

KENNETH MATIMURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND WAMAMBO JJ
HARARE, 9 October 2018 and 30 January 2019

Criminal Appeal

E Chibondo, for the Appellant
F I Nyahunzvi, for the respondent

WAMAMBO J: The appellant was convicted of attempted murder as defined in section 189 as read with section 47 of the Criminal Law Codification Reform Act [*Chapter 9:23*]. In his notice of appeal appellant attacks the conviction only. The sentence imposed upon the appellant is 5 years imprisonment of which 3 years imprisonment was suspended on condition of good behaviour. The remaining 2 years imprisonment were suspended on condition of appellant performing community service.

The grounds of appeal can be summarised as follows:-

The Trial Court misdirected itself when it found that appellant was reckless when in fact he had taken steps to avoid injuring the complainant by firing warning shots.

The Trial Court misdirected itself when it disregarded the fact that a shotgun at a range of 60-70 metres could cause death only if it hit a vital organ.

The Trial Court failed to attach due weight to the investigator's evidence and also failed to realize that Allen Govha's evidence was fabricated. The facts of the matter which are common cause are as follows:-

On 29 November 2016 at Darwendale Dam, Nyabira the appellant a security guard employed at Irvodale fishing Co-operative was in a canoe patrolling. Appellant observed complainant and his colleague who were also aboard a canoe. Suspecting the two to be stealing his fishing nets he confronted them leading to the complainant and his colleague fleeing. Appellant shot complainant on his buttock using a shotgun.

Allen Govha whose evidence is alleged to have been fabricated is the complainant. Specifically because of this allegation by the defence his evidence will be closely scrutinised.

According to the complainant, appellant hastily approached him and his friend and upon reaching them aggressively placed his canoe stick in complainant's boat. Complainant removed the stick for fear that it may result in his canoe capsizing. Complainant intimated that they should move to shallow water. The appellant who was in possession of a firearm appeared as if he was about to load it leading the complainant to canoe towards the harbour. When the applicant's canoe was about 15 metres from the shore the appellant stood up and shot at the canoe twice leading to it capsizing. The Appellant was hit on the buttocks in the process. The Appellant fired a third shot in the direction where complainant's colleague had fled to. According to complainant appellant shot at his canoe from about 8 to 10 metres. Complainant dismissed the firing of any warning shots by the appellant and further dismissed allegations of having stolen any fish.

Benedict Tonderai Simuperi is the person who was in complainant's company when the above events unfolded. A close reading of his evidence reflects that he corroborated complainant's evidence in all material respects. There was a concerted attempt at discrediting the above two witnesses in cross examination although it bore no fruit. The witnesses remained consistent and indeed their evidence reads well.

The appellant's version is that he and his colleague, discovered that some of their fishing nets were missing. They started looking for the culprits who had stolen their fishing nets. Upon observing complainant and his colleague in their canoe the appellant approached them. He realised that the nets in complainant's canoe resembled their missing nets. An altercation ensued and while complainant and his friend moved away "one of them" used a catapult to attack the appellant and the complainant, resulting in the appellant being struck on the waist. The appellant fired in the air in a bid to stop complainant and his companion from using a catapult to attack them. He then fired at the canoe in order that the canoe would be damaged and stop complainant, and his colleague from fleeing.

Two defence witnesses Solomon Manatsa and Steven Gudubura also gave evidence. Steven Gudubura was of the considered view that, a shotgun can cause a person's death and that it is an obligation on the person who uses it to observe safety precautions. He further testified that at a range of 70 metres a shot gun can cause death or injury to a person.

Solomon Manatsa, seemed to favour the appellant's version and did not give evidence from an objective view for the most part, when he testified.

The medical report reflects that appellant had "multiple small wounds right sided region back and right, buttock with associated abdominal tenderness," that a sharp instrument was used the degree of force used was severe and that the injuries caused were serious.

Although, appellant insisted that he fired warning shots this was refuted by the complainant. It is noteworthy that the question was not posed to complainant's companion who was at the scene when the events in this matter unfolded.

Be that as it may firing a shotgun which issues out bullets with a broad range at a canoe with human occupants clearly created a deadly hazard.

The circumstances, did not call for such drastic action. Indeed appellant confirmed that his intention was to damage the complainants canoe so that water would enter it and the occupants would stop fleeing from him. Nothing is mentioned by appellant about the risk of killing the occupants of the boat. It was not proven in evidence that a shotgun can cause death from 60 to 70 metres only if it hits a vital organ. This appears to have been a misunderstanding of the evidence. In fact the evidence of Steven Gudubura, a CID Ballistics Forensic firearms identification officer, was to the effect that within a range of 70 metres a shot gun can "cause death or injury to a person."

There is no proof on record that complainant fabricated evidence. His evidence was tested and was also corroborated by his companion and the medical report.

We find that appellant was reckless when he fired a shotgun that struck complainant, because of the nature of the weapon, the distance between the two and the fact that complainant, was in a canoe and in water thus in a vulnerable position. Further we find that complainant posed no danger to appellant. The allegation that complainant or his companion used a catapult to attack appellant, was not asked of complainant's companion in cross examination. It was also feebly put to the complainant. It was clearly a red herring which in any case does not change the complexion of the case.

We find that by firing a dangerous weapon, a gun at complainant who was in a canoe, resulting in serious injuries, appellant must have foreseen the real possibility of killing the complainant and despite the risk attended thereto he proceeded with his action. Also see *The State v Anesu Chikerema* HH 317/17 and *State v Pheneas Sigauke* HH 745/17.

We find no fault, misdirection or error with the Trial Court's reasons for convicting appellant. We find that the conviction was a result of a holistic analysis of the evidence.

In the result we dismiss the appeal in its entirety.

HUNGWE J agrees.....

Jakachira and Company, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners