IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 60/2018**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

ALEX MWEWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***Makungu, Kondolo and Majula JJA***
On 23rd August, 2018 and ..20.. November, 2018

For the Appellant: Mr. H.M. Mweemba – Legal Aid Board
For the Respondent: Mrs. C. Soko – National Prosecution Authority

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *The People v. Chimbala (1973) ZR 118*
2. *Mugula v. The People (1975) ZR 282*
3. *Phiri Charles v. The People (1973) ZR 168*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia*
2. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

Other Authorities referred to:

1. *Achbold, Criminal Pleading, Evidence and Practice, Fortieth Edition, Editor S.G Michell 1962 – 1979 Sweet and Maxwell*

This is an appeal against conviction and sentence. The appellant was convicted of Aggravated Robbery contrary to Section 294 (1) of the Penal Code and sentenced to 18 years imprisonment with hard labour. It was alleged that on 6th March, 2017 at Ndola, in the Ndola District of the Copperbelt Province jointly and whilst acting together with other persons unknown and being armed with an offensive instrument namely a screw driver, they stole a television set valued at K450.00 the property of Royd Chola and immediately before or immediately after the time of such robbery, did use or threaten to use actual violence to the said Royd Chola in order to obtain or retain the said property.

The prosecution case was based on the evidence of three witnesses. The first and second witnesses (PW1 and PW2) were a married couple namely Lloyd Chola and Regina Chola respectively. The third witness (PW3) was Mukuka Mwansa a Police Constable stationed at Chipulukusu Police Post, Ndola. The prosecution evidence was as summarised below:

On 5th March, 2017 around 01:00 hours PW1 and PW2 were in their bedroom. PW1 was asleep while PW2 was breastfeeding their child when the appellant entered the bedroom and took a 14-inch

television set (TV). The appellant was seen by PW1 who shouted "thief.!" She held the appellant by the leg but he freed himself and proceeded to the sitting room. By then, PW2 had woken up and pursued the appellant. The appellant dropped the TV as soon as PW2 started struggling with him. PW1 then picked up the TV and secured it in the bedroom. In an attempt to flee, the appellant stabbed PW1 with a screw driver in the shoulder and it remained lodged there. However, PW2 apprehended him and later took him to the police to whom he handed over the screw driver. PW3 visited the crime scene during her investigations and established that the padlock to the main door was damaged although the padlock could not be found. She also discovered that PW2 was stabbed with a screw driver during the robbery. The TV that was stolen, the said screw driver and PW1's medical report were all produced in evidence.

In his defence, the appellant stated that he used to be a businessman. On 4th March, 2017 he went to PW1's house to collect a debt that arose from two pairs of sneakers and six metres of chitenge material that he sold to PW2 on credit on 5th February, 2017. Then PW1 informed him that he would pay at the month end but he insisted that he be paid forthwith. Consequently, a scuffle ensured

between him and PW1 who kicked him in the abdomen and in retaliation, he pushed PW1 who started shouting: "Thief...!" Thereafter he was beaten by unknown people until he collapsed and in the morning, when he came to, he found himself in a police cell. The appellant's further evidence was that he was not in possession of the screw driver at the material time.

The learned trial Judge found that the appellant had stolen the TV and that the theft was accompanied by violence as the appellant assaulted PW2 using an offensive weapon. It was also the trial court's finding that the appellant was not a credible witness and he failed to disclose any reasonable explanation of what transpired. He was of the view that the appellant's defence of having a business relationship with PW1 was an afterthought. That there was overwhelming evidence against the appellant proving that the appellant was guilty as charged.

This appeal is based on one ground of appeal which is framed as follows:

"The learned Judge erred in law and fact when he convicted the appellant on insufficient evidence as the prosecution had not proved the required ingredients of the offence."

At the hearing of the appeal, counsel for the appellant, Mr. Mweemba relied entirely on the appellant's heads of argument filed herein on 22nd August 2018, wherein he submitted as follows:

The actual violence (assault with a screw driver) against PW2 in this case occurred after the property had been dropped. The assault had nothing to do with the theft or retaining or preventing resistance to the TV being stolen or retained. That this position was established in cross examination of PW1 and PW2. There was no violence immediately before and after the taking of the TV. Mr. Mweemba relied on the Supreme Court cases of ***The People v. Chimbala*** [1] and ***Mugala v. The People.*** [2]

In the ***Chimbala*** [1] case it was held *inter alia* that:

> ***"It is necessary under a charge of Aggravated Robbery to prove that the taking and force used or threatened contemporaneous with the taking was accompanied by an intent to deprive the owner permanently of the thing stolen."***

In the ***Mugala case*** [2] it was held *inter alia* that:

> ***"It is necessary to show that the violence was used in order to obtain or retain the thing stolen."***

In conclusion, Mr. Mweemba contended that the conviction for Aggravated Robbery was a misdirection. He urged us to quash the conviction, set aside the sentence and substitute the conviction with a lesser offence of attempted theft or assault.

In response, Mrs. Soko made *viva voce* submissions to the effect that the evidence given by PW1 and PW2 under cross examination revealed that the violence was used in an attempt to flee the scene and had nothing to do with the theft of the TV. Re-examination of the said witnesses resulted in their credibility being impugned and for these reasons, the state does not support the conviction for aggravated robbery.

Mrs. Soko went on to state that there are several alternative charges that could have been preferred against the appellant including assault occasioning actual bodily harm, causing grievous bodily harm and breaking into a building with intent to commit a felony. She urged us to consider setting aside the conviction. In light of the use of a screw driver to assault PW2, she suggested that we substitute the charge of aggravated robbery with an offence that carries a stiff penalty.

We have carefully considered the record of appeal and the arguments advanced on behalf of both parties.

We accept the parties' common ground that the lower court misdirected itself by convicting the appellant for Aggravated Robbery when the evidence on record did not prove some essential elements of the offence beyond reasonable doubt.

We are compelled at this point to set out the provisions of Section 294(1) of the Penal Code:

"Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of Aggravated Robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years."(Underlined for Court's emphasis only)

The taking or theft of the TV is undisputed and neither is the use of the screw driver to assault PW2. It is also clear that the appellant did not use the screw driver for purposes of obtaining or retaining the thing stolen or to prevent or overcome resistance to its being stolen or retained. He only used it in an effort to run away from the crime scene after abandoning the TV.

Following the case of ***The People v. Chimbala*** [1] we take the view that the force was not contemporaneous or simultaneous with the taking of the TV or accompanied by an intent to deprive the owners of the TV permanently. The facts of the case show that no violence was used to obtain or retain the thing stolen (***Mugala v. The People*** [3] applies). Our position is fortified by the evidence of both PW1 and PW2 under cross examination.

In light of the foregoing, the question that has arisen is whether we should exercise our discretion to substitute the conviction with that of a lesser offence pursuant to Section 181 (2) of the Criminal Procedure Code [2] which provides that:

> ***"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

The Supreme Court has in a plethora of authorities including ***Phiri (Charles) v. The People*** [3] held thus:

> ***"It is not a condition precedent to the substitution of a minor offence that it be cognate to the offence charged; the fact that the alternative is or is not cognate to the offence originally charged will be one of the factors to be taken into account by the court. The test to be applied by the court in considering the exercise of its discretion to substitute a minor offence is whether the accused "can reasonably be said to have had a fair opportunity to meet the alternative charge."***

Similarly, the authors of Archbold [1] discuss larceny and aggravated larceny under the Theft Act 1968 and words in that Act that are similar to the words used in Section 294 (1) of our Penal Code Chapter 87:

> ***"Immediately before or at the time of doing so and in order to steal." Among other things, they elucidate that;***
>
> ***"The force or threat of the use of force must be immediately before or at the time of stealing and for the purpose of stealing."***
>
> ***"Force used after a theft is complete will not amount to a robbery, although that force may constitute a separate criminal act. The offence of theft will be complete as soon***

as there is an assumption of the rights of the owner which is dishonest and which is accompanied by an intention permanently to deprive."

"Force used only to get away after committing a theft does not seem naturally to be regarded as robbery (though it could be charged as a separate offence in addition to the stealing)."

We take a leaf out of the foregoing authorities. The lower court indeed erred when it convicted the appellant for Aggravated Robbery. We have therefore looked at various alternative lesser offences including assault occasioning actual bodily harm contrary to Section 248 of the Penal Code and breaking and entering a dwelling house with intent to commit a felony therein contrary to Section 301 of the Penal Code.

Section 248 provides:

"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years..."

Section 301 provides:

"Any person who –

a. Breaks and enters any dwelling house with intent to commit a felony therein; or

b. Having entered any dwelling house with intent to commit a felony therein, or having committed a felony in any such dwelling house, breaks out thereof; is guilty of the felony termed 'house breaking' and is liable to imprisonment for seven years. If the offence is committed in the night, it is termed' burglary' and the offender is liable to imprisonment for ten years."

We are of the view that the appellant had a fair opportunity to meet the alternative charges under Sections 248 and 301 of the Penal Code and therefore the case passes the test set out in ***Phiri v. The People.***[3] Under the circumstances, we deem it fit to substitute the offence of Aggravated Robbery with the lesser charges of Assault occasioning actual bodily harm contrary to Section 248 of the Penal Code and Burglary contrary to Section 301 of the Penal Code which were proved against the appellant beyond any reasonable doubt. It is noteworthy that the medical report exhibited as **'P3'** proved that PW2 had a *"left posterior penetrating wound of the shoulder,"* which we take as actual bodily harm. Harm is defined under Section 4 of the Penal Code as:

"Any bodily hurt, disease or disorder whether permanent or temporary."

We therefore convict the appellant of the alternative offences under Sections 248 and 301 of the Penal Code.

Coming to the issue of sentence, Assault occasioning actual bodily harm attracts a penalty of five years whereas Burglary attracts a penalty of ten years. Being a first offender and all things considered, the appellant is hereby sentenced to 3 years imprisonment with hard labour for assault occasioning actual bodily harm and 7 years imprisonment with hard labour for the offence of Burglary, with effect from the date of arrest. The sentences shall run concurrently.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE