

IN THE SUPREME COURT OF ZAMBIA  
329/2013  
HOLDEN AT KABWE  
(Criminal Jurisdiction)

SCZ/APPEAL No

BETWEEN:

**VICTOR PHIRI**

Appellant

AND

**THE PEOPLE**

Respondent

CORAM: **WANKI, JS, LISIMBA AND LENGALENGA, AG. JJS**  
On 3<sup>rd</sup> December, 2013 and 8<sup>th</sup> April, 2014

For the Appellant : Mr. K. Muzenga, Principal Legal Aid  
Counsel -  
Legal Aid Board

For the Respondent : Mrs. M. M. Bah Matandala, Senior State  
Advocate - National Prosecutions  
Authority

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## **J U D G M E N T**

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**LENGALENGA, AG. JS, delivered the Judgment of the Court.**

**Cases referred to:**

- 1. PETER HAMWEENDA v THE PEOPLE (1977) ZR 184**
- 2. NKUMBWA v THE PEOPLE (1983) ZR 103**
- 3. JOHN TIMOTHY & FESTON MWAMBA v THE PEOPLE (1977) ZR 394**

- 4. CHANSA v THE PEOPLE (1975) ZR 136**
- 5. SHAWKI FAWAZ AND CHELELWA v THE PEOPLE (1995)**
- 6. LUCKSON NGOSA v THE PEOPLE - SCZ No 251 OF 2012  
(unreported)**
- 7. KAMBARAGE MPUNDU KAUNDA v THE PEOPLE (1990)  
ZR 215**
- 8. NIKUTUSHA & ANOTHER v THE PEOPLE (1979) ZR 261**
- 9. PATRICK SAKALA v THE PEOPLE (1980) ZR 205**

**Legislation referred to:**

**THE PENAL CODE, CAP 87 OF THE LAWS OF ZAMBIA  
THE CRIMINAL PROCEDURE CODE, CAP 88 OF THE LAWS OF  
ZAMBIA  
THE FIREARMS ACT, CAP 110 OF THE LAWS OF ZAMBIA**

The appellant was convicted on three counts of aggravated robbery contrary to section 294(2) of the Penal Code, Cap. 87 of the Laws of Zambia.

On count two the particulars of offence are that the appellant, Victor Phiri with three others, namely, Luke Kasempa, Allan Sondashi and Kombe Chola, on 20<sup>th</sup> March, 2003, at Lusaka, jointly and whilst acting together and whilst armed, did steal from Chenge Chibanda, one motor vehicle, a Toyota Mark II, registration number AAX 1377, one desktop computer processing unit, one Nokia cellular phone, one Barclays Bank connect card,

one driving licence and Citi Bank cheque book and one belt, all valued at K23 525 000.00.

On count three, the particulars are that on 6<sup>th</sup> April, 2003 at Lusaka, the appellant, Victor Phiri, Luke Kasempa, Allan Sondashi and Kombe Chola, jointly and whilst acting together and whilst armed did steal from Isaac Tembo, K14 270 425.00 cash, one Philips cellular phone and two cheques in the sum of K1 250 000.00.

On count four, the particulars are that on 6<sup>th</sup> April, 2003, at Lusaka, the appellant, Victor Phiri, Luke Kasempa, Allan Sondashi and Kombe Chola, jointly and whilst acting together and whilst armed, did steal from Maureen Mwamba, K5 982 000.00 cash and one Bosch cellular phone, all valued at K6 477 000.00.

The appellant was sentenced to fifteen (15) years imprisonment with hard labour effective from 7<sup>th</sup> April, 2003 on count 2.

However, it is not clear what sentence was handed down to him on count 3 and count 4 as the record is not available and even the warrant for execution of sentence on count 3 is missing.

It is our observation that there is on the record of appeal, a certificate of sentence of death issued on 6<sup>th</sup> February, 2007 in respect of the appellant. The appellant now appeals against conviction and sentence.

From the judgment of the trial court, it is clear that the prosecution case rested on the evidence of eight witnesses.

In relation to count two, briefly, the evidence is to the effect that on 24<sup>th</sup> March, 2003, at about 20:15 hours, PW7, Chenge Chibanda and others were abducted in his metallic brown Toyota Mark II, registration number AAX 1377, as he was about to enter his residence at the gate in the Chainama area of Lusaka. They were driven in PW7's car by three armed men to a quarry off Mumbwa Road whilst the fourth man followed driving a white car from which the three armed men had come from. Upon arriving at the quarry, PW7 and the other car occupants were ordered to run into the bush and told not to look back otherwise they would be shot. Apart from stealing PW7's Toyota Mark II, the three armed men stole three cellular phones, one watch, a Xylo computer, PW7's passport, the vehicle registration book. The matter was reported to Lusaka Central Police Station. Later on in

April, 2003, the computer and vehicle were recovered by the police and PW7 identified it by its engine and chassis numbers and physical marks.

The evidence in count three was that on 6<sup>th</sup> April, 2003, around 14:35 hours, PW1, Isaac Tembo, an Internal Auditor at Zambia Daily Mail was on duty at the office in Lusaka when an armed man walked into his office, pointed a gun at him, ordered him to lie down and then demanded the keys for the safe and he gave him. Then a second man went in and pointed a pistol at PW1's chest and then got the money from the safe. At the same time, a third man had arrived and he attacked the Cashier, Maureen Mwamba whilst the first intruder got PW1's Philips cellular phone. Thereafter, they ran out of the office to a metallic grey Toyota Mark II, registration number AAV 4176. PW1 confirmed that the cash stolen was K14 270 425.00 plus cheques valued at K1 100 250.00. Some of the cash was recovered by the police from some of the suspects but the Philips cellular phone was never recovered. PW1 valued it at K375 000.00.

PW2, Maureen Mwamba, an Accounts Assistant at Zambia Daily Mail, Lusaka confirmed that on 6<sup>th</sup> April, 2003, she was on

duty as a Cashier around 14:30 hours and that she was counting money when they were attacked and she was ordered to lie down and not to scream or else she would be shot. She was physically assaulted as she tried to take out her Bosch phone which was also stolen but it was later recovered by the police. She valued the phone at K395 000.00. This witness had testified that the cash stolen from her office was K5 982 000.00. She also mentioned that the first man had a small greyish gun that he pointed at her whilst the second man had a big gun with a wooden butt and that it is this second man who slapped her on the cheek and kicked her on the waist. PW2, described the vehicle that the intruders came in as a grey car which they drove into the premises and parked directly opposite her office door.

PW3, Bartholomew Saineti, a car washer testified that on Sunday 6<sup>th</sup> April, 2003, he was outside the Zambia Daily Mail Accounts office washing PW2's car around 14:35 hours when a car sped into the premises and parked next to the one he was washing and then reversed it fast and parked it facing the gate. He said that the car was a grey Toyota Mark II, registration number AAV 4176 and that there were four men inside and three

of them came out and went into the Zambia Daily Mail Accounts office whilst the driver remained in the car. PW3 later saw them emerge, carrying Maureen's handbag and they got into the car and sped off. This witness identified the car ("**P3**") at the police station when it was recovered. He was able to identify it by a yellow wheel/rim which was at the front of the car at the time of the robbery. He stated that the vehicle had no registration number at the police station.

PW4, Constable Hector Kachengwa of the Lusaka Division Flying Squad in the Zambia Police Service testified that on 9<sup>th</sup> April, 2003, a suspect, Victor Phiri and appellant was taken to his office for interview by a panel of officers. He was a suspect in an aggravated robbery which occurred on 6<sup>th</sup> April, 2003 at Zambia Daily Mail. After the said interview, the appellant led police officers to John Laing to his mother-in-laws's house. He asked her to give the police the money he had given her for safe custody and the revolver he gave, Dala, his brother-in-law. Even though Dala was not present, another person, Chibwe got the revolver from where it had been put and gave it to Sub-Inspector Raelly together with three rounds of ammunition. The appellant's

mother-in-law handed over the sum of K1 860 000.00 to the police in the appellant's presence. This witness later identified **"P1,"** the revolver, **"P4,"** the three rounds of ammunition, **"P5,"** being the K1 860 000.00 cash and the appellant in court as the first accused.

PW5, Detective Chief Inspector Steven Mvula Zulu, a Ballistics Expert of ten years examined the revolver, **"P1"** and **"P4"** the three rounds of ammunition that were handed over to him by Sub-Inspector Raelly. Thereafter, he prepared a report of his finding and it was produced as **"P6."**

PW6, Sub-Inspector George Raelly of the Anti Robbery Flying Squad investigated the matter and through an informer learnt that the appellant and his wife of John Laing were seen spending a lot of money when he was unemployed. He was approached and after some revelation, the police proceeded to Duly Motors Limited where they apprehended Lucas Kasempa. The appellant later led the police to High Quality Printers where they recovered a grey Toyota Mark II with no registration number. The appellant was verbally warned and cautioned before leading the police to the recovery of the said vehicle. Further, upon searching the



appellant's house in John Laing, the police recovered a Bosch cellular phone which was blue and green in colour in a lady's handbag in the bedroom. The said phone fitted the description of the phone stolen from PW2, Maureen Mwamba. PW6 recovered K500 000.00 cash from the appellant's wife, Cheelo.

Later, Sydney Chisamu in whose premises the Toyota Mark II was found, was apprehended and interviewed and later jointly charged with the appellant after being found with K51 700.00 and surrendering a mattress. He later escaped.

PW8, Detective Constable Noah Habeenzu was allocated a docket of aggravated robbery to deal with on 31<sup>st</sup> March, 2003 in relation to a Toyota Mark II registration number AAX 1377 that was stolen from Chenge Chibanda at gunpoint. He first interviewed two suspects, the appellant and Luke Kasempa and warn and caution statements were recorded from them. Information from the appellant led to the apprehension of Sydney Chisamu who also gave the police information that led to the apprehension of Allan Sondashi in Kitwe. Later on 21<sup>st</sup> April, 2003, PW8 jointly charged and arrested the four suspects for the offence of aggravated robbery. Under warn and caution, they all

denied the charge. Sydney Chisamu escaped from prison whilst the other two accused were found with no case to answer at the close of the prosecution case. The appellant was found with a case to answer on three counts and he was put on his defence. He was subsequently convicted on counts two, three and four and sentenced to prison terms of fifteen (15) years imprisonment with hard labour and the mandatory death penalty.

The appellant in his defence gave evidence on oath and did not call any witnesses. He testified to the effect that he was a businessman who moulded building blocks for sale, along Kafue Road, Lusaka where he worked with Like Kasempa. That on 7<sup>th</sup> April, 2003 he went for work but at about 11:00 hours, he went home to sleep as he was not feeling well. On arrival, the police apprehended him and searched his residence but they found nothing. They asked him who his closest friend was and he mentioned Luke Kasempa. They then got Kasempa's cell phone number and used it to apprehend him at Caltex Filling Station along Ben Bella road. Thereafter, the two of them were questioned at Lusaka Central Police Station over this case. He stated that he told the police that he knew nothing about the

case. He stated further that he was not apprehended in an ambush in the manner described by PW6, Sub-Inspector Raelly. Further, the appellant stated that Cheelo from whom a cell phone, double mattress and kitchen items were recovered was not his wife as alleged. He said that he was single and not married at all. He denied leading the police to High Quality Printers where the Toyota Mark II was recovered. He also denied leading the police to a place where they recovered a revolver or anywhere else. The appellant stated that PW6, Raelly lied to court in his evidence. He stated further that he knew nothing about the recovery of K1 860 000.00 from the woman the police allege was his mother-in-law.

He said that he met PW6, Sub-Inspector Raelly for the first time on 7<sup>th</sup> April, 2003 when he was apprehended. He added that before that he never had any dealings with PW6. The appellant stated further that only his house in the area was searched by the police. They never told him why they searched his house. He concluded by stating that he did not know why PW6 lied in court and implicated him in this case out of the four accused in the case. The foregoing was the evidence.

The appellant filed three grounds of appeal which state as follows:

- 1. The learned trial judge misdirected himself in law and in fact when he found that the appellant was in possession of P2 and that he led to the recovery of P1 based on hearsay evidence.**
- 2. The learned trial judge misdirected himself in law and in fact when he convicted the appellant on all three counts based purely on circumstantial evidence when an inference of guilt was not the only inference which could reasonably be drawn from the facts.**
- 3. The learned trial judge erred in law and fact when he accepted the expert ballistic evidence in the absence of any test material or photographs being presented before him.**

The grounds of appeal are supported by written heads of argument. In support of ground one, learned Counsel for the appellant, Mr. Muzenga submitted that it was not disputed that **“P2,”** a cell phone relating to count 2 was found in a handbag belonging to a woman the police alleged to be the appellant’s wife, according to evidence on pages 8 and 9 of the record, but this woman was never called as a witness. He argued that the police never interviewed the neighbours or relatives to confirm that the appellant lived in that house or that the woman was the

appellant's wife. He further argued that even the woman who was alleged to be the appellant's mother-in-law, Dala his brother-in-law who kept the pistol and Chibwe who gave the police the pistol and three rounds of ammunition were not interviewed or called as witnesses. He submitted that these were key witnesses and that no reason was offered by the State for failing to call them. He submitted that what this implied is that the information that the police had was basically inadmissible hearsay as to the truth thereof and that it should be disregarded. Mr. Muzenga contended that the failure by the police to interview and call the foregoing witnesses amounts to dereliction of duty. He submitted that the said dereliction must operate in favour of the appellant (see **PETER HAAMWENDA v THE PEOPLE**<sup>1</sup>).

Learned Counsel for the appellant submitted further that in fact, the appellant denied the assertions by the officers that the woman from whom exhibit "**P2**" was recovered was his wife and that the woman from whom some money was recovered was his mother-in-law. He further submitted that the appellant denied the issues surrounding the recovery of exhibit "**P1**."

Mr. Muzenga submitted that, therefore, the prosecution should have proceeded by calling the witnesses even in rebuttal after the accused's defence. He submitted that that is permissible under section 294 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia which provides:

**“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to contradict the said matter.”**

Learned Counsel for the appellant submitted that whenever a dispute arises as to what exactly transpired in a criminal matter, the burden lies on the prosecution to prove the issue beyond all reasonable doubt. He submitted that hearsay evidence cannot be a substitute. He, therefore, prayed that the hearsay evidence be excluded and that the appeal be allowed.

In support of ground two and three learned Counsel for the appellant submitted that the evidence was basically through the recovery of a cell phone **“P2”** and motor vehicle **“P3.”** He argued that the person from whom **“P2”** was recovered was never called as a witness as already observed in ground one, to

effectively connect the phone to the appellant. As for the recovered money, he argued that the woman from whom it was recovered was also not brought to court as a witness. He further submitted that in any event, the money was not specifically identified as being the one that was stolen.

Mr. Muzenga submitted that the evidence against the appellant is circumstantial and that in the absence of the witnesses referred to in ground one, the said evidence is very weak such that not only an inference of guilt could reasonably be drawn from the facts. He submitted further that it is a cardinal principle of criminal law that where a number of inferences could be drawn from the facts, an inference which is more favourable to the accused must be adopted.

He argued that even if it was correct, as the trial court took it, that the accused was in possession of “P2” (the cell phone) and on the basis of **NKUMBWA v THE PEOPLE**<sup>2</sup> drew an inference of guilt, that case is distinguishable from this case. He submitted that a cell phone can easily exchange hands in a matter of hours.

Further, in respect of count 2, he submitted that the only evidence was that the appellant led the police to the recovery of the stolen motor vehicle, “**P3.**” The vehicle was allegedly stolen on 20<sup>th</sup> March, 2003 and it was recovered on 7<sup>th</sup> April, 2003, about seventeen (17) days later. Mr. Muzenga argued that the circumstantial evidence is very weak such that an inference of guilt of the main offence of aggravated robbery in count 2 cannot stand.

He prayed that this court upholds the appeal on this ground two, quash the convictions, set aside the sentences, acquit the appellant and set him at liberty.

With respect to ground three, learned Counsel for the appellant submitted that PW5 merely testified that he fully examined “**P1,**” the pistol and was satisfied that its working condition was perfect and capable of loading and firing rounds of ammunition of caliber .38 and Wesson (page 11 of the record). He submitted that there were no test spent cartridges, other testing materials or photographs presented to the trial court. He referred us to the case of **JOHN TIMOTHY & FESTON MWAMBA v THE PEOPLE**<sup>3</sup> where this Court held *inter alia*:



**“(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 110, 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 eye witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.”**

Counsel for the appellant’s contention is that besides just stating that he fully examined **“P1,”** the ballistics expert, PW5 never told the trial court whether or not he tested **“P1”** to establish that it was capable of firing any shot, bullet, bolt or other missile as required by section (2) above.

He further relied on the case of **CHANSA v THE PEOPLE**<sup>4</sup> in which this Court observed:

**“It is for the court to come to a finding and the expert’s evidence is merely there to assist the court in coming to its conclusion...”**

To emphasize the same point he also relied on the case of **SHAWKI FAWAZ AND CHELELWA v THE PEOPLE**<sup>5</sup>.

Mr. Muzenga further relied on the case of **LUCKSON NGOSA v THE PEOPLE**<sup>6</sup> (unreported) in which we observed:

**“It must be emphasized that trial courts must bear in mind that the mere use of a firearm does not make a robbery an armed robbery unless the firearm is properly examined and that it is established it is a firearm within the meaning of the Firearms Acts.”**

In the present case, learned Counsel for the appellant submitted that the expert did not place before the trial court any test materials or any other materials showing what tests he did to reach his conclusion. He submitted that that was a serious error and that the trial court should not have accepted his opinion. He contended that the learned trial court fell into error when it concluded that **“P1”** was a firearm under the Firearms Acts based on the incomplete and unreliable evidence of PW5.

Learned Counsel for the appellant, therefore, prayed that this Court upholds this appeal, quash the convictions, set aside the sentences and substitute them with convictions of ordinary

aggravated robbery under section 294(1) of the Penal Code, Cap 87 of the Laws of Zambia.

Although both parties were given time that is, twenty-eight (28) days within which to file grounds of appeal and heads of argument and arguments in response, respectively, we did not receive any written arguments from the learned Senior State Advocate.

We have considered the submissions by Counsel and we are grateful for the same.

The appellant's ground one is that the learned trial judge misdirected himself in law and in fact when he found that the appellant was in possession of "**P2**" and that he led police to the recovery of "**P1**" based on hearsay evidence.

There was evidence before the trial court that when PW1, Isaac Tembo and PW2, Maureen Mwamba were robbed of large sums of money in cash, cheques, one Phillips cell phone and one Bosch cell phone ("**P2**"), one of the firearms was a small greyish gun, a pistol that was used. This pistol was used to threaten both witnesses according to their evidence.

We accept that the prosecution case rested solely on circumstantial evidence as none of the prosecution witnesses identified the appellant herein as one of the assailants. **"P2,"** the Bosch cell phone was allegedly recovered in a bag in the appellant's bedroom during a search of his house by the police. Coincidentally, the phone stolen from PW1 at the Daily Mail offices was a Bosch cell phone.

**"P1,"** a pistol or revolver was allegedly recovered from the appellant's mother-in-law's house where the appellant allegedly led the police. At the same house, the police were allegedly handed three rounds of ammunition by one Chibwe and some money upon the appellant's instruction. Although learned Counsel for the appellant strongly argued that the police's failure or omission to call the appellant's wife, mother-in-law, Chibwe and Dala was fatal to the prosecution case, we disagree.

We are, further, of the considered view that it cannot be a coincidence that some money and **"P1,"** the revolver and rounds of ammunition were found in the appellant's mother-in-law's house. Further, that the appellant led the police to that house.

It also cannot be a coincidence that **“P2,”** a Bosch cell phone was found in a bag in the appellant’s bedroom. A Bosch cell phone was stolen from PW2 Maureen Mwamba of Zambia Daily Mail at gun point.

We are, therefore, not convinced that these are all odd coincidences especially since the appellant played a role in all these incidents. We find therefore, that the learned trial judge was on firm ground when he found that the appellant was in possession of **“P2”** and that he led the police to the recovery of **“P1.”** The evidence before the trial court was not hearsay as alleged by the appellant but circumstantial evidence. We, further, find that this circumstantial evidence was so cogent and compelling that no rational hypothesis other than the appellant was involved in the aggravated robberies can be arrived at.

We turn to the allegation by the appellant that there was dereliction of duty on the part of the police when they did not call people that he considered to be key witnesses in the case. The witnesses considered as key witnesses were in fact the same witnesses that PW4 and PW6 referred to as the appellant’s mother-in-law, brother-in-law Dala, Chibwe and appellant’s wife,

Cheelo. If this Court accepts that these potential witnesses were in some way related or connected to the appellant, then these witnesses would have been what is described as suspect witnesses. In the case of **KAMBARAGE MPUNDU KAUNDA v THE PEOPLE**<sup>7</sup> we made the following observation:

**“(vi) Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses.”**

However, we must emphasize that suspect witnesses need not only be friends or relatives to the prosecutrix. They may be friends or relatives to the accused or appellant, as in the present case. They also may have a possible interest of their own to serve and as such, the police and the prosecution may have purposely decided not to call them as witnesses. In **NIKUTUSHA & ANOTHER v THE PEOPLE**<sup>8</sup>, this Court held *inter alia*:

**“The prosecution has no duty to call all witnesses. The need to call other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt.”**

From the aforesaid, it is clear that there is no law that compels the prosecution to call all witnesses.

Further, in view of the foregoing, we find that there was no dereliction of duty on the part of the police when they did not call the people the appellant's Counsel considered as key witnesses.

We, therefore, find no merit in this ground of appeal and we, accordingly dismiss it.

We turn to ground two where the appellant alleges that the learned trial Judge misdirected himself in law and in fact when he convicted him on all three counts based purely on circumstantial evidence.

From the particulars of offence in counts three and four and the evidence of PW1, Isaac Tembo and PW2, Maureen Mwamba, there is no doubt that these offences were committed on the same date 6<sup>th</sup> April, 2003. In fact, the unfortunate incident occurred at the same premises, the Zambia Daily Mail offices where PW1 worked as an Internal Auditor and PW2, as an Accounts Assistant.

Further to the connection of the two counts, there was the evidence of the appellant leading PW4, PW6 and other officers to

the recovery of some money K1 860 000 (**"P5"**) from the appellant's mother-in-law and K500 000 (**"P12"**) from the appellant's wife. There was also evidence from PW6 that the appellant and his wife were spending lavishly and moving around in taxis despite the fact that the appellant was unemployed. In both counts three and four cash money in sums of K14 270 425 and K5 982 000 respectively was stolen.

In addition to this, in both counts three and four, PW1 and PW2 mentioned that one of their assailants had a small greyish gun (according to PW2) or a pistol (according to PW1). A pistol or revolver was recovered from the appellant's mother-in-law's house in John Laing Compound. In count four, a Bosch cell phone was stolen at gun point from PW2, Maureen Mwamba. Coincidentally a Bosch cell phone of the same description, serial number 37049926146679 and IMEI number 450092671466797 was recovered from a lady's bag in the bedroom in the appellant's house in John Laing.

Our further observation was that in count two Chenge Chibanda was robbed of a Toyota Mark II, registration number AAX 1377. This vehicle was used in the robbery at the Zambia



Daily Mail offices according to evidence from the prosecution witnesses, especially PW3, Bartholomew Saineti a freelance car washer. According to PW6's evidence it was the appellant who led a team of police officers to High Quality Printers where they recovered the Toyota Mark II at Sydney Chisamu's premises.

After considering all this evidence though, circumstantial, we are of the considered view that it cannot be a case of odd coincidences that the appellant was connected to recovery of items stolen at gun point in all three counts. We find that there was overwhelming evidence that connected the appellant to the commission of the offences. The circumstantial evidence was so cogent and compelling (see **PATRICK SAKALA v THE PEOPLE**<sup>9</sup>).

Therefore, considering the foregoing, we find that the learned trial Judge was on firm ground when he convicted the appellant on all three counts based purely on circumstantial evidence. We also find no merit in ground two and we, accordingly, dismiss it.

In ground three, the appellant's contention is that the learned trial judge erred in law and fact when he accepted the

expert ballistic evidence in the absence of any test material or photographs being presented before him.

We examined the contents of PW5's forensic ballistic examination report at pages 10 to 11 of the record. He fully examined and identified the exhibit firearm as an Enfield revolver serial number L7124 of a Wesley conversion and of .38 caliber, Smith and Wesson. He confirmed that it was in perfect working condition and capable of loading and firing rounds of ammunition of caliber .38 Smith and Wesson.

Detective Chief Inspector Steven Mvula Zulu further confirmed that he also examined the three rounds of ammunition and discovered that they were live and of caliber 9mm parabellum. He stated that they could only be loaded and fired from the exhibit Enfield revolver by a trick.

He described the Enfield revolver and rounds of ammunition as dangerous weapons capable of causing death or injury to a human being or an animal when fired upon. He further stated that it can also cause fear to any sane person when challenged with it. The appellant challenges the acceptance of this expert ballistic evidence on the basis that no test spent cartridges, other

testing materials or photographs were presented before the trial court.

We also looked at the definition of a firearm under the Firearms Act, Cap 110 of the Laws of Zambia. Section 2 states as follows:

**“Any lethal barreled weapon of any description from which any shot, bullet, bolt or other missile any shot, bullet, or which can be adapted for the discharge of any shot, bullet, bolt or other missile.”**

Our comparison of the contents of the forensic ballistics examination report with section 2 of the Firearms Act, Cap 110 disclosed that the exhibit Enfield revolver **“P1”** is a lethal barreled weapon within the definition in section 2 of the Act. Further that it is capable of loading and firing rounds of ammunition of caliber .38 Smith and Wesson. We are satisfied that this description fits the definition under section 294(2)(a) of the Penal Code, Cap. 87 of the Laws of Zambia. We find, therefore, that the expert evidence satisfies the guidelines we laid down in the case of **JOHN TIMOTHY & FESTON MWAMBA v THE PEOPLE** that was cited by Counsel for the appellant.

Further, Mr. Muzenga relied on a more recent unreported case of **LUCKSON KACHA NGOSA v THE PEOPLE** to try and persuade us that “**P1**” was not properly examined by PW5 to establish that it is a firearm within the meaning of the Firearms Act. However, we do not accept his arguments on that contention. We find that “**P1**” was fully examined even though, PW5 did not exhibit any test materials or spent cartridge to prove that he test fired the said revolver.

Therefore, for the foregoing reasons, we find that the learned trial Judge was on firm ground when he accepted the forensic ballistic evidence by PW5 that “**P1**” was a firearm within the definition under section 2 of the Firearms Act, Cap. 110.

In conclusion, we find no merit in this ground of appeal and we dismiss it.

The net result is that the appeal is dismissed. We, accordingly uphold the convictions and sentences on all three counts.

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M. E. Wanki  
**SUPREME COURT JUDGE**

.....  
M. Lisimba  
**ACTING SUPREME COURT JUDGE**

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