IN THE SUPREME COURT FOR ZAMBIA SCZ/9/1/93

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN: Mwangala Lifumbila Namangolwa Appellant

vs

The People Respondent

Coram: Gardner, Chaila and Chirwa JJS.,
1st November, 1994

D.M. Luywa of Luywa & Co for the applicant.

W. Wangwor Principal State Advocate for the state.

JUDGMENT

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

Case referred to: (1) Phiri E. and ors v The People (1978) Z.R. 79.

The applicant was convicted of threatening violence. The particulars of the offence being that he, on the 8th of April, 1991 at Lukulu, threatened David Mulemwa with intent to cause alarm to the said David Mulemwa with injury to this person, to wit he said:- "I will cut off your neck." He was also convicted of a second count of employing persons in matters of witchcraft contrary to section 7 (d) of the Witchcraft Act. The particulars of the second count were that he and another, on a date unknown but between 1st and the 11th of September, 1991, at Lukulu, jointly and whilst acting together, did employ two others to cause the death of David Mulemwa by use of witchcraft or non-natural means. The second accused in the second count was acquitted. The applicant was sentenced to nine months imprisonment on the first count and fined K40.00 on the second count.

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On appeal to the High Court the sentence on the first count was suspended. The applicant now applies for leave to appeal out of time.

Mr. Luywa, on behalf of the applicant, has put forward a number of grounds of appeal. On the first count, the first ground of appeal was that the applicant was not given the opportunity to be represented by an advocate of his choice contrary to the provisions of the Constitution. He pointed out that, although he was originally due to act on behalf of the applicant before the magistrate's court, he had on the date fixed for hearing an appointment to appear before this court. He therefore sent a junior representative of his firm to the magistrate's court to apply for an adjournment on that ground. The record indicates that, when the representative applied for an adjournment, he also told the magistrate that he himself had not had an opportunity to read the record so he was not ready to defend the case. The public prosecutor suggested that the case should proceed but should be adjourned for a short while to enable the representative to acquain himself with the facts of the case so that he could defend it. The magistrate in a reserved ruling ruled that there had been plenty of opportunity for Mr. Luywa himself to attend the hearing and he held that the trial should proceed in the absence of Mr. Luywa. The case was then adjourned until the following day and, before the trial commenced, the representative of Mr. Luywa said that he had now read the record and was ready to proceed with the defence. Mr. Luywa told this court that his representative was in fact still a student lawyer and was not called to the Bar until some two and a hal months later. This information however, was not given to the magistrate at t trial of the case. This court has dealt with the question of adjournments on several occasions in the past and we have indicated that adjournments should be granted whenever it would be inconvenient for reasonable cause for counsel to appear on a certain day. We have however, indicated that there must be a limit to the number of adjournments and the discretion has always been with the court trying the case. In this particular instance when the magistrate was told that Mr. Luywa himself was unavoidably detained before this court the magistrate should, as a matter of courtesy, appreciated that proceedings before this court take precedence and in the circumstances should have allowe an adjournment.

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However, in the event there was a person present before the magistrate who he himself out as qualified to attend the court and to represent the accused. In the circumstances, when the trial in fact took place it was not wrong to allow Mr. Luywa's representative to conduct the defence on behalf of the accused. As, at that stage, nothing improper on the face of it occurred, and as, in the event, the point to be considered was the legal effect of the appellant's actions and words, a matter which can be decided by this court, the application on this ground must be refused.

The second argument in respect of count one was that the threat made by the applicant was not real a threat at all. The facts of the case were that the applicant was employed with the complainant in the Local Government. Apparently some matter had occurred as a result of which the High Court made an order that certain procedures should or should not be followed. The complainant wrote a letter to a number of persons in the applicant's position and the applicant felt that the writing of the letter contravened the court order. There is evidence that the applicant then went into a meeting which was being chaired by the complainant at which two other employees of the council were present. He then said, pointing a finger at the complainant, "I will cut off your neck, I do not play with little boys like you." The evidence of the complainant was that when these words were uttered he was so frightened that he looked for a way of escape, and the evidence of the two witnesses who were with him said that the complainant was frightened and that they were frightened and shocked to the extent that their meeting was abandoned. Mr. Luywa pointed out that in the evidence of the applicant he had said that he had qualified his words by saying "I will do this if you write another letter like the one you have just written." Mr. Wangwor, on behalf of the state, accepted that those qualifying words were uttered. Mr. Luywa argued that, as the applicant had no weapon, the threat was not really a threat at all and if it were so it was qualified to the extent that it was of something which would happen in future if another such letter was written. Mr. Luywa urged us to find that a threat to do something in the future is not a threat within the terms of section 90 of the Penal Code.

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As to the argument that the words used were not a threat, section 90 of the Penal Code, under which the applicant was charged, reads, in part as follows:-

"Any person who:

(a) threatens another with any injury to this person or property with intent to cause alarm to that person .... is guilty of a misdemeanour and liable to imprisonment for five years."

Mr. Wangwor very properly indicated that the State did not support the conviction on the second count because the only two witnesses who gave evidence of the involvement of the applicant were patently accomplices and there was no corroboration to support the evidence which they gave. In this connection the magistrate referred to the case before this court of Phiri E. and Ors v The People (1) . In that case this court said, inter alia on page 81 at paragraph (ix) "In Zambia the test is:- Was there corroborative or supporting evidence of such weight that the conclusion is not to be resisted that any court behaving reasonably, moving from the undisputed facts and any findings of fact properly made by the trial court, would, directing itself properly certainly have arrived at the same conclusion." Although this paragraph was quoted by the magistrate he was more convinced by the argument of the Director of Public Prosecutions in that case who had argued that if the evidence of accomplices appears to be so honest that it should be believed it may be accepted without corroboration. This proposal of the law was rejected by this court and the law is as set out in the paragraph we have cited. In this case there was no corroboration of the two accomplices and the conviction on the second count was therefore wrong. In this case there was undoubtely a threat of injury. The cutting of a person's neck is obviously an injury. The fact that the threat was qualified in that it was not to take effect unless the complainant did some future thing-in this case the writing of a letter similar to the one he has already written- does not affect the issue so far as the application of the section is concerned. The purpose of the law is in order to prevent people from uttering threats which cause alarm. In this particular case the threat to injure did, on the evidence, cause alarm, not only to the complainant but to those others who heard it.

In circumstances we are quite satisfied that the offence was proved and that the words of the applicant, albeit qualified as they were, constituted a threat with intent to alarm.

So far as sentence is concerned, Mr. Luywa argued that the offence was misdemeanour by a first offender and should not have been the subject of even a suspended sentence of imprisonment.

For the reasons we have given the application in respect of the first count is refused; the application in respect of the second count is granted and treated as the appeal which is allowed. The conviction on the second count is quashed and the sentence on that count is set aside. So far as the sentence of nine months suspended sentence on the first count is concerned we consider this to be an appropriate sentence which reflects the view of the court that this misdemeanour was not so serious as to merit a more severe punishment. The application in respect of sentence is refused.

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B. T. Gardner
SUPREME COURT JUDGE

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M. S. Chaila
SUPREME COURT JUDGE

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D. K. Chirwa
SUPREME COURT JUDGE