

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 50 OF 1993

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

CHRISTOPHER MALUMA

Appellant

V

THE PEOPLE

Respondent

Coram: Sakala, Chirwa, Musumali, JJJ.S.
At Lusaka on 27th July and 24th August, 1993

For the Appellant: Ms. Henriques, Senior Legal Aid Counsel

For the Respondent: Mrs. E. Chipande, State Advocate

J U D G M E N T

Chirwa J.S. delivered the Judgment of the Court.

On 27th July, 1993 we allowed the appeal and the appellant was acquitted and we said then that we would give our reasons later and this we now do.

The particulars of the offence are that Christopher Maluma, on the 29th day of November, 1989 at Gwembe in the Gwembe District of the Southern Province in the Republic of Zambia murdered Raphael Chiselenga.

The facts briefly are that the appellant was the grandson of the deceased Raphael Chiselenga. The prosecution's case was that on 29th November, 1989 the appellant asked his mother, who was PW 1 in the Court below, to take one cow to Gwembe where she was going to sell it for him.

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She told the appellant that as a woman she could not drive the cow. The appellant is then alleged to have insulted PW 1 and threatened that he was going to kill the deceased and then he would be praised for that. It was also alleged that the appellant accused the deceased as having bewitched him as he had body pains. PW 1 further said that that was not the first time for the appellant to have threatened to kill the deceased. Shortly after this encounter, PW 1 left for Gwembe and on her way she passed through some place where there was beer drinking. She again met the appellant there and also found the deceased and other people. Before she could greet her father who is deceased, the father left the place. She also realised that the appellant had left the place. She then left and went to her home and when she reached her home she heard people mourning and on making inquiries she was told that her father had been killed. The fact of the appellant's presence at the beer party is corroborated by PWs 2, 3 and 4. PW 3 also talked of the appellant's threat to kill someone but he took it as a joke as the appellant usually joked in that manner.

There is also evidence that the appellant at one stage on 29th November, 1989 borrowed an axe from PW 4 but PW 4 got it back from the appellant before he left the drinking place.

In arguing the appeal on behalf of the appellant, Miss Henriques submitted that the learned trial Judge erred and misdirected himself in finding the appellant with a case to answer because the evidence of PWs 1, 2 and 3 was contradictory and therefore could not be relied upon. She said that it was strange that the appellant could have uttered threats to kill the deceased to PW 1 who was his mother. The contradictions are on such matters as when the appellant left the beer party; when the deceased was found dead and when the appellant was seen by PW 5 running away from the direction where the deceased's body was found. The witnesses give different times. Miss Henriques also submitted that PW 2 should have been treated as a witness with a possible interest to serve as he was the last person

to be seen with the deceased when they left the beer party and he cannot be cleared merely on account of his age. Miss. Henriques also attacked the learned Judge's finding that the deceased was with an axe as there is no evidence to support this finding and that infact the axe that the appellant had borrowed from PW 4 had been taken away from him at the beer party before he left.

On behalf of the people Mrs. Chipande in supporting the conviction submitted that the people were relying on circumstantial evidence, that various pieces of evidence put together do connect the appellant to the crime. She submitted that the contradictions pointed out are not fatal to the prosecution case.

We have carefully considered the evidence on record and also submissions by Counsel. We are in total agreement with Mrs. Henriques that evidence of the main prosecution witnesses is riddled with many contradictions that it would be unsafe to rely on them. The timings are vital in this case. PW 5 stated that she saw the appellant running from the Western direction of the village where the deceased's body was found latter at about 14.00 hours. PWs 2 and 3 talk of the deceased leaving the beer party at 15.00 hours, this means that when PW 5 saw the appellant at 14.00 hours the deceased was still at the beer party. The appellant therefore could not have had the opportunity to kill the deceased. Equally we are in agreement that ~~PW 2~~ should have been treated as a witness with a possible interest to serve as according to his evidence he was the last person to be in the company of the deceased. His evidence needed corroboration and we see none on record. To clear him on account of his age was a misdirection. This now leaves ^{US} with the alleged threats uttered by the appellant that he would chop the deceased. There is prosecution evidence that the appellant was fond of joking in that manner, his mode of jokes cannot be taken as evidence against him. Further the medical evidence does not state that an axe was used. To find that the appellant chopped the deceased with an axe is a misdirection.

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In any event there is evidence that the axe that the appellant borrowed from PW 4 was taken away from him by PW 4 whilst at the beer party. There is no cogent evidence to connect the appellant to the crime. We therefore allowed the appeal. The conviction was quashed and sentence set aside.

E. L. Sakala
JUDGE OF SUPREME
COURT

D. K. Chirwa
JUDGE OF SUPREME
COURT

C. M. Musumali
JUDGE OF SUPREME
COURT