**IN THE SUPREME COURT OF ZAMBIA** **APPEAL Nos. 173/174/ 175 of 2017**
**HOLDEN AT NDOLA**
(*Criminal Jurisdiction*)


BETWEEN:

**GIVEN NGANZIMBI** **1ST APPELLANT**
**MAYBIN LIKANDO** **2ND APPELLANT**
**JACOB LIPONDA** **3RD APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.
On 6th November, 2018 and on 17th June, 2020.

*For the Appellant:* *Mr H. Mweemba, Principal Legal Aid Counsel - Legal Aid Board.*

*For the Respondents:* *Mrs C. S. Kachaka, Senior State Advocate, National Prosecutions Authority.*

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## J U D G M E N T

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

***Cases referred to:-***

1. **Ngosa v The People, SCZ Appeal No. 251/2012**
2. **John Timothy & Feston Mwamba v The People (1977) Z.R.394**

3. **Boniface Chanda Chola, Christopher Nyamande & Nelson Sichula (1988 - 1989) Z.R. 163**
4. **Green Nikutisha & John Mwakishala v The People (1979) Z.R. 261**
5. **David Dimuna v The People (1988 - 1989) Z.R. 199**
6. **Joseph Mulenga, Albert Joseph Phiri v The People (2008) 2 Z.R 1**

The three appellants were convicted by the High Court at Lusaka, Sitali J, as she then was, presiding, for the offence of Aggravated Robbery contrary to **section 294(2)** of the **Penal Code** and were sentenced to death. The particulars of offence had alleged that the three appellants and one John Chana Manjata on the 21st June, 2014 at Lusaka jointly and whilst acting together with other persons unknown and whilst armed with a firearm and a knife, stole from Susan Janet Chapman, a Land Rover Freelander motor vehicle registration number AKB 18, a Canon Printer, a Toshiba Laptop, a Blackberry cell phone, a Nokia cell phone, a radio cassette player, a blanket, 3 pots, a school bag, Emirates [Airline] air tickets and K20,000.00 cash altogether valued at K79,570.00, the property of Susan Janet Chapman and that at or immediately before or immediately after the time of such stealing, they used or threatened to use actual violence to the said Susan Janet Chapman in order to obtain or retain the said property or prevent or overcome resistance

to its being stolen. John Chana Manjata was found with no case to answer at the close of the case for the prosecution and was acquitted. The motor vehicle was found damaged beyond repair after it was involved in an accident within Shibuyunji. The rest of the stolen items were never recovered.

The evidence that the robbers were armed with firearms was given by PW1, Pastor Dr Susan Janet Chapman as well as PW6, Mathias Malasha. PW1 run a school called Kings School and a church called Day Spring Ministries both situate at Mukobela Village, Nampundwe in Shibuyunji district where the robbery took place. PW6 was a student teacher doing teaching practice at PW1's school.

Between the two witnesses, PW6 was the first to encounter the robbers. According to the witness, it was on 21st June, 2014 between 18:00 hours and 19:00 hours while sitted in the outside kitchen at the school with two ladies, Doreen Pasela and Grace Mwila, preparing supper when he saw about 7 men standing in the entrance to the kitchen. The intruders ordered the trio not to make any noise under threat of death if they did so. The men were armed with two firearms. PW6 described one of the fire arms as black and small with a long

barrel. It was being held by a man standing next to him whom the witness identified initially at a police identification parade and later in court as the 1st appellant. He identified the firearm during the trial as the exhibit P3 which was described by PW5, the Forensic Ballistics expert, as a Luger pistol. Another robber, whom PW6 identified as the 3rd appellant, had a large kitchen knife. The witness and the two ladies were ordered to lie down. Two of the men remained guarding them in the outside kitchen while the five proceeded into the house where PW1 was. The trio were also taken into the house shortly after where PW6 saw, among the robbers, the 2nd appellant whom he recognised as one of the strangers that he had seen come to a prayer meeting held at the school the previous day.

According to PW1, she was in her room preparing work for Grade 12 pupils on her laptop when in walked three men armed with a firearm which she described as a short gun (not a shotgun). They also had a knife. PW1 stated that there was a solar lamp where she was working and visibility was good. The robber who had the gun pointed it at her and asked for money. The robbers went on to ransack the house and took away the items listed in the information

including PW1's car. The matter was reported at Shibuyunji Police Station. At the trial, PW1 did not identify the gun that she saw during the robbery.

Another witness, PW4 Nebert Chiko, testified that on 17th June 2014, he was a guest at his brother in-law, the 2nd Appellant's home in Kanyama compound within Lusaka. During the night a friend to the 2nd appellant, John Chana Manjata, nicknamed "Chinese" came and gave the 2nd Appellant a pistol and left. PW4 was still at the 2nd appellant's home when the 2nd appellant arrived home in a dishevelled state around 02:00 hours on the 22nd June, 2014. The 2nd Appellant got a pistol from one of his shoes and gave it to John Chana Manjata who also happened to be there. At the trial PW4 identified the exhibit P1, a pistol described by PW5 as a "Ceska Zbrojovka", as the one which he saw John Chana Manjata give to the 2nd appellant on 17th June, 2014 and which the 2nd appellant gave to John Chana Manjata when he returned home in the early hours of the 22nd June, 2014.

PW5 was Senior Superintendent Nyanfuko Pius Ilunga, at the time, the Officer in-charge of the Forensic Scenes Department at the

Zambia Police Service Headquarters and a Forensic Ballistics Expert as earlier stated. He testified that on 10th July, 2014 he was handed two firearms, a Ceska Zbrojovka pistol 1983 model (exhibit P1) and a Luger pistol 1908 model (exhibit P3) both of 9mm calibre for examination by PW9, Detective Sergeant Simon Kwesa, the arresting officer. He was also handed 22 cartridges for examination as well. PW5 described the two pistols as being in good working order capable of firing and discharging live ammunition of 9mm calibre. He also found 7 of the 22 cartridges given to him to be live ammunition capable of being fired and discharged from the Luger pistol and other firearms of 9mm calibre. He submitted a report containing his findings arising from the examination of the guns and the cartridges.

PW9's evidence was that the Luger pistol was recovered from the 1st appellant's ex-wife Susan Mushanga, in Mandevu compound where the 1st appellant led police while the Ceska was recovered from John Chana Manjata.

In his defence, the 1st appellant did not say anything about the allegation that PW6 saw him with what turned out to be the Luger

pistol during the robbery. His defence was simply that he was not part of the robbery.

The 2nd appellant stated that police lied when they said he led them to recover the firearm (from John Chana Manjata). He stated that he knew nothing about its recovery.

The 3rd appellant's defence was that he knew nothing about the firearm or where it was recovered from.

In her judgment, the learned trial judge did not expressly state that the firearm[s] seen by PW6 was or were the same one[s] recovered by police and examined by PW5 and found to be firearms as defined in the Firearms Act. The judge did, however, state when sentencing the appellants, that the evidence on record was that the 1st accused (1st appellant in this appeal) carried a firearm at the time of the robbery; that PW1 and PW6 stated that a gun was pointed at them at some point during the robbery; and that there was no evidence that the 2nd and 3rd appellants did anything to dissociate themselves from the offence in spite of being aware of the firearm. Based on that she sentenced all three appellants to death.

The ground of appeal put up in this matter is this: that the learned trial judge erred in law and fact when she sentenced the appellants to death for aggravated robbery involving the use of a firearm in the absence of conclusive proof that the appellants were, at the material time, armed with a firearm [or firearms].

At the hearing of the appeal, Mr Mweemba had applied for leave to file a supplementary ground of appeal and heads of argument in the course of the session to which Mrs Kachaka did not object. We granted the application. We have, however, not had sight of the supplementary ground or the heads of argument. All we have seen is the original ground of appeal and the heads of argument filed with leave at the hearing as well as the respondent's heads of argument in response which both advocates had indicated that they would rely on. Our judgment is, accordingly, based on the ground of appeal and the heads of argument filed at the hearing.

It was submitted in support of the one ground of appeal to the effect that although the evidence of PW1 and PW6 suggested that the appellants were armed with guns at the material time, PW1 did not identify the gun at the trial and PW6's identification of the exhibit P3

was insufficient to connect it to the firearm allegedly involved in the robbery. It was pointed out that the two witnesses were terrified as they testified and could not have properly observed the guns. It was submitted that no "ballistic evidence" was collected from the scene which could have tied the guns allegedly seen by the two witnesses to the Ceska and the Luger. Referring to the definition of "firearm" in section 2 of the Firearms Act, it was submitted that there was no evidence that the guns which PW1 and PW6 allegedly saw were capable of discharging any shot or bullet.

It was further submitted that the evidence relating to how the Ceska and the Luger were recovered by police was obscure and unreliable in reference to the evidence of PW9 on the issue; that there was no evidence of the exact place in or outside the house of Susan Mushanga where the Ceska was recovered. Therefore, that the prosecution had not proved that the Ceska was recovered in the manner claimed. We were urged to uphold the appeal, set aside the death sentence and substitute it with one under section 294(1) of the Penal Code.

The State's response was that the evidence of PW1 and PW6 was extremely clear that the appellants were armed during the robbery. It was submitted that the two witnesses were candid in their narration of the guns they saw with the robbers. It was pointed out that PW6, particularly said that he was able to identify the same gun that the 1st appellant had and did so in court. It was stressed that the evidence of PW1 and PW6 asserted that the robbers were actually armed.

Further, that PW5 placed the two firearms within the definition in the Firearms Act thus satisfying the requirement stated in the case of **Ngosa v The People**[1] that-

> **"indeed, the fact that the exhibited firearm was identified during the trial as the one used during the robbery, cannot, without a ballistic examination, lead to a conclusion that it was a firearm within the definition under the Firearms Act."**

It was, accordingly, submitted that it cannot be true that the evidence that the appellants were armed with the lethal weapons exhibited in court was insufficient. The case of **John Timothy & Feston Mwamba v The People**[2] was cited in which it was held that-

> **"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".**

It was submitted to the effect that the evidence of PW5 and PW6 was sufficient and conclusive of the fact that the appellants were armed during the robbery with firearms capable of causing death which was why the trial court sentenced them as such.

It was also submitted that there was nothing obscure or unreliable about the evidence how the firearms were recovered in view of the arresting officer's evidence. Relying on the case of **Boniface Chanda Chola, Christopher Nyamande & Nelson Sichula**[3] it was pointed out that the arresting officer had not been to Susan's house prior to him being led there by the 1st appellant and vital evidence was recovered from there. It was submitted that the fact that Susan was not called as a witness is neither here nor there as she was equally available to the defence or could have been called at the instance of the court. To emphasise the submission, the case of **Green Nikutisha & John Mwakishala v The People**[4] was cited for the holding that-

> **"(i) 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."**

It was submitted in this vein that there was completely no doubt cast on PW9's testimony that would have demanded the calling of another witness. Still on the same point the case of **David Dimuna v The People**[5] was cited where this court held that-

> **"(2) Whilst it is desirable, if the evidence of one police officer is challenged, to call other available police officers there is no rule of law or otherwise for there to be corroboration of a single police officer."**

It was finally submitted that the State had proved through PW1 and PW6 that the appellants were armed during the robbery and also through PW9 that the Ceska was recovered from the 1st appellant's former wife where the appellant led police. We were implored to uphold the sentence as it is correct in principle and that we should decline to interfere with it.

We have considered the appeal and the arguments put up by the respective advocates. The issue to resolve, in our considered view, is whether the Ceska and Luger pistols were the ones seen in the

hands of the robbers at the crime scene on the evening of the 21st June, 2014. It is not in question that the two exhibits are firearms within the definition in the Firearms Act. The forensic ballistics expert evidence was explicit on the point and it was not challenged.

There was, however, no direct evidence that the Ceska pistol was one of the firearms seen with the robbers at the scene of the crime. The evidence that tends to indicate that it was one of the firearms is circumstantial. This evidence was given by PW4 that on 17th June, 2014 while visiting his brother in law, the 2nd appellant, at his home in Kanyama compound, John Chana Manjata came there and gave the 2nd appellant a pistol. Later on 22nd June, 2014 around 02:00 hours in the morning the 2nd appellant arrived home in a dishevelled state and gave the pistol back to John Chana Manjata. At the trial in the court below, PW4 identified the Ceska as the pistol which had exchanged hands on the 17th and the 22nd June, 2014 between the 2nd appellant and John Chana Manjata.

We see no reason why PW4 could have lied against the appellant who was in fact his brother in-law. We do not think that it was a mere coincidence that so shortly after the robbery at PW1's school in which

the 2nd appellant was identified as one of the robbers, he returned home with the firearm and gave it back to the person that had given it to him a couple of days or so earlier. In the circumstances, we find ourselves compelled to draw the irresistible inference that the firearm which changed hands between the 2nd appellant and John Chana Manjata was one of the two firearms seen by PW6 during the robbery at Mukobela village. Even though PW1 did not identify the firearm that she saw during the robbery, it is clear from the evidence of PW6 that the robbers had two firearms one of which he identified. We are inclined to conclude, from the evidence available, that the other was the Ceska that the 2nd appellant handed back to John Chana Manjata when he returned from the robbery.

In relation to the Luger, PW6 gave direct evidence that he saw it in the hands of the 1st appellant during the robbery. He identified it at the trial and it was admitted into evidence without objection from the defence. There was no challenge to PW6's evidence on the matter whatsoever. Even if we ignored the evidence of the arresting officer that the 1st appellant led police to his wife from whom the Luger was

recovered, PW6's evidence is still cogent enough and established the fact that the firearm was the one used in the robbery.

As we said in the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[6] –

> **"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 was folly for the defence to have failed to challenge the prosecution witnesses on the material evidence.

We are satisfied on the evidence before the trial court that the Ceska and the Luger pistols were the guns seen in the hands of the appellants during the robbery and there is no doubt in our minds that they are firearms as defined in section 2 of the Firearms Act. We must point out that the detail that the robbers were armed with two firearms as disclosed by the evidence of the prosecution witnesses should have been stated in the particulars of offence so that the

accused were fully aware of the extent of the charge against them. Our view, however, is that the omission did not prejudice them bearing in mind that the allegation was that they were armed at least with a firearm on the basis of which the offence of Aggravated Robbery under **section 294 (2)** of the **Penal Code** was founded and they were convicted. We are satisfied that the learned trial judge properly convicted the appellants and the sentence was correct at law and in principle.

We find no merit in the appeal and we dismiss it.

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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**