IN THE SUPREME COURT OF ZAMBIA Appeal No. 230, 231, 232/2017
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

DARIUS CHANDA NKOLE **1st APPELLANT**

FRANCIS KALUBA **2nd APPELLANT**

ZANTA KABANGABANGA **3rd APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
on 5th March, 2019 and 13th March, 2019.

For the Appellant: Mr. K. Muzenga, Deputy Director, Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **The Minister of Home Affairs, The Attorney General vs. Lee Habasonda suing on His Own Behalf and on behalf of SACCORD (2007) Z.R. 207**
2. **Muyunda Muziba and Another vs. The People, Selected Judgment No. 29 of 2012**

3. **Muvuma Kambanja Situna vs. The People (1982) Z.R. 115**
4. **Alubisho vs. The People (1976) Z.R. 11**
5. **Joseph Mulenga and Another vs. The People Appeal No. 128/2017**
6. **Jutronich and Others vs. The People (1965) Z.R. 9**
7. **Miloslav vs. The People SCZ Appeal No. 49/2013**
8. **Roberson Kalonga vs. The People (1988 -1989) Z.R. 90**
9. **Mugala vs. The People (1975) Z.R. 282**

Statutes referred to

1. **Section 294(2) (b) of the Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
3. **Article 18 of the Constitution of Zambia**

The appellants were convicted of the offence of aggravated robbery and sentenced to life imprisonment.

The facts revealed that on the 19th August, 2014 around 23:00 hours the complainant PW1 was walking back home after selling chicken pieces at a bar. She had raised K150 from her sales and she had a Nokia phone. As she proceeded home, she found the appellants outside another bar. They blocked her way, took her phone and money, lifted her and dragged her to an unoccupied house where the 1st appellant stripped her naked. The appellants took turns in raping her starting with the 1st appellant. This went on for about an hour and a half. The trio were disturbed by noise

from some passersby and the 2nd and 3rd appellants ran away leaving the 1st appellant who still wanted to continue sexually assaulting the complainant. As the two struggled, the complainant managed to grab a brick which she used to hit the 1st appellant on his forehead and she ran to her grandmother's house where she reported the incident. According to the complainant, the 1st appellant could be heard shouting profanities and threats against her as he passed her grandmother's house after the ordeal that very night. There was evidence that the appellants were tried for the offence of rape in the Subordinate Court. In cross-examination the complainant conceded that the 2nd appellant was her boyfriend but she insisted that he ganged up with his friends to rape her. She also denied that she was drunk on the night in question.

The matter was reported to the police and this led to the apprehension of the appellants. The 2nd appellant was apprehended after he was spotted by the complainant at a shopping centre. She alerted PW4 a member of the neighbourhood watch and together with the complainant they all proceeded to the police station where the 2nd appellant was detained. PW4's version was

that he knew the 2nd appellant and he called out to him and as the complainant was nearby, together they went to the police station where he was detained. And this evidence tallies with that of PW3 (the mother to the complainant).

The evidence of PW5 was that the police requested him to accompany them as the appellants led them to the scene of crime. He stated that the appellants were in front while the police officers were behind. The complainant was present at the time.

There was evidence from PW6, the scenes of crime officer, that the appellants led the police to the scene of crime. That they admitted to raping the victim but denied stealing anything from her. That the 1st appellant and 3rd appellant were on the run and were apprehended much later.

All the appellants denied having robbed and raped the complainant. They also denied leading the police to the scene of crime. However, the 1st appellant admitted that he had injured his nose although his explanation was that it was due to a fall from a bicycle. According to the 1st appellant, on the material day the

complainant went to his house looking for the 2nd appellant. He called him and the two went outside to discuss some issues. He stated that he discouraged the 2nd appellant from dating the complainant as she was older than him and she was a drunkard.

The 2nd appellant claimed that he was in a relationship with the complainant and her parents wanted him to marry her but he felt he was too young. He denied going to the 1st appellant's house as alleged by the 1st appellant. He completely denied participating in raping the complainant. According to the 2nd appellant, he could not steal a phone from the complainant as he had bought her one earlier.

The 3rd appellant stated that he was apprehended by the police at a bar. That he was identified by the complainant after she saw him at the CID office. It was his evidence that he was implicated in this matter by the police due to his drunkenness.

In her judgment, the learned judge, as we will show later in our judgment, hastily concluded that the appellants worked in

collusion when they stole from the victim and raped her. All three appellants were found guilty and sentenced to life imprisonment.

Dissatisfied with the decision of the lower court, the appellants appealed to this court against conviction and sentence. The learned Deputy Director, on behalf of the appellants, advanced three grounds of appeal couched in the following terms:

1. **The learned trial judge misdirected herself in law and in fact when she convicted the appellants for the offence of aggravated robbery in the absence of proof beyond all reasonable doubt.**

2. **The learned trial judge misdirected herself in law when she delivered a judgment which fell short of the standard set out in** *Section 169(1) of the Criminal Procedure* Code Chapter 88 of the Laws of Zambia **thereby depriving the appellants of an opportunity to property appeal against it.**

3. **The learned trial court erred in law and in fact when she imposed the maximum sentence without giving reasons for so doing.**

At the hearing of the appeal, Mr. Muzenga the learned Deputy Director relied entirely on his filed heads of argument. In ground one, he contended that there does not appear to be any concrete evidence that the complainant was robbed of her cell phone and

K150 cash. Counsel pointed out that the complainant's evidence was full of contradictions: she denied during cross-examination that the 2nd appellant was her boyfriend but later conceded to the fact; she did not report the robbery to the first person she encountered and she told her mother that she lost money and trays during the rape. In view of these alleged inconsistencies in the complainant's evidence, Counsel argued that the credibility of the complainant was brought into question. On the totality of the evidence, Counsel opined that the prosecution failed to discharge its burden of proof beyond reasonable doubt that the items mentioned in the particulars of the offence were stolen. On this ground alone, Counsel urged us to allow the appeal.

Ground two attacked the judgment of the trial court on the basis that it did not meet the standard set out in **Section 169(1) of the Criminal Procedure Code, Cap 88 of the Laws of Zambia**. In the words of learned Counsel, what the trial court delivered was no judgment at all. Counsel's argument is that in her five paged judgment, the learned trial judge concentrated mainly on the evidence of the complainant and hardly considered the evidence of

the other prosecution witnesses and of the three appellants. It was submitted that reading the judgment, it is difficult to determine how the learned trial judge arrived at her decision to convict the appellants. Counsel found solace in the cases of **The Minister of Home Affairs, The Attorney General vs. Lee Habasonda suing on His own Behalf and on behalf of SACCORD;**[1] **Muyunda Muziba and Another vs. The People**[2] and **Muvuma Kambanja Situna vs. The People.**[3]

It was submitted that ordinarily, a retrial would be the appropriate mode in such a scenario. It was noted, however, that in the case in *casu* four years has passed since the appellants were incarcerated and the evidence in the court below being shaky and looking at the fact that the trial court made no findings of fact, the proper course here is to acquit the appellants in the interest of justice. Therefore, Counsel contended that a retrial is inappropriate in this case.

Turning to ground three which is on sentence, it was submitted that the sentence of life imprisonment was manifestly

excessive in view of the value of the items stolen and in the light of the fact that the appellants were first offenders. The main issue is that the trial judge did not give any reason for meting out such a harsh sentence. We were referred to the case of **Alubisho vs. The People**[4] in which we gave guidance to appellate courts when dealing with appeals against sentence. It was submitted that it was a serious misdirection for the trial court to simply pronounce the sentence and that the appeal against sentence should be allowed and that the sentence of life should be set aside and a fairer sentence imposed.

At the hearing of the appeal, Mr. Muzenga in his argumentation added another dimension to ground one.

His argument is that there were no threats or actual violence to the complainant before the purported taking of the items mentioned in the information. Counsel submitted that since the 2nd appellant was PW1's boyfriend, there was no threat of violence throughout the taking. He conceded that there was evidence that the 1st appellant grabbed the phone from PW1. Mr. Muzenga

are disputed. She argued that since PW1's evidence on the robbery was not challenged, it follows that this evidence was undisputed.

Mrs. Mwansa insisted that a robbery took place in which a phone and K150 cash were stolen and that the offence of aggravated robbery was proved and the appellants were properly convicted. Ground one should fail, she argued.

In responding to ground two, it was submitted that the appellants were able to comprehend the lower court's judgment hence the appeal before us. While conceding that **Section 169 (1) of the Criminal Procedure Code** provides a model of what a judgment must contain, Counsel submitted that the appellants were not denied of any right to appeal the decision of the lower court.

Responding to the issue of credibility raised by her learned friend, Mrs. Mwansa argued that the issue was not raised in the court below. In support of her argument, she cited the case of **Muyunda Muziba and Sitali Ilutumbi vs. The People**[2] (also cited by Mr. Muzenga). According to Mrs. Mwansa, in the **Muyunda**

Muziba case we guided that when issues of credibility arise, the reasons which usually underpin credibility include, poor visibility, fleeting glimpse and poor evidence of identification. Counsel contended that none of these issues were raised in the court below for the issue of credibility to arise. She vigorously defended the judgment of the lower court that, although short, it discloses that the learned trial judge had analysed the evidence and facts and that her learned friend conceded this when he stated thus in his submission: "what purports to be an analysis and findings of the trial court ...." Counsel contended that the length of the judgment is immaterial as the substance is what matters. Counsel agreed with her learned friend that a retrial at this stage would be unfair to the appellants and prejudicial to the State. That it is not in the interest of justice to send the matter for retrial.

It was submitted that a court properly directing itself under **Section 169(1) of the Criminal Procedure Code** would have found the appellants guilty.

In the alternative, should we be persuaded by Mr. Muzenga's arguments, we were invited to evaluate the evidence before the trial court and arrive at an independent opinion.

Mrs. Mwansa contended that the prosecution having discharged its duty of proving the case beyond reasonable doubt, the failure by the trial court to analyse the evidence, should not result in the acquittal of the appellants in the midst of the over whelming evidence on record. In the words of Counsel, the guilt of the appellants cannot and should not be absolved by a judgment found wanting in structure. Counsel relied on the case of **Muyunda** to buttress her argument in which we stated that where the judgment of a trial court is poor or goes missing, this will not lead to an acquittal. We were invited to categorise the judgment appealed against as a poor judgment, evaluate the evidence in its totality and confirm the conviction of the trial court.

Coming to ground three, Counsel for the State conceded that the learned judge did not give reasons when she meted out the sentence of life imprisonment. Counsel submitted that the

sentence imposed by the learned judge was not excessive as Section 294 (2) (b) of the Penal Code provides that death is the appropriate sentence where there is grievous harm. It was submitted that grievous harm was occasioned to the victim in this case as she was raped by the appellants causing her to bleed from the anus and her private part. It was contended that the rape exposed her to sexually transmitted diseases thereby endangering her health. It was Counsel's submission that the sentence of life imprisonment is inappropriate under the circumstances as the appellants should have been sentenced to death. Counsel referred us to the case of **Alubisho vs. The People**. We were urged to tamper with the sentence and substitute it with the sentence of death so that it is reflective of the gravity of the offence the appellants committed.

In augmenting ground one, Mrs. Mwansa submitted that the prosecution proved theft which was accompanied by force. She alluded to the evidence of PW1 who stated that her phone and money were grabbed from her. Mrs. Mwansa submitted that PW1's evidence indicates the use of force during the commission of the offence. Counsel submitted that this case fell within the ambit of

Section 294 (1) as it is clear that violence was used before, during and after the commission of the offence. She opined that the offence of aggravated robbery was proved to the required standard.

In her brief augmentation relating to ground three, Mrs. Mwansa argued that the manner in which the offence was committed is one which dictates the sentence of death rather than life imprisonment. She submitted that in the case of **Miloslav vs. The People**[7] this court did not shy away from tampering with the sentence upwards. Relying on Section 4 of the Penal Code, Mrs. Mwansa argued that PW1 was raped by three men without protection, who took turns to rape her and her health was likely to be endangered as she could have contracted HIV. She implored us to critically look at the circumstances of this case and consider the grievous harm done to PW1.

In his reply in relation to ground three, Mr. Muzenga argued that the death sentence advocated by Mrs. Mwansa is untenable at law. He submitted that the appellants were not charged under Section 294 (2) and the particulars never alleged that grievous harm

was occasioned. He referred us to the case of **Roberson Kalonga vs. The People**[8] which, in his view, is instructive on the issue at hand. Further, he pointed out that the medical report is inadequate as it did not relate to the charge of aggravated robbery but to the offence of rape which was a separate felony. Mr. Muzenga's argument is that PW1 was not injured during the robbery.

However, in the same breath, Mr. Muzenga submitted that the appellants should have been tried by one court, namely the High Court, to avoid contravening **Article 18 of the Constitution**. That this court should advise the State that in cases of this nature the culprits must be prosecuted before one court. He submitted that the appellants were convicted and sentenced to 25 years imprisonment for rape and if they appealed against that sentence, there would be confusion. He strongly urged us to reduce the life sentence and order the sentences to run concurrently as they were a series of offences committed at the same time.

We have considered the arguments by Counsel. The issue for our determination in ground one is whether the learned trial judge was on firm ground when she convicted the appellants of the offence of aggravated robbery. In ground two, we must determine whether the judgment of the lower court meets the threshold set under Section 169 (1) of the Criminal Procedure Code. We will deal with the two grounds together.

Mr. Muzenga has strongly argued that since the judgment of the lower court is irreparable, we must acquit the appellants rather than send the case back to the High Court for retrial. Mrs. Mwansa has strongly opposed this position and has urged us to uphold the conviction on the ground that the evidence against the appellants was overwhelming. Section 169(1) of the Criminal Procedure Code provides that:

> **The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**

Further, in the celebrated case of **The Minister of Home Affairs, The Attorney General vs. Lee Habasonda Suing on His own behalf and on behalf of the Southern African Centre for The Constructive Resolution of Disputes (SACCORD)** this court had occasion to give guidelines on judgment writing. It was held, *inter alia,* that:

> **Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.**

And in the case of **Muvuma Kambanja Situna vs. The People** we held that:

> **Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited.**

In the case in *casu,* a total of seven witnesses were called by the prosecution while the appellants gave their evidence on oath. The learned trial judge in her summary of evidence, concentrated much on the evidence of PW1, the victim of the attack and touched only on the evidence of PW2 and PW3. She summed up the

appellants' defence in six lines. Then the learned trial judge continued:

> "**I have carefully considered the evidence on record and I am of the considered view that all the 3 accused persons were together on the date in question and attacked the complainant PW1, by brutally raping her, injuring her in the process and forcefully stealing her money amounting to K150.00 plus her mobile phone. In fact A2 admitted giving PW1 a sumsang mobile phone worth K350.00 in his testimony before court.**
>
> **I am therefore convinced that the accused persons stole the said phone together with the money amounting to K150.00 from PW1 by using actual violence to PW1. I am therefore satisfied that the necessary components of the offence of aggravated robbery, contrary to Section 294(1)of the Penal Code, Chapter 87 of the Laws of Zambia, have been met hence I find each of the accused persons guilty and accordingly convict each of them with the said offence."** (underlining ours)

Although the learned judge stated that she had "carefully considered" the evidence on record, a reading of the two paragraphs above do not reveal that she did so. The brief judgment is devoid of the facts which convinced the learned trial judge into arriving at the conclusion that it was the appellants who robbed PW1. In our view, the learned trial judge merely jumped to the conclusion that it was the appellants who committed the offence - a conclusion which she formed immediately after purportedly carefully considering the

evidence on record. Contrary to Mrs. Mwansa's argument, the judgment appealed against is not only wanting in structure but in substance as well. The issue here is that where a trial court fails to write a judgment to the required standard thereby rendering it "a purported judgment", as the appellate court we are now compelled to do the work of the trial court which is unacceptable. In this case, the learned trial judge abdicated her duty by failing to analyse the evidence placed before her by the prosecution and the defence. As pointed out by Mr. Muzenga, the five paged judgment focused mainly on PW1's evidence without considering the evidence of the other six witnesses and the evidence of the appellants was covered in six lines. The judgment appealed against reveals a lack of seriousness on the part of the trial judge and the result is this appeal which may have been avoided had the learned trial judge applied her mind to the task before her. We do not hesitate to agree with Mr. Muzenga that the judgment definitely fell short of the standard prescribed under Section 169 (1) of the Criminal Procedure Code. We do not, however, agree with Mr. Muzenga that the appellants were deprived of an opportunity to properly appeal

against the judgment of the lower court. The record speaks for itself and the fact that the appeal is before us is a clear indication that the appellants have not been prejudiced in the manner suggested by Mr. Muzenga. Ground two succeeds only to the extent that we agree that the judgment fell below the required standard.

The matter does not however, end here. In the case of **Muvuma Kambanja Situna vs. The People** we did state that a defective judgment *may* result in an acquittal where it is not merited. In the appeal before us, the learned Deputy Director strongly argued that should we agree with him that the judgment of the lower court fell below the required standard, then the appellants should be acquitted rather than send the matter back to the High Court for retrial. The State also agreed that the ends of justice would not be achieved by sending the case for retrial as the appellants have been in custody for over four years and that the prosecution would face insurmountable hurdles in starting the trial all over again.

Both Counsel cited the case of **Muyunda Muziba and Sitali Ilutumbi vs. The People** where the record of appeal was complete save for the judgment of the trial court which went missing for unexplained reasons. In the said case, we stated thus:

> **"Where a judgment of the trial court goes missing, technically there will be nothing to show, on its face that the trial court adequately considered all the relevant material that was placed before it. It is this failure which deprives the appellate court from assessing the merits of the case. This, in no way, should be taken to mean that when the judgment of a trial court is *poor* or goes missing on appeal, the appeal must succeed and the appellant be acquitted."** (Italics ours)

As pointed out by Mrs. Mwansa, in the present case we are dealing with a poor judgment and this cannot lead to the acquittal of the appellants unless the evidence in the court below did not prove the offence of aggravated robbery. In other words, aside from the poor judgment, was the offence of aggravated robbery proved beyond reasonable doubt?

Mr. Muzenga questioned whether PW1 was robbed or she merely lost her items during the scuffle. His argument, is that there was no violence connected to the taking of the property. This is

what PW1 had to say in her evidence (and we alluded to this evidence during the hearing of the appeal):

> **"I wanted to pass but they blocked me, I tried to go on the other side, again they blocked me. Then they stripped me, Chanda Nkole in particular when I fell down, I wrestled with all 3 men as they held me on both sides. They were insulting me and telling me not to make noise. They asked me to show them what I had. I had a phone with me and K150 realised from the selling of chickens. I had a nokia phone 1100 with red lines around it but mainly white in colour. I bought the said phone at K90. They grabbed my phone and K150. Then they got handkerchief and put it in my mouth..."**

The above portion of PW1's evidence has violence written all over it and we refuse to be drawn into Mr. Muzenga's legal gymnastics. Section 294 (1) of the Penal Code provides that:

> **Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery...**

Further, in **Mugala vs. The People**[9] we held that to prove a charge of aggravated robbery it is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen.

While it is true that PW1 at first denied that the 2nd appellant was her boyfriend, this is not sufficient reason for us to discount her whole evidence which taken holistically shows that she was indeed robbed by the three appellants. We do not agree with Mr. Muzenga that her credibility was questionable on this aspect. The appellants knew PW1 and they had been drinking at the bar where she had been selling chicken pieces that evening. The three perpetrators jointly and whilst acting together waylaid her as she proceeded home, stole from her in violent circumstances. Mr. Muzenga's argument that PW1's story could not hold water because she was the 2nd appellant's girlfriend is untenable. The circumstances clearly show that the 2nd appellant ganged up with his co-accused to rob and rape the victim for reasons best known to himself. That PW1 was traumatised by the whole ordeal cannot be doubted. She was a victim of gender based violence which is a violation of one's human rights. Her dignity as a woman and as a person was taken away from her in a violent and degrading manner by three men who were known to her. And they took turns in raping her and yet Mr. Muzenga argued that there was no violence

in this case - in fact, he questions that a robbery took place simply because PW1 magnified the rape over the robbery. In our view, PW1 as the victim chose to magnify the abuse and violation to her person more than the loss of a phone and money which are recoverable. This should not be held against her. PW1 the victim in this case can never recover the damage and loss of her dignity - no doubt she will carry the shame to her grave.

Mr. Muzenga under this limb, also argued that there was no medical report in relation to the aggravated robbery. Counsel conceded in the end that the offences committed within these set of facts constituted a series of offences. It is not in dispute that the medical report produced during trial was in relation to the offence of rape. However, it is clear as we shall discuss this within this judgment that the two offences could not be separated as they occurred at the same time. In any case, there is no law which requires that to prove aggravated robbery, a medical report must be produced. Therefore, Mr. Muzenga's argument cannot be sustained.

We hold that there was violence before, during and after the taking of the property from PW1, and that she was raped in the process. We find that the learned judge properly directing her mind would still have found that the offence of aggravated robbery was proved beyond reasonable doubt.

Turning to ground three, the issue is that the learned trial judge gave no reasons for imposing the maximum sentence which is life imprisonment. Our immediate reaction is that we agree with Mr. Muzenga. We have already stated within this judgment that a trial court must give reasons for its decisions and this was no exception.

Before we go any further we wish to consider the invitation by Mrs. Mwansa that in view of the grievous harm caused to the victim in this case, we should use our discretion and substitute the life sentence with that of the ultimate death penalty. She relied on the provisions of Section 294 (2) (b) which prescribes the death penalty where grievous harm is done to any person in the course of commission of the offence. We have considered the argument by

Counsel for the State. At this stage, we are inclined to agree with Mr. Muzenga that Mrs. Mwansa's invitation is untenable at law more so that the appellants were not charged under Section 294 (2)(b). Further, we held in **Roberson Kalonga vs. The People** (cited by Mr. Muzenga) that an accused person must be informed that he stands charged with that particular offence especially that we are being called upon to interfere with a lower sentence.

Mrs. Mwansa's reliance on our decision in **Miloslav vs. The People** cannot assist her as it related to the offence of indecent assault where the appellant was sentenced to 15 years imprisonment which we considered to be wrong in principle. We felt in that case that the sentence was inadequate having regard to the fact that the appellant was the employer to the victim and we took the view that he abused her because of the authority he wielded over her. We enhanced the sentence to 20 years imprisonment.

We take the view that Mrs. Mwansa's submission is in fact a reminder to the prosecution that they have a role to play when it

comes to sentence of an accused. It is a fact that in our courts, almost every case, if not in every case, the State always informs the trial court (as it did in this case) that "there is nothing known" against the accused and ends there. It appears to us that in our jurisdiction when it comes to sentencing, the prosecution is a mere spectator. The trial court at sentencing stage (or even the appellate court in appropriate cases) is left at large without any input from the State. Perhaps time has come, for the State in appropriate cases to play its role through Section 302 of the Criminal Procedure Code which states that:

> **The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed.**

We are aware that in other jurisdictions after conviction, before passing sentence, the court holds a sentencing session where it receives evidence from the prosecution and the defence. This includes evidence of the seriousness of the offence, the previous convictions if any, relevant reports, evidence from the victim's family, mitigation and so on. In some jurisdictions the sentencing session can take days depending on the circumstances. The law is

already on our books and should be used as this will help courts to impose well informed sentences with a holistic approach. We urge the State to take advantage of Section 302 in appropriate cases. In view of what we have stated, Mrs. Mwansa's argument cannot succeed.

Under this ground, Mr. Muzenga complained that the sentence was excessive in view of the fact that the appellants were first offenders and the value of the items stolen was quite minimal. In his augmentation at the hearing of the appeal, the learned Deputy Director added another dimension when he argued that the appellants were being punished twice as they were convicted of aggravated robbery which is the subject of this appeal and also of rape. Mr. Muzenga conceded (while somehow sitting on the fence) that the aggravated robbery and the rape were 'a series of offences'. He argued that the prosecution should have tried both aggravated robbery and rape in one court rather than punish the appellants twice contrary to Article 18 of the Constitution.

The difficulty we have with Mr. Muzenga's argument is that this appeal is against the judgment of the High Court which convicted the appellants of one count of aggravated robbery and sentenced them to life imprisonment without giving any reasons. The record shows that it was during cross-examination of PW1 that the issue of the appellants being charged with rape came up. PW1 admitted in cross-examination that she testified in the rape case before the Mkushi Magistrates court. She conceded that in those proceedings she admitted that the 2nd appellant was her boyfriend. Notably, even the police witnesses did not mention the outcome of the rape case. More importantly before sentence, the court below was informed that there was nothing known against the appellants and the learned trial judge rightly treated them as first offenders.

In the cases of **Jutronich and others vs. The People**[6] and **Alubisho vs. The People**[4] we held that:

> **In dealing with appeals against sentence the appellate court should ask itself these three questions:**
>
> **(1) Is the sentence wrong in principle?**
>
> **(2) Is the sentence so manifestly excessive as to induce a sense of shock?**

(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?

Looking at the circumstances of this case, we must state that the sentence has not come to us with a sense of shock. Clearly, the offence of aggravated robbery cannot be separated from the offence of rape and if one considers the offence of rape separately, the aggravated robbery will be a factor as well. Therefore, when considering sentence in the aggravated robbery, a trial court would not turn a blind eye to the fact that the victim was robbed and raped all at the same time. This was a very serious offence depicting how women become victims of gender based violence even at the hands of men who are expected to protect them. Whichever way one looks at it, the two offences are intertwined and this is why we have agreed that in future, cases of this nature should be tried by one court.

In any event, the appellants were sentenced to life imprisonment for aggravated robbery and if it is true as Mr. Muzenga has submitted (we cannot verify this) that they were sentenced to 25 years for rape then the 25 year sentence was

"swallowed" within the sentence of life imprisonment. In practical terms, it is not possible that the 25 years can run consecutively to the sentence of life. In this particular case, the question of contravening Article 18 of the Constitution does not arise. In our view, and we have stated this herein, Mr. Muzenga's arguments only serve to remind the State that where there are similar facts such as in this case, the culprits should be subjected to one trial. This will serve the ends of justice for both the State and the perpetrators.

This appeal is dismissed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE