IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

JUDGMENT NO. 116 OF 1993

(Criminal Jurisdiction)

B E T W E E N: ALEX KANDAMI MULENGA — APPELLANT

Vs

THE PEOPLE — RESPONDENT

CORAM: GARDNER, SAKALA AND MUZYAMBA JJS.,
19th October, 1993

S.W. Chirambo Senior Legal Aid Counsel for the appellant.
J.M. Mwanachongo Principle State Advocate for the State.

J U D G M E N T

Gardner J.S. delivered the judgment of the court.

Cases referred to:-

(1) Love Chimbini -v- The People (1973) Zambian Reports page 191

(2) Turnbull and Another (1976) 3 E.R. 445

The appellant was convicted of an act intended to cause grievous harm. The particulars of the offence were that he, on the 21st February, 1991 at Mporokoso, did unlawfully wound Jackson Kasama Mushota. The prosecution evidence was that the complainant, Jackson Mushota, was cutting poles in the bush when he saw the appellant, whom he said he recognised as he had known him well for many years, and the appellant had a gun. The complainant thought the appellant was shooting birds and he followed him; however, the appellant took cover and the complainant could no longer see him. The complainant proceeded with the cutting of poles and whilst he was still doing so he saw the appellant 90 metres away coming towards him with a gun. He did not see the appellant aim the gun but he was shot and sustained injuries to his body. When he was taken to the hospital it was found that he had a number of pellet wounds in his body and some of the pellets still remained in his body after he was discharged from the nospital.

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There was no other eyewitness of what occurred. The appellant gave evidence on oa and said that he was nowhere near the scene of the shooting at the time, that he did not have a gun and that no gun was found in his possession when his premises were searched by the police. He agreed that he knew the complainant well.

Mr. Chirambo on behalf of the appellant argued a number of grounds of appeal, the first of which was that the gun should have been produced and the fingerprints on the gun which ought to have been produced should have been made available to establish the identity of the assailant. Secondly, counsel argued that there was no corroboration of a single witness identification. He maintained that at 30 metres in the circumstances of this case, with a number of trees around the complainant could not have been sure of identifying the appellant. He maintai further that the complainant was an unsatisfactory witness because he contradicted himself in that at one stage the complainant said he saw the appellant aiming a gu at him and the next moment said that he did not see him actually aim the gun. Because of the unsatisfactory nature of the evidence, Mr. Chirambo argued that the evidence of identification should not have been accepted. Counsel further argued that there was a statement in the medical report indicating that the complainant d not know who had shot at him because the police constable who had written the instructions to the medical authorities had said that the complaint was that the complainant had been shot by a person unknown. In these circumstances Mr. Chirambo argued that the complainant could not have told the police whom he accused of shooting at him. Finally, Mr. Chirambo argued that the evidence that the appellant had previously accused the complainant of being a wizard and had attacked him with an axe for that reason, should not have been used by the learned trial judge in the manner which he did, namely where the judge found that the appellant had the intention to shoot the complainant and to cause him grievous har

Mr. Mwanachongo on behalf of the state argued that there was no question of the possibility of mistaken identity because the appellant himself had admitted in evidence that the parties were well known to each other. He also maintained that there was no impropriety in the learned trial judge's having referred to the previous history of the case when the appellant had accused the complainant of being a wizard and had attempted to axe him.

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Dealing with the first ground of appeal that no gun was used in this case, we are quite satisfied that the rest of the evidence overwhelmingly proves that the complainant was shot and received injuries from shotgun pellets. It follows, therefore, that a gun must have been used and its non-production because it could not be found did not weaken the prosecution case. This ground of appeal cannot succeed. In connection with that ground we would comment that the fact that the gun was not found in the premises of the appellant does not suggest his innocence because, in the circumstances, it would not have been reasonable to expect the appellant to retain possession of the gun having used it as alleged.

With regard to the quality of the identification in this case we appreciate that this was a case of single witness identification, but, as we said in the case of Love Chimbini -v- The People 191 (1) where a suspect is well known to a witness the possibility of mistaken identity is very much less than where a complete stranger is the subject of identification. We are also mindful of the comments made in England in the case of Turnbull and Another, 1976 3 All E.R. 845, (2) in which the court held that even in a case where a suspect was well known to a witness, when a witness had only a fleeting glimpse of his assailant there was still a possibility of mistaken identification. In this case the complainant said that he saw the appellant earlier when he followed him, and, although he did not mention the distance at which he then saw the appellant it is quite clear from his evidence that he was able to recognise the appellant. In all the circumstances it cannot be said that he had only a fleeting glimpse of his assailant, and no question of the possibility of mistaken identification arose on which the learned trial judge should have adjudicated.

With regard to the question of the unreliability of the complainant as a witness, we note Mr. Chirambo's comment that this witness at one time said that the appellant aimed the gun at him and then immediately afterwards said he did not actually see the aiming; but this was all in his evidence in chief and cannot be regarded as an inconsistency. Instead it was a very proper correction of his own evidence by the witness.

In regard to the learned trial judge's use of the earlier evidence that the appellant had previously assaulted the complainant with an axe and had accused him of being a wizard, we are quite satisfied that there was no impropriety in his method of referring to that evidence.

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It was evidence of similar conduct by the appellant and was properly used by the learned trial judge in supporting the motive for the assault on the complainant.

For the reasons we have given none of the grounds of appeal can succeed. The appeal against conviction is dismissed.

The appellant was sentenced to twelve years imprisonment with hard labour, and, in the course of sentencing him, the learned trial judge said:- "Incidences where people kill each other or do grievious harm to each other based on witchcraft suspicion is so alarming in this province. Despite the sentences I have imposed on accused persons who are so married to witchcraft I am amazed to note in this case that the accused still had to hurt PW1 as if he were an animal." There was no evidence that this particular appellant was aware of any of the sentences that had been imposed by the learned trial judge and the sentence imposed was wrong in principle.

We agree with the learned trial judge that the use of belief in witchcraft as an excuse for assault must be deprecated by this court and deterrent sentences must be imposed on those who use such an excuse for their assaults.

The appeal against conviction is allowed and the sentence imposed by the High Court is set aside. In its place we sentence the appellant to four years imprisonment with hard labour with effect from 25th February, 1991, the date of his arrest.

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B. T. GARDNER
SUPREME COURT JUDGE

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E. L. SAKALA
SUPREME COURT JUDGE

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M. M. MUZYAMBA
SUPREME COURT JUDGE