

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT NDOLA AND KABWE
(APPELLANT JURISDICTION)**

APPEAL NO.51/2000

BETWEEN:

ANDREW KASONDA

APPELLANT

AND

THE PEOPLE

RESPONDENT

**Coram: Sakala, Ag. DCJ, Chirwa, Lewanika, JJS.
On 5th September, 2000 and
7th November, 2000.**

**For the Appellant: Mrs. J. Kaumba,
Assistant Principal State Advocate**

**For the Respondent: R.O. Okafor,
Principal State Advocate.**

J U D G M E N T

Lewanika, JS. delivered Judgment of the court.

The two appellants had been convicted of the offence of theft contrary to Section 272 of the Penal Code, the particulars of the offence being that on the 13th day of November, 1998 at Solwezi in the Solwezi District of the North Western Province of Zambia, jointly and whilst acting together with another person unknown stole 1 jacket, 1 bottle of cooking oil, 1 packet of Zamwasha, 1 plate and K105,450.00 cash all together valued at K160,000.00 the property of Borniface Meleki by the Subordinate Court at Solwezi. The 1st appellant was sentenced to 26 months imprisonment with hard labour and the 2nd appellant was sentenced to 18 months imprisonment with hard labour, suspended for two years on condition that he does not commit a

similar offence within that period. The 1st Appellant appealed to the High Court against the conviction and sentence whilst the 2nd appellant did not appeal. At the hearing of the appeal the learned Judge below found that the evidence on record disclosed the offence of theft from the person contrary to Section 276(a) of the Penal Code. The learned Judge found no merit in the appeal against conviction by the 1st Appellant and dismissed the appeal and also used his revisionary powers under Section 338(1) of the Criminal Procedure Code and set aside the conviction of theft and substituted it with a conviction of theft from the person. He also set aside the sentences and substituted them with sentences of 5 years imprisonment with hard labour from the date of arrest in respect of the 1st appellant and 5 years imprisonment with hard labour from the date of his apprehension in respect of the 2nd appellant. At this stage we wish to emphasize the fact that the 2nd appellant had not appealed and was not present when the learned Judge exercised his revisionary powers. The powers of review of a High Court Judge are contained in Section 338 of the Criminal Procedure Code. Section 338(2) provides as follows:

338(2). No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of making representation in writing on his own benefit.

In the case now before us the learned Judge did not call on the 2nd appellant to make any representations before deciding to review his conviction and sentence to his detriment. The order of review in respect of the 2nd appellant ought not to have been made in his absence and is a nullity and we hereby

set it aside and restore the conviction and sentence of the Subordinate Court and direct the appellate Judge to summon the 2nd appellant to show cause why his conviction and sentence should not be reviewed.

With regard to the 1st appellant, we have considered the arguments advanced by Counsel for the 1st appellant and the respondent as well as the evidence on record. Although the complainant was alone when he was attacked the attack on him took a bit of time. He was able to identify his assailants with the help of nearby security lights and the evidence on record is that at one stage they took the complainant to a light and stared at his face to see if he was a local who would be able to identify them. He was also able to identify his assailants a few hours later in the morning which led to their apprehension as they wore the same clothes as on the night of the attack. The complainant had K160,000.00 and a jacket stolen from him. The 1st appellant was found with K75,000.00 and his wife was found with K35,000.00 and the 1st appellant's wife led the Police to the 1st appellant's house where the stolen jacket which was hidden under the bed was recovered. There was overwhelming evidence against the 1st appellant and the sentence of 5 years imprisonment with hard labour merited. We find no merit in the appeal of the 1st appellant and we dismiss it accordingly.

E.L. SAKALA
AG. DEPUTY CHIEF JUSTICE

D.K. CHIRWA
SUPREME COURT JUDGE

D.M LEWANIKA
SUPREME COURT JUDGE