

M v THE PEOPLE (1979) Z.R. 107 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND BRUCE-LYLE, JJ. S.
19TH DECEMBER, 1978, AND 3RD JANUARY, 1979
S.C.Z. JUDGMENT NO. 1 OF 1979

Flynote

Criminal law and procedure - Murder - Justifiable homicide - When defiance available.

Headnote

The appellant was convicted of murder.

The appellant was a trained soldier and a member of ZPRA, an army of liberation of the Patriotic Front. On the day the deceased met his death the appellant was on duty in a ZPRA camp guarding certain spies including a number of Selous Scouts of whom the deceased was one. Every guard had been given strict instructions by their superiors to ensure that none of the persons being guarded escaped. His orders were that in the event of any such person attempting to escape the guard was to fire one warning shot and, if ignored, to shoot the person. It was alleged that if any prisoner succeeded in escaping, the guard would be liable to the death penalty.

The deceased attempted to escape, and was shot and killed by the appellant after failing to stop when two warning shots were fired. On appeal, counsel for the appellant urged the court to consider the defence of justifiable homicide.

Held:

- (i) The defence of justifiable homicide is available to a person who uses reasonable force to prevent the escape of an enemy of the Republic of Zambia.
- (ii) When considering the defence, the question is one of what was reasonable in the particular circumstances of the case and this includes taking into account all the circumstances of the case, including the nature and degree of force used, the seriousness of the evil to be prevented, and the possibility of preventing it by other means.

p108

- (iii) Failure to stop the deceased from escaping could not only have placed the appellant's life in jeopardy, but the security of Zambia could have been endangered. The appellant was justified in taking the deceased's life

For the appellant: R.O. Okafor, Legal Aid Counsel.

For the respondent: R.E.M. Mwape, Senior State Advocate.

Judgment

SILUNGWE, C.J.: delivered the Judgment of the court.

The appellant was convicted of murdering Mbasera Lutho on 1st September, 1977. As the learned trial judge properly found, there was no dispute as to the facts.

The appellant is a trained soldier and a member of ZPRA - an army of liberation belonging to the political wing of the Patriotic Front led by Mr Joshua Nkomo. On the day the deceased met his death, the appellant was on duty in a ZPRA camp guarding certain spies including a number of Selous Scouts of whom the deceased was one. Selous Scouts were/are known agents of the armed forces of Rhodesia. The appellant was armed with a firearm during the performance of his guard duties. Every guard, including the appellant, had been given by ZPRA superiors strict instructions to ensure that none of the persons being guarded escaped. In the event of any such person attempting to escape the guard was under an order to fire at least one warning shot and, if the person trying to escape failed to stop, the guard was to shoot at him. It was alleged that should an escapee succeed in getting away, the guard would be liable to the death penalty.

Whilst on guard duties on the material date, the appellant had occasion to permit all the Selous Scouts to come out of the guard-room between 0800 hours and 0900 hours so that they could warm themselves in the sun. It so happened that the deceased was the last to come out and that as soon as he did so he took to his heels. The appellant who was standing at the side of the door of the guard-room then gave chase and fired two warning shots at the ground but the deceased's flight continued. The appellant then fired at the deceased's legs but the deceased still continued to run away. The appellant kept on firing at the deceased until the latter fell down. The deceased was then taken back to the guard-room where he died shortly afterwards.

A post-mortem examination on the body of the deceased disclosed two bullet wounds on the trunk of the body and one on the chin, the cause of death being due to haemorrhage and shock.

On the evidence before the court the learned trial judge made the following findings of fact:

" . . . that the accused was at the material time a member of ZPRA, an Army attached to the Patriotic Front and led by Mr Joshua Nkomo; that ZPRA is engaged in hostilities with the armed forces of Rhodesia of which the Selous Scouts form part; that on the 1st September 1977, the accused was a guard at camp run by ZPRA with orders to shoot persons who tried to escape, if a warning

p109

shot was ignored . . . that the deceased was a member of the Selous Scouts under the guard at camp on that day that he attempted to escape and was shot and killed by the accused after he failed to stop when two warning shots were fired by the accused . . . and that the guards are issued with firearms."

Although in the court below learned counsel had submitted that this was a case of excusable homicide, only the defences of ignorance and compulsion were considered in the judgment and found not to avail the appellant. On appeal to us learned counsel for the appellant relied on the

defence of justifiable homicide and urged this court to acquit his client. Justifiable homicide is of several kinds. It includes, for instance, the due execution of public justice in putting a person to death in pursuance of a legal sentence, and, its commission for the advancement of public justice such as the killing by a jailer of a prisoner for the sake of preventing an escape from lawful custody, to mention but a few. In our considered view the defence is available to a person who uses reasonable force to prevent the escape of an enemy of the Republic of Zambia.

In all cases of justifiable homicide the question is simply one of what was reasonable in the particular circumstances of the case. In considering what was reasonable the court is to take into account all the circumstances of the case, including in particular, the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means. It would not be reasonable to cause death unless it were necessary to do so in order to prevent the crime or effect the arrest and the evil which would follow from failure to prevent the crime or effect the arrest is so great that a reasonable man might think himself justified in taking another's life to avert that evil. (*See Halsbury's Laws of England*, 4th Ed., Vol. 11 para. 1179).

Here, failure to stop the deceased could not only have placed the appellant's life in jeopardy, but more importantly, it is a notorious fact that the security of Zambia could have been endangered. Thus the consequences flowing from the deceased's successful escape could have been of such gravity and magnitude to the appellant, to his colleagues and to Zambia, that he was justified to take the deceased's life in order to avert that evil.

The trial court's failure to consider that the appellant might have been justified in taking the deceased's life so as to avert the evil was a misdirection. Since we are not in a position to say whether the trial court must inevitably have convicted had it not so misdirected itself we are unable to apply the proviso to s. 16 (1) of the Supreme Court Act.

The appeal against conviction is allowed, the conviction is quashed and the sentence set aside.

Appeal allowed
