IN THE SUPREME COURT OF ZAMBIA Appeal No. 149 of 1985

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

KENNEDY NKOLOLA Appellant

- v -

THE PEOPLE Respondent

coram; Ngulube, D.C.J., Gardner, J.S. AND Bweupe, AJ.S.

3rd November, 1987

A.M. Kasonde, Kasonde & Company, for the appellant

C.K. Chanda, Senior State Advocate, for the respondent

J U D G M E N T

Ngulube, D.C.J., delivered the judgment of the court.

The appellant was sentenced to fifteen years imprisonment with hard labour following upon his conviction on a charge of aggravated robbery. The particulars alleged that on 26th September, 1984, at Mazabuka, the appellant jointly and whilst acting together with two other men, stole a watch, a lumber jacket and some cash from the complainant who was PW.3. On the evidence there was no doubt that on the night in question, the complainant in company of PW.2, visited a tavern and were there joined by the appellant and two other men. They all drank together and the appellant was introduced to the complainant and vice versa. According to the evidence, the group drank together for about an hour. There was also no dispute that around 20.00 hours, the complainant and his particular companions left the tavern; the complainant walked ahead to go and purchase some cigarettes while his companions were following behind. Three men attacked the complainant, assaulted him and took the property named in the charge sheet. The complainant screamed and PW.2 respondend to the calls. The issue before the learned trial judge was one of identity of the men who attacked the complainant.

2/.....He

He reviewed the evidence, found that the appellant had been identified by the complainant and that there were other items of evidence implicating the appellant. We shall return to this in a moment.

On behalf of the appellant, Mr. Kasonde, on a brief from the Director of Legal Aid, has put up a spirited fight. He relies on the grounds of appeal which were filed by the appellant himself and which were a general attack on the quality of the evidence which was used to convict. One argument was that there was not sufficient identification of the appellant by the complainant. In this regard, Mr. Kasonde pointed out, among other things, that the complainant had been drinking for a long time. Mr. Kasonde also complained that the learned trial judge did not deal specifically with the doctrine of recent possession. This was in relation to the evidence which was to the effect that the appellant was found in possession of the stolen lumber jacket. Mr. Kasonde also complained that PW.5 a young brother of one of the co-accused was an accomplice or a witness with a purpose of his own to serve. In this regard, we note that this witness did not give evidence adverse to the appellant and that the only significance which the learned trial judge attached to the recovery of the watch from the possession of that witness was that it was the appellant who led the police to the house where that witness was. Mr. Kasonde raised a number of other points but, in the view that we take, it would be pointless to dwell on all those points. As the learned trial judge pointed out, the complainant had been drinking with the appellant for quite sometime in a tavern which was well lit. He also accepted the evidence that the attack upon the complainant took place directly under a street lamp or very near one and, accordingly, the learned trial judge found that the complainant had a good opportunity to identify the appellant. If it were necessary to look for a connecting link and assuming the identification to have been of poor quality, the learned trial judge, correctly in our view, identified other evidence and circumstances linking the appellant to this offence. Thus, the appellant was seen by PW.2 to be running from the scene of the attack; a day later, the

3/.....appellant

appellant was found in possession of the stolen lumber jacket; and he led the police to the house of the co-accused from where the stolen wrist watch was recovered. The appellant, of course, offered no explanation for his possession of the lumber jacket and Mr. Kasonde complained that the learned trial judge should not have made a comment on this point. With respect, the learned trial judge was perfectly entitled to observe that the appellant had not advanced any explanation as to how he came to be in possession of the stolen property and to find that, in the light of all the other evidence which we have outlined, the appellant took part in the robbery and was properly identified by the complainant. It is unnecessary for us to discuss in any great detail the difference between the drawing of an inference from the possession of recently stolen property and the use of such possession as corroborative evidence. The submissions on behalf of the appellant appeared to have missed this distinction.

Finally we were invited to consider the possibility of substituting a conviction on a lesser charge of receiving stolen property. Here again, once the distinction to which we have referred is appreciated, the question of substituting the conviction on the facts of this case does not arise. It follows from what we have been saying that we have been unable to see any merit in this appeal. The appeal against conviction is dismissed and there is, of course, no appeal against the mandatory sentence.

.....
M. S. Ngulube
DEPUTY CHIEF JUSTICE

.....
B. T. Gardner
SUPREME COURT JUDGE

.....
B. K. Bweupe
ACTING SUPREME COURT JUDGE