IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 144/2021**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

KENNY MWAMFULI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Makungu and Muzenga JJA
On 18th May 2022 and 26th August 2022

For the Appellant: Mrs. M. K. Liswaniso, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate, National Prosecution Authority

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JUDGMENT

MUZENGA JA delivered the Judgment of the Court.

Cases referred to:

1. **Simpokolwe v. The People (1975) ZR 180**
2. **Attorney General v Achiume (1983) ZR 1**
3. **Jackson Kamanga and 4 Others v. The People, SCZ Appeal Number 30, 31, 32, 34/2020**
4. **Robson Chizike v. The People, CAZ Appeal No. 94 of 2020**

Legislation referred to:

1. **The Penal Code Chapter 87 of the laws of Zambia.**

1.0. INTRODUCTION

1.1. The appellant was convicted of two counts of possession of forged bank notes, **contrary to section 358 of the Penal Code**[1] by the subordinate court of the first class, sitting at Mbala. The particulars of offence in count one alleged that the appellant on 29th December 2018, at Mbala in Mbala District of Northern Province of the Republic of Zambia did have in his possession 15x K100 bank notes, knowing the same to be forged notes or currency notes.

1.2. In count two, the particulars of offence alleged that the appellant, on the same date, did have in his possession 7x K100 bank notes or currency notes knowing the same to be forged notes or currency notes.

1.3. He was sentenced to 18 months imprisonment with hard labour on each count to run concurrently by Hon. C. K. Chanda.

2.0. THE EVIDENCE BEFORE THE TRIAL COURT

2.1. The case for the prosecution was that on 28th December, 2018 between 20:00 hours and 21:00 hours, PW1, Collins Siame, was at Christel Inn Bar when he received a phone call from the appellant. The appellant requested PW1 to lend him a K1000, however PW1 informed him that he could only

afford a K700. The appellant accepted the K700 and promised to pay it back the following day. The next day around 10:00 hours, PW1 called the appellant, requesting for the money he had lent him as he wanted to purchase beer from PW4. The appellant paid back the K700.00 in K100 notes. He also added K200.00 in K100 notes for the beer he would consume later that day.

2.2. Upon receiving the money, PW1 went to buy beer from PW4. Thirty minutes later, PW4 called PW1 to go back and collect his money as the bank had rejected it for being counterfeit. PW4 returned the suspected K700 forged notes to PW1. In turn, PW1 called the appellant, informing him about the forged bank notes that he had given him. The appellant asked PW1 to return the bank notes to him which PW1 did. The appellant promised to deposit the K700 directly into PW1's account. As they were discussing, the police officer who testified as PW3 and other police officers arrived and got the K700 forged bank notes. They also got the K200.00 forged bank notes which the appellant had given PW1 as payment for beer.

2.3. Both the appellant and PW1 were apprehended and taken to the police station, but PW1 was set free and allowed to go home. At the police station, PW3 searched the appellant and he recovered from his pockets K600 fake notes in K100 denominations, bringing the total amount seized from the appellant to K1, 500.00. Later PW3 handed over the appellant together with

the K1, 500.00 forged bank notes to the arresting officer, detective Inspector Daniel Nyangu, PW5.

2.4. On 31st December, 2018 Racheal Chitumba, a Bartender at Mr C. Night Club, handed over K700 in K100 notes, of fake bank notes to PW5 which she alleged the appellant had used to buy beer from the night club. The total amount of forged bank notes that the appellant possessed was now K2, 200.00, in K100 denominations.

2.5. PW5 sent the K 2,200.00 to the Bank of Zambia for analysis and verification. The forged notes were examined by PW2, Shadrick Mukuwa, a Bank of Zambia Assistant Manager of Security Operations, after which he rendered a report of his findings. PW2's findings as contained in the report exhibited on the record, were that all the K2, 200.00 bank notes that the Bank received from PW5 were counterfeit banknotes. He explained that he used both manual and mechanical methods of testing the said banknotes.

2.6. In his defence, the appellant did not deny that he was found in possession of the forged bank notes to the tune of K1, 500.00. He told the trial court that on 28th December 2018 he was approached by one Sydney who told him that he was from Mpulungu and he was interested in purchasing a home theatre that the appellant was selling. The two negotiated the price until they settled for K1500. The appellant testified that Sydney asked for time to go to town to withdraw the money to purchase the said home theatre. It

was then that the appellant decided to borrow K700.00 from PW1. He told the trial court that at around 20:00 hours, Sydney took K1500 in K100 notes to him as the purchase price for the home theatre. He explained that he did not know that the bank notes that Sydney had given him were counterfeit.

3.0. **FINDINGS AND DECISION OF THE TRIAL COURT**

3.1. The trial magistrate found that the conduct of the appellant did not show that he did not have knowledge that the banknotes in issue were counterfeit. According to the trial magistrate, when PW1 confronted the appellant about the K900.00 fake notes that he had given him, the appellant did not appear worried but merely informed PW1 that he was going to deposit the money into his account. The trial magistrate dismissed the appellant's evidence that the forged bank notes were given to him by Sydney.

3.2. The trial court concluded that the appellant knew that the K 2,200.00 banknotes that he had in his possession were forged bank notes.

4.0. **CONSIDERATION OF THE MATTER BY THE HIGH COURT**

4.1. Dissatisfied with both conviction and sentence, the appellant appealed to the High Court advancing four grounds of appeal as follows:

a) **The trial court erred in law and fact in convicting the appellant of the offence of possession of Counterfeit Bank Notes when the prosecution did not adduce any evidence**

proving that the appellant knew that the 15x K100 banknotes in question were counterfeit banknotes.

b) The trial court erred in law and fact in convicting the appellant on count 2 of the offence of possession of Counterfeit Bank Notes when there was no evidence adduced by the prosecution to prove that the counterfeit notes in count 2 were in the possession of the appellant on the stated date.

c) That the trial court magistrate erred in law and in fact to find that K2200 counterfeit notes were in the possession of the appellant when there was no evidence on the record to that effect.

d) The trial court erred in law and fact when it inferred that the appellant's resisting arrest at the time of apprehension proved that he had knowledge that the notes in question were counterfeit banknotes.

4.2. The gist of the appellant's submissions before the High Court was that the appellant did demonstrate that he was not aware that the banknotes in his possession were counterfeit notes.

4.3. The gist of the respondent's submission before the High Court was that the state did not support the conviction of the appellant as it had failed to prove

the ***mens rea*** of the offence in question namely **that the appellant knew that the banknotes which he possessed were forged.** It was submitted that the appellant gave a reasonable explanation of how he came to be in possession of the forged banknotes. According to the state, the appellant went further and gave the police Sydney's telephone number though his phone was off. The state contended that PW5 had an opportunity to follow up on the phone number with ZICTA or the relevant mobile network provider.

4.4. With regards to count two, the state submitted that the prosecution erred by not calling Racheal Chitumba as a witness to prove the allegation that it was the appellant who used the K700.00 forged banknotes to purchase beer from MR. C Night Club.

4.5. After careful consideration of the evidence or record, the judgment appealed against, as well as the submissions filed, despite the prosecution not supporting the conviction, the High Court found that it was duty bound as an appellate court to consider the propriety or otherwise of the decision of the trial court appealed against. The High Court held that grounds two and three raised issues which were not raised before the trial court and were therefore incompetent.

4.6. With respect to grounds one and four, the High Court noted that the burden to prove that the accused knew that the bank notes or currency notes were

forged, lies on the prosecution and the standard of proof is one beyond a reasonable doubt. After considering and examining the evidence on record, the learned High Court Judge was satisfied that the appellant knew that the K2,200.00 banknotes he had were forged or counterfeit. The judge found that the prosecution had proved the offence against the appellant that he possessed the said forged banknotes knowing the same to be forged. Accordingly, the High Court upheld both conviction and sentence of eighteen (18) months imprisonment with hard labour on each count which the trial court ordered to run concurrently.

4.7. Discontent with the decision of the High Court Madam Justice M. C. Mulanda, the appellant lodged an appeal before this court.

5.0. **GROUNDS OF APPEAL**

5.1. Before us, the appellant filed two grounds of appeal couched as follows:

1) The learned trial Court erred when it arrived at the decision that the prosecution had proved that the appellant had knowledge that the money in issue were counterfeit notes despite there being no evidence on record to that effect; and

2) The trial court erred when it concluded that K700.00 received from Racheal was money in possession of the appellant and that the appellant had the knowledge that it was fake when the

evidence with regard to the K700.00 from Racheal was hearsay evidence which should not have been accepted by the court.

6.0. **APPELLANTS ARGUMENTS**

6.1. In support of ground one, learned counsel for the appellant contended that the court below erred when it arrived at the decision that the prosecution had proved that the appellant had knowledge that the money was counterfeit despite there being no evidence on record to that effect. We were referred to the case of **Simpokolwe v. The People**[1] in which the Supreme Court guided that:

(i) In a charge of being in possession of forged bank notes under section 358 of the Penal Code, Cap. 146, it is an ingredient of the offence that the person convicted must show that the bank notes in question are forged.

(ii) The onus is on the prosecution to show that the accused person knew that the notes were forged.

(iii) Where an accused person gives an explanation on the spot which could well be true, and where the onus is on the prosecution to show guilty knowledge, then if the prosecution makes no effort to challenge the truth of that explanation, the court is left with nothing more than such

explanation and the State cannot be said to have discharged its onus.

6.2. According to counsel, the appellant was found in possession of only K600.00 upon his apprehension thus possession ought to have applied only to K600 found in his possession as possession imputes what one has on his person. It was submitted that even if we find that the money that PW1 was allegedly given by the appellant was in possession of the appellant, a reasonable explanation was given as to where the money came from and the appellant went ahead to give the police Sydney's mobile number. It was contended that there was a dereliction of duty on the part of PW5 as no effort was made to trace the said number through a mobile operator.

6.3. In support of ground two, it was contended that the trial court erred when it concluded that K700.00 received from Racheal was money in possession of the appellant and that the appellant had the knowledge that it was fake when the evidence with regard to the K700.00 from Racheal was hearsay which should not have been accepted by the trial court.

6.4. Counsel submitted that the said Racheal was not in any way connected to the appellant as she was never called to testify before the trial court to confirm that it was the appellant who gave her the K700.

6.5. In summing up the arguments, learned counsel noted that the K700.00 was wrongly connected to the appellant and that the total of K2200 could not have been explained by the appellant as supported by the above arguments. We were thus urged to acquit the appellant.

7.0. **RESPONDENT'S ARGUMENT**

7.1. On behalf of the respondent, learned counsel in responding to ground one argued that the trial court was on firm ground when it convicted the appellant for the subject offence. It was contended that it is trite law that an appellate court cannot reverse the findings of fact unless the same are perverse or not supported by evidence on the record. We were referred to the case of the **Attorney General v Achiume**[2] to support this submission. Counsel contended that nothing perverse has been pointed out on which this court can reverse the findings made by the trial court.

7.2 With regards to possession, it was the state's submission that the appellant did not dispute being in possession of a total of K2, 200 x K100 which includes the K600 found on his person. We were referred to **Section 4 of the Penal Code** which defines possession as:

> **"be in possession of" or "have in possession" as-**
>
> (a) **Includes not only having in one's own personal possession but also knowingly having anything in actual possession or custody of any other person, or**

having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person..."

7.3. It was submitted that from the record, the appellant's possession of 22 notes of K100 was not disputed and that it is misleading to come and raise this issue on appeal when it was not raised during trial. In digest, we were urged not to entertain this ground of appeal as it is too late in the day.

7.4. In responding to ground two of the appeal, it was contended that the trial court did not err when it included the K700 received from Racheal as part of the money which the appellant was in possession of. It was contended that when the police were taking the warn and caution statement, the appellant admitted that he was in possession of the K700. That the K700 was properly connected to the appellant and that the fact that Racheal was not called as a witness does not take away the fact that the forged banknotes were connected to the appellant who did not challenge the connection. Counsel further contended that even if Sydney was to be found, it was still not going to change the fact that the K700 was properly connected to the appellant.

7.5. It was submitted that there was no hearsay evidence with regard to K700 which is inadmissible to warrant the reversal of the findings of fact made by

the trial court and that this issue was not raised during trial and the appellant cannot raise it as a ground of appeal.

7.6. In summation, we were urged to uphold the judgments of the trial court and the High Court and dismiss the appeal in its entirety.

8.0. **THE HERAING**

8.1. At the hearing of this appeal, on 18th May 2022, learned Counsel for the appellant Mrs Liswaniso informed the Court that she would file the appellant's arguments on the 19th May 2022. Learned counsel for the respondent, Mrs. Chipanta-Mwansa equally informed the court that she would file by the 20th May 2022. We are grateful to both counsel for their arguments.

9.0. **CONSIDERATION AND DECISION OF THE COURT**

9.1. We have carefully considered the arguments by both parties, the record and the judgment sought to be assailed.

9.2. We shall first consider ground two of the appeal. The issue in ground two is that the evidence in support of count two is inadmissible hearsay. That evidence was given by PW5, the arresting officer who informed the trial court that he received a report from Rachael Chitumbula, a Bar-tender at MR. C. Night Club to the effect that the appellant bought beer worth K700 at the night club using suspected fake notes. She then handed over the

notes to PW5. These notes were subsequently found to be counterfeit. For unknown reasons, Rachael Chitumbula was not called as a witness at trial.

9.3. We thus agree with counsel for the appellant that the evidence against him in respect to count two is inadmissible hearsay and the conviction cannot stand. The state has argued that during warn and caution, the appellant did not dispute the K700. This evidence was given by PW5 a police officer in court and the appellant was not asked if it was voluntary or not. The alleged admission must thus be excluded (See the cases of **Jackson Kamanga and 4 Others v. The People**[3] and **Robson Chizike v. The People**[4]. We thus find merit in ground two.

9.4. The appellant has contended in ground one that he did not know that the notes in his possession were counterfeit and that the explanation he gave is reasonable.

9.5. Learned counsel for the appellant argued that the appellant could only be said to have been in possession of K600, which is the actual money found on his person. We do not agree with this argument. This is because despite not having been found in actual possession of the K900, he was the one who gave PW1 K700 and K200 for beer. We thus agree with learned counsel for the state that even if he had no actual possession, he still had constructive possession. We thus cannot fault the learned trial court's finding that the appellant was in possession, of K1, 500.

9.6. The Supreme Court guided in the **Simpokolwe case** supra that knowledge is an important ingredient. The appellant paid back his debt to PW1, who in turn paid for beer for his bar to PW4. Both PW1 and PW4 could not tell that the money was counterfeit until a machine at the Bank detected the money to be counterfeit. The appellant upon being apprehended informed the officers (PW3 and PW5) that he did not know that the money in question was counterfeit. He went further to explain how he came into possession of the K1, 500. He even revealed the name and a contact number of the person who paid him the K1, 500 for his music system.

9.7. We note that the learned trial court did not accept the explanation given by the appellant and the reason for this was that the appellant explained where he got the K1, 500, but failed to account for the other K700. We have no doubt that if the trial court had taken a proper view of the evidence relating to count two, it would have come to a conclusion that there was no evidence in support of it. Consequently, the trial court would have found that the appellant properly explained his possession of the K1,500.

9.8. We wish to state that once an accused person gives an explanation on the spot as guided by the **Simpokolwe case** supra, the onus is on the prosecution to offset the explanation to the required standard, which in this case they did not discharge.

9.9. If the trial court properly directed its mind, it would have found that the prosecution did not discharge it's burden. Consequently, we also allow ground one of the appeal.

10.0. **CONCLUSION**

10.1. We allow both grounds of appeal and quash the convictions and sentences relating to both counts. The appellant is acquitted and set at liberty forthwith.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE