IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 95/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

DERRICK KUNAKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.
On 8th May, 2018 and on 8th December, 2020.

For the Appellant: *Mrs S. C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondents: *Ms G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **Mugala v The People (1975) ZR 282**
2. **Bwalya v The People (1975) ZR 227**
3. **Joseph Mulenga, Albert Joseph Phiri v The People**

Legislation referred to:

1. **Penal Code, Chapter 87, Laws of Zambia, sections 294 (1)**

When we heard this appeal, we sat with Mr. Justice G. S. Phiri who has since retired from judicial service. The decision is, therefore, that of the majority.

The appellant, Derrick Kunaka, was convicted by Mr Justice C. Chanda in the High Court at Ndola on one count of Aggravated Robbery contrary to section 294 (1) of the **Penal Code**. The particulars of offence were that the appellant, on 19th May, 2015 at Ndola, whilst armed with an offensive instrument, namely, a screwdriver, stole from Petronella Mulenga, K1,200 money in cash, 1 x 8 metres chitenge material, one cell phone, one handbag, one ATM card and one green National Registration Card, altogether valued at K2,330 the property of the said Petronella Mulenga and used actual violence to the said Petronella Mulenga in order to obtain or retain the said property. The learned judge imposed a sentence of 25 years imprisonment with hard labour. The appeal is against conviction.

The evidence given on behalf of the prosecution at the trial was that the appellant was employed by PW2 as a taxi driver and used to drive the latter's Toyota Fun Cargo car registration number ACX 8906. Petronella Mulenga, who was the complainant and testified as PW7 was a married woman who was not living with her

husband at the time of the incident. In the afternoon, on 19th May, 2015 PW7 met with PW3 who was her business associate at Main Masala Market in Ndola. PW3 gave PW7 K1,200 she had realized from the sale of merchandise on behalf of PW7. PW7 had in her possession an orange handbag, a Barclays ATM card, an NRC and 8 meters of wax chitenge material. She remained at the market checking on people who owed her money and also tried to sell the chitenge material.

Between 19:00 hours and 20:00 hours, PW7 decided to go home. She got into a taxi that was being driven by the appellant. She did not know the appellant at the time. She told the appellant that she was going to Kabushi township. Instead of going in that direction, the appellant drove her in a different direction. When she asked him why they were going in a different direction, he told her that he wanted to buy fuel for the vehicle. They ended up in the Bwana Mkubwa area of Ndola.

During the trip, PW7 protested and attempted to stop the appellant from driving further by taking hold of the steering wheel of the motor vehicle which the appellant was driving at high speed. In the scuffle that ensued, the appellant beat and stabbed PW7 with a screw driver all over the body (hands, legs and face). Along

the way the vehicle ran out of fuel and one of the tyres got punctured.

The appellant stopped the vehicle and dragged PW7 from the car unto the ground. He had in his hand PW7's hand bag in which were the items listed in the information including the sum of K1,200 that she had just been given that afternoon by PW3.

The violent ordeal ended when PW7 struggled free from the appellant's clutches as he tried to drag her away from the vehicle. She managed to shout for help.

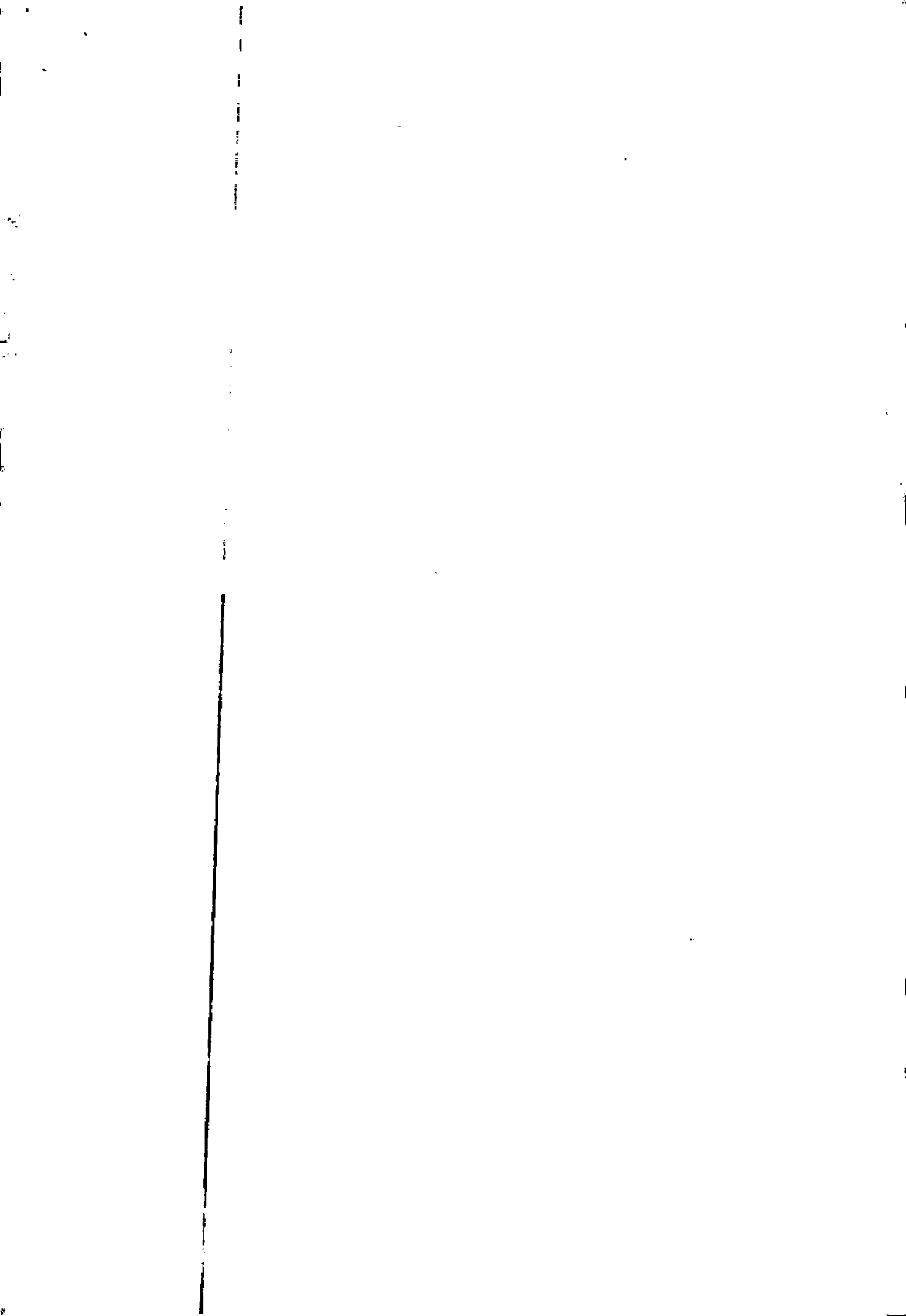
PW1 testified that he was in his house in Bwana Mkubwa watching television around 22:00 hours when he heard someone shouting for help. He went outside and found PW7 standing in some light. She had injuries and was bleeding a lot. PW7 told him that a taxi driver had attacked her. He went with her to the road where he saw the taxi. Other people came to the scene. The matter was reported to police at Bwana Mkubwa police post. PW7 was taken to the hospsital for medical attention and the vehicle was pushed to the police post.

PW1 returned to his house and he was opening the door when he noticed a person behind him. He asked the person who he was

and the stranger told him that he was the taxi driver of the fated taxi, the appellant in this matter. He then asked the appellant why he had injured PW7 in that manner. The appellant told him that PW7 was a prostitute whom he had carried as he was going to Dangote; that as they were going, they started fighting for the steering wheel. According to PW1, he did not want to pursue the matter further in case it caused the appellant to run away. He proposed to the appellant that they go to the police but the appellant refused saying that he might be killed. He, instead asked to call his father. PW1 called the appellant's father who came and the appellant was taken to the police post.

There was evidence from the appellant's employer, PW2, however, that the explanation that he got from the appellant was that he had been attacked by villagers. This witness also stated that he saw the vehicle on the night of the incident and noted that it was damaged on the left side and one of the tyres was punctured.

PW5, the police officer who received PW7's complaint narrated that upon meeting the appellant he asked him why he had abandoned the car. The appellant responded that he was attacked after the car had a puncture.



PW8, the arresting officer also told the Court below that the appellant told him that he took PW7 to the area in Bwana Mkubwa because he wanted to have sex with her. He also said that the appellant told him that he had hit into a wall which caused the tyre puncture. He produced the medical report pertaining to the injuries sustained by PW7. According to the medical report, she sustained the following injuries:

> **"Lacerations on left and right sides of the face, lacerations on anterior aspect of both legs, abrasions on the nose, and extensive bruising involving face, both upper limbs and back."**

These injuries were found, in the medical report to be consistent with the complaint of a screw driver having been used to inflict them.

In his defence, the appellant's story was, however, that PW7 was his girlfriend of one month's duration on the date of the incident. He had been with her on the material day from 19.00 hours and that they drank beer together until 21.30 hours when he got a call to pick up a truck driver client at Dangote (Cement Plant). He stated that PW7 did not have "anything on her" (implying she did not have the handbag) when they met. On the way, PW7 kept on fondling him to a point where he lost control of the vehicle which went to hit into a wall fence. PW7, who had not put on a

seat belt, hit her forehead on the dashboard and injured herself. Pieces of metal beneath the passenger seat also injured her on the body. He drove the motor vehicle from the accident scene up to a point near some houses. PW7, thereafter, lamented how she was going to explain to her husband how she got injured. She got out of the car and began to shout that a thief had attacked her. He parked the vehicle and hid himself before contacting his parents who came with police. He denied telling PW8 that he had wanted to have sex with PW7.

The learned trial judge found in his judgment that PW7 was with the appellant when she sustained the injuries; that the car had a punctured tyre and was abandoned by the appellant at the place where it was found; that the appellant told his employer, PW2 that he was attacked by villagers the reason for which he abandoned the car; that neither the screw driver which PW7 alleged the appellant used to injure her [n]or the hand bag and its contents which PW7 alleged the appellant stole from her were recovered. The learned judge then went on to observe that the injuries sustained by PW7 could not by any stretch of imagination, have been caused by either a bump on the dash board nor a fall on the metals (imbedded) deep inside and under the car seat, as

we understood the finding. He found instead that the injuries were inflicted with a sharp instrument and that a screw driver fit neatly in that description. Therefore, that it did not matter that the screw driver was not recovered.

The learned judge further rejected the appellant's defence that PW7's injuries could have been caused by the car hitting into a wall because the car which the court had an opportunity to see in the photographs exhibited had no damage that could have resulted from that kind of impact. Instead, the learned judge found that PW7, whom he considered to be a more credible witness than the appellant, was "*abducted*" and assaulted in the process of fighting for her life; that the tyre burst happened when she was struggling for the steering wheel. The learned judge found it hard to believe that PW7 was caressing the appellant when the appellant denied that they were having sex in the car. The judge also dismissed the assertion that the appellant did not go away with the handbag. In conclusion the judge found that the prosecution had proved that the appellant had committed the offence to the requisite standard of proof beyond reasonable doubt; that the appellant had not offered any reasonable explanation that could

create a doubt in his mind. He found the appellant guilty as charged and convicted him.

Disenchanted with the outcome of the case in the Court below, the appellant launched an appeal in this Court on the one ground that-

> **"The trial court erred in law and fact when it convicted the appellant for the subject offence in the absence of proof that the assault on the complainant was occasioned in furtherance of stealing from her."**

The written and oral submissions made on behalf of the appellant essentially attack the finding of the lower Court that the offence of aggravated robbery was proved. It was submitted that the evidence on record did not show that the assault on PW7 was occasioned in furtherance of the theft of the handbag and its contents. Mrs Lukwesa correctly listed the ingredients of the offence of aggravated robbery under section 294(1) of the **Penal Code** and referred to the case of **Mugala v The People**[1] in which we held that-

> **"To prove a charge of aggravated robbery in terms of section 294 (1) of the Penal Code, Cap. 146, it is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen".**

It was contended that the assault was in no way connected with robbery and the actions of the appellant did not constitute aggravated robbery but rather some other offence as borne out by his conduct after PW7 shouted for help which was not consistent with someone executing a robbery. PW7 did not even see the appellant run away with her handbag and that her testimony did not suggest in any way that she was put in fear in relation to her property being stolen. It was pointed out that the conduct of the appellant in voluntarily giving himself up to the police was not consistent with the allegation that he had robbed PW7, as we understood the argument.

It was contended that if at all the appellant lied when he said he was attacked by villagers, that cannot be used to draw an inference of guilt. It was submitted on the strength of the case of **Bwalya v The People**[2] that a man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence.

Learned Counsel's view was that the appellant did not go away with the handbag but just held it and left it at the scene as the owner (PW7) ran away and anyone from the crowd might have picked it. She submitted that the appellant had a difference with

PW7 because the two were in a relationship. It was also pointed out that PW7 had confirmed that the appellant had told her that he was going to refuel the motor vehicle. On the basis of these arguments, Counsel urged us to allow the appeal and set aside the conviction against the appellant.

Ms Nyalugwe, responded to Mrs Lukwesa's submissions orally. She began by stating that the State supported the conviction of the appellant because the offence charged was proved on the evidence. The learned Deputy Chief State Advocate submitted that PW7 was with the appellant that night and that, against her will, the appellant drove her in a different direction than where she had asked him to take her and he locked the doors; that when PW7 asked him why he was not taking her in the correct direction, he did not answer; that they struggled for the steering wheel and in the process she was assaulted as shown by the medical report; and that the appellant took PW7's handbag which contained the items listed in the information. Counsel contended that the appellant's explanation that PW7 was his girlfriend who was fondling him as he drove the car causing the car to run into a wall cannot reasonably be true based on the evidence considered by the court below. Counsel contended that having placed himself

at the scene and in light of PW7's evidence that she saw the appellant with her handbag, the reasonable conclusion to be drawn is that the appellant stole the handbag and its contents; and that he used violence immediately before stealing the property. We were urged to uphold the conviction.

In reply, Mrs Lukwesa submitted that the appellant is not contesting the injuries or what may have been used to inflict them but contends that one cardinal element of the offence (i.e. theft) was not proved to warrant the offence of aggravated robbery.

We have considered the appeal and the contending arguments on behalf of the parties. It is quite plain that the ground of appeal as presented does not challenge the learned trial judge's finding that the appellant inflicted or caused PW7 to sustain the injuries alleged in the evidence. The question, is whether the appellant assaulted PW7 in furtherance of an intention to steal PW7's property.

The starting point is that where violence is inflicted on a victim and the property of the victim is taken by the assailant, this must suffice as a robbery under section 292 of the **Penal Code** and if an offensive weapon is used in inflicting the violence and the property of the victim is taken, it becomes an aggravated robbery

under section 294 with the variations under subsections (1) and (2) of the **Penal Code**. The key is that the violence is used to aid the taking of the property and this is a matter of the evidence available.

In the instant case, the evidence given by PW7 at the trial before the lower court was as follows: when the vehicle came to a standstill and the appellant began to drag PW7 from the car, he had PW7's handbag in his hand; PW7 extricated herself and managed to call for help. The appellant disappeared from the scene. Evidence from other prosecution witnesses spoke to how the appellant gave varying explanations how he found himself in the predicament.

The appellant's evidence in defence on the issue was simply that PW7 had nothing when she came into the car implying that he could not have taken the handbag if she did not have it in the first place.

The learned trial judge, in his judgment, dismissed the appellant's defence that PW7 did not have her handbag when they met as a concocted afterthought.

We have considered the evidence relating to the handbag. It is clear from the record of evidence in the court below that PW7 was not challenged on her assertions that she had her handbag when they first met and that the appellant had her handbag in his hand as he was dragging her away from the car. In the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[3], we stated that–

> **"During trial parties have the opportunity to challenge evidence by cross-examining witnesses. Cross-examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial. In this case, the evidence of gunshots, recovery of ammunition and spent cartridges was not challenged."**

It is, of course, the displacement of evidence through cross examination that affects the efficacy of a party's case and not the mere fact of asking questions. However, where there is no cross examination on an issue at all, then the issue of displacement does not even arise. In this case, PW7 was not cross-examined on her assertion in her evidence in-chief that she had her handbag when she first got into the taxi and that the appellant had her handbag as he dragged her away from the car. The defence that PW7 did not

have her handbag when she first met the appellant would appear then to have come as a mere afterthought at the time of the appellant's defence at the trial. The learned trial judge was, therefore, entitled to dismiss the defence as such. We are satisfied, therefore, that the ~~appellant~~ PW7 had her handbag when she first got into the taxi and that the appellant had it in his hand as he dragged PW7 from the car.

Turning now to the question whether the appellant took or stole the handbag, Mrs. Lukwesa suggested that it could have been taken by any one of the people that came on the scene. We have perused the evidence, we have not found any evidence to support the suggestion. There is even no evidence that the appellant put the handbag back in the car.

It is clear from the evidence that the appellant was the last person seen in possession of the handbag and the last person in the company of PW7. The question is why would he have the handbag after brutally assaulting its owner? We are inclined to accept that the brutal attack on PW7 could only have been with a view to steal her property more so that he took her in a direction she did not ask him to take her. We cannot agree that there was

any intimate relationship between the two as the violence perpetuated by the appellant is inconsistent with that relationship.

The appellant's varied explanations do not help matters either. He told the lower court that PW7 had been fondling him leading to the "accident"; then there is the explanation that he was attacked by villagers; yet he told PW1 who came on the scene soon after the incident that he had been struggling for the steering wheel with PW7, this last point in fact confirming PW7's assertion that she grabbed the steering wheel to stop the appellant from taking her in the direction which was not her home. We, therefore, find it strange that the appellant's counsel could argue that PW7's testimony did not suggest in any way that she was put in fear for purposes of stealing from her. Why else would someone brutally assault another and take their handbag if not for the purposes of stealing from them and to overcome resistance? The appellant used violence to take advantage of the victim and steal from her.

As to why the handbag was not recovered, we note that before the appellant called at PW1's house, the appellant had enough opportunity to dispose of the property he got from PW7 during the period in which the witness went to assist PW7 before the police

could come. The appeal lacks merit. We dismiss it. The conviction is upheld.

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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