.R. as a soldier and whilst on duty he got a report that his wife was sick. He got permission to take his sick wife to hospital. On his return from hospital, he found that door to his house wide open and on entering it he found that his gun was missing. He reported to his Commanding Officer who warned him that if he did not find the gun he would be taken to Lubumbashi where he would be dealt with severely. He suspected his servant to have stolen his gun and he went looking for him along the Zambia/Congo border but as he did not know the boundary, he strayed into Zambia and he was captured by the Zambian authorities but he told the Police what he was looking for. He denied knowing the co-appellants. He admitted that the gun exhibited in court below was his but that it was stolen. He denied taking part in the robbery.

In considering the evidence, the learned trial judge found as a fact that the 1st and 2nd appellants left a red bicycle with PW 4 and 6 and that this bicycle was one of the items stolen from the complainant the previous day before they left it with PW 4 and 6. He also accepted that the 2nd appellant sold a blanket to PW 5. He found that since the two appellants were found in possession of property recently stolen, they must have taken part in the robbery. He further found that appellants 1 and 2 led the Police to where the AK 47 rifle was recovered. Further, a search of 2nd appellant's house resulted in the recovery of some property recently stolen. As regards to the 3rd appellant, he found that the gun was from this appellant and that he gave it to his friends to commit crimes and such he was a party to the offence by virtue of Section 21 (1) (c) of the Penal Code, Cap. 87. He rejected the 3rd appellant's story as to how the gun was found in Zambia because his initial story to the Police was that he had given it to his friend for hunting but in Court his story changed that it was stolen by unknown person.

At the hearing of the appeal, the 1st appellant appeared in person and handed in written heads of arguments which had two grounds of appeal. The first one was that there was dereliction of duty by the Police in not lifting finger prints from the gun allegedly recovered in this case so as to establish who handled it. This, it was submitted should be resolved in the appellant's favour. The second ground of appeal was to the effect that since conviction was based on recent possession of stolen property, any explanation by an accused person should be accepted. In present case, the 1st appellant explained how he came to be in possession of the blanket. This was given to him by **Ngosa** for him to exchange it for charcoal. This, it was submitted, is a reasonable explanation and the appellant should therefore, be acquitted.

The second appellant too represented himself at the hearing of the appeal and in his written heads of arguments he argues that the learned trial judge erred in law and fact in accepting the evidence of PW 6 that he, the appellant, left a bicycle with him after borrowing K20,000 when there was no witness. He denies knowing this witness. On PW 3, he submitted that although this witness claims to have seen him during the robbery, there was no identification parade conducted at which the witness identified him. Dock identification in court is not sufficient and should be disregarded. On the question of his apprehension and arrest, he submitted that he was originally arrested for attempted murder but the people who apprehended him never testified in court and that all the property was brought by Ngosa who escaped and went to Congo. He therefore submitted that no sufficient evidence was led to prove any case against him beyond all reasonable doubt and he prayed that he be acquitted.

On behalf of the third appellant, Mr Mupeta submitted that the only reason why the appellant was convicted was because of the gun. He submitted that

the appellant gave an explanation as to how his gun was lost and the fact that he told two different stories as to how the gun was lost, or released, this lie should per se go against him. It was submitted that the appellant testified that he was beaten by the Police, hence his story that he had lent his gun to his friends for hunting. The Court should have accepted the story he gave in court when he was free, that his gun was stolen from his home when he had taken his wife to the hospital.

On the conviction on armed robbery, it was submitted that in as much as the gun recovered was proved to be a gun within the meaning of Firearms Act, there is no evidence that, that was the gun that was used in the robbery because there was no evidence of the one that may have picked the empty cartridge from the scene and also evidence from the one who took this cartridge to the ballistic expert. With this break in the link of evidence, it is unsafe to sustain the conviction under Section 294 (2) of the Penal Code, Cap 87. It was prayed that the conviction of the 3rd appellant be quashed.

On behalf of the State, Mrs Kaumba supported the conviction and sentences. It was submitted that 1st and 2nd appellants were found handling and in possession of property recently stolen. For the 1st appellant, he sold a blanket to PW 5 which was identified by the complainant as hers stolen during the robbery. For the 2nd appellant, a number of items were found in the house where he was found sleeping. For both 1st and 2nd appellants they left a stolen bicycle as security. Further, the two appellants led the Police to the recovery of the gun. As for the 3rd appellant, it was submitted that as he admitted that the recovered gun was his the circumstances of his arrest should be taken into account. It was submitted that it was too much of coincidence that the 3rd appellant should be apprehended near where the gun

was recovered the previous day and had been seen loitering around that area. The only conclusion that can be made is that he was aware that the gun was hidden there and wanted to pick it up but unfortunately he did not find it. Whilst conceding that there was a break in the chain of evidence to link the gun with the empty cartridge found at the scene of the robbery, it was submitted that the evidence of PW 11 that he received the empty cartridge from **Inspector Bwalya**, was sufficient link to connect the cartridge to the gun and therefore sufficient evidence that a gun was used to the robbery. The court was urged to dismiss the appeals.

We will deal with the case against the 1st and 2nd appellants first.

We have considered the evidence and judgment on record and the written and oral submissions by the 1st and 2nd appellants and by Counsel for the 3rd appellant. From the evidence there is no doubt that the complainant was robbed of the property listed in the information and that this robbery took place at night. Although PW 3 identified the 2nd appellant in court as one of the attackers, this is dock identification which has little or no value unless we find other incriminating evidence. This has been the position and was emphasised by the then Court of Appeal in the case of **ALI and ANR v THE PEOPLE (1).**

In this case, the Police recovered a number of items stolen during the robbery. There was the recovered bicycle. According to the prosecution case, this bicycle was recovered from PW 4 and the circumstances of how the bicycle was found with PW 4 was explained by not only PW 4 himself but by his father PW 6. According to the evidence of these two witnesses, the bicycle was brought to the working place of PW 6 by the 1st and 2nd appellants who approached him with the intention of hiring his truck to

transport charcoal. PW 6 referred them to his son, PW 4, who usually did that business. After making the arrangements with PW 4 and as the two appellants were going, they asked for K20,000 for transport to check on the charcoal they were to transport. At first PW 6 was reluctant but PW 4 persuaded him to give them the money as the appellants were well known persons having dealt with them before. PW 6 gave K20,000 to the 2nd appellant and the bicycle was left as security to be given back to the appellants on the return of the K20,000 and PW 4 took the bicycle to his home. A few days later the Police in company of the two appellants approached PW 4 and asked him about the bicycle, he readily agreed that he was keeping the bicycle given to him by the two appellants and he gave the Police the bicycle. This bicycle was identified by the complainant as one of the items stolen from him during the robbery on 12th April 2000. According to PW 6, this bicycle was brought to his working place by the appellants on 13th April 2000, a day following the robbery.

There is also the evidence of PW 5 who lives in the same village as the two appellants. Sometime in April 2000 as he was passing by the 1st appellant's house, the appellant told him that he was selling a blanket given to him by somebody who exchanged it with charcoal and that he was selling it as he had no food. The appellant was offering the blanket for K20,000. He did not have the K20,000 but gave him K5,000 down payment and collected the blanket. The following day, the Police visited him and asked him about the blanket and he explained how he bought the blanket. This blanket was identified by the complainant.

When the appellants were arrested for a different offence, their houses were searched. Nothing was found in the 1st appellant's house. But upon searching the 2nd appellant's house, a number of items suspected to be stolen

were found. They included a TV set, travelling bag, two blankets, a pair of bed sheets, one pair of shoes, one white overall, one T-shirt and Cap with "Auto World" written on them. These items were all identified by the complainant as part of the goods stolen from him on 12th April 2000 and these items were recovered on 14th April 2000. On the same day, the appellants led the Police to a thicket where they had hidden the gun and the gun was recovered by the Police.

Taking the totality of the evidence, the evidence against these two appellants is overwhelming that they were involved in the robbery. They were found in possession of property recently stolen. Their denial cannot stand. The bicycle was left by the appellants with PW 4 and 6 who were well known. A blanket was sold by 1st appellant to PW 5 who stays in the same village and on selling he told PW 5 that the blanket was given to him by someone in exchange of charcoal. There was no mention of Ngosa. We see no merits in the appeals against the conviction on aggravated robbery. The appellants were convicted of armed aggravated robbery. Although some gun was recovered and there was evidence that gun shots were fired, we have had difficulties in upholding the conviction on armed aggravated robbery. The two eye witnesses to the robbery never talked of a spent cartridge at the scene. The Inspector who is alleged to have picked the cartridge was never called to give evidence. There is, therefore, no link of the gun to the robbery. We therefore set aside the conviction of armed aggravated robbery and substitute it with ordinary aggravated robbery.

Coming to the 3rd appellant, the only evidence against him is the gun. The gun having been dislinked to the robbery, there is no evidence against him to connect him to the ordinary aggravated robbery. He was not with co-appellants when the left the bicycle with PW 4 and 6. Nothing was found on

him. We therefore allow his appeal, we set aside the conviction and quash the sentence.

Having found 1st and 2nd appellant guilty of ordinary aggravated robbery, we now have to think of suitable sentence. The complainant was beaten with a stick and was admitted in hospital. She sustained, according to the medical report the complainant had swollen and painful hip, chest pains and back. She was admitted in hospital for three days. We note that the robbery was by a gang and therefore it takes it out the minimum sentence range. Both appellants are therefore sentenced to 18 years I.H.L with effect from 16th April 2000.

D K Chirwa
JUDGE OF THE SUPREME COURT

S S Silomba
JUDGE OF THE SUPREME COURT

S S K Muthali
AG. JUDGE OF THE SUPREME COURT