IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

SCZ JUDGMENT NO. 53 OF 2014
APPEAL NO. 39 OF 2014

B E T W E E N:

CHARLES PHIRI APPELLANT
AND
THE PEOPLE RESPONDENT

CORAM: **WANKI, MUYOVWE, JJS AND LENGALENGA, AG. JS**

On 12th August, 2014 and 3rd December, 2014

For the Appellant: Mr. H.M. Mweemba, Senior Legal Aid Counsel

For the Respondent: Ms. C. Bako, Acting Deputy Chief State Advocate

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J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:-

1. **Salwema -Vs- The People (1965) ZR 4 CA.**
2. **Woolmington -Vs- DPP (1935) 1 ALL ER.**
3. **Mwewa Muromo -Vs- The People (2004) ZR 207.**
4. **Mwape -Vs- The People (1976) ZR 160 (SC).**
5. **Haonga and Others -Vs- the People (1976) ZR 200 (SC).**
6. **Sakala -Vs- The People (1987) ZR 23 (SC).**
7. **David Zulu -Vs- The People (1977) ZR 151 (SC).**
8. **DPP-Vs- Risbey (1977) ZR 28 (SC).**
9. **Kenmuir -Vs- Hattingh (1974) ZR 162 (SC).**

LEGISLATION REFERRED TO:

10. **The Penal Code Chapter 87 of the Laws of Zambia.**

(2049)

The appellant was convicted on two counts by the Lusaka High Court. In count one he was convicted of murder contrary to **Section 200 of the Penal Code** and in count two he was convicted of aggravated robbery contrary to **Section 294(1) and (2) of the Penal Code Chapter 87 of the Laws of Zambia**.

The particulars of the offence in count one alleged that the appellant on the 4th July, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, whilst acting together with others did murder Blastone Zimba.

The particulars of the offence in count two alleged that the appellant on 4th July, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting with others and whilst being armed with a fire arm did steal from Blastone Zimba 1.5 billion Kwacha cash (old currency) the property of Zambia National Commercial Bank Plc and at or immediately after the time of such stealing did use actual violence to Blastone Zimba in order to obtain, retain or

prevent or over come resistance to the said property being stolen.

(2050)

The prosecution evidence was given by 16 witnesses before the trial Court. The following is a summary of the prosecution evidence given at the trial of the appellant together with others. Blastone Zimba, the deceased herein, was assigned together with Peter Tembo who was accused number six during trial of this matter, to transport K1.5 billion Kwacha cash from Lusaka to Kabwe on behalf of Zambia National Commercial Bank by Anderson Security.

The deceased was the driver of the van which was used to transport the money, and he together with Peter Tembo was attacked by two people as they proceeded to Kabwe. One of the attackers was armed with a firearm while the other was armed with a tyre of a motor bike. The two attackers had arrived earlier at the scene of the crime in a blue car registration number ABE 1935 which parked at the lay by at the scene of the crime. When the van which was transporting the money

reached at the scene, the person who was armed with a tyre hit the passenger window and broke it. Peter Tembo was pulled out of the passenger seat

(2051)

and made to lie down. The person who was armed with a firearm fired in air, and shot the victim. The gunman later pulled the victim out of the driver's seat and drove the van away with his fellow attacker. The blue car which brought the two attackers followed the van behind. The Anderson Security van, the trunk which contained cash and the blue car were found abandoned in the bush. Less than one third of the cash was recovered.

The appellant was employed by Benson Nyirenda as taxi driver. Then appellant was driving a Toyota Corolla registration number ABE 1935 blue in colour as taxi. The appellant was operating during the night. On 3rd July, 2007 the appellant requested from Benson Nyirenda to use the car during the day and the appellant's request was granted. The appellant did not report back to Benson Nyirenda until 5th July, 2007. When

Benson Nyirenda phoned the appellant on the 4th July, 2007, the appellant's phone was outside coverage area. The car he was driving as taxi was not taken back until it was discovered abandoned in the bush.

(2052)

The appellant in his defence before the trial Court denied driving the blue car registration number ABE 1935 which was spotted at the scene and which transported the attackers who shot Blastone Zimba and got away with the money. It was his brief testimony that the last day he got the motor vehicle in question from his boss he was not feeling well. As a result he gave the motor to his co-driver not employed by his boss and without the knowledge of his boss. Efforts by Benson Nyirenda (PW14) to locate the appellant's co-driver yielded no results.

At the close of the proceedings before the trial Court, the appellant was convicted together with others for the subject offences and sentenced to death. Being dissatisfied with the

trial Court's judgment and sentence, the appellant now appeals to this Court.

The appellant advanced the following two grounds of appeal:-

(2053)

1. **The learned Judge in the lower Court misdirected himself and erred both in law and in fact when he convicted on circumstantial evidence purported/alleged to have passed the test when in fact the circumstantial evidence fell short of the required standard test.**

2. **The learned Judge in the Court below fell in grave error when it failed to consider the reasonable explanation of the appellant thereby shifting the burden of proof on the appellant.**

Counsel for the appellant filed heads of arguments in support of the said grounds of appeal. The gist of the arguments in support of ground one of the appeal, is that the appellant was wrongly convicted as the circumstantial evidence upon which the conviction was based could not have only led to an inference of guilt. It was contended that several other inferences could be drawn from the circumstantial evidence in this matter which allegedly linked the appellant to the crimes.

The response to ground one was that the trial Court had sufficient evidence from which to draw the only reasonable inference which inference is that the appellant took part in the offences he was charged with. It was argued that the trial Court was on firm ground when it alluded to the evidence of leading

(2054)

namely that the appellant led the police to the apprehension of accused number 6 at trial, as the evidence which further strengthened the circumstantial evidence.

The brief argument in support of ground two of this appeal is that the explanation by the appellant was reasonably possible although not probable and that the prosecution failed to discharge their burden of proof. Counsel argued further that it is wrong to convict an accused on his own explanation. Counsel for appellant relied on the cases of ***SALWEMA -VS- THE PEOPLE***, (1) ***WOOLMINGTON -VS- DPP*** (2) ***AND MWEWA MURONO -VS- THE PEOPLE*** (3) in support of this ground.

The brief response by Mr. Bako to ground two is that the trial Court was on firm ground when it dismissed the

explanation given by the appellant as being a concoction meant to mislead the Court and serve his own skin from the consequences of his action. It was argued that the appellant's explanation that he gave the vehicle to his colleague to use on the 4th of July, 2007 could not reasonably be true as all efforts to trace the existence of

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this colleague he mentioned proved futile. The trial Court was therefore on firm ground in stating that it was unreasonable to expect a person to hand over the vehicle to a person who could not be traced.

We have carefully examined the record of proceedings before the trial Court and the submissions made on behalf of the appellant and the State. We have also considered the two grounds of appeal advanced by the appellant before us. We shall deal with the grounds in the order they were argued. But before considering the grounds we find it necessary to comment on parties to a crime and the doctrine of common

design. We take this position in view of the fact that the appellant was convicted together with others on the same facts.

Section 21 of the Penal Code is instructive as to who can be a party to an offence. It provides thus:-

> **"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:-**
>
> **(2056)**
>
> **(a) every person who actually does the act or makes the omission which constitutes the offence;**
>
> **(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
>
> **(c) every person who aids or abets another person in committing the offence;**
>
> **(d) any person who counsels or procures any other person to commit the offence.**
>
> **(2) In the case of paragraph (d) of Subsection (1), such person may be charged either with committing the offence or with counselling or procuring its commission. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done**

> **the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."**

As far as **Section 21 of the Penal Code** is concerned every person who executes any of the roles in the above stated circumstances will be deemed to be a principal offender and liable to same punishment regardless of the role so played. We

(2057)

understand a principal offender to be a person who actually perpetrates or takes part in the perpetration of the offence.

In light of **Section 21** it is our view that principals can be persons present at the commission of the offence or persons giving assistance before the commission of the offence. A person who is present at the commission of the offence but who without committing the offence assists or encourages its commission is guilty as a principal offender. Similarly a person who is not present at the commission of the offence but who

before its commission encourages, advises, assists or arranges the commission of the offence is guilty as a principal offender.

Assistance is simply help rendered. This help can take various forms in the context of crime. It can range from giving information to supply of equipment used in the commission of crime. A supplier of equipment used in a criminal enterprise may be convicted as a principal, provided that the person who supplied the equipment was aware of the type of crime the equipment would be used for.

(2058)

Regarding common design **Section 22 of the Penal Code** provides:-

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

It is clear from the above cited provision that parties to a common design intended to prosecute an unlawful purpose can be convicted as principal offenders. Each party is deemed to

have committed the offence(s) committed in the process of prosecuting the unlawful purpose. The common design need not be expressed or premeditated. The act of joining in the prosecution of an unlawful purpose is sufficient. We have had occasion to determine upon the criminal liability of participants in a common design. We refer to some of our decisions on this subject hereunder.

In ***MWAPE -VS- THE PEOPLE*** (4) when applying our mind to the question of common design we held that:-

(2059)

> **"In law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal."**

Similarly, in the case of ***HAONGA AND OTHERS -VS- THE PEOPLE*** (5) we said that:-

> **"If a death results from the kind of act which was part of the common design then if the offence be murder in one then it is murder in all."**

On the same subject and in respect of **Section 22 of the Penal Code**, in ***SAKALA -VS- THE PEOPLE*** (6) we had this to say:-

> **“Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design.”**

In light of what we have said above, it is opined here that the evidence before the trial Court properly disclosed the appellant as a party to the crimes. The appellant assisted in supplying and driving the backup car registration number ABE1935 on the date in question. The appellant qualifies for all intents and purposes to be regarded as a principal offender. The evidence at trial also disclosed that there was a common design which was being prosecuted by the appellant and his colleagues with whom he was

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convicted by the trial Court. The enterprise was unlawful and its prosecution resulted in the offences for which the appellant was convicted together with others and rightly so.

We now turn to the grounds of appeal in this matter. In the first ground of this appeal it has been argued that it was an error for the trial Court to have convicted the appellant herein

on circumstantial evidence which fell short of the required standard. It was contended that the circumstantial evidence in this matter permitted more than one inference. The State supported the conviction and argued that the circumstantial evidence herein permitted only an inference of guilt.

Circumstantial evidence is made up of facts from which a fact in issue can be deduced. It is settled law that the Court is competent to convict on strong circumstantial evidence. For circumstantial evidence to be regarded as strong it must have attained a degree of cogency permitting only an inference of guilt. On this point we call in aid what we said in ***DAVID ZULU - VS- THE PEOPLE***. [(7)] In that case we stated among others that:-

(2061)

> **"The Judge in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt."**

In this matter the appellant was connected to the crimes by circumstantial evidence. It is our view that the circumstantial evidence given by the prosecution witnesses took the case

outside the realm of conjecture and permitted only an inference of guilt. The appellant's explanation attempted to affect the cogency of the prosecution's evidence. But on grounds of credibility the trial Court did not accept the appellant's explanation. Having rejected the appellant's explanation, the only inference left in the evidence before the trial Court was that of the appellant's guilty. In the circumstances of this case, it was safe for the trial Court to convict the appellant on the strength of circumstantial evidence. Ground one of this appeal, has no merit and we dismiss it accordingly.

It was argued in ground two, that the trial Court erred when it failed to consider the reasonable explanation of the appellant

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and thereby shifting the burden of proof on the appellant. We cannot agree with the argument advanced on behalf of the appellant. We hold this view because it is clear from the trial Court's judgment that the appellant's explanation was considered. The trial Judge in determining the appellant's

liability took into consideration the appellant's explanation. After considering the appellant's explanation the trial Court found that the said explanation could not exonerate the appellant from the liability. The trial Court is privileged to assess which evidence to accept and which evidence to reject taking into account the question of credibility among others. The Appellate Court does not enjoy the said privilege. We are fortified by our decision in ***DIRECTOR OF PUBLIC PROSECUTIONS -VS- RISBEY*** (8) where we stated *inter alia* as follows:-

> **"But where the issue is one of credibility and inevitably reduces itself to a decision as to which of two conflicting stories the trial Court accepts, an Appellate Court cannot substitute its own findings in this regard for those of the trial Court."**

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We also find solace in ***KENMUIR -VS- HATTINGH*** (9) where we stated as follows:-

> **"Where questions of credibility are involved an Appellate Court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the**

> **trial Judge unless it is clearly shown that he has fallen into error."**

Ground two of this appeal has no merit and it is dismissed accordingly.

This appeal fails for lack of merit and it is dismissed accordingly.

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M. E. Wanki,
SUPREME COURT JUDGE

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E.N.C. Muyovwe,
SUPREME COURT JUDGE.

.....
F. M. Lengalenga,
ACTING SUPREME COURT JUDGE.