HB 176/18
HC (CRB) 18/18

THE STATE

Versus

BINO NDOU

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J with Assessors Mr J. Sobantu & Mr O. Dewa
BULAWAYO 12, 13 & 22 JUNE 2018

Criminal Trial

Ms N. Ndlovu for the state
B. Masamvu for the accused

MABHIKWA J: The now 42 year old Bino Ndou of Village 4, Ndame area of Beitbridge under Chief Staudze in Matabeleland South Province is facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. It is alleged that on 23 April 2017 and at Nottingham Estates, along Mtshilashokwe River, the accused shot Edward Ndou on the right thigh intending to kill him or realising that there is a real risk or possibility of his conduct causing the death if he continued to engage in that conduct despite the risk or possibility.

Background facts

The state case was that the accused, who was 41 at the time of the incident was employed as a guard at Chivhombwe Project, Nottingham Estate, at Beitbridge. The deceased was 28 at the time and employed as a game scout at the same institution. His duties were to conserve wild animals including those within Chivhombwe Project. It was alleged that on 23 April 2017, at around 10:00 hours the deceased and 3 colleagues were on an anti-poaching patrol when they observed the accused arriving with a Remington Express Magnum shot gut checking snares. They reacted and advanced towards the accused who initially cocked the gun and pointed it at the trio but decided to run away. As they pursued the accused the deceased and one Petros Moyo took one direction whilst one Jeffrey Ncube took a different direction.

The accused subsequently fired one shot at close range hitting the deceased on the right thigh. The deceased bled profusely and later died as a result of the shooting. The cause of death as per the conclusions by Dr S. Pesanai who examined the deceased's remains to be bronchoaspiration, haemorrhagic shock, fractured right femur, gunshot wound, assault.

The accused pleaded not guilty to the charge and his defence was mainly that his gun discharged accidentally when he was grabbed from behind at a time when he was being pursued by people he suspected to be poachers and had hid in a bush. He then fought with the grabber (Petros Moyo) until he was let go and both he and Petros ran in different directions thereafter. He said he never aimed at anyone and did not see anyone being shot by his bullet. He also said he had acted in self-defence and had exercised reasonable restraint on the day in question.

Common cause issues

1. It is common cause that the accused, the deceased and the state witnesses were within the vicinity of the crime scene on the day in question.
2. Although initially it appeared disputed, it was eventually agreed and became common cause that the fatal incident occurred between 0900 and 1000 hours (in the morning).
3. It is common cause that the quartet worked at literary the same place though working at different sections with different employers.

Issues for determination

The issues for determination by the court are:

(a) Is the accused the person who shot the deceased?
(b) Whether the shooting caused the death of the deceased

What emerged from the evidence of the state witnesses is that the trio of game scouts went out on an anti-poaching patrol. They then came across an area which showed poaching activity in the form of snares. They deliberately disturbed 2 of the wire snares by removing them. Thereafter they lay ambush uphill were they could observe what was happening below.

They then saw the accused arrive. He was checking the wire snares and even re-set the two that they had removed. At some stage, he appeared to have noticed them and retreated. He then made some signals beckoning them. At that stage, the now deceased recognized the accused as the security guard of Chivhombwe Project and advised the other two.

Believing that the accused had also recognized them and was thus beckoning them, they advanced towards him to hear what he had to say. They were surprised to be shown a clean pair of heels. They then naturally gave chase but in the process, the deceased and Petros Moyo lost Jeffrey Ncube. This is expected in a bush chase. Jeffrey was the one armed, Petros and the deceased followed the accused with Petros, perhaps being the better athlete, in front. Both were unarmed. Petros testified that as they got to a place where the accused was apparently hiding, he shot the deceased on the thigh from close range. When Petros heard the sound of gunfire, he turned only to face the accused who had just shot the deceased. When he tried to get hold of the deceased, the accused aimed his gun at him and tried to shoot but it "jammed". I have put "jammed" in quotes because the firearms expert later testified that the word would be wrongly used in that scenario. He said that it was quite common that one fails to fire a gun when in haste, unsure or in panic. He said a jammed gun would need to be repaired to fire against yet accused's gun was working perfectly when examined.

After the "jam" accused produced a knife threatening to stab him. He said seeing that the accused was armed he had no choice but to take to his heels this time running away from the accused, leaving the deceased groaning in pain. When he made a report at No. 9, where they were based he was told that Jeffrey had already phoned. He went back with the others to ferry the injured colleague who passed on about 20 minutes of arrival at a clinic.

The court accepts this evidence as by and large credibly portraying what transpired. No evidence has been adduced to show who else apart from the accused could have shot the deceased from such close proximity, under what circumstanced and for what reason or motive. This evidence was corroborated well by that of Admire Mutizwa, the ballistics expert who testified that whoever shot the deceased must have shot him from close range. This is so because

the plastic word would invariable drop at most 10 metres from the point of shooting. It cannot be propelled any further. *In casu*, the plastic ward was found inside the deceased's thigh together with the lead pellet. Mutizwa's findings were that the fatal bullet was fired from the accused's shotgun to the exclusion of any other gun. He said that every firearm leaves a mark on the spent cartridge which is unique to the particular firearm. His conclusion was that the plastic ward and lead pellet plucked from the deceased's thigh could only have been fired from the accused's gun and no other. He demonstrated how he comes to such a conclusion. One may assume that the more the plastic word and lead pellet are propelled towards the 10m distance, the more they are inclined to separate and/or lose steam and power so that towards that distance, the plastic word is unlikely to penetrate the body. It is safe to conclude that the deceased was shot at very close range, a distance much shorter than 10 metres which is in line with the sketch plan drawn by Claurence Tendenguwo at the scene as indicated by the accused and the state witnesses. The distance is given as 1 metre. All this corroborates the testimony of Petros, including his estimation in court that the accused shot the deceased from about 2 metres away.

Having said that, the court will reject the accused's defence and evidence that he never saw the deceased when his gun "accidentally discharged". Whichever way one looks at it, accused would have to be blind not to see the person he shot at such close range. Even if he had been about 10metres from the deceased, which by the way is unlikely, he still should have seen him. If not, and assuming he temporarily went blind, again which is unlikely, he should have heard the deceased groaning and crying for help. The totality of his defence and evidence in that respect is simply that it defies natural logic and science.

That brings the court to another vital piece of evidence which was not at all challenged by the accused. It comes up clearly in Jeffrey Ncube's evidence and is a natural reaction of a person in the deceased's circumstance soon after the shooting.

Jeffrey says that having heard a gunshot, he fired twice in the air to try and communicate his whereabouts to his colleagues. He then approached the direction of the gunshot. He found the deceased groaning and crying for help. He told him he was feeling hot. He asked him to

remove his shoes and trousers and then put him in the shade. He then said he had been shot by Bino. (emphasis mine)

According to Jeffrey, the deceased passed on about 45minutes from the time he heard the shot that was not fired by him. According to Petros, deceased passed on about 20 minutes after arrival at a clinic. The utterance by the deceased was clearly a dying declaration which apparently corroborates the evidence by Petros and Mutizwa.

The requirements of a dying declaration are clear from decided cases including *S* vs *Mukwambuwe* 2014 (2) ZLR 104 (H); See also, John Reid Rowland's *Criminal Procedure in Zimbabwe* (1997) at p 18-21.

In terms of s254 (1) of the Criminal Procedure and Evidence Act Chapter 9:07 a declaration made by a deceased person upon the apprehension of death is admissible when it would be admissible in English Law. In English Law, the requirements for admissibility of dying declarations are:

1. The person who made the statement must be dead at the time of the trial.
2. The trial must be for the murder or culpable homicide of the dead person.
3. The statement must relate to the cause of the deceased's death.
4. At the time he made the statement the declarant must have been dangerously ill and have been without hope of recovering.
5. The witness must have been a competent witness

Dying declarations are admitted in evidence as an exception to the rule against hearsay evidence. *In casu*, the requirements of a dying declaration are all present. In fact in *S* v *Mukwambuwe (supra)* where the deceased made utterances in almost similar circumstances, he died about 3 ½ hours after the utterances. The court held that the utterances would have been properly admitted as a dying declaration had the state called the witnesses to whom they were made to testify verbally rather than simply make formal admissions and produce the witness's statement in terms of s314 of the Code.

From the onset the accused's defence was, as already shown above, accidental shooting. He fared badly in testifying and showing the accident. On the other hand he also claimed self defence but did not bother to satisfy the requirements of self defence clearly laid out in section 253 (1) of the Criminal Law Codification & Reform Act, chapter 9:23;

The section provides as follows;

(1) Subject to this part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if-
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
- (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
- (c) the means he or she used to avert the unlawful attach were reasonable in all the circumstances; and
- (d) any harm or injury caused by his or her conduct –
  - (i) was caused to the attacker and not to any innocent third party; and
  - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

The accused seems to have been on a fishing expedition for defences and therefore would have been in problems trying to expand on that defence considering his evidence in court that he did not even see the person he shot. He clearly cannot defend himself against a non-existent person. His fishing for defences is also manifest when he realises that there is also evidence that Jeffrey Ncube's firearm also discharged. He then tries to major on that discharge and claims that

it is Jeffrey who may have shot the deceased. The court does not buy such a defence. In any case, the accused should give a defence, he cannot simply 'suggest' defences as he seems to have done. He cannot hide behind the rule that the state has the onus to prove.

The court will however rule out actual intention to kill. If the accused was that close and seeing the deceased as the court has ruled, he would have shot him in the head or chest if he actually meant to kill him. He did not. But by his own account the accused is trained in firearms and knows them better that the state witnesses. Whilst on the face of it shooting the thigh would not necessarily kill. Can it be said that the accused did not possibly foresee the possibility of death in the circumstances? Can it be said that when you shoot a person with a shot gun, with its shattering effect one did not see the possibility of death?

Having shot the deceased, he did not assist, instead, he scared Petros to flee, thereafter he also fled the scene leaving the deceased to bleed to death. He died minutes later only 20 minutes of arrival at the clinic. He would have died even earlier had Jeffrey not arrived. Death was foreseeable to him but he nonetheless went on to shoot and acted in a manner that even ensured the death thereafter by blocking assistance.

Accordingly, the accused is found guilty of murder with constructive intent.

Reasons for sentence

The accused's personal circumstances are that he is 42 years old. He is a family man with a wife and 4 children. He is a first offender.

The court will consider in assessing sentence that the accused spent six (6) months in custody before release on bail pending trial. Further, the court will take into account that during the bereavement period before burial the accused sent his aunt and sister to offer his condolences which was accompanied by assistance during that period. Although it was rejected by the deceased's family, the accused at least at that stage showed some remorse and a human face.

These courts have repeatedly emphasised the sanctity of human life. In this case a relatively young life was needlessly lost. The court will once more express its revulsion on behalf of society over such conduct exhibited by the accused on the day of the shooting.

Due to his conduct, not only an innocent life was lost, but the life of a young man in the course of his lawful duties – duties which according to his own version, the accused was supposed to compliment. Instead of staying steadfast in the path of good virtue, he was himself snaring animals. The court will deter others from acting recklessly when faced with the need for upholding the sanctity of human life. Imprisonment is clearly unavoidable but the court will consider the submission by counsel for the defence in as far as the length of sentence is concerned which submissions found support from the state counsel.

The accused is accordingly sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Dube-Tachiona & Tsvangirai, accused's legal practitioners