IN THE SUPREME COURT OF ZAMBIA APPEALS NOS 30/31 OF 1987

AT NDOLA

(Appellate Jurisdiction)

BETWEEN:

1. EVANS IVIL CHAMA Appellants
2. DERICK MELODY MUSONDA MULENGA

and

THE PEOPLE Respondent

CORAM: Silungwe, C.J., Gardner, Ag. D.C.J., Chaila Ag. J.S.

8th December 1987

For the Appellants : In person

For the Respondent : Mr. F. Mwiinga, Director of Public Prosecutions

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J U D G M E N T

Silungwe, C.J., delivered the judgment of the court.

Both appellants - Evans Ivil Chama and Derick Melody Musonda Mulenga - were jointly charged with Felix Bwalya with the offence of aggravated robbery, contrary to section 294(1) of the Penal Code, Chapter 146.

The prosecution evidence, especially that of PW1 - the complainant - revealed that during the night of October 20, 1983, as he was returning from Edinburgh hotel in Kitwe where he worked as a waiter, he was suddenly set upon by about three men; he struggled with them but was not able to stop the assailants from depriving him of his wrist watch. The chain of the wrist watch snapped during the struggle and a piece thereof remained in PW1's possession; this piece was later produced in evidence and marked Exhibit P2.

During the trial, the learned trial judge acquitted the third accused, Felix Bwalya, on the ground that the only evidence implicating him was that of a co-accused-the first appellant - Evans Chama. This morning, the learned Director of Public Prosecutions has told us that the state does not support conviction against the second appellant, Derick Melody Musonda Mulenga-for the apparent reason that he was charged with this offence on the basis that he had been found in the house of the first appellant from which the complainant's wrist watch was recovered at 0230 hours during the night of the robbery, that was a few hours after the commission of the crime. There was no evidence adduced by the prosecution to show that the second appellant was in any way implicated in the robbery, other than the fact that he was found in the first appellant's residence when the stolen watch was recovered. Further, there was nothing to indicate that he was aware of the presence of the stolen watch in the first appellant's house or that he had acted in concert with him. It would appear on the evidence that the second appellant was possibly an innocent visitor and, as such, he could not be said to have been in recent possession of the complainant's wrist watch. It is because of this realisation that the learned Director of Public Prosecutions has, quite properly, indicated that the State does not support his conviction. It follows that it would be unsafe to allow the conviction against the second appellant to stand; accordingly, the conviction is quashed and the sentence of fifteen years imprisonment with hard labour is set aside.

As regards the first appellant, the complainant's wrist watch was found in a cupboard in his residence within a matter of few hours after the robbery had taken place. He was himself found hiding under a bed. According to the prosecution evidence, the third appellant (hereinafter re referred to as the appellant) told PW3, the detective constable who was the investigating officer in this case, that there were two wrist watches which had allegedly been brought to him by his friend - Felix Bwalya - the third accused at the trial. He was led to Felix Bwalya's residence who, on being confronted with the allegation against him, denied having had anything to do with the two wrist watches; he in point of fact denied any knowledge of those wrist watches. In his evidence on oath, the appellant testified that he had not told the police anything about the complainant's wrist watches. The wrist watch complained of had incidentally been properly identified and it bore the name "T.K. Ngelesani" as it had previously been given to the complainant by Mr. Njelesani as a present. The appellant further testified that the police had told lies against him concerning the wrist watches. In his additional grounds of appeal, however, he now says that the evidence given by the police was correct; this is in direct conflict with the evidence which he gave in court.

We are satisfied that on the evidence before him, the learned trial judge did not misdirect himself by accepting the prosecution evidence and rejecting that of the appellant. Further, we are satisfied that the learned trial judge properly applied the doctorine of recent possession when he convicted the appellant as charged.

The appellant submits that he should have not been convicted as he had given an explanation. His only explanation in evidence consisted of a general denial, namely, that he knew nothing about the wrist watch in question. The learned trial judge was clearly entitled to find that that did not amount to a reasonable explanation. Consequently, the appellant's conviction was well founded. His appeal against conviction is thus dismissed.

The appellant has appealed against sentence as well. It is not competent for this court to disturb the sentence of fifteen years imprisonment with hard labour it being the minimum mandatory sentence. The appeal against sentence is also dismissed.

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Annel M. Silungwe
CHIEF JUSTICE

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B. T. Gardner
AG. DEPUTY CHIEF JUSTICE

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M. S. Chaila
AG. SUPREME COURT JUDGE