SCZ APPEAL NO. 121 OF 1999

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

CARTIS LUKWESA — *APPELLANT*

V

THE PEOPLE — *RESPONDENT*

CORAM: Chirwa, Muzyamba and Chibesakunda, JJs on 2nd May and 3rd October 2000.

For the Appellant: In Person

For the People: Mr. C.F.R. Mchenga, Senior State Advocate

J U D G M E N T

Chirwa, JS, delivered the judgment of the Court.

Cases referred to:

1. *Chibozu V The People [1981] Z.R. 28*
2. *Khumalo V The People [1981] Z.R. 136*

The appellant, Cartis Lukwesa, was charged with one count of murder contrary to section 200 of the Penal Code, Cap 87. The particulars of the

offence alleged that the appellant on 20th September 1996 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia murdered one JOSEPH NKWAZI. Upon his trial he was found guilty of the offence and sentenced

to death. He has appealed against both conviction and sentence.

The evidence led by the prosecution was that PW1, Collins Sampa, PW3 Francis Chanda and others were working on a project making concrete blocks in Nkwazi Compound in Ndola. PW1 was in a container loading cement when he heard the guard asking people why they were passing near their working place. Few moments later he heard a gun shot, he went out and saw two strangers. He described one as being tall and medium built, the other was fat and light in complexion. He ran behind the container where he found a third person. At that stage he saw that the deceased was lying down. He reported the matter to the Police. He identified the appellant as one of the strangers he found outside the container. He identified him at the identification parade and in Court. He denied having seen the appellant before the identification parade.

Prosecution Witness (PW) 3 testified that on 20th September 1996 he was at the Nkwazi Project loading cement and at about 1700 hours he saw two men pass by. The guard told these people that there was no way or path where they were passing. These men passed but came back and said that they were members of the neighbourhood watch and ordered all the workers to lie down and they started shooting. He said both men were armed. After the shooting they went away. This witness later saw the deceased lying down with gun shot wounds in the leg and chest. He described the assailants

and that one was short and brown and that he identified the appellant as an identification parade as one of the assailants. He denied that he saw the appellant before the parade or that the Police showed the appellant to him.

Prosecution Witness (PW) 4 is a Police Officer who conducted the identification parade at which both PW1 and 3 identified the appellant. After the parade he asked the appellant if he was happy with the parade, the appellant respondent that he was not happy, as the witnesses had seen him in the Criminal Investigations Officer's (CIO's) Office.

Prosecution Witness (PW) 5 was the investigating and arresting officer who testified that after the arrest, the appellant denied the charge. The witness also produced the post mortem report.

At the close of the prosecution case the appellant was found with a case to answer and in his defence he denied the offence but does not account for 20th September 1996. On the identification parade, he insisted that the identifying witnesses saw him in the CIO's office and he complained to the officer conducting the parade. In his written heads of arguments which he relied upon, the appellant argued four (4) grounds of appeal. The first ground of appeal attacked the identification parade mainly saying that the parade was man-staged in that the Police made the identifying witnesses see him in the CIO's office before the parade and also outside the parade as he was in the cells and the witnesses were outside the Police Station and they saw him being led from the cells to the parade. He submitted that this is supported by the evidence of PW4 who conducted the parade. Further after the parade, he complained to the officer about the unfairness. He attacked the learned trial judge's conclusion that the parade was not man-staged that

if it were even the third identifying witness would have identified the appellant. He concluded and prayed that this identifying evidence should be discarded.

The second ground of appeal is that there was conflicting evidence among the prosecution witnesses. This is particularly as to when the deceased died and when the post mortem was conducted. PW1 said that the attack was on 20th September 1997. The investigating officer said that he died on 20th September 1996. PW2 said that he attended a post mortem examination on 24th September 1997 yet the post mortem report shows that the examination was conducted on 24th September 1996. The appellant submitted that with all these contradictions to the evidence of the prosecution it is unsafe to accept and use it to convict him.

The third ground was on failure for the prosecution to call the doctor who conducted the post mortem examination. He submitted that it was wrong for the prosecution to adduce medical evidence under Section 191 A of the Criminal Procedure Code. It was submitted that the doctor's oral evidence was needed to clarify as to when death of the deceased occurred. Also the prosecution gave no reason why the doctor was not called. He submitted that the admission of the post mortem report in the absence of the doctor reacted unfairly against him as the report does not show cause of death.

The fourth ground of appeal was that the Police failed to bring collected evidence, which could have been in his favour. In this regard the appellant argued that since PW5 said that when he, appellant, was apprehended he was with a firearm, this firearm was not produced in Court,

a favourable assumption should therefore be made in favour of the appellant that no firearm was found on him.

For the State, Mr. Muchenga supported the conviction arguing broadly that there was overwhelming evidence against the appellant in that the two eye witnesses, PW1 and 3 saw the appellant shoot the deceased and the shooting took place in day broad light. Further these witnesses gave description of the assailants to the Police. He supported the learned trial judge's consideration of the evidence on identification parade. He therefore prayed that the appeal be dismissed.

We have considered the heads of arguments filed by the appellant, his supplementary oral submission and those of the learned Senior State Advocate. Further we have considered the evidence on record and the judgment of the learned trial judge. On the first ground of appeal, which attacked the identification parade, we note that both PW1 and 3 denied under cross-examination that they saw the appellant before the parade or that the Police showed them the appellant before the parade. We also note that the appellant did make a complaint to the officer who conducted the parade that the witnesses had seen him in the CIO's office and he repeated this in his defence. The gist of the appellant argument is that the parade was stage-manned. We agree with the learned trial judge's observation that if the Police wanted to have overwhelming identification evidence, even the third witness who failed to identify the appellant could have been made to identify the appellant. The two identifying witnesses gave circumstances, which

gave them separate opportunities of identifying the appellant. Each gave to the Police descriptions of the appellant. From the circumstances that gave PW1 and 3 opportunities to observe and the description given to the Police we are satisfied that these two witnesses were not stage-manned. We would agree with the learned trial judge that the identification of the appellant by these two witnesses cannot be faulted. We would dismiss this ground of appeal.

The second ground of appeal is that there was conflict in the evidence of PW 1, 2, 3 and 5 this is particularly as to the date when the deceased died. It will be noted at page 5 of the record that after the evidence of PW 4 the learned Principal State Advocate applied to amend the date in the particulars of the offence to read 20th September 1996 instead of 20th September 1997 and there was no objection. It appears that dates were suggested to witnesses. But if we look at the post mortem report, the post mortem examination was on the body of Joseph Nkwazi, after it was identified by Dominic Nkwazi (PW2), was conducted on 24th September 1996. It cannot be a mere coincidence that the deceased in the present case should be Joseph Nkwazi and the identifying witness should be Dominic Nkwazi (PW2), was conducted on 24th September 1996 and these names should appear in the post mortem report. Further, although the defence was not asked whether they wished to re-call any witnesses after the amendment to the particulars of the information, at the close of the prosecution case, they indicated that they did not wish to apply to recall any witness; see page 5 of the record. With this background, we are of the opinion that the contradictions are of no major consequence that can make us interfere with the conviction. We

note that there was no defence put forward, the appellant merely attacked the identification parade and that aspect having been dealt with, we see no merit in this ground of appeal.

The third ground of appeal was that the failure by the prosecution to call the doctor who conducted the post mortem examination was fatal and prejudicial to the appellant. In support of this ground the appellant referred to the cases of (a) ***CHIBOZU V THE PEOPLE [1981] Z.R. 28*** and (b) ***KHUMALO V THE PEOPLE [1981] Z.R. 136***. In the ***CHIBOZU*** case there was a post mortem report produced under Section 191 A of the Criminal Procedure Code and this Court did not say the report cannot be produced.

What we said was that there may be need for the doctor to elucidate on the terminology used especially where the report is inconclusive. We accept in present case that the doctor did not indicate the cause of death. In the ***CHIBOZU*** case the doctor found that the deceased met her death through being burnt to death. In the present case the circumstances were that the deceased and his friends, including Prosecution Witnesses (PWs) 1 and 3, were loading cement when the appellant and his friend passed by. They were told that there was no path. They came back, both armed, and opened fire. The deceased fell down and died on the spot. The post mortem showed that the deceased had on his body bullet wounds on the chest. On its way the bullet tore the neck vessels and caused a huge hematoma in that region and wounded the left lung. According to the eyewitnesses there was no intervening factor between the firing by the appellant and his friend and

finding the deceased dead. We also take note that the defence did not apply to call the doctor to give oral evidence as it is entitled to under Section 191 A (i) (ii) of the Criminal Procedure Code. By saying this we are not shifting the burden of proof to the defence but that if they thought that the post mortem in its form without oral evidence from the maker would prejudice their case, they were entitled to have the doctor summoned. However, from the circumstances of this case, there is no doubt that the deceased died of gun shot wounds inflicted by the appellant and his friend. The case ***KHUMALO*** is irrelevant to the case at hand. This ground of appeal cannot succeed.

The fourth ground is that the failure by the Police to produce the gun allegedly found on the appellant should react in his favour. The evidence of PW5 was that when he got a report of the presence of armed bandits in Kawama he dispatched officers to the area and the officers came back with three (3) suspects who included the appellant, plus one firearm. This witness never said that the firearm was found on the appellant. There is no merit in this ground of appeal.

On the whole therefore, there are no merits in the appeal against conviction and it is dismissed. There can be no appeal against the mandatory sentence.

D.K. CHIRWA
SUPREME COURT JUDGE

W.M. MUZYAMBA
SUPREME COURT JUDGE

L.P. CHIBESAKUNDA
SUPREME COURT JUDGE