

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HP/44/2018

THE PEOPLE

V

**BRYSON MIZINGA
COSTA MIZINGA**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26th DAY OF MARCH,
2018**

For the State : *Mr F. Sikazwe, State Advocate, NPA*

For the Accused Persons : *Mrs M. Mushipe with Ms T. Wamukwamba,
Mushipe and Associates*

R U L I N G

CASES REFERRED TO:

1. *Patel V The People 1969 ZR 132*
2. *Mutale V The People 1973 ZR 25*
3. *Nkole V The People 1977 ZR 35*
4. *Randee and Portee 92.CR.APP.R.322*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
2. *Archbold 43rd Edition*

The two accused persons stand charged with two counts. In the first count the offence is aggravated robbery contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that Bryson Mizinga and Costa Mizinga on 18th April, 2017, at Lusaka in the

Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, and being armed with offensive weapons namely knives, did steal 1 Nokia cell phone, car keys and K340.00 cash, altogether valued at K490.00, the property of Ackim Nkhoma, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Ackim Nkhoma, in order to obtain or retain or prevent or overcome resistance to the items being stolen or retained.

In the second count the offence is unlawful wounding contrary to Section 232 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that Bryson Mizinga and Costa Mizinga on 18th April, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together and being armed with offensive weapons namely knives, unlawfully wounded Samuel Njobvu.

Both accused persons denied the charges, and when the matter came up for trial on 14th March, 2018, Counsel for the accused persons Ms Mukwamba applied that the two counts be separated as they were wrongly before the court. It was her submission that the second count that is triable by the Subordinate Court, should be tried by the Subordinate Court, and she relied on Section 135 (1) of the Criminal Procedure Code (CPC), as authority. That the said provision states that all offences whether felonies or misdemeanours may be charged in the same indictment if they are founded on the same facts or on part of a series of conduct of a similar character.

Further that Section 135 (3) of the said CPC the court is empowered at any stage of the proceedings if it is of the opinion that a person may be embarrassed in his defence by reason of being charged with more than one offence in one charge or information, or that for any other reason it is desirable that a person is tried separately for one or more offences in a charge or information, to order a separate trial.

Ms Mushipe submitted that at the time the accused persons were appearing before the Subordinate Court they were charged with aggravated assault and the record of those proceedings had not been availed to them. That the accused persons had been committed to this court for the offence of aggravated robbery and unlawful wounding, when it was clear that the offence of unlawful wounding is triable by the Subordinate Court. It was submitted that it was the contention of the defence that the indictment in this matter was bad and defective, as it prejudiced the constitutional rights of the accused persons.

That this was on the basis that firstly, the charge upon which the accused persons were indicted was different from that contained in the certificate of committal as well as the information. Secondly that the accused persons had been charged with a capital offence triable by this court, as well as another offence that is triable by the Subordinate Court. That if trial in the matter proceeded on the basis of that indictment, it would contravene Article 118 2 (a) (b) (c) and (e) of the Constitution.

Further in the submissions, it was stated that Article 18(7) of the Constitution is mandatory with no exception, and that the accused persons had a right to a fair trial. To this effect the case of **MUTALE V PEOPLE 1973 ZR 25** was relied on where the Supreme Court held that where an indictment is bad at law, the accused persons ought to be discharged or the offence indicted ought to be quashed. It was also stated that the information before the court was an abuse of court process, and the case of **NKOLE V THE PEOPLE 1977 ZR 35** was relied on stating that in that case it was held that in framing charges, the accused persons should be charged under correct sections of the law as it results in embarrassment to the accused person.

That pursuant to Article 118 of the Constitution, and the case of **PATEL V PEOPLE 1969 ZR 132**, the accused persons in this matter would be prejudiced and embarrassed in their defence as the information was irregular as it was amended without seeking the court's leave and from the Subordinate Court, and before committal the offences should have been severed or

separated. That the failure to give the accused persons the amended information had resulted in their failure to prepare for trial.

The case of **RANDEE AND PORTEE 92.CR.APP.R.322** was also referred to, submitting that in that case it was held that where an objection to an indictment was made on the ground of abuse of court process, the indictment must be quashed, and proceedings stayed. Further reference was made to Page 13 of **Archibold 43rd Edition**, and it was submitted that it is stated on the said page that indictments can be quashed if defective.

That in this case if the court proceeded with trial on the information in its current form, the offence of unlawful wounding would not be appealable to this court but to the Court of Appeal. It was prayed that the information be quashed for being bad and defective at law.

In response, Mr Sikazwe on behalf of the State submitted that contrary to arguments by the defence, the information before the court was not bad or defective. That the cases relied on by Ms Mushipe had given examples of bad indictments as those that did not disclose an offence or the law pursuant to which the charge had been brought, yet she had gone ahead to submit that the information in this matter was bad, as it disclosed an offence and the law had been cited.

As regards the submissions pertaining to the irregularity of the information before the court as it was amended before seeking leave of the court, Mr Sikazwe stated that there had been no amendment. That the CPC is clear on the procedure, and the Director of Public Prosecutions (DPP) issued a certificate of committal, and the accused persons were committed to the High Court. It was further submitted that Section 257 (2) of the CPC empowers the DPP to amend, alter, and include any offence disclosed by the facts.

With regard to the arguments that the accused persons will be prejudiced and embarrassed if the trial proceeds on the current information, it was stated that the defence had not demonstrated the said embarrassment or prejudice that

