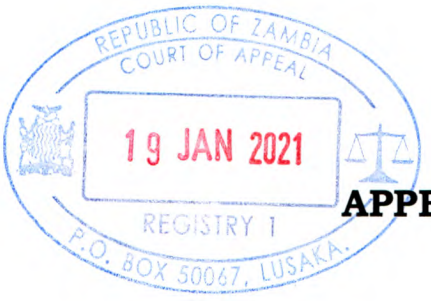
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 048 OF 2020**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

OLIVER MUTETESHA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Chashi, Lengalenga and Majula, JJA**

ON: **24th September, 14 October, 10th and 12th November, 2020 and 19th January 2021**

For the Appellant: *K. Tembo, Legal Aid Counsel, National Legal Aid Board*

For the Respondent: *R. L. Masempela, Deputy Chief State Advocate, National Prosecutions Authority*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Muvuna Kambanja Situna v The People (1982) ZR, 115**

2. **Crispin Soondo v The People (1981) ZR, 302**
3. **Bwalya v The People (1975), ZR, 227**
4. **Kambafwile v The People (1972) ZR, 242**
5. **Mbinga Nyambe v The People - SCZ Judgment No. 5 of 2011**
6. **Joseph Banda and Ashanti Tonga v The People - SCZ Appeal No. 41 and 42 of 2017**
7. **Ilunga Kabala and John Masefu v The People (1981), ZR, 102**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of Honourable Mr. Justice M. D. Bowa, delivered on 24th December 2018, in which he convicted the Appellant of the offence of aggravated robbery contrary to Section 294 (1) of **The Penal Code**[1] and sentenced him to fifteen (15) years imprisonment with hard labour.

2.0 BACKGROUND

2.1 The Appellant was charged with two (2) counts of aggravated robbery contrary to Section 294 (1) of **The Penal Code**[1].

2.2 The particulars of the offence in the first count were that, the Appellant on 5th November 2017 at Lusaka, in the

Republic of Zambia jointly and whilst acting together with other persons unknown, did steal from Samson Zulu, one Toyota Corolla, registration number ABT 28 valued at K33,000.00, the property of Ernest Mwakamui Manaseh and at or immediately before or immediately after the time of such stealing, did use or threatened to use actual violence on Samson Zulu in order to obtain or retain the said property or prevent or overcome resistance from it being stolen.

2.3 The particulars on the second count being that, the Appellant on 5th November 2017 at Lusaka, in the Republic of Zambia, jointly and whilst acting together with other persons unknown and armed with unknown type of firearms and iron bars did steal from Sailas Mapendamo Masambadeba, MTN, Airtel, Zamtel cards, 1 container cooking oil, 2 packets of biscuits, 2 bottles of lotion, 4 loaves of bread and K8,000.00 the property of Sailas Mapendamo Masambadeba and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to Sailas Mapendamo

Masambadeba in order to obtain or retain the said property or to overcome resistance from being stolen.

3.0 EVIDENCE IN THE COURT BELOW

3.1 In pursuit of the case, the prosecution called five (5) witnesses. Of relevance was the evidence of PW2, PW3, PW4 and PW5. PW2 Benjamin Mbewe, a taxi driver testified that on the material day, he left the vehicle he was operating as a taxi at a taxi rank and went to watch football. Around 19:00 hours, he allowed PW3, another Taxi driver to use the vehicle to take a customer. PW3 later reported to him that the vehicle had been stolen.

3.2 PW3, Samson Zulu, who was robbed in the first count, testified that he was in possession of the vehicle when a customer booked it to take him to Eden Institute on pay forward basis. When they reached a certain house, someone came and hit him with a hole handle on the shoulder. In the process, other persons appeared with a firearm and he was hit on the knee.

3.3 The person who had hired the vehicle then produced a knife. After being over powered, PW3 ran away and the assailants drove the vehicle away.

3.4 PW4, Mapendamo Silas Masambadeba was the person robbed in the second count. According to his evidence, he was attacked by four assailants with pangas. The assailants abandoned the vehicle which was stolen from PW3 when it could not start. PW4, identified the Appellant in court (dock identification) as one of the assailants who had hit him with a panga.

3.5 PW5, Constable Michelo Nkonoko, the dealing officer testified that a small black phone was recovered from the vehicle and it bore the Appellant's name. He got in touch with the Appellant's daughter who had constantly been calling the number. The daughter then led the police to the Appellant.

3.6 In his defence, the Appellant testified that he lost the phone on the material day around 16:00 hours at a bar called the Shade. When he got home, he tried to call the number, but it was not reachable. That the following day

when he was about to go and report the loss of the phone, he was apprehended by the police.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the evidence before him, and establishing undisputed facts, the learned Judge opined that, the only issue that fell for determination was resolving whether or not the accused was part of the group that committed the crimes. According to the learned Judge, the only evidence implicating the accused was offered firstly by PW4 who testified that he was able to identify the accused as the person amongst the group who had hit him with a machete and that he has a limp. That further evidence was given by PW3 and PW5 to the effect that there was a phone which was left in the stolen vehicle after the robbers ran away, whose ownership was traced to the accused.

4.2 On the issue of identification evidence, after considering the evidence of a single identifying witness and the case of **Muvuna Kambanja Situna v The People**[1], the learned Judge concluded that it would be unsafe to rely on the

identification evidence because of contradictory evidence and there being no identification parade conducted. PW4's dock identification was discarded.

4.3 As regards the cell phone evidence, the learned Judge found that the phone was found in the vehicle on the same night and barely hours after the car had been stolen. The learned Judge opined that this was circumstantial evidence and that he was satisfied that the phone was left in the car by one of the assailants in haste to avoid being caught. Further, the learned Judge found the accused's story in his defence unlikely and not reasonably true, as his defence was a made-up story.

4.4 The learned Judge was of the view that the circumstantial evidence had taken the case out of the realm of conjecture so that it had attained such a degree of cogency which can permit only an inference that the accused was part of the group that staged both robberies. He found the accused guilty on both counts and convicted him accordingly.

5.0 THE APPEAL

5.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing one ground of appeal couched as follows:

> *"The trial court erred in law and fact when it held that the inference of guilty was the only one that could reasonably be drawn from the facts of the case in casu."*

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Mr. Tembo, Counsel for the Appellant submitted that the evidence of identification by the prosecution was too weak to be relied upon. That therefore, the only evidence on record allegedly linking the Appellant to the case at hand, circumstantially was the phone. It was Counsel's contention that the inference of guilty was not the only inference that could be reasonably drawn from the circumstances of the case.

6.2 It was submitted that the Appellant offered a reasonably true explanation on how he lost the phone. That there is

no direct evidence that it was the Appellant who dropped the phone in the vehicle.

6.3 It was further submitted that, the explanation by the Appellant that he tried to call the phone, when he discovered that it had been lost was not seriously challenged through cross examination. That the prosecution never countered the said story by asking the Appellant to show the trial Court the call logs on his phone which was an exhibit, the same said calls.

6.4 It was further submitted that the trial court did not believe the assertion by the Appellant that he was at home at the time of the robbery. That the explanation was reasonably true on the ground that, had he been at the scene of the crime, he would have easily been identified, since PW3 and PW4 claimed that they had proper opportunity for reliable observation.

6.5 It was submitted that, even assuming the *alibi* was false, the fact did not shift the prosecutions burden of proving its case to the required standard. Our attention was drawn to

the case of **Crispin Soondo v The People**[2], where the Supreme Court held that:

> *"Even if an alibi was a deliberate lie on the part of the appellant, the inference cannot be drawn that he did it because he has been involved in the offence. A man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in an offence."*

6.6 Furthermore, the case of **Bwalya v The People**[3] was cited, where similar remarks were made by the Supreme Court.

6.7 Counsel submitted that, the trial court in its Judgment stated that, the Appellant's phone was actually on, contrary to his assertion. It was contended that the finding by the trial court was not supported by the evidence on record. That the evidence on record and the findings of the trial court will show that the phone was on and off. That at page 88, lines 3-4 in its Judgment, the court below stated in its Judgment that:

"When the motor vehicle was recovered, a small phone was found inside and when it was switched on, the name Oliver Mutetesha came up."

That according to the Appellant's testimony in his defence, the phone was on and off when he tried to call it.

6.8 On the finding by the court below, that the Appellant's defence was a made-up story on account of his demeanor, Counsel submitted that there is nothing on record, particularly during the defence, where the court recorded that the Appellant's demeanor was wanting. The persuasive High Court case of **Kambafwile v The People**[4] was cited where the court stated as follows:

"Equally, if the court observed a witness to be hesitant or uncomfortable when asked certain questions or unwilling to look the court or counsel in the eye, these are items of evidence which must be recorded if conclusions are to be drawn from them. On the face of the record before us the adverse finding on demeanor has no evidence to support it (see Make Machobane v The People, Judgement No. 12 of 1972 - CAZ)."

6.9 In concluding, it was Counsel's submission that in view of his arguments, alternative inferences other than that of guilty exist on the facts of the case. That in **Mbinga Nyambe v The People**[5] it was held that:

> *"Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of an alternative and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation."*

7.0 ARGUMENTS IN OPPOSING THE APPEAL

7.1 Mr. Masempela, Counsel for the Respondent in opposing the appeal, submitted that, the trial court did not err when it drew an inference of guilt in the circumstances of the case. It was submitted that; it is trite law that a conviction can be secured on circumstantial evidence as was stated in the case of **Joseph Banda v The People**[6]. That as the record will show; the learned Judge drew an inference of guilty after considering the evidence in totality.

7.2 It was submitted that the Appellant was connected to the robberies through the phone which was linked to him. That the Appellant did not disown the phone. According to Counsel, the explanation the Appellant gave over the phone was unreasonable and could not be believed.

7.3 That it was an odd coincidence that the Appellant lost his phone and it was found in the stolen vehicle; shortly after the robbery. Further that he made no attempt to report to the police about the loss. It was Counsel's submission that the explanation given for that odd coincidence cannot reasonably be true, hence it is no explanation at all as laid down in the case of **Ilunga Kabala and John Masefu v The People**[7] where it was held as follows:

> *"It is trite law that odd coincidences, if unexplained maybe supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation."*

7.4 Counsel submitted that the prosecution could not have been expected to show the court whether or not the

Appellant had sent messages to this line. That information only came out during the defence.

7.5 It was also submitted that from the facts of the case, the only inference that could be drawn was that the Appellant whilst acting together with other persons unknown, stole the motor vehicle in count one and later went and stole other items and money as per count two; and in the process dropped his phone in the vehicle that had been used in the commission of the offences.

7.6 According to Counsel, the trial Judge cannot be faulted for holding that the Appellant's defence was a made-up story, and that the state had discharged its duty of proving the guilt of the Appellant. That the circumstances of the case satisfied the threshold of circumstantial evidence on which a conviction can be secured and it is competent to convict upon it.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the sole ground of appeal; the Judgment being impugned and the arguments by the

parties. We note that the learned trial Judge having found it unsafe to rely on the dock identification evidence, the only evidence which was left to link the Appellant to the offences was the evidence of PW3 and PW5 in respect to the cell phone which was found in the stolen motor vehicle.

8.2 Indeed, the Appellant did not dispute that the phone belonged to him. He however proffered an explanation that he lost the phone on the material day at shades bar. According to the Appellant, he tried to call the phone and sent messages to it. It was the Appellant's contention that at the time the offences were being committed, he was at home and intended to report the missing phone the following day. Further that at the time of his apprehension, he was preparing to go and report the missing phone.

8.3 In our view, the Appellant gave a plausible and reasonable explanation of how he lost the phone and how he tried to call the number and sent messages. There is also evidence of how the Appellant's daughter constantly called the

number which in our view was an attempt to try and trace its whereabouts.

8.4 In the view that we have taken, the conclusion that the Appellant must have left the phone in the car as he fled the crime scene cannot safely be said to be the only inference. There is also an inference that he lost the phone earlier on in the day and the assailant who was never apprehended took the phone with him to the crime scene and dropped it on fleeing. In our view, this was reasonably possible. As the Supreme Court stated in the **Mbinga Nyambe** case cited by Counsel for the Appellant, a consideration of whether they or any of them explanations may be said to be reasonably possible cannot be condemned as speculation.

8.5 Furthermore, where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt one which is more favourable to an accused if there is nothing in the case to exclude such inference. We do not find any evidence on the record which

excluded the inference that the Appellant lost the phone and he is therefore accorded the benefit of doubt.

8.6 In the view that we have taken, there is insufficient evidence to link the Appellant to the commission of offences. Therefore, the circumstantial evidence herein has not taken the case out of the realm of conjecture, for it to attain such a degree of cogency which can only permit that the Appellant was part of the group which committed the offences.

8.7 We therefore set aside both convictions and sentences and set the Appellant at liberty.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

B. M. MAJULA
COURT OF APPEAL JUDGE