

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)

APPEAL NO. 11/2005

NIXON CHINKUBALA

VS

THE PEOPLE

CORAM: LEWANIKA, DCJ, CHITENGI, SILOMBA JJS
On 4th April, 2006 and2007

For the Appellant:	In Person
For the Respondent:	C.F.R. MUCHENGA, Director of Public Prosecutions

JUDGMENT

LEWANIKA, DCJ delivered the judgment of the Court.

The Appellant was convicted of the offence of aggravated robbery contrary to Section 294 (1) of the Penal Code and sentenced to 15 years imprisonment with hard labour. The particulars of the offence being that the Appellant on 30th November, 2002 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting with other persons unknown did steal from Ben MAKAI one radio cassette, one television set, one table clock, one jeans trousers, two puma blankets, one

pair of bed sheets, one bag, one mosquito net, one track suit and K2,050,000.00 cash altogether valued at K6.5 million and at or immediately before or immediately after the time of theft did use actual violence to the said Ben MAKAI in order to obtain the said property or overcome resistance to its being stolen.

The evidence adduced by the prosecution in brief is that on 29th November 2002, PW 1, the complainant was going to his business premises from his house when he met PW 3 who said to him, *“today you will see what will happen to you.”* He wanted to ask PW 3 what he meant but did not do so as he thought that PW 3 was not serious. This was around 1600 hours to 1700 hours. He closed his restaurant at around 2300 hours and proceeded home with his wife and children. After midnight as they were preparing to sleep he heard a lot of noise and dogs barking. Later he heard a gun shot and realized that they were being attacked by bandits. He heard his children screaming and wanted to go out but his wife restrained him. The bandits went to his daughter’s house and a shot was fired and his daughter’s house was set on fire. He heard the bandits say that don’t come out or we shall kill you. Some of his daughters ran to his house and others into the bush. One of this daughters entered into his house followed by three bandits. They ordered him to lie down and hit him with the butt of a gun.

They continued hitting him until he became powerless. They then left him and went to collect keys from his son's house. From his house they took two blankets, two pairs of bed sheets, three shirts, three trousers, a TV and one suitcase. In the morning he went to report the robbery at Westwood Police Station. He said that he was not in a position to identify any of his assailants.

PW 2 testified that on the night of 29th November 2002 he was sleeping in the house with his two brothers, Moses and Bonny. Some bandits came and he heard a gun shot. Moses wanted to go out but the bandits said that if you come out we will kill you. Then he saw three bandits come to their house. The one on the door was armed; one carried burning grass in his hands. Two of them started beating Moses whilst asking for the whereabouts of the person who sells on the counter. He said that the one who had the gun held him by the hand. He further said that the light from the burning grass was enough for him to see their assailants. He described one of their assailants as having a gap between his teeth and that when he talks his lips bend and that he was dark of medium built and wore a jeans trousers. He did not see the other assailant clearly. He said that the one he has described is the one who had the gun. He said that he showed them the person who sells on the counter. The bandits then fired a gun shot and the

girls ran away from their house and the bandits set it on fire. He then ran into the bush and subsequently gave a statement at Westwood Police Station. He said that the two assailants were in the house for about ten minutes. Later he attended an identification parade at the Police Station where he identified the Appellant.

Cross examined he said that there were eight people on the parade and that he had asked the police officer at the parade to let the people on the parade talk so that he could identify his assailant. He said that the Appellant was the only person who had a gap between his teeth.

PW 3 testified that on 28th November, 2002 at around 2000 hours he was playing pool at Situmbeko village when a person he did not know gave him K5,000.00 and asked him to buy him a drink. He bought a drink for K1,500.00 and this person gave him the change. He continued playing pool and this person went away. On the following day at around 0700 hours he went to the roadside to wait for a friend who was going to give him a lift to Mumbwa. When his friend did not turn up, he started drinking beer. He picked a quarrel with his drinking companions and went to Mwembeshi Bridge. Between 1600 hours and 1700 hours he returned to Situmbeko village and met the same person who had sent him to buy a drink on the previous night. He said that this person had a missing tooth and that when

speaking his mouth bends. This person asked him if he knew where the owner of the restaurant PW 1 stays and he showed him. This person then said to him that he should not tell anybody about what he had told him and that if he did, they would shoot him. He also told him that he belonged to the anti robbery squad at Chelston. As he walked away from this person he saw another man who was tall and armed with a firearm who came to join the person he had been talking to. He said that as he left the two people he met a Toyota Corolla vehicle which was moving slowly and it stopped where the two men were and they boarded the vehicle. There were five other occupants in the vehicle. He identified the Appellant as the person who had sent him to buy a drink.

He further deposed that on 3rd December, he heard that PW 1 had been robbed and he suspected the people he had seen on 29th November. On 9th December 2002 he was at Situmbeko bus stop when he saw a minibus that had delivered some bread. He went to talk to the driver who was a friend of his. The Appellant called him and gave him K500.00 to buy cigarettes and after buying cigarettes, the Appellant took him to PW 1's yard where the Appellant lit and smoked a joint of marijuana. The witness told the Appellant not to smoke marijuana, but the Appellant said that he smokes because he is a police officer. The Appellant then asked him if he had heard

what had happened and when the witness said he had not, the Appellant said that he was the one who had done it. At this point they were confronted by PW 1's wife PW 4. The witness told PW 4 that she should apprehend him and the Appellant and take them to the police station. He said that at this point, the Appellant ran away and he apprehended him. He said that the Appellant was apprehended at the bus stop. On 10th December 2002, he was taken to Westwood Police station where he narrated the events of 28 and 29th November 2002. He did not see the Appellant again until after he had been detained for seven days. He was released from custody and told that he would be required to testify.

PW 4 who is the wife to the complainant testified that on the night of 29th and 30th November 2002 they knocked off between 2300 hours and 2400 hours and reached home safely. As they were preparing to go to bed she heard dogs barking and two minutes later she heard a gunshot and people shouting that if you come out, we will kill you. Her husband wanted to come out but she restrained him. From the foot steps she surmised that there were many people outside. Later she heard another gunshot coming from the direction of a house occupied by her daughters, one of her daughters ran into their house and was followed by the bandits. They were three, two entered the bedroom and one remained in the sitting room armed

with a gun. The one with the gun ordered PW 1 to lie down and produce the money or he would be killed. The two who entered the bedroom slapped her and she could see her assailants from the light of the burning house. They said to her that if she did not give them money they would kill PW 1. She could not see their faces as they wore masks. She pleaded with them not to kill them and gave them her hand bag which had K1,700,000.00. The one with the gun kept on assaulting her husband and they asked for more money otherwise they would kill PW 1. She then gave them a brief case which had money for the church. The bandits opened the wardrobe and took out various items among them were three shirts, a new mosquito net, two pairs of bed sheets. They also took a television set and a torch. After the bandits left, she and her children went to hide in the bush and on the following morning they reported the matter at the police station. She valued the stolen property at K15 million although the police subsequently recovered a video cassette recorder from the road.

PW 4 further deposed that on 9th December, 2002 she was selling at the restaurant in the afternoon when she saw PW 3 whom she had known for a long time go behind the restaurant with someone. She went outside to see what they were doing as they had stayed for some time. When she got to where they were she saw PW 3 drawing a sketch on the ground and there

was the smell of marijuana. The other man ran away and when she asked PW 3 he said that he did not know the man but that they were merely smoking together. She held PW 3 by the hand and PW 3 said to her that do not apprehend me alone but with the other man so that you can question us together. He told her that the other man had gone to the bus stop. They went to the bus stop and pulled out the man from a mini bus which he had boarded with the help of some vigilantes. Upon being questioned the man revealed that he was a policeman and produced an identity card. She described this man as dark in complexion, medium built, that he had a missing tooth and that when he talks his mouth bends. She identified the Appellant as the man she was describing. After questioning the Appellant, they took his details and released him whilst PW 3 remained in the custody of the vigilantes who conveyed him to the police station on the following day. She said that she saw the Appellant at the police station after a few days.

PW 6, PW 7 and PW 8 were all police officers who were stationed with the appellant at Handsworth Police Post. Their evidence was to the effect that the Appellant was supposed to report on duty on 19th November 2002 at 1600 hours but that he did not do so.

PW 9 testified that on 17th December 2002 he conducted an identification parade where the Appellant was a suspect in the commission of an aggravated robbery. There were eight other people on the parade who were of similar appearance to the Appellant. He explained to the Appellant what his rights were and the Appellant called DW 2 his younger brother to witness the parade. The witness only had one identifying witness, PW 2. He explained to PW 2 what the procedure was and PW 2 requested the witness if he could talk to the people on the parade as that is when he could identify the culprit properly. He said that PW 2 identified the Appellant after talking to him. The witness said that among the people on the parade there was one other who had a missing tooth.

The witness confirmed under cross-examination that the Appellant had complained to the officer in charge that the identification parade was unfair.

PW 10 gave evidence of arrest of the Appellant and after his evidence Counsel closed the case for the prosecution.

On being put on his defence, the Appellant elected to give evidence on oath and called two witnesses.

In his evidence the Appellant deposed that on 29th November 2002 he was on duty at Handsworth Police Post. That on 30th November, he was

informed that he was one of the officers who had been selected to beef up the Traffic Section at Chainama. He reported at Chainama Traffic Section on 1st December 2002 and worked there up to 7th December 2002. On 7th December he knocked off at 1200 hours and decided to go to Mumbwa to see his wife who was ill. On 9th December he started off from Mumbwa using a minibus which developed a fault on the way. The driver stopped the minibus at a lay by at Situmbeko village. Whilst the bus was being attended to he was chatting with the driver when he saw a callboy who was asking the driver for money. He gave the call boy K1,000.00 to buy him two cigarettes and a box of matches. While the callboy was gone he went to a public toilet to relieve himself. The callboy followed him to give him the cigarettes and as he was lighting the cigarette he saw a woman who was telling the callboy that she had stopped him from coming to her place because he smokes marijuana. He left them and went to the bus stop and boarded the bus. As the bus was about to start off, he saw a group of people who were saying that they wanted to see the person who had been with the callboy. He asked them what the problem was and they told him that he had been smoking marijuana. These people insisted that they wanted to know him as a robbery had occurred at that place. He showed them his I.D. Card but they insisted that he comes out of the bus. They asked the callboy (PW 3) how he came

to know him but PW 3 said that he did not know him. The people took his particulars and released him.

As to the identification parade, the Appellant said that PW 2 had gone through the parade on the first occasion and failed to identify anyone. The parade officer then asked the people on the parade to open their mouths and he was the only one with a missing tooth on the parade. He said that he complained to the parade officer about the manner in which the parade was conducted. He denied any involvement in the robbery.

DW 1 was a police officer who was at the material time a records officer based at Chelston Police Station. He produced a document showing an entry made on 30th November 2002 that the Appellant was among officers who were attached to Chainama Traffic from 1st December 2002 to 7th December 2002.

DW 2 was the younger brother of the Appellant and he testified that on 17th December 2002 he went to visit the Appellant who was being held at Westwood Police Station. He arrived at the police station at around 0900 hours. At around 1000 hours he saw the Appellant being led from the Cells to the toilet. At the same time he noticed a group of two women, two men and a boy who were sitting nearby. He saw one of the women point at the Appellant and say to the boy, '*that is the young man.*' At around 1340

hours the Appellant was taken out of the cells for lunch. He had brought him some food, and after lunch he was taken back into the cells. The group of persons he saw earlier were still at the police station. Later he was led by the police to witness the identification parade. There were eight people on the parade including the Appellant. The young man or boy he had seen before went through the parade and did not identify anyone. He then asked the officer conducting the parade if he could ask the people on the parade to open their mouths. When the people did so, that is when he identified the Appellant. He said that the Appellant was the only person on the parade with a missing tooth. He later lodged a complaint with the officer in charge about the manner in which the parade had been conducted.

On the basis of this evidence the learned trial Judge convicted the Appellant of the offence of aggravated robbery contrary to Section 294(1) of the Penal Code and sentenced the Appellant the fifteen years imprisonment with hard labour. The Appellant has appealed against the said conviction.

The Appellant has filed five grounds of appeal, namely:-

1. That the learned trial Judge misdirected himself in fact and erred in law when he convicted the Appellant based on identification by a single witness without various satisfying factors that must be taken into account;
2. That the learned trial Judge further misdirected himself in fact and in law when he convicted the Appellant based on identification by

a single witness without regard to the rules pertaining to the fairness of the parade;

3. That the learned trial Judge further misdirected himself and erred in fact and in law when he found corroboration to convict the Appellant based on identification by not only a single witness but a child from the immaterial testimony of a suspect witness (PW3);
4. That the learned trial Judge misdirected himself when he drew an inference to convict the Appellant from the alleged conduct of the Appellant when PW 4 and PW5 accosted him on 9th December, 2002 at Situmbeko bus stop;
5. That the learned trial Judge further misdirected himself when he found the immaterial and incredible testimony of PW 6, PW 7 and PW 8 as supportive to convict the Appellant based on identification not only by a single witness but a child and a suspect witness, PW3.

At the hearing of the appeal, the Appellant who appeared in person said that he was relying on the heads of argument that he filed. But he added that PW 3 should have raised the alarm when he met him on 29th November 2002. He also complained that his warrant of commitment at the Prison shows the date of his arrest as 11th December 2004 instead of 11th December 2002.

The learned Director of Public Prosecutions said that he supported the conviction although the case hinges on the evidence of a single identifying witness, PW 2. He said that from the evidence on record the witness had ample opportunity to observe and identify the persons who attacked them. He said that although the incident occurred at night, the witness told the

court that he was able to identify the Appellant from the light coming from the torched house. That the court had considered whether the evidence of PW 2 was corroborated by other evidence. He pointed out that there was the evidence of PW 3 who said that on the day in question the Appellant had asked him for directions to the complainant's house. He said that for those reasons, he would urge us to dismiss the appeal.

In reply the Appellant said that according to the evidence of PW 2 the light came from the burning grass that the assailants were holding in their hands. He also urged us to consider the fact that PW 3 was a suspect witness who only implicated the Appellant after being detained for eight to ten days.

We have taken into account the submissions of the Appellant and the Director of Public Prosecutions as well as the evidence on record. In the view that we take of this appeal, we do not intend to deal with the Appellant's grounds of appeal servatim. As has been pointed out both by the Appellant and the Director of Public Prosecutions, the conviction of the Appellant was primarily based on the evidence of a single identifying witness, namely PW 2. The evidence of both PW 1, the complainant and PW 4 his wife is that they would not identify their assailants. PW 4 went further to state that at the time of the robbery their assailants wore masks and she could not see their faces. The evidence of PW 2 was that, *'the person I saw has a gap*

between his teeth and when he is talking his lips bend.....” The evidence on record is that at the identification parade PW 2 asked the officer who was conducting the parade to talk to the persons on the parade and it was only after he had been allowed to do so that he identified the Appellant. He identified the Appellant because he had a missing tooth and his mouth bends when he talks. This witness admitted in cross-examination that of the persons who were on the parade, it was only the Appellant who had a missing tooth. This was also the evidence of DW 2 the Appellant’s younger brother who also attended the identification parade. So that in reality apart from the evidence of PW 3, which is suspect, the only evidence linking the appellant to the commission of the offence was his identification by PW 2. In our view it would be unsafe to sustain this conviction and the sentence of the court below.