

REPORTABLE (29)

**MAXWELL BOWA
v
THE STATE**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
BULAWAYO, MAY 5, 2014 AND HARARE, JUNE 27, 2014**

M. Majuru, for the appellant

T. Makoni, for the respondent

GARWE JA: This is an appeal against conviction on a charge of murder and the sentence of death imposed by the High Court at Gweru on 17 September 2013.

The facts of this case which are either common or were not seriously in dispute during the trial proceedings are as follows. The appellant was employed as a senior game ranger by the Department of National Parks and Wildlife. Sometime in February 2012 an Assistant Commissioner with the Zimbabwe Prison Services was arrested at a road block whilst carrying ivory. On his arrest he implicated one Tanaka Nyoni and Moses Makwavarara as the source of the ivory. Thereafter further information was received by the Department to the effect that one Makwavarara operated as the gunner, Lennon Nkosana as the carrier and Tanaka Nyoni as the sponsor of the illegal hunting syndicate. Lennon Nkosana is the deceased.

On the day in question, that is, 12 June 2012, a group of ten parks rangers accompanied by two police officers proceeded to Simuchembo area of Gokwe North in an

operation to arrest the suspected poachers. Nine of the game rangers were armed with rifles. Simuchembo area is within walking distance of a number of national parks areas. It is common cause that on arrival at Tanaka Nyoni's homestead at about 1.00am, the rangers discovered that Tanaka Nyoni was not present. On further questioning the employees present, namely, Africa Dakura, Tichaona Makoni and Tichaona Ndlovu, the game rangers formed the impression that Tanaka Nyoni was putting up at his father's place of residence. With the employees, the rangers proceeded to Tanaka Nyoni's father's homestead. On arrival they split into two groups in order to secure two paths that exited from the homestead. It is common cause the appellant was in the group that first approached the homestead. It was at that stage that Dakura's wife indicated a house in which Tanaka Nyoni was believed to have been sleeping. Tanaka Nyoni's vehicle was also parked at the homestead. What happened immediately outside the house was in dispute but it is clear that two persons ran out of the hut – one after the other - and disappeared into the darkness. It is also common cause that the deceased, Lennon Nkosana, also came out of the same hut after which the appellant then fired his firearm hitting him in the chest and killing him instantly. The gunfire awakened other occupants of the homestead including the mother of the deceased who, on discovering that the deceased had died, challenged the rangers not to go away and grappled for possession of the firearm with the appellant. The rangers together with the two police officers and Tanaka's employees managed to flee from the homestead. They eventually proceeded to Chitekete Police Base where the appellant was arrested the following morning and his weapon confiscated.

As indicated earlier the above facts were largely common cause or at least not seriously in dispute during the trial. However the circumstances surrounding the actual shooting of the deceased were the subject of much controversy. The appellant claimed that

he believed he was under attack but such claim was rejected in its entirety by the trial court. In order to determine whether the court *a quo* correctly assessed the evidence before it, it became necessary for this court to analyse relevant portions of the evidence led before the court.

Four witnesses gave evidence for the State. These were Lesbern Nkosana, Africa Dakura, Teddy Nhidza and Aaron Chiramba. For the defence, the appellant, Archbat Zhou and Jonathan Mashava gave evidence. The summary of their evidence follows;

Lesbern Nkosana was the deceased's brother and was sharing a bed with the deceased. He was twenty (20) years old at the time. In an inner room were their younger brothers Liverton, Luxon and McDonald. Armed game rangers forcibly opened the door and ordered everyone to lie on the floor. He and the deceased were then assaulted as the rangers asked where Tanaka was. As the rangers illuminated the inner room in which their younger brothers were sleeping, Luxon and McDonald, aged 16 and 17 respectively, came out of the inner room and walked out. The deceased immediately followed them and shortly thereafter there was the sound of a gunfire. When he went out, he found the deceased lying on the ground about three metres from the door bleeding from the chest. He appeared to have two chest wounds. He denied that the deceased was holding an axe at the time he exited from the house. He told the court that although the moon had risen, visibility was not good. He admitted that his mother followed the rangers and grabbed them, telling them they were not going anywhere after killing her son. He denied that Tanaka was present at the homestead, or that he was one of the two that ran out of the house.

Africa Dakura was employed by Tanaka Nyoni and was staying at Tanaka Nyoni's homestead together with his wife. He shared the residence with Tichaona Makoni and Tichaona Ndlovu aged twenty two and fifteen years respectively. It was his evidence

that whilst asleep game rangers came into the house where he was sleeping with his wife and child. They assaulted him with sticks and booted feet asking where Tanaka Nyoni was. When they told the rangers that Tanaka was not present, he, together with his wife and the two young men, were ordered to accompany them. He told the court that on the way the rangers would assault him, asking him where the elephant tasks were as well the firearm that was being used to hunt elephant. He admitted that they found Tanaka's vehicle parked at his father's homestead that night, having been brought there by Lesbern, his younger brother and that it was the same vehicle that was used the following morning to ferry the deceased's body to the police station.

Teddy Nhidza was one of the two police officers who accompanied the rangers. He was made to understand that the rangers wanted to arrest one Tanaka Nyoni who was suspected of dealing in ivory and possessing a firearm. He denied that Africa Dakura was assaulted. It was his evidence that when they proceeded to Tanaka Nyoni's father's residence they had been told by Dakura and the two young men, both known by the name Tichaona, that he was there. He denied seeing any axe or other weapon at the scene where the deceased was shot. He admitted that there was a National Park located about three to four kilometres from Tanaka Nyoni's homestead and that the police station was receiving many reports of the killing of elephant. During the questioning of the employees, information was given by one of the two young men to the effect that the firearm belonging to Tanaka had been collected by a person called Ndombolo. He denied hearing any warning shots before the deceased was shot. It was also his evidence that the vehicle that Tanaka Nyoni normally used was parked in front of his father's homestead where the incident occurred. All in all he recovered a total of six (6) spent cartridges.

The State also called Aaron Chiramba who was the member-in-charge of Chitekete Police Base. It was him who arrested the appellant the following morning and recovered what he called a commando rifle. The trigger of the rifle could be positioned on safe, rapid and automatic. On rapid it would only fire one bullet at a time whilst on automatic it would release many bullets at the same time. He confirmed that there were a number of national parks close to the Police Base.

At the instance of the court Edwick Nkosana, the mother of the deceased was called. She explained that although her family used the name Nkosana and Nyoni interchangeably, Nkosana was the surname and Nyoni the totem.

In his defence, the appellant told the court that their department had received information that Tanaka Nyoni was engaged in poaching together with his younger siblings. On the fateful night it was Africa Dakura who indicated that Tanaka Nyoni was not present at his homestead and that he had proceeded to his father's homestead. It was Dakura and his wife Agnes and the two young men both by the name Tichaona who led them to Tanaka's father's homestead. He confirmed that the group of rangers split into two groups as they approached the homestead. It was his group that approached the house that had been indicated by Agnes and when he knocked and indicated that he and his colleagues were from National Parks, the door was not immediately opened. It was only opened when he knocked for the second time at which stage one man opened the door, came out and ran away. He was followed by another, who appeared to be holding a gun. He then fired warning shots and it was then that the deceased came out holding an axe and walked in his direction. Although he told the deceased to throw down the axe the deceased continued walking at a fast pace in his direction at which stage he fired toward the hand holding the axe. In the process however the

deceased was hit in the chest and he fell. He was thereafter accosted by the deceased's mother and realising that a grave situation had arisen, he and the other rangers then left the homestead running. He denied that on arrival at the homestead, they forcibly opened the door and went in. This would not have been wise because they were aware that Tanaka Nyoni whom they were looking for was armed. He confirmed that his firearm was on automatic. He denied that he intended to kill the deceased. Although he did not personally know Tanaka Nyoni, he was aware that Tanaka operated in a ring which included his siblings and one Moses Makwavarara. It was his evidence that the other rangers in his company must have seen the axe that the deceased dropped. It was also his evidence that the two men who ran out of the house before the deceased did so had taken a different direction whilst the deceased, on coming out of the house had advanced towards him.

Jonathan Mashava told the court he is in the investigations and security section of the Parks and Wild Life Management Authority at Gokwe. He was part of the group that went to apprehend persons suspected to have been involved in the poaching of elephants at Chirisa Game Park four days earlier. The appellant was his senior during the operation. Amongst the poachers to be apprehended was one Tanaka Nyoni who was known in poaching circles as "TK". They also intended to apprehend one Ndombolo, the deceased, Moses Makwavarara and Jimmy Sibanda. It was Africa Dakura who advised them that since the arrest of the Prison Service Assistant Commissioner in February 2012, Tanaka Nyoni was no longer putting up at his homestead but rather at his father's homestead. It was for that reason they proceeded to Tanaka Nyoni's fathers' homestead where Dakura's wife indicated the house in which Tanaka Nyoni was supposed to be sleeping. He did not get the opportunity to see the deceased's body after the shooting. It was his evidence that Chirisa Safari area was about ten kilometres due south of Tanaka Nyoni's residence, whilst Chizarira

National Park was about three kilometres due west of the homestead. It was also his evidence that poaching is a violent offence and very often involves the use of firearms. For that reason they are equipped with AK 47 assault and other rifles to defend themselves. It was upon interviewing Assistant Commissioner Mudzamiri of the Prison Service who had been found in possession of ivory that he learnt that Moses Makwavarara acted as the gunner, the deceased as the carrier and Tanaka Nyoni as the sponsor. This information was treated as classified and was not available generally to the other rangers. However, the names of the suspects were discussed at the Police Base that night before the rangers left for Simuchembo area. He told the court he personally knew both Tanaka Nyoni and the deceased Lennon Nkosana, who was tall and wore dreadlocks.

Archbat Zhou was, like the appellant, a senior ranger with the Department of National Parks and Wild Life. He had been a ranger for 24 years. He was involved in the operation that resulted in the death of the deceased. He knew both Tanaka Nyoni and the deceased as persons who were suspected of engaging in poaching elephant. On the night in question he saw two young boys come out of a house at Tanaka Nyoni's father's homestead. The house had been indicated to them by Agnes, Dakura's wife. He was standing near the entrance at the time the appellant knocked. When the door was opened, he noticed there were two men sleeping in the outer room and three in the inner room. He walked back in order to alert the other group of rangers, leaving the appellant and Mabushe standing near the entrance. It was then he heard gunshot - at least seven rounds - and he went back. He found the deceased lying down and close to his feet was an axe. He went back to the other rangers who were on the perimeter of the homestead and told them that a man had been shot. When they went back into the homestead a number of people came out of the adjacent houses and, fearing for their lives, they hurriedly left the homestead.

In its judgment the court *a quo* rejected the appellant's claim that he was protected by the provisions of s 3 of the Protection of Wild Life (Indemnity) Act, Chapter 20.15. The court was of the view that a person in the position of the appellant would be indemnified where "for instance (sic) he comes across poachers who resist arrest and threaten to harm him or threaten to kill him." In view of its finding that the deceased was not armed and was not resisting arrest but was simply running out of the house to avoid further assaults by the other rangers inside, the court found that the appellant was not entitled to such indemnity. On the appellant's claim of self defence, the court was of the view that the appellant was not defending himself as the deceased was not armed and was running away to avoid further assaults. The court accordingly rejected that defence as well and consequently found the appellant guilty of murder with actual intent, and, upon finding no extenuating circumstances, imposed the ultimate sentence of death on the appellant.

In this appeal the appellant has attacked both the conviction for murder with actual intent and the finding that there were no extenuating circumstances. In particular the appellant has submitted that the court *a quo* misdirected itself in relying on the evidence of Lesbern Nkosana and Africa Dakura and in failing to appreciate that Lesbern Dakura was the deceased's brother as well as the brother of Tanaka Nyoni and therefore not an independent witness. The appellant has further attacked the evidence of the two witnesses on the basis that they were also suspected of complicity in the poaching of elephant and should therefore have been treated as accomplices. Further the appellant has submitted that both the defence of self defence and the defence of indemnity under the Protection of Wild Life (Indemnity Act) should have succeeded.

On a careful consideration of the evidence given during the trial, it is clear that the appellant and his colleagues were of the opinion that Tanaka Nyoni, together with some of his brothers and other persons, were involved in the poaching of elephant from the nearby national parks. It is also clear from the evidence that approximately four days before this operation elephant had been killed in a national park and it was believed that it was Tanaka Nyoni and his accomplices who were involved in the killing. The appellant and the other rangers were also aware that Tanaka Nyoni was in possession of a firearm. It was for that reason that a decision was taken to proceed to Tanaka Nyoni's homestead in the dead of night in order to arrest him and possibly secure the firearm and the ivory. The evidence of Africa Dakura is clear that when the rangers came, not only were they demanding to know whether Tanaka Nyoni was present at the homestead, but also the whereabouts of the firearm and ivory. It is apparent from all this that the rangers believed they were going after suspects who were armed. It was for that reason that a total of ten rangers, nine of whom were armed with rifles, were involved in this operation.

It was common cause that two persons ran out of the house in which Tanaka Nyoni was believed to be sleeping. When the deceased ran out and was shot, the only persons outside the house were the appellant and other game rangers. Lesbern Nkosana, whose evidence was believed by the court, was still inside the house. He did not witness the shooting although it appears he went outside immediately after the sound of gunfire to ascertain what was taking place. The evidence also established that although there was moonlight visibility was poor outside the house. It was never clearly established how, given such poor visibility and the commotion that ensued he would have concluded that he had not been in possession of an axe just before the shooting.

Given the overall circumstances of this case, it seems to me that there may be substance in the submission by the appellant that the court *a quo* misdirected itself in believing the evidence of Lesbern Nkosana without properly analysing it and considering the probabilities. I would agree that in all the circumstances, the evidence of Lesbern was not only suspect but also did not accord with the probabilities.

The appellant is a senior ranger in the Parks and Wild Life Department and had been employed as a ranger for thirty five (35) years. If indeed the deceased was not armed, why would the appellant have fired at him in the manner he did? It is common cause two of his younger brothers ran out of the house, but were not shot. The appellant would have been a few metres from the door when the two ran out and disappeared into the darkness. Had it been a case of the appellant being trigger happy, he would, in all probability, have fired at the two young men as well. He did not do so. The probabilities are such that the deceased must have conducted himself in a manner that made the appellant believe that he was in danger. In my view there can be no other explanation for the events that unfolded. Indeed Archbat Zhou told the court *a quo* that he saw an axe lying close to the deceased's feet. Whilst accepting that Archbat Zhou is the appellant's workmate, that the appellant was his senior at the workplace and that he may have reason to lie and protect the appellant, his version was not shown to be untrue.

In coming to the conclusion that the deceased was not armed with an axe and that the appellant was never under any threat the court *a quo* in my view misdirected itself. There was no credible evidence to the contrary and the probabilities indicated the possibility that the deceased must have conducted himself in a manner that must have convinced the appellant that his own life was in danger. On the evidence led before it, the court could not

have been satisfied beyond a reasonable doubt that the claim by the appellant was entirely false and stood to be rejected out of hand. At the very least, the court should have concluded that there was some doubt as to what happened exactly, and, in keeping with the principle applicable in these circumstances, resolved the doubt in favour of the appellant. In this regard I agree wholeheartedly with remarks of SANDURA JA (as he then was) in *Edward Chindunga v The State* SC 21/02 that:-

“..... In my view, the appellant gave a reasonable explanation of what he did during the night in question. That explanation cannot be rejected out of hand.

As I said in *S v Kuiper* 2000(1) ZLR 113(S) at 118B-D:-

“The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373, the learned judge said:-

‘... no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ...’

Similarly, in *R v M* 1946 AD 1023, DAVIS AJA said the following at 1027:

‘And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true ...’”

In this regard attention is also drawn to *S v Manyika* 2002(2) ZLR 103(H), 105 A-G; *Isaac Mubaiwa v The State* SC 33/98 at page 3 of the cyclostyled judgment.

I am satisfied that the court *a quo* misdirected itself in completely rejecting the claim by the appellant that the deceased came out holding an axe and that although he warned the deceased to drop the weapon, the deceased continued running towards him, as a result of which he then fired at him. There was a real possibility that the claim may have been true.

In the light of the above finding the issue that now arises is whether the provisions of the Protection of Wild Life (Indemnity Act), [Chapter 20:15] (“The Act”) apply to the appellant. The Act in s 3 provides:-

“3. Indemnity

No criminal liability shall attach to any person who, at the relevant time, was an indemnified person, in respect of any act or thing whatsoever advised, commanded, directed or done or omitted to be done by him, whether before, on or after the date of commencement of this Act, in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life.”

The pertinent question therefore whether the killing of the deceased was done “in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life.”

In coming up with the above provision, it must have been the intention of the legislature to provide indemnity to armed personnel in the employ of the State who are involved in anti-poaching activities in respect of conduct which might otherwise attract criminal sanction if such conduct is done in good faith for the purpose of or in connection with the suppression of poaching activities. In my view the Act recognizes the fact that such personnel may find themselves in situations in which decisions have to be made in a split second in order to subdue, arrest or contain dangerous persons involved in poaching activities. As long as the conduct is *bona fide* and intended to suppress poaching of wild life such personnel would be indemnified.

It is clear from the above provision that a person claiming indemnity must satisfy two important requirements. The first is that such person must have been acting in good faith. The second is that the act done by him must have been for purposes of or in

connection with the suppression of the unlawful hunting of wild life. These two requirements must be read in conjunction with each other. If good faith is lacking or if the act is not for the purposes of or connected with the suppression of the unlawful hunting of wild life then such indemnity would not attach to such person. But what do these two requirements entail?

Dealing firstly with the question of good faith, I can do no better than repeat the remarks of KEKEWICH J in *Mogridge v Clapp* 1892 3 Ch 382 CA. At page 391 the learned judge stated:-

“..... Now, what does “good faith” mean? What is meant by those two English words which are the exact equivalent in every sense of the expression which is perhaps more commonly used, though not more correctly or properly, *bona fides*? I think that the best way of defining the expression, so far as it is necessary or safe to define it, is by saying that it is the absence of bad faith – of *mala fides*”

In short good faith is the subjective state of mind that a certain set of facts genuinely exists on the basis of which it becomes necessary to act in a manner most right thinking people would consider appropriate given those facts. A disproportionate reaction given a particular set of facts may well justify an inference that such reaction was not actuated by good faith.

On the other hand the words “for the purposes of or in connection with the suppression of the unlawful hunting of wild life” must be given a wide interpretation and would include anything linked to, related to or connected with attempts to suppress the unlawful hunting of wild life. The words “for the purpose of” have been interpreted to refer to the main or dominant purpose – *Stobart v Codd, N.O.* 1965(2) S.A. 253, 258 A. The words “in connection with” are wider. As stated by WILLIAMSON J in *S v Mpetha and Others* (1) 1982 (2) S.A. 253, the words are not of precise connotation. At page 257 C-D, he remarked:

“They indicate a relationship between two things, but the degree of relationship or connection is undefined and indefinite. These words can quite properly cover the whole spectrum of relationships from a close and direct relationship, at the one end of the scale, to a remote and indirect relationship, at the other end. The term is an elastic one and the context and purpose of the statutory provision must be considered in order to assess the degree of elasticity appropriate to the case.”

In suggesting a wide interpretation the learned judge further remarked at page

257 H:-

“It is surely not to be presumed that, when the Legislature was trying to be fair to an accused, as in my opinion it manifestly was in the case of this section, it intended a narrow construction to be put upon these words which could, and probably would, result in unfairness to an accused.”

In the present matter the killing of the deceased, though unfortunate, was the result of a *bona fide* attempt to apprehend persons who were believed to be armed and involved in poaching activities. In my view the court *a quo* should have found that such indemnity attached to the appellant and consequently a verdict of not guilty entered.

In view of the conclusion I have reached above, it becomes unnecessary to consider whether the appellant successfully demonstrated that he was also acting in self defence. However comment is called for on one further aspect of this case. Even on the basis of the facts it found proved, the court *a quo* was clearly in error in finding that no extenuating circumstances existed. The circumstances surrounding the death of the deceased in my view provided mute evidence of extenuation. Against the background already given in this judgment, the incident occurred on the spur of the moment during the execution of official duty, in poor visibility and in circumstances in which the appellant may have genuinely believed that harm was likely to befall him.

In the circumstances, the appeal is allowed and the conviction and sentence are set aside.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Chinongwenya & Zhangazhe, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners