IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 3 OF 1986

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N : ABLAM BINES CHITALA APPELLANT

AND

THE PEOPLE RESPONDENT

CORAM: Ngulube, D.C.J., Gardner and Sakala JJ.S.

2nd September and 6th October..... 1987

For the Appellant : H. Silweya, Silweya & Company

For the Respondent : G. S. Phiri, Senior State Advocate

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J U D G M E N T

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

The appellant was sentenced to undergo four months imprisonment with hard labour following upon his conviction on a charge of giveng false information to a public officer, contrary to Section 125 (1) of the Penal Code. The particulars alleged that, on a date unknown but between 15th and 29th December, 1983, at Mbala, he gave false information to a person employed in the public service, namely the Honourable Mr. Grey Zulu, The Secretary of State for Defence and Security, when he said in a letter to him "a hired terrorist of a terrible person like Mushala hired by Freedom House and kept at Chikoko's RestiHouse by Mbala District authority was in Mbala to probably cause trouble and kill leaders in the district" including the appellant himself, or words to that effect, which information he knew was false thereby intending the Honourable Mr. Grey Zulu to cause investigations which he would not have done if he knew the true state of the information. The appellant was convicted of an offence which is essentially one of public mischief in that a person wastes the time and resources of the police or other public authorities who are

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thereby dispatched on a wild goose chase investigating a report which, to the knowledge of the accused, has no truth and no basis whatsoever.

In this case, there was no dispute that the appellant wrote a letter to Honourable Mr. Grey Zulu who was at the time Secretary of State for Defence and Security. In that letter, he stated words totthe effect, not only as set out in the charge, but also that he desired the Secretary of State for Defence and Security to cause investigations to be instituted to establish the truth of what he specifically referred to as a rumour which had reached him through a number of persons whose names he listed in the letter complained of. At the conclusion of their investigations, the police preferred the subject charge against the appellant. The appellant's report was to the effect that a rumour had reached him through the named persons - who included PW12, a businessman, and a number of defence witnesses - that he was on a list of persons whose lives were threatened by the authorities in the Mbala District Council; that a Mushala - like individual had come to Mbala allegedly from Freedom House and as a guest of the Council; and that this individual had been taken to the appellant's house in his absence by PW13, a Council Messenger. The prosecution called witnesses from the Council and elsewhere who all denied hearing of any such rumour themselves and who all denied that the Council and Freedom House had hired any terrorist. They also called PW12 who denied that he had originated the rumour. PW13 (supported by PW14) denied having taken a stranger to the appellant's house and claimed instead that he had taken Honourable Cosmas Masongo, the Minister of State, to the appellant's house. The prosecution also called the investigating officer, Acting Superintendent Mwape (who was PW16) who interviewed and took statements from the persons listed in the appellant's letter but chose not to call them as prosecution witnesses, with the exception of PW12. The appellant called such persons as his witnesses and they all gave evidence favourable to him and to the effect that they

had passed on the rumour to him and that some had seen the stranger referred to.

In his judgment, the learned trial magistrate devoted an inordinate amount of space to criticising, in fairly strong language and with much warmth, the attitude and conduct of the appellant's counsel. However, he also found that PW12 did not originate the rumour; that the rumour was a creation of the appellant's imagination; that all the defence witnesses were unreliable and were friends or relations ofthe appellant who must have conspired with the appellant to support him; and that, accordingly, the appellant was guilty of the charge.

When considering the case for and against the appellant, the learned trial magistrate stated that all the evidence for the defence required corroboration from an independent witness. This was clearly a misdirection in that the learned trial magistrate was misplacing the burden of proof by suggesting that the appellant had to establish his innocence by evidence given by his witnesses together with idependent corroboration. In consequence, the learned trial magistrate found that, although Honourable Masongo, a defence witness, had clearly established that he had nemer been to the appellant's house, and that, therefore, PW13, had lied concerning the person that he had taken to the appellant's house, PW13 was to be excused of his lies because his memory must have failed him with the passage of time. The learned trial magistrate found that Honnorable Masongo could not be the terrorist alleged and attributed this suggestion to the appellant. The appellant made no such suggestion but called the Minister to rebut PW13's untrue allegations. To the extent that the learned trial magistrate wrongly assigned the suggestion referred to, which suggestion played a key role in his believing the prosecution and disbelieving the appellant's side, he had once again misdirected himself. These misdirections were drawn to our attention by Mr. Silweya and quite properly conceded to by Mr. Phiri, the Senior State Advocate.

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There were other misdirections such as the failure by the learned trial magistrate to correctly identify the issues which fell to be determined in the case, a matter to which we will turn in a moment when considering other issues. It follows, therefore, that the conviction of the appellant can only stand if we can apply the proviso to section 15 (1) of the Supreme Court of Zambia Act, Cap. 52, as Mr. Phiri asked us to do.

It was common ground in this appeal that what the prosecution had to prove was that there was no such rumour reaching the appellant about an alleged terrorist and that the appellant knew the information which he wrote was false. In this regard, we agree with Mr. Silweya's submission-with which even the learned Senior State Advocate agreed-that, upon a proper reading of the letter complained of, the appellant did not state as a fact that there was a terrorist in Mbala but simply that it was a rumour which had reached him and which he invited the Honourable Mr. Grey Zulu, Secretary of State for Defence and Security, to investigate. It follows, therefore, that the prosecution were required to prove that the appellant did not receive such rumour and not, as the learned trial magistrate supposed, that other persons had not heard it or that there was infact no such terrorist. Mr. Silweya submitted that there was evidence led by the appellant which showed his basis for belief in the rumour. It was pointed out that DW8, his wife, had stated that she was present when PW12 first made a report to the appellant about a list of threatened persons and that she had reported to the appellant the visit by a stranger brought to their house by PW13, the Boma Messenger. Subsequently, she identified the messenger to PW16. On that occasion, the messenger did not deny taking a visitor to the appellant's house but claimed that this was Honourable Masongo, an allegation which was manifestly untrue but which PW13 was quite happy to repeat in court. Mr. Silweya also pointed out that the appellant led evidence from DWs 4 and 5 to the effect that they had informed the appellant about these matters after learning of them

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from PW12 and after meeting a stranger brought to them by a messenger at a bus station in Mbala.

The learned trial magistrate found that the appellant and his witnesses had concocted the whole story. As already noted, the defence witnesses had made statements to PW16, the investigating officer, and we can only assume that they were not called by the prosecution because their statements supported the appellant's and showed that they were the persons who had given him the information contained in his letter. Mr. Phiri, who supports the conviction, argued that, because PW12 denied originating the rumour, and because no one else apart from the defence wi witnesses had heard the rumour, the appellant could not have received any such rumour and must have known, as an Honourable Member of Parliament and Councillor, that the story which he wrote about was false since neither the Council nor Freedom House could conceivably indulge in the activities alleged. In our considered view, Mr. Phiri's argument misses the point: As was pointed out by Mr. Silweya, the appellant gave the names ofthe persons who told him the rumour and called most of them as his witnesses. The reference in the letter and in the indictment to a Mushala - like terrorist from Freedom House as the guest of the Council was inspired, as Mr. Silweya pointed out, by the fact that DW8 mentioned a bearded stranger who was brought by PW13, asCouncil Messenger, and who claimed to have come from Freedom House, according to what DW8 told the appellant. However unreasonable the rest of us would consider it to be, there was thus some basis for the apparently incredible letter written by the appellant. The question, however, is whether the learned trial magistrate was right to find that the whole of this story was a fabrication on the part of the appellant and his witnesses. If the appellant and his witnesses fabricated the story about a list of persons seen by PW12, they certainly did not fabricate the fact that PW13 took an unknown person to the appellant's house. The part of the rumour was supported

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by a solid witness, namely Honourable Masongo, whose testimony discredited that of PW13. In any case, the admission by PW13 that he took a person to the appellant's house (and who was definitely not Honourable Masongo as he had tried to claim) clearly supported the appellant when he reported in the letter the visit of a stranger to his house.

From the foregoing discussion, it is clearly impossible for this court to say what the learned trial magistrate's findings on the issue of credibility would have been had he not misdirected himself, especially with regard to the significance of Honourable Masongo's testimony. We find that we are unable to apply the proviso so as to uphold the conviction which we find to be unsafe and unsatisfactory. The appeal is allowed; the conviction is quashed; and the sentence set aside.

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M. S. Ngulube
DEPUTY CHIEF JUSTICE

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B. T. Gardner
SUPREME COURT JUDGE

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E. L. Sakala
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 7 OF 1987

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

DAVID NAKACHOMA Appellant

vs

THE PEOPLE Respondent

CORAM: Ngulube, D.C.J., Gardner and Sakala JJ.S

1st September, 1987

For the Appellant : Mr. F. Kongwa

For the Respondent : Mrs. N. B. K. Mutti, Senior State Advocate

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J U D G M E N T

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Sakala, J.S. delivered the judgment of the court.

The appellant was convicted of stock theft by the Subordinate Court of the first class holden at Namwala. The particulars of the offence alleged that on a date unknown but between the 1st and 31st August, 1984 at Namwala he stole one ox valued at K250.00 the property of Benny Musemune Ng'ongwa.

On account of a previous conviction of stock theft the trial magistrate committed the appellant to the High Court for sentence as that court had no power to impose the mandatory minimum sentence of seven years for a subsequent offence of stock theft. The learned High Court judge imposed a sentence of twelve years imprisonment with effect from 12 September, 1985. The appellant has appealed against this sentence.

The brief facts of the case were that sometime in August 1984 an ox with a brand mark S.H.9 kept by PW2 but

belonging to PW1 went missing. On 22nd August, 1984 the appellant was seen by PW4, his relative driving three oxen in the plain. Among the three was the complainants' ox. PW4 was present when the appellant marked the ox with his own brand mark. PW7 assisted the appellant in branding the ox. The ox was branded D.N.M. on top of the brand mark S.H.9. There was evidence that the brand mark D.N.M. belonged to the appellant. According to PW7 the appellant told him that the brand mark S.H.9 was not gazetted. The appellant gave evidence in his defence. He did not deny branding the ox in issue. He testified that the ox was his. He called two witnesses who also testified that the ox belonged to him. The learned trial magistrate carefully examined the evidence from the prosecution and that of the defence. He accepted the prosecution evidence and rejected that of the defence.

We are satisfied that the trial magistrate's finding cannot be faulted. Mr. Kongwa on behalf of the appellant has submitted that there were no aggravating circumstances to justify the imposition of the sentence above the mandatory minimum sentence. We agree with him. We take note that the appellant has a previous conviction of stock theft but on the facts of this case we find no basis which justifies the court's imposing a sentence more than the mandatory minimum sentence. A sentence of twelve years imprisonment with hard labour is wrong in principle. We, therefore, set aside the sentence of twelve years, in its place we impose the

minimum mandatory sentence of seven years with effect from the 12th of September, 1985.

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M. M. S. Ngulube
DEPUTY CHIEF JUSTICE

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B. T. Gardner
SUPREME COURT JUDGE

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E. L. Sakala
SUPREME COURT JUDGE