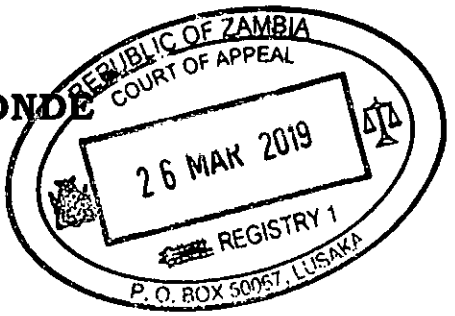
**IN THE COURT OF APPEAL OF ZAMBIA** **App No. 90/2018**

**HOLDEN AT LUSAKA**
***(Criminal Jurisdiction)***

**BETWEEN:**




**CHRISPINE SHAKONDE** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**CORAM: Mulongoti, Sichinga and Ngulube, JJA**
**On 15th October, 2018 and 26th March, 2019**

*For the Appellant:* *Mr. C. Siatwinda- Legal Aid Counsel, Legal Aid Board*
*For the Respondent:* *Mrs. A. K. Mwanza- Senior State Advocate, National Prosecutions Authority*

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# JUDGMENT

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**SICHINGA, JA, delivered the judgment of the Court**

**Cases Referred To:**

1. ***Elias Kunda v The People (1980) ZR 100 (SC)***
2. ***George Nswana v The People (1988-1989) ZR 174 (SC)***
3. ***Saluwema v The People (1965) ZR4 (CA)***
4. ***Yotam Manda v The People (1988 - 1989) Z.R. 129 (S.C.)***

5. ***Martin Mupeta and John Chanda v The People SCZ/137/2012***
6. ***Machipisha Kombe v The People (2009) Z.R. 282 (SC)***
7. ***Ilunga Kabala and John Masefu v The People (1981) Z.R. 102.*** **(SC)**
8. ***Dorothy Mutale and Another v The People (1995-1997)*** **ZR 227 (SC)**
9. ***Mambwe v The People (SCZ Judgment No. 8 OF 2014)***
10. ***David Zulu Vs. The People (1977) ZR 151 (SC)***

**Legislation Referred To:**

1. ***The Penal Code Act, Chapter 87 of the Laws of Zambia***

This appeal is against the judgment of the High Court dated 20th October, 2017 pursuant to which the appellant was convicted of aggravated robbery, contrary to ***Section 294 (1) of the Penal Code***[1]. The particulars of the offence were that the appellant and four others, on 6th February, 2017 at Lusaka in the Lusaka District of Zambia, jointly and whilst acting together, did steal a motor vehicle namely Toyota Allex registration number ALH 3290 (hereinafter called "the subject vehicle") valued at K23,000.00, being the property of David Kabwe (PW1) and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said David Kabwe in order to obtain or

retain the subject vehicle or prevent or overcome resistance to its being stolen.

The evidence on record is that on 5th February 2017, the victim of the subject offence (PW1) arrived at his home around 23:00hours and parked his vehicle outside his bedroom window and went to bed after locking the gate and doors. He woke up around 02:00 hours upon hearing some noise and when he peeped through the window, he saw about six people outside and he shouted for help. Three men then came towards his window and told him they would break down the house if he continued shouting. He then saw the men push his vehicle outside the gate, and that is how it was stolen. Regarding the identity of the perpetrators, PW1 testified that he was unable to recognize them as it was dark and raining that night. He then reported the matter to Chelstone Police and gave a statement to that effect.

Twelve days after the incident, PW1 was called to identify a recovered vehicle at the police station, which he identified as his stolen vehicle and he produced the white book, whose registration number matched with the number engraved on the side mirrors. No identification parade was conducted.

The investigating officer (PW3) testified that he was given information that a stolen vehicle had been seen between Kanyama and John Laing Compounds. Acting on this information, PW3 and other officers went to the appellant's house, apprehended him, and recovered a vehicle whose ignition had been tampered with, which

was taken to the police station together with the suspect. PW3 further testified that upon being interviewed, the appellant revealed that he was with four others. The others were then rounded up by police, interviewed and charged with the subject offence after they failed to give satisfactory answers. PW3 stated further that the name Joshua Banda was never mentioned by the appellant during investigations as the one who tasked him to sell the subject vehicle.

In his defence, the appellant (DW1) testified that his neighbour, Joshua Banda, asked him to find a buyer for the subject vehicle, after which Joshua Banda would avail the documents relating to the said vehicle. Having found a prospective buyer, the appellant was apprehended by the police when he was on his way back to John Laing to collect the documents relating to the subject vehicle from Joshua Banda. It was his testimony that the police did not make an effort to interrogate Joshua Banda even though he told them that he was only given the vehicle to sell.

The appellant stated further that when he was with the police, A5 (Charles Ntambwe) called him saying that he wanted to show the vehicle to a prospective buyer. The police told him to arrange to meet A5 somewhere. When they met as agreed, A5 and A4 (Raymond Mwanza) were apprehended.

A5 testified that the appellant told him that he was selling a motor vehicle. When he (A5) found a prospective buyer, he and A4 arranged to meet with the appellant, where upon they were apprehended by the police, who were with the appellant at the time.

After he was apprehended, he received a call from A1 (Dennis Ngoma), who asked for an instrument used to cut plunks and when the police asked who he was talking to, they ordered him to lead them to where A1 was, and A1 was apprehended in this manner. A1 confirmed A5's testimony with regards to how he was apprehended. A3 testified that he had been arrested and detained at Chongwe Police when he called A4 to inform him that he was in custody and asked A4 to tell his family that he had been arrested. On the same day, police moved him from Chongwe to Lusaka Central Police, where he found A4 and other three men whom he did not know.

The trial Court found that the appellant's explanation was not reasonably true, in that, having been apprehended at his house with the vehicle, the appellant would have led the police to Joshua Banda, who lives just within the neighbourhood, but he did not. The trial Court judge therefore proceeded to find that the appellant was not in innocent possession of the vehicle, and the only inference that could be drawn was that he was among the people who robbed PW1 of his vehicle.

As regards the appellant's co-accused, the court found that there was nothing connecting the other four accused persons to the offence, more so that the appellant did not give any evidence incriminating them. The trial judge accordingly acquitted all four of them.

Dissatisfied with the High Court's decision, the appellant has now appealed to this Court, advancing the following grounds:

1. **The learned trial Court misdirected itself when it found that the explanation given by the appellant cannot be reasonably true.**
2. **The learned trial Court erred both in law and in fact by making a finding that the appellant cannot reasonably claim to have been in innocent possession of the vehicle when it did not find any suspicious features surrounding the case to warrant such a conclusion.**
3. **The trial Court fell in error when it failed to consider whether there was any likelihood that the motor vehicle might have changed hands in the meantime, from the time it was stolen to the time it was found with the appellant.**
4. **Alternatively, the lower Court misdirected itself when it failed or omitted to consider the question of whether the appellant, not being in innocent possession, was the thief, a guilty receiver or retainer before convicting him of aggravated robbery.**

Heads of argument in support of this appeal were filed on behalf of the appellant on 8th October, 2018. Under the first ground of appeal, Mr. Siatwinda submits that when the trial Court convicted him by invoking the doctrine of recent possession, it did not properly follow the guidance of the Supreme Court *vis* the principles governing the said doctrine. The cases of ***Elias Kunda v The People***[1] and ***George Nswana v The People***[2] are cited in this regard. The learned Legal Aid counsel submits that based on these

two authorities, the principles governing the doctrine of recent possession are applied in two stages; the first is to determine whether the possession was recent, and the second is to determine whether there was any explanation given by the appellant that could reasonably be true.

Our attention is drawn to the portion of the record of appeal containing the appellant's defence, where the appellant stated that he explained to the police when he was being apprehended that the vehicle belonged to Joshua Banda and that he was ready to take them to Joshua Banda, but they refused to pursue this course of action. On this premise, it is submitted that the explanation given by the appellant was not challenged, discredited or rebutted by the prosecution, and that the trial Court failed to give reasons for discounting the appellant's version which can reasonably be true. Reliance in this regard is placed on the cases of ***Elias Kunda v The People***[1] and ***Saluwema v The People.***[3]

Under the second ground of appeal, the thrust of the appellant's argument is that the trial court did not elucidate on what it found to be suspicious features warranting a conclusion that the appellant was not in innocent possession of the subject motor vehicle. Our attention is drawn to the portion of the judgment, where the trial Court found that the appellant's explanation of how he was in possession of the subject vehicle could not reasonably be true. In this regard, it is counsel's submission that such a finding suggests that the absence of an explanation that could reasonably

be true implies that the person is not in innocent possession without anything more, which is contrary to the holding of the Supreme Court in the above cited case of ***George Nswana v The People***[2], the relevant portion of which is as follows:

> ***"Where suspicious features surround the case that indicates that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer."***

Counsel submits that this holding means that unless there are suspicious features surrounding the case, innocent possession cannot be ruled out, and that since the record does not disclose any suspicious features, and the trial Court did not allude to any, the possibility that the appellant was in innocent possession had not been ruled out, and thus remains a reasonable inference which could be drawn from the facts on record. On this premise, it is counsel's prayer that this Court upholds this ground of appeal and finds that the appellant was in innocent possession of the motor vehicle.

Under the third ground of appeal, the main argument advanced on behalf of the appellant is that the trial Court should have made a specific finding on whether from the evidence on record, there was no reasonable likelihood that the motor vehicle could have changed hands and thus warranting a high degree of probability that the

appellant, being in recent possession himself, committed the offence.

The fourth ground of appeal is in the alternative. Counsel for the appellant submits that should this Court find no merit in the first three grounds of appeal, we should find that the trial Court erred in not considering whether the appellant was then a thief or a guilty receiver or retainer. Counsel again relies on the case of ***Nswana***[2] and submits that before convicting the appellant of aggravated robbery, the trial Court should have resolved the question as was put in that case, that is; *"whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer."*

Furthermore, Mr. Siatwinda argues that from the evidence on record, there are other inferences that can be drawn in so far as the guilt of the appellant is concerned. The first is that the appellant, not being in innocent possession of the subject vehicle, himself robbed it from David Kabwe. The second is that the appellant, not being in innocent possession, is a guilty receiver, having received the motor vehicle with guilty knowledge at the time of receipt. The other inference is that the appellant, not being in innocent possession, is a guilty retainer having retained the motor vehicle with guilty knowledge of theft but acquired after receipt of the same. On this basis, since there is no direct evidence on record linking him to the commission of the subject offence and that guilt was by inference, the trial Court should have drawn an inference of guilt that is more favourable to the appellant. Counsel relies in this

regard on the case of ***Yotam Manda v The People*** [4], where it was held as follows:

> ***"The trial court is under a duty to consider various alternative inferences which can be drawn when the only evidence against an accused person is that he was in possession of stolen property. Unless there is something in the evidence which positively excludes the less severe inferences against the accused person (such as that of receiving stolen property rather than guilt of a major case such as aggravated robbery or murder) the court is bound to return a verdict on the less severe case."***

At the hearing, the respondent relied on heads of argument dated 12th October, 2018. Under the first ground of appeal, the learned senior state advocate submits that contrary to the appellant's submission that the Court below did not properly follow the guidance of the Supreme Court in applying the principles governing the doctrine of recent possession, the learned trial judge, in determining whether the said doctrine applied to this case, aptly invoked the cases of ***Elias Kunda*** [1], ***George Nswana*** [2] and ***Martin Mupeta and John Chanda*** [5]. Counsel also submits that the lower Court gave reasons for its decision and provided specific points for justification. In this regard, our attention is drawn to the portion of the judgment appealed against at page J13, where the trial Court

considered whether the appellant's explanation was reasonably true.

The learned senior state advocate submits further that there is more than one piece of evidence linking the appellant to the commission of the offence, which reveals some odd coincidences and something more to justify the conviction. To this effect, counsel submits that it is odd that the subject car was found with the appellant barely a week after it was reported to have been stolen, with the number plates removed. That additionally, the appellant claimed to have been selling the subject vehicle on behalf of someone else, but had no documentation to this effect, and the appellant also led the police to the apprehension of four other accused persons. On odd coincidences constituting evidence of something more in terms of evidence that the Court is entitled to take into account, reliance is placed on the cases of ***Machipisha Kombe v The People***[6] and ***Ilunga Kabala and John Masefu v The People.***[7]

In response to the second ground of appeal *vis* suspicious features surrounding this case to warrant the conclusion that the appellant was not in innocent possession of the subject vehicle, the learned senior state advocate submits on behalf of the respondent that the failure by the appellant to lead the police to Joshua Banda was what the Court found as suspicious and is therefore in line with the ***Nswana***[2] case.

In response to the third ground of appeal, the learned state advocate submits that the learned trial Court properly applied the cases of ***Martin Mupeta and John Chanda*** [5] and ***Elias Kunda*** [1]. Counsel contends that based on these authorities, the Court was entitled to find that eight days after the motor vehicle was stolen was indeed sufficiently recent possession, and that from the evidence on record, there is nothing to show that the motor vehicle had in those eight days exchanged hands.

With regards to the fourth ground of appeal, the learned state advocate contends that the trial Court wholly analysed the evidence and fittingly found the appellant guilty of the offence of aggravated robbery. In this regard, we are referred to the evidence confirming that on the material day, there was more than one person, armed with offensive weapons and threatened to use actual violence to PW1 to obtain or retain the vehicle.

Before we proceed to address the grounds of appeal, we would like to first address what appears to be a misapprehension of facts based on the evidence on record. The trial Court stated the following at page J11 of the judgment appealed against:

> ***"The evidence given by PW1 was that he saw more than five people pushing his vehicle towards the gate, and when he opened the window, three of them had advanced towards him with machetes and iron bars."***

The record, so far as it relates to the evidence of PW1, shows that PW1 did not testify to having seen any weapons with the people who stole his vehicle. The trial judge's finding that the three men who approached PW1's window were armed with machetes and iron bars is therefore not supported by any evidence on record. We note that this misconception of facts was also stated by the learned state advocate in his submissions. This notwithstanding, we are of the view that a court properly directing itself would still have found that the people who committed the offence were more than two and as such, even in the absence of weapons, this ingredient of the offence of aggravated robbery was still satisfied.

We shall deal with the first two grounds of appeal together, as the issue for determination in both grounds is in relation to whether or not the appellant was in recent possession of the motor vehicle and if so, whether he was part of the mob that robbed PW1 of his vehicle. It is of course not in dispute that the offence of aggravated robbery was committed, with PW1 being the victim as he is the owner of the subject vehicle which was stolen. What is disputed is whether the appellant was among the people who committed the offence on the material day.

Regarding the possibility of there being more than one inference to be drawn from the evidence on record and from the circumstances

of this case, we are indeed guided by the case of ***Dorothy Mutale and another v The People***[8] where the Supreme Court stated that:

> ***"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."***

The question then is whether *in casu*, there is something to exclude the inference that would have otherwise been more favourable to the accused. In the circumstances of this case, the inference that would have been more favourable to the appellant is the inference that he was in innocent possession of the subject vehicle. The question for determination is then; whether from the evidence on record, there was something to exclude this inference.

With regards to the trial Court's application of the doctrine of recent possession, Mr. Siatwinda agreed that the trial Court rightly found that the appellant was in recent possession of the subject vehicle within the meaning ascribed to what qualifies as recent possession in the case of ***Martin Mupeta and John Chanda v The People***[5], that is; about eight days from the date of commission of the offence.

We now move on to determine whether the appellant was in innocent possession of the vehicle, a guilty retainer, or he was among the people who stole the subject vehicle from PW1. We are

guided in this regard by the case of ***Mambwe v The People***[9] wherein the Supreme Court had the following to say:

> ***"We are alive to the fact that for an inference of guilt based on recent possession to be sustained, there must be no likelihood that the goods might have exchanged hands because it is only then that there will be a consequent high degree of probability that the person in recent possession himself obtained them and committed the offences connected thereto. Further there should be no possibility that the accused might have come into possession of the stolen property otherwise than by stealing it."***

In arriving at the conclusion that the explanation the appellant gave of how he was in possession of the subject motor vehicle could not reasonably be true, contrary to Mr. Siatwinda's contention that the trial judge did not allude to any suspicious feature on the facts on record, the record shows that trial judge in fact relied on the evidence that although the appellant was apprehended at his house and in possession of the subject vehicle, he lamentably failed to lead the police to Joshua Banda, who lived in the same neighborhood. We agree with the reasoning of the learned trial judge in this regard. The appellant gave one explanation as to how he came to be in possession of the subject vehicle at trial, but failed to do so when he was apprehended, at which point he had an opportunity to exonerate himself. On this premise, we are inclined

to agree with the learned trial judge that his explanation of how he acquired possession of the subject vehicle is not reasonable.

Applying the case of ***Dorothy Mutale***[8] on why the appellant was not given the benefit of an inference that was more favourable to him, in our view, this was excluded by virtue of his having been found in recent possession of the subject vehicle and his failure to lead the police to the person on whose behalf he was allegedly selling the subject vehicle.

In our view, and following the guidance in the ***Nswana Case***[2] and the case of ***Mambwe v The People***[9], it is unlikely that the subject motor vehicle changed hands within the eight days from the time it was stolen to when it was found in the possession of the appellant.

Having already ruled out the likelihood of the vehicle having changed hands from the time it was stolen, and coupled with our support of the trial Court's finding that the explanation given by the appellant was not reasonable, we are of the view that this is enough to exclude an inference that is more favorable to the appellant. This being a matter that borders heavily on inferences as there is no evidence of identity of the perpetrators, we are alive to the need to satisfy ourselves that the circumstantial evidence has taken the case out of the realm of conjuncture so that it attains such a degree of cogency which can permit only an inference of guilt, as was held by the Supreme Court in the case of ***David Zulu v The People.*** [10]

In conclusion, we are inclined to agree with the learned trial judge to the extent stated. The net result of this appeal is that it fails and we accordingly dismiss it. With regards to the sentence of fifteen years imprisonment, we are of the view that it was indeed befitting on the circumstances and we see no reason to temper with it.

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**J. Z. Mulongoti**
**COURT OF APPEAL JUDGE**

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**D. L. Y. Sichinga**
**COURT OF APPEAL JUDGE**

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**P. C. M. Ngulube**
**COURT OF APPEAL JUDGE**