REPORTABLE ZLR (54)

Judgment No. SC. 57/06
Crim. Appeal No. 74/06

FRANCIS MHOMHO v THE STATE

SUPREME COURT OF ZIMBABWE
MALABA JA, GWAUNZA JA & GARWE JA
HARARE, OCTOBER 10, 2006 & JANUARY 23, 2007

E T Gara, for the appellant

J Makwakwa, for the respondent

MALABA JA: On 25 October 2003 the appellant was charged before the High Court with murder, it being alleged that on 17 December 2003 at or near Nyamapanda Border Post he unlawfully and intentionally killed one Shorai Domingo by shooting him in the back with a gun. The appellant pleaded not guilty. He proferred the defence of lawful killing in terms of s 42(2) of the Criminal Procedure and Evidence Act *[cap 9:07*] ("the Act") and alternatively prayed that he be found guilty of culpable homicide.

The case proceeded on the basis of a statement of agreed facts. The statement read as follows:

> "1. The accused is Francis Mhomho a private soldier of the Zimbabwe National Army (ZNA) serving with 2.2 Infantry battalion.
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> 2. On 17 December 2003 the accused was on joint army and police border patrol duties along the Zimbabwe-Mozambique border near Nyamapanda Border Post.

3. At around 2100 hours the accused together with constable Leonard Lamazolo laid an ambush at a point which was suspected to be used by illegal border crossers.

4. At the same time Shorai Domingo (the now deceased) and one Trymore Chirenje approached the position where the accused and constable Lamazolo were hiding.

5. On seeing the two the accused ordered them to approach his position. At the same time he moved forward towards them.

6. When they met with the accused one of them suddenly attacked the accused and tried to wrestle his service rifle.

7. During the scuffle the accused lowered his rifle and cocked it.

8. On seeing the policeman the two stopped attacking the accused and fled.

9. In order to stop and arrest them the accused fired one shot to the side of the direction of flight of the person he was able to see because of his bright clothing.

10. After firing the shot the accused heard somebody cry out and on investigation he discovered that the shot had struck the deceased.

11. The other persons in the company of the deceased fled into Mozambique and only returned to Zimbabwe when they heard of the deceased's death.

12. The post mortem report and ballistics report respectively annexed hereto as Exhibit 'A' and 'B' established that the deceased's death was caused by the shot fired from the accused's rifle."

The bullet entered the deceased's body at the back in the lamber region and exited from the sternum. It was contended on behalf of the appellant that the facts showed that his acts satisfied the requirements of s 42(1) of the Act entitling him to the protection under s 42(2). Section 42 of the Act provides that:

"1. If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted –

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees;

the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome the resistance or to prevent the person concerned from escaping.

2. Where a person whose arrest is attempted is killed as a result of the use of justifiable force in terms of ss (1), the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule."

The first argument urged on the court was that the offence the deceased and his compatriot had committed was the assault on the appellant, in that they attacked him and attempted to disarm him of his service rifle. Assault is a First Schedule offence. The learned Judge was of the opinion that the deceased had committed an immigration offence for which he would have been arrested. That offence was not a First Schedule offence. The learned Judge held that the appellant was in the circumstances not entitled to the protection under s 42(2) of the Act.

The appellant was found guilty of culpable homicide on the ground that in firing the shot that killed the deceased to the side of the person he could see without taking any precaution to ensure that the other person he could not see, but knew was in that general direction, he acted negligently. The learned Judge said :

"We note that the accused fired only one shot, there was no warning shot fired and that shot was not directed either into the air or onto the ground to constitute a warning shot. He was aware that there were two people who were fleeing from him and by firing to the side he took a calculated risk that one of the people was not in the direction of this shot."

He was sentenced to five years imprisonment with labour, of which 2 yrs was suspended for five years on conditions of good behaviour. The appellant appealed with leave of the court *a quo* against both conviction and sentence.

Against conviction the contention was that the learned Judge misdirected herself when she held that the protection under s 42(2) of the Act was not available to the appellant because the offence the deceased would have been arrested for was not a first Schedule offence. The second ground of appeal was that having, found as a fact that the appellant fired the shot to the side of the fleeing person he was able to see, the learned Judge misdirected herself in holding that he acted negligently.

It appears to me that the agreed facts show that at the time the appellant discharged the firearm the deceased and his compatriot had committed the offence of assault in addition to the contravention of s 42(2) of the Immigration Act *[Cap 4:02]*. To the extent that the learned Judge held that the deceased had not committed a First Schedule offence for which he would have been arrested she misdirected herself. I, however, do not think that the finding of a misdirection on the part of the learned Judge confers on the appellant the protection afforded by s 42(2) of the Act.

The authorities show that for the appellant to have invoked the protection afforded by s 42(2) of the Act it ought to have been shown that he had taken other reasonable steps in the attempt to prevent the deceased from escaping before resorting to the use of the force that killed him. Lansdown and Campbell *Criminal Procedure and Evidence* "Vol V at p 205 say that:

"The mere fact that the suspect flees does not justify any person in shooting him. The person endeavouring to effect an arrest must first use other means to capture him, and he can resort to a firearm only if he can use no other means whatever to capture him. If circumstances permit, an oral warning should be given, then a warning shot into the ground or in the air, and thereafter the arrestor should try to shoot the suspect in the legs. Each case must, however, depend on its merits in order to determine whether the arrestor had acted reasonably in terms of the subsection, the question being whether he could reasonably have prevented the suspect from escaping otherwise than by killing him."

In this case the appellant did not shoot at a person he was having sight of. He could not have been firing to prevent a person out of his sight from escaping. The appellant simply fired the only shot into the dark without having taken care to ensure that the person whose escape he would have been entitled to prevent was there or not. He does not say the only shot fired was intended to be a warning shot. It was directed at the level of the chest. There were no shots fired into the air or to the ground. The appellant appears to have simply fired the shot in the direction of the two people just because they were fleeing. He clearly acted precipitately and pre-maturely took the drastic action of shooting the deceased.

The learned Judge was correct in the finding that the appellant was negligent in that he failed to take reasonable steps to ascertain the whereabouts of the deceased before discharging his firearm. In *S v Burdett* 1996(2) ZLR 658(5) the accused was found to have committed a *bona fide* error of fact in that he had fired a shot in the direction of the deceased believing that the deceased was not there. It was nonetheless held that he acted negligently. See also *S v Chikutu* 1996(1) ZLR at 702–707.

The appellant was correctly found guilty of culpable homicide. The appeal against conviction must fail.

On sentence, it was argued that the sentence is manifestly excessive as to induce a sense of shock. There is merit in the submission. The sentence has not adequately taken into account the fact that the appellant committed the offence in circumstances in which had he been less precipitous in his actions the killing of the deceased would have been lawful. He was on duty at the time enforcing the law.

The evidence placed before the trial court was that the appellant had performed his duties diligently on previous occasions, such that what happened on this day must truly have been out of character and bound to traumatise him so far as it led to a premature termination of a promising career in the Army.

Whilst there is need to emphasise in the sentence the sanctity of life and the fact that those who carry firearms in the execution of their duties must always remember that these are extremely dangerous weapons, the overall sentence must adequately reflect the appropriate balancing of the interests of society against those of the accused. It appears to me that this is a case in which it was not necessary to suspend a portion of the sentence of imprisonment.

The appeal against conviction is dismissed. The appeal against sentence is allowed and the sentence imposed by the trial court is set aside and substituted with a sentence of eighteen months' imprisonment with labour.

GWAUNZA JA: I agree.

GARWE JA: I agree.

Pro-deo