KAMBARANGE MPUNDU KAUNDA v THE PEOPLE (1992) S.J. 1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, A.G. D.C.J., AND SAKALA, J.S.
S.C.Z. JUDGMENT No.1 OF 1992 19TH
FEBRUARY AND 19TH MARCH, 1992.

Flynote

Evidence - Affidavit evidence on a contentious matter - Rule 39(1) of the Supreme Court of Zambia Rules - Court's power.

Bail - Extenuating circumstances - Whether bail can be granted on appeal to a person convicted of murder - Order 45 (2) of the Supreme Court Rules - Section 123 of the Criminal Procedure Code.

Criminal Procedure - Coroner's order - Whether it is in conformity with the law.
Criminal Procedure - D.P.P.'s initial decision not to prosecute the appellant - Whether it was made by a mistake of fact or law on some obscure issue.

Amendment of charge - Necessary when initial charge is defective.
Evidence - Witnesses with an interest to serve - Court's need to warn itself- Exclusion of danger of false implication.

Witnesses - Proper test for assessing credibility of.

Headnote

The appellant, with a passenger, was driving through Kamanga Compound in Lusaka around midnight. He drove past a group of people who were walking in the same direction on the road as he himself was traveling; he did so at speed and stopped immediately after them. One of the passengers in his car then alighted and fired a shotgun in the air. The appellant also alighted and fired four shots in the air with a pistol. He then lowered the aim of his pistol and fired three more shots close over the heads of the people in the group so that one shot killed the deceased by striking her in the back of the head. Upon the appellant's arrest, the Director of Public Prosecutions announced that the appellant would not be prosecuted. However, the coroner at the inquest ruled that the appellant be prosecuted. The appellant was accordingly prosecuted and convicted of murder. On appeal it was

Held:

(i) That in view of the D.P.P.'s public statement that the appellant would not be prosecuted for homicide on the ground of self-defence, the right to prosecute thereafter was lost for the reasons already given;

(ii) That as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, well have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant are having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection;

(iii) That the learned trial judge misdirected himself by applying improper test in his assessment of the credibility of the prosecution eye witnesses most of whom were found to have told lies on certain issues including as to the amount of alcohol they had consumed;

(iv) That the appellant acted in self-defence and was, therefore, not guilty of murder

Cases cited:

(1) Nkumbula and Another v The Attorney-General (1979) Z.R. 267 at page 272
(2) Githunguri v The People Miscellaneous Application of 1985 (Nairobi Law Monthly, October 1987)
(3) Nyirenda v The People (1980) Z.R. 194
(4) Shamwana and others v The People (1985) Z.R 41
(4) R. v Johal and Ram (1972) 56 Cr. App. R. 3
(5) R. v Hall (1968) 52 Cr. App. R. 528
(7) R. v Jones and others (1974) 59 Cr. App. R 120. C.A.
(8) Chimbo and others v The People (1982) Z.R. 20
(9) Haonga and Another v The people (1976) Z.R.200
(10) Palmer v R. (1971) 55 Cr. App. R. 223
(11) Tembo v The People (1972) Z.R. 220

For the Appellant: Mr. Richard Ngenda of Ngenda & Associates
For the State: Major K. M. Kaunda, State Advocate

Judgment

SILUNGWE, C.J.: read the judgment of the court.

When we heard this appeal on February 19, 1992 we made two rulings and said we would give our reasons later. We now give those reasons.

In the first application, Mr. Ngenda sought to adduce further evidence in the form of an affidavit sworn by professor Bernard Henry Knight, a Barrister-at-Law and professor of forensic pathology, who sought to deal with the pathological and ballistic evidence of the expert witnesses in this case. Mr. Ngenda argued that the evidence was necessary to indicate the probable distance of the deceased from the weapon used to fire the shot which killed her. Mr. Ngenda said that the evidence was not available at the trial because it had not been prepared until after judgment had been delivered.

Major Kaunda (who is unrelated to the appellant), on behalf of the State, opposed the application on ground that the defence had every opportunity to produce the evidence before the end of the trial.

We have examined the record and note that the last day on which Dr. Mahendra Parakash Garg, a consultant forensic pathologist, gave evidence, on recall, was May 31, 1991. The defence case was closed on July 24, 1991. Thereafter, final submissions were made on August 14, 1991 and judgment was delivered on
October 14, 1991. There was, therefore, a period of four and half months before delivery of judgment during which time evidence could have been obtained from an expert witness to support the appellant's case. No application was made to the trial court to enable such evidence to be presented to the court and no valid explanation was given by counsel as to

why such evidence was not obtained and produced to the High Court. Professor Knight's affidavit was not sworn until December 23, 1991.

Whilst we appreciate that this Court has power, under rule 39(1) of the Supreme Court of Zambia Rules, Cap. 52 of the Laws, to hear additional evidence or to direct that additional evidence shall be taken, no valid argument has been put forward by Mr. Ngenda as to why the Court could or should accept affidavit evidence on a contentious matter. As we said in Nkumbula and another v The Attorney-General (1), at p.272, it is inappropriate for evidence to be taken on affidavit in a controversial matter. Certainly, in this case, it is provable that the learned State Advocate would have wished to cross-examine the deponent and, indeed, would have been so entitled. For these reasons, we refused the application.

The second application was for bail. Mr. Ngenda argued that in view of the fact that the coroner's order was a nullity and for the other reasons which he put forward, the amendment made to the charge by the learned trial judge increasing it from manslaughter to murder was also a nullity. Consequently, the appellant should be treated now as having been charged only with manslaughter. If treated on this basis, Mr. Ngenda argued, the Court has power to grant bail and the appellant should accordingly be granted bail.

Another argument advanced by Mr. Ngenda in support of the bail application was that by necessary implication, murder is now a bail- able offence in view of the amendment to section 201 of the penal Code, Cap. 146 by Act No. 3 of 1990 under which a person convicted of murder may now receive a sentence other than capital punishment where extenuating circumstances exist.

In view of the provisions of rule 45(2) of the Supreme Court Rules, which specifically provide that the provisions of section 123 of the Criminal Procedure Code, Cap. 160 (hereinafter referred to as the C.P.C.) shall apply, bail cannot be granted in any appeal against a conviction for murder regardless of whether there are any extenuating circumstances.

We appreciate the ingenuity of the arguments; but the fact remains that the appellant was charged with murder, rightly or wrongly, and remains so charged and, in this case, convicted until a successful appeal, if any. At that stage of the proceedings, and mindful of the provisions of section 336 of the C.P.C., this Court was bound by the provisions of section 123(1) of the C.P.C. as read with rule 46(2) of the Supreme Court Rules, Cap. 52 of the Laws. For these reasons, the second application was also refused.

We now deal with the main appeal.

This appeal is against conviction and sentence. The appellant, who was originally charged with manslaughter, was convicted of murder, the learned trial judge having amended the charge at the close of the case for the prosecution.

The facts of this case were that the appellant was driving a Toyota Corolla car along a dirt road in Kamanga compound, Lusaka, after midnight on September 3, 1989.

According to the prosecution evidence, when the appellant drove past a group of people who were walking in the same direction on the road as he himself was traveling, he did so at speed and stopped immediately after them. One of the passengers in his car then alighted and fired a shotgun in the air. The appellant also alighted and fired four shots in the air with a pistol. He then lowered the aim of his pistol and fired three more shots close over the heads of the people in the group so that one shot killed the deceased by striking her in the back of the head.

The defence story was that the appellant, his fiancée and DW2 were on their return journey after having taken his fiancée's sister to her home in Chamba Valley, beyond Kamanga compound. This was after a party organised by the appellant's elder sister in woodlands which they had attended and at which neither the appellant, a commercial pilot, now DW2, a Moslem, had taken any alcohol. There was evidence that both the appellant and DW2 had been manning the gates at the party.

The evidence of the appellant and his passenger, Raffick Mohamed Ebrahim Mulla, was that when they saw a group of people on the road, the appellant, who was driving, slowed down to 25 Kilometres per hour and then sounded the horn of his car twice. The people in group were slow to give way and the appellant passed them on the extreme left; while he was doing so, there was bang on the rear right passenger window and another on the rear windscreen. This caused the appellant to swerve the car to the left, facing Kamanga compound. The car came to a stop because there was a slight embankment. There was then a group behind the car and a group in front of the car both of which were advancing towards it.

DW2, Rafick Mulla, got out of the passenger side of the car and fired a shot in the air with a shotgun. The appellant also left the car and fired four shots into the air. Both groups continued to advance towards them and the appellant, thinking that they were in great danger, lowered his aim and fired three more shots close above the heads of the people with the intention that the noise of the bullets would act as a further deterrent. The groups then dispersed and the appellant and DW2 arrested the nearest person in the crowd; this person was PW11, Andrew Kaonga. They then took Andrew Kaonga to a police station and reported to the police that they had been in danger and had arrested the man as one of the people who had attacked them.

The police went to the scene with the appellant and DW2. They collected the body of the deceased and took it to the University Teaching Hospital where she was pronounced dead.

The post-mortem report indicated that the deceased had died as a result of a bullet wound in the back of the head.

Prosecution witnesses gave evidence that they, or most of them had been attending a farewell for one of their number and had consumed no more than one crate of beer among about sixteen of them from about 16.00 hours to shortly before the incident.

The public analyst's report on the deceased who was one of the members of the party was that the deceased had consumed the equivalent of nine and a half (9.5) bottles of Mosi beer or 526 milliliters (that is over two thirds of s standard 750 milliliters bottle) of spirits.

In his judgment, the learned trial judge believed the prosecution witnesses who said that they had taken no aggressive action towards the car or its occupants and disbelieved the appellant and DW2. The learned trial judge accepted the evidence that the five shots had been fired in the air but held that the next shots fired by the appellant were fired when he knew that they would probably kill someone. So, in the absence of any danger to himself or his friends, he was guilty of murder.

Prior to the commencement of criminal proceedings in this case, tow events worth noting occurred. The first one was that a short while after the deceased's death, the Director of Public Prosecutions (hereinafter referred to as the D.P.P.), on examining a police docket, decided - and made his decision known to the public through a press statement - that the

appellant would not be prosecuted for homicide on the ground of self-defence; the police docket was then closed. Not long thereafter that the D.P.P. died of natural causes.

The second event was that when an inquest was subsequently held, the coroner, on consideration of the evidence before him ordered that the appellant and his friend, Rafick Mulla, should be charged with the murder of the deceased.

Consequently, on August 9, 1990, the police arrested the appellant and Raffick Mulla and jointly charged them with murder. The appellant and his co-accused appeared before a magistrate's court and were summarily committed to the High Court for trial on the charge of murder.

However, a new DPP filed information in the High Court against the two men containing one count of manslaughter only. During the initial stages of the proceedings, the charge against Raffick Mulla was dropped. As we have already indicated, the learned trial judge enhanced the charge to murder at the close of the case for the prosecution; put the appellant on his defence on that charge; and subsequently convicted him of it.

Mr. Ngenda prosecuted the appeal on a number of grounds. The first of those grounds wad divided into two parts the first of which was that the appellant's rights were violated because, at the end of the inquest proceedings in this case, the coroner purported to order that the appellant be charged with murder. He argued that the D.P.P is empowered under Article 56 of the (current) Third Republican Constitution) to institute, undertake, take over or discontinue any criminal proceedings against any person before any court, other than a court martial. He went on to say that the powers are vested in the D.P.P alone to the exclusion of any person or authority, subject to delegation to, but not to the direction or control of, any other person or authority.

Mr. Ngenda contended that the D.P.P.'s decision to prosecute the appellant for manslaughter was prompted by the coroner's order; and that as the D.P.P. was constitutionally not subject to the direction or control of any person or authority, the coroner's order constituted a direction to the D.P.P. and was, therefore, a nullity.

A coroner is under a duty, in terms of section 28(1)(c) of the Inquests Act, Cap. 216 to name a person or persons, if any, whom he considers should be charged with any of the specified homicide offences, including murder. When a coroner makes an order in this regard, the order is directed, not to the D.P.P., but to the police authorities who should take the initial steps to charge the person or persons named with any of the specified offences. Thereafter, the D.P.P. has discretion to prosecute the person or persons named by the coroner for the offence mentioned or for any other offence disclosed, or not to prosecute at all.

As the coroner's order was neither directed to, nor binding on, the D.P.P., it was not a nullity; rather, it was in conformity with the law.

The second part of the first ground was that where, as in this case, the office of the D.P.P. makes a public pronouncement that, upon legal considerations, it is not going to prosecute an accused person, it cannot thereafter turn around and prosecute such person in the absence of fresh evidence, otherwise the prosecution would be unjust, an abuse of the process of the court, oppressive and vexatious. In support of his argument, he referred us to the Kenyan case of Githunguri v The Republic (2) to which we shall shortly return.

But Major Kaunda argued, on behalf of the respondent, that there was nothing in law or in practice to prevent the D.P.P from reviewing his earlier decision not to prosecute an accused person.

We take the view that, the D.P.P. having said publicly, as in this case, that the appellant would not be prosecuted on the ground that he had acted in self-defence and was, therefore, not guilty of any offence, could not reopen the case without showing that there was fresh evidence which would have affected his earlier or first decision in the matter, otherwise reopening the prosecution would be an abuse of the process of the court, oppressive and vexatious. In this particular case, the learned state advocate was not able to point to any fresh evidence except to say generally that there had been an inquest since the first decision. As a matter of fact, the case record does not disclose any fresh evidence.

Coming to the Githunguri case (2) which was cited by Mr. Ngenda the facts there were that the Attorney-General in Kenya (hereinafter referred to as the A.G.), whose powers are apparently equivalent to those of the D.P.P. in Zambia, told the accused person - and later made a statement in Parliament - that he would not be prosecuted for the alleged exchange control offences. The appellant had allegedly committed the offences some nine years previously and, five years later, the A.G. made the statement referred to above. One year thereafter, four of the original twenty charges were resurrected by a new A.G. and Division of the High Court of Kenya granted an order of prohibition preventing the prosecution from continuing. In the course of delivering the judgment of the court, Acting Chief Justice Madan said:

"We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what had transpired and also being led to believe that there would be no prosecution the appellant may well have destroyed or lost the evidence in his favor. Secondly, in the absence of any fresh evidence the right to change the decision to prosecute had been lost in this case, the appellant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the appellant will not a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious.

If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 7791) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent the prosecution in the public interest because otherwise it would similarly be an abuse of the process of the court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event."

We agree with the reasoning of the learned Acting Chief Justice in the Githunguri case (2). We would respectfully add that there might be some other reasons which could alter the circumstances in which the decision not to prosecute might not be lost, for instance, if a mistake of fact of law on some obscure issue had been made in the first instance. Such circumstances might render it necessary for a prosecution to take place in order for justice to be done. There was no evidence let to show that the initial decision by the D.P.P. not to prosecute had been made by a mistake of fact or law on some obscure issue.

There is here no evidence that any documentary or other evidence was either lost or destroyed. But, in order to come within the Githunguri case (2), it is necessary in every case for the prosecution to show that fresh evidence exists to justify the reopening of the prosecution. As we have said in this case, there was no such fresh evidence.

For the reasons given, we would hold that the D.P.P.'s right to reopen the prosecution in this case was lost.

Mr. Ngenda then argued the second part of the first ground of appeal. He submitted that the decision by the learned trial judge to upgrade the charge from manslaughter to murder at the close of the case for the prosecution was a fundamental error in both law and fact. He contended that, by his action, the learned trial judge was seen to be playing the role of prosecutor to the clear detriment of the appellant; and that the purported substitution of the most serious charge known to the law, with the attendant irreversible penalty, could not be justified under section 27392) of the C.PC. It was further contended that the learned trial judge should not have applied section 272(2) of the C.P.C. on the ground that the section should be applied only when the original charge is defective. In this case Mr. Ngenda argued that the charge of manslaughter was not defective and, consequently, that the learned trial judge had no power to apply the section.

For his part, the learned State Advocate submitted that the learned trial judge was in order to amend the charge from manslaughter to murder. He argued that section 273(2) of the C.PC. empowers the court to amend a defective information at any stage of the proceedings; and that amendment can mean upgrading or reducing a charge. He cited the case of Nyirenda v The People (3) where this Court held that where the facts disclose a major offence, it is improper for a court to accept a plea to a lesser offence. The learned State Advocate pointed out that courts in England have given section 5(1) of the Indictments Act 1915, which is equivalent to section 273(2) or the C.P.C., a wider interpretation; and that, in the present case, the information was defective because it failed to charge the offence disclosed by the depositions.

In responding to Mr. Ngenda's argument, that by initiating the amendment on his own motion the learned trial judge assumed the role of prosecutor, Major Kaunda submitted that, on the authority of Shamwana and Others v The People (4), a court can amend a defective charge on its own motion.

The provisions for section 272(2) of the C.P.C. are in these terms:

"273(2) Where, before a trial upon information or at any stage such trial, it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms as to the court shall seem just."

The question may be asked as to what is meant by a defective information or charge. As section 273(2) of the C.P.C. is a replica of section 5(1) of the Indictments Act 1915 of England, the English law that has evolved on the matter is of interest and relevance to Zambia. The following extract is taken from note 3 of paragraph 937 of Halsbury's Laws of England, Fourth Edition Reissue Vol. 11(2):

"The indictments Act 1915 s.591) (as amended by the prosecution of Offences Act 1985 s. 31(6), Sch.2 imposes on the trial judge a duty to remedy a defective indictment if the necessary amendment may be made without injustice. ... An Indictment is defective if it charges offences which are not disclosed by the deposition and fails to charge an offence which is so disclosed."

In paragraph 1-66 of Archbold Criminal pleading Evidence and practice Forty-Third Edition Vol. 1, we find the following:

"When an amendment may be made:

Since the passing of the Indictments Act 1915, there have been a number of decisions as to the circumstances in which it is proper for the judge to order an amendment of the indictment. The appellant courts have shown an increasing willingness to allow amendments of substance to be made.....

The present position is largely set out in the considered judgment of the Court of Appeal in R v Johal and Ram (5), where reference is made to several of the earlier authorities. It is submitted that the present position as to the effect of the Indictments Act 1915 s.5(1) is as follows: (the word 'indictment' includes 'count' where thee is more than one count). 'Indictment' includes 'count' where thee is more than one count).

(a) An indictment is ... defective not only when it is bad on the face of it (e.g. because of duplicity or because the particulars disclose no offence), but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;

(ii) when for such reasons it does not accord with the evidence given at the trial: R v Hall (60; R v Johal and Ram(5);

(iii) when the evidence led in support of the indictment discloses more than one offence: R v Jones and others(7)

(b) The court has power to order an amendment which involves the substitution of a different offence for that originally charged in the indictment or even in the inclusion of an additional count for an offence not previously charged: R v Johal and Ram (5);

(c) An amendment of any kind may be made at any stage of the trial provided that, having regard to the case and the power of the court to postpone the trial, the amendment can be made without injustice....."

The foregoing references are manifestation of good law not only in England but also in Zambia. Accordingly, a court has power, either on its own motion or at the instance of either the prosecution or the defence, to amend an indictment by, for instance, upgrading the offence originally charged substituting a different offence for that originally charged; or even including an additional court or an offence not previously charged. We wish to stress, however, that it is advisable that an amendment should be made as early as possible during the course of a trial as a late amendment may, in some cases, cause injustice to an accused person. To quote the Court of Appeal in R. v Johal and Ram (5) at page 354:

"The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

Although the amendment was made at the "case of answer/no case to answer" stage, we consider that, in the circumstances of this case no injustice as thereby caused to the appellant, especially that a proper procedure as regards the appellant's rights was observed at the time by the learned trial judge; and the appellant's defence (i.e., self defence) was not prejudiced by the amendment.

In the view that we take in the present case, and for the reasons stated above, the learned trial judge's decision to amend the information by upgrading the charge from manslaughter to murder at the close of the case for the prosecution was not misdirection.

A further argument was advanced by Mr. Ngenda on the second ground. The argument was that, having upgraded the charge, the proper course for the learned trial judge to take was to disqualify himself from continuing with the trial and to order a retrial before another judge since to continue with the case, as he did, gave the impression that he had made up his mid to convict the appellant before he could hear the case for the defence.

On the contrary, we are of the view that the finding in this case, by the learned trial judge, that the evidence before him warranted a charge of murder rather than manslaughter was no different from a finding in any case that there is a case to answer. Such a finding does not in any way mean that the trial judge has already made up his mind to convict the accused before he could hear his side of the story. This argument is misconceived.

The next (i.e third) ground of appeal was that the learned trial judge misdirected himself in law and in fact with regard to the assessment of the credibility of the prosecution eye witnesses, some of whose evidence was unsatisfactory.

Firstly, it was argued that all the prosecution eye witnesses were either relatives or friends of the deceased and that, as such, they were witnesses with a possible interest of their own to serve. He referred to the case of Chimbo and Others v The people (8) where this Court held that a court, faced with the evidence of an accomplice or s suspect witness, should warn itself against the danger of false implication of the accused and go further to ensure that that danger has been excluded.

Although the above aspect of the third ground of appeal was equally argued in the court below, it was clearly not dealt with by the learned trial judge. In our opinion, it is feasible for relatives or friends of a victim to have a possible bias against an accused person. We would agree with Mr. Ngenda that the prosecution eye witnesses in this case were friends or relatives of the deceased and, therefore, could well have had a possible bias against the appellant, and as they, and in particular PW11, Andrew Kaonga, were themselves the subject of the initial complaint by the appellant as having attacked him and his friends, there was a possible interest of their own to serve. Failure by the learned trial judge to warn himself and specifically to deal with this issue was misdirection.

The second aspect of third ground is an attack on the learned trial judge's assessment of the credibility of the prosecution eye witnesses. It was contended that the learned trial judge found as fact that principal eye witnesses gave untruthful accounts relating to 9a) the time when the incident is alleged to have occurred; and (b) the amount of alcohol taken by them on the night in question. These, Mr. Ngenda said, were material points and that their evidence on other issues ought not to have been believed. He cited Hong and Others v The People (() at p. 203 as a case in point.

In his submission, Major Kaunda said on behalf of the respondent that the learned trial judge was in order to believe the evidence of the prosecution eye witnesses on some material points and felt that Hong (9) was supportive of the respondent's case.

In his judgment, the learned trial judge accepted the principle set out by this court in Hong (9), at p.207, that:

"Where a witness had been found to be untruthful on a material point, the weight to be attached to the reminder of his evidence is reduced; although, therefore, it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on other points can stand alone) nevertheless there must be very good reasons for accepting the evidence of such a witness on an issue identical to that on which eh has been found to be untruthful."

The learned trial judge than went on to say that he had analysed the evidence of some of the prosecution witnesses and made specific findings on certain points. He said that those findings:-

"revealed two things (1) that those witnesses did tell a lot of truthful evidence individually and severally and (2) that most of them also told some untruthful evidence. In the light of this, I was not able to persuade the defence counsel's submissions that the story of those witnesses was manifestly unreliable, and thus adversely affected their credibility in this case on all the points. Yes there were certain issues in which most of them have been disbelieved. But there were equally other issues on which they gave creditable testimonies, which either established common cause facts or were agreed to by the accused person and his friend."

The learned trial judge did not deal with the evidence which was in dispute, i.e., where there was no common cause. It is precisely with regard to that evidence where the prosecution witnesses were in conflict with the appellant and his eye witness, Raffic Mulla, that it was necessary for the learned trial judge to indicate why he preferred the evidence of the prosecution witnesses who had been found to have given untruthful evidence on certain issues.

The learned trial judge did, however, make adverse findings about the credibility of the appellant and DW2 (Raffick Mulla) whom he specifically found to be liars. For example, he found the appellant to be a liar because of his testimony that the could not say whether people in the groups were armed or not. In fact the appellant said that it was dark so he could not see clearly; that the incident happened so quickly that he could not tell whether the people were carrying any weapons; and that, in any event, it was not necessary for the people to have weapons in order for them to threaten to attack. This evidence by the appellant could not possibly be used to form a conclusion that the appellant must be lying on this issue. He found both the appellant and DW2 to be liars because they differed as to whether there was one or two bangs when DW2 was quit prepared to concede that there may have been more than one bang. The learned trial judge criticised the memory of the appellant and DW2 as to the number of bangs saying that these should have been clear in their minds because, as he put it; "The period September, 1989 to May, 1991 (i.e. about one year and nine months) when the two testified in this court is too short for them to have forgotten what really happened on the night in question." It seems to us that the learned trial judge's comments as to the number of bangs were unfair to the appellant not only in view of the long (not short) period of time that had elapsed since the incident took place but more importantly because DW2 was willing to concede that there may have been more than one bang.

As to whether the appellant's car was "stuck" on an embankment soon after he had gone past the group, the learned trial judge said that he did not believe that story on the ground that had there been such an embankment at the scene of the shooting, he would have expected the appellant and DW2 to have been able to identify that spot because of that embankment when they took the police to the scene on September 4, 1989. Again, this was an unfair comment since no issue had been made as to whether there was an embankment or not; in fact, the appellant was not even cross-examined on the matter. In his testimony, the appellant referred to the embankment as a slight one. There was no suggestion by the appellant that the embankment was as huge as to be readily recognisable on a dirt road.

The learned trial judge misdirected himself when he held that Andrew Kaonga's evidence (i.e. PW11's evidence) that he heard the appellant tell the police that someone had humped on the car was unchallenged. Mr. Ngenda pointed out to us that PW11 had been cross-examined on this issue and had been specifically asked why any such reference was omitted from the reports of the police offices. His response was that maybe because the appellant was the president's son or may be the police forgot it. The learned trial judge did not resolve the question as to who was telling the truth on the matter and assumed that because of the alleged lack of challenge to PW11's evidence that the appellant and his defence witness had told lies to the police about the alleged attack.

The learned trial judge further found that the appellant had told Assistant Commissioner of Police Mr. Emmanuel Mutale (PW9) at State Lodge that he and his friends had been attacked and were lucky to be alive, was a lie because there was not even a resemblance of an attack on them. This was an unfair finding against the credibility or the appellant in that his whole defence was that he and his friends were under threat from two groups of advancing people who had struck his car.

In deciding the likelihood whether or not the appellant and his friends were threatened, the learned trial judge found that on the evidence, the locality where they were that night was a peaceful one. This is what he said:

"In the absence of evidence on this point, I am not free to hold that the people in Kamanga compund are stoner of motorists. On the contrary, I am obliged to hold that the residents of that compound are law abiding citizens. So there was no evidence to show that the sort of compound the accused person found himself in on the night in question was anything than a peaceful one. I am not able to take judicial notice that the compound is notorious for stoning motorists because it has not acquired such a reputation. This being the case, I find and hold that there was nothing to have made the accused person and his group apprehensive of the fact that they were in Kamanga compound that night."

Although one of the passengers in the car asked the appellant to close the window on the appellant's side because people in that area were in the habit of throwing stones at motorists at night, which evidence was admissible as to the fact that the statement was made, the appellant did not rely on the notoriety of the area to support his statement that he feared that his life and the lives of his companions were in danger. He relied on the behavior of the two groups of people whom they encountered. The fact that the learned trial judge said that there was no evidence to show that the sort of compound the accused person and his friends found themselves in was any thing other than a peaceful one was an unjustified finding against the acceptance of everything that the appellant and his witness said.

The learned trial judge failed to give reasons for preferring the evidence of the prosecution witnesses most of whom he found to have given untruthful evidence on certain issues. Indeed, most of the prosecution witnesses told lies as to the quantity of alcohol they has consumed individually and severally.

There was one matter with which the learned trial judge dealt at the end of his judgment and that was with regard to whether or not the appellant and his witnesses had putPW11 into the boot of his car in order to take him to the police station where they laid their complaint. In this respect, the learned trial judge noted that DW2 had said that when they arrived at the police station, PW11 appeared to be drunk. PW11, however, told the court that he did not drink alcohol and, as the learned trial judge correctly pointed out, his evidence in this respect was not shaken in cross-examination. The learned trial judge deduced from this that PW11's appearance of being drunk must have been caused by having been put in the boot of the car. None of the witnesses was asked as to whether PW11's appearance of being drunk might have been caused by his confinement in the boot of the car. But if the learned trial judge's deduction of the cause of PW11's appearance was correct, we would note that the defence evidence in this respect was about something which took place after the main incident and a discrepancy here would not go to the root of the matter.

In the light of the misdirections to which we have referred, the tests of credibility applied by the learned trial judge were not the proper ones. Had he applied the proper tests he might well have come to a different conclusion on the issue of credibility in so far as this relates to the prosecution witnesses.

We are satisfied that the learned trial judge misdirected himself as to the assessment of the credibility of the prosecution eye witnesses most of whom were found to have told lies on certain issues, let alone as to the amount of alcohol that they had consumed.

We now come to deal with what we consider to be the final ground of appeal. It was submitted here that the learned trial judge misdirected himself by holding that the appellant had not acted in self-defence. Mr. Ngenda aurged us that the test to apply is not only objective but also subjective as the accused's state of mind at the material time is a relevant fact and, therefore, worthy of consideration. He further submitted that courts must be hesitant in applying over fine tests to actions taken and weapons used in the heat of the moment. In support of his argument, he cited the English case of Palmer v R (10) and the Zambian case of Tembo v The People (1). In Palmer (10). Lord Morris of Borth-y-Fest said at pp.242 and 243:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.... If the moment is one of crisis for someone in immanent danger, he may have to avert the danger by some instant reaction.... If there has been attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to anxiety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken... If the jury considers that an accused acted in self-defence or if the jury is in doubt as to this, then they will equate."

And in the Tembo (11), the then Court of Appeal of Zambia said (per Baron J.P. as he then was) at p.227:

"The courts in the common law countries have always been very slow to apply over fine tests to actions taken and weapons used in the heat of the moment."

In considering this ground, we agree with the authorities cited by Mr. Ngenda and the learned trial judge. The essence of the case is whether or not the appellant had an honest and reasonable belief that lives of himself and his friends were in such danger that it was necessary to fire warning shots close to the heads of the people on the road.

According to the evidence of the appellant and his witness, the car in which they were traveling was struck once or twice on the window and car windscreen by members of the group which they passed. As a result, the appellant swerved the car to one side so that the car stopped. At that time, the appellant and DW2 said that there was a group of people in front and another group behind them both of which were advancing towards them. Thinking that the groups intended to attack them DW2 fired a warning shot with shotgun into the air and the appellant fired four shot with pistol into the air. Both witnesses said that this did not stop either group from advancing. In fact, one prosecution eye witness, Jessie Mwanza (the deceased's elder sister), testified that some of her friends said that blanks were being used. The appellant then thought it was necessary to stop the people from advancing to fire closer to their heads so that they could hear the whine or whistling of the bullets which would act as a more effective deterrent. After the firing of these latter shots, the groups did in fact disperse.

On the evidence before the trial court, it is difficult to believe that those two sober men, with a female passenger, stopped their car after passing a group of people for no reason at all and proceeded, again for no reason at all, to fire warning shots in the air before firing some shots dangerously low near the heads of the people. The only possible reason could have been that the men were out to make mischief and were showing off with their firearms. But, having regard to their sobriety, there is no basis for entertaining any such suggestion. In contract, however, there was no evidence that any member of the crowd of people was known to the appellant and DW2 and, therefore, the appellant could have had no possible reason for any personal animosity towards anyone there, while at least some members in the crowd had consumed a great deal of alcohol and some of them, in particular PW11 who was subsequently apprehended by the appellant and DW2, and advanced very close to the appellant and his friends with the result that they were in fear of their lives.

In our view, the situation of the appellant was that it was reasonable, after the blows delivered to the car and after seeing the two groups continue to advance towards him, despite the warning shots that were fired, to be in fear of his life and the lives of his friends, especially that some, including PW11, were very close to him. In those circumstances, it was reason-able for him to lower his aim with intent to frighten the oncoming people by the sound of the bullets despite the danger to those people of ding so. Is seems to us that there was no good reason for the learned trial judge to reject the version of events as given by the appellant and SW2. The defence account by two sober men as to what happened at the material time should have been accepted or at least the appellant and his witness should have been given the benefit of doubt as against the version of the prosecution eye witnesses some for whom were shown to have been lying in their evidence.

On the basis of what we have said above, the following findings clearly emerge:

(a) that, in view of the D.P.P.'s public statement that the appellant would not be prosecuted for homicide on the ground of self-defence, the right to prosecute thereafter was lost for the reasons already given;

(b) that as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, well have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant are having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection;

(c) that the learned trial judge misdirected himself by applying improper test in his assessment of the credibility of the prosecution eye witnesses most of whom were found to have told lies on certain issues including as to the amount of alcohol they had consumed; and

(d) that the appellant acted in self-defence and was, therefore, not guilty of murder.

The appeal is allowed, the conviction is quashed and the sentence is set aside. The appellant stands acquitted.

Appellant Acquitted