IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 48 OF 1985

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

LEWIS SINYANGWE Appellant

and

THE PEOPLE Respondent

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

15 September 1987

For the Appellant : Mr. S. K. Munthali, Senior Legal Aid Counsel

For the Respondent : Mr. Okafor, Senior State Advocate

J U D G M E N T

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

The appellant who was originally tried on a charge of murder, was convicted of manslaughter and sentenced to ten years imprisonment with hard labour. The particulars of the offence on the charge of murder alleged that on the 21st of October, 1983 at Kasama, he murdered Josephat William Chitambi, his brother. The eye witness to the incident was PW2 whom the learned commissioner accepted as a witness of truth. Her evidence was to the effect that the deceased complained about the appellant's drinking habits. Thereafter the appellant assaulted the deceased and the deceased managed to rescue himself from the appellant and left. According to PW2, the appellant went in the same direction and then assaulted the deceased. There was evidence from the police officer, who was PW4, to the effect that when he received the report he went to the scene and found both the deceased and the appellant unconscious. They were both rushed to the hospital.

The appellant gave evidence in his defence that the death of the deceased was by an accident as they collided. The learned trial judge did not accept this evidence. He found that the prosecution had not proved the charge of murder but that of manslaughter. He found the appellant guilty of manslaughter and convicted him accordingly.

The learned Senior State Advocate, Mr. Okafor, appearing for the state has properly informed the court that he was not supporting the conviction.

We have looked at the judgment. We have serious difficulties in explaining firstly, how both the appellant and the deceased were found unconscious, secondly, that according to the post mortem the injury sustained by the deceased was at the back of his head. It would appear to us that although the deceased's fall might have been caused by a blow the injury at the back could not have been caused by a blow. It would also appear to us that the explanation given by the appellant that he collided with the deceased is supported by the evidence of the police officer who said he found both of them unconscious at the scene. While in the normal circumstances in the light of the record being defective, a complaint properly raised by the appellant, we would have ordered a re trial, we do not consider this to be a proper case to order a re-trial. Consequently we allow the appeal. The conviction is quashed and the sentence is set aside.

.....
M. M. S. Ngulube
DEPUTY CHIEF JUSTICE

.....
B. T. Gardner
SUPREME COURT JUDGE

.....
E. L. Sakala
SUPREME COURT JUDGE