ELISHA MALUME TEMBO v THE PEOPLE (1980) Z.R. 209 (S.C.)

SUPREME COURT
KAPEMBWA, AG. CJ, GARDNER, AG. JCD AND CULLINAN, AG. J.S.
1ST JUNE, 1979 AND 24TH JANUARY, 1980
S.C.Z.JUDGMENT NO. 1 OF 1980

Flynote
Criminal law and procedure - Murder - Self defence - Shooting - Principles to be Applied in determining reasonableness.

Headnote
There was a disturbance in the appellant's chicken run and the deceased, a servant from next door went unarmed into the chicken run to find out the cause. In so doing he presumably frightened away a former intruder who was the fully dressed man seen running away behind the servant s quarters by the appellant.

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Having seen one man run away, the appellant went back to his house and obtained a pistol which he fired into the air as a warning. When he received no reply to his challenge of who is there, he walked about forty-five metres towards the chicken run until he saw a dark figure inside the run at whom he fired.

The trial judge found that the shooting of the deceased was a use of force wholly out of proportion to the necessities of the situation. He convicted the appellant and sentenced him to three years' imprisonment with hard labour for manslaughter. On appeal:

**Held:**

(i) In order for the appellant to succeed in justifying his shooting, of the deceased, it is necessary for his mistaken belief and his action to be reasonable.

(ii) In considering whether the appellant was reasonable in assuming that he was in danger to such an extent that it was necessary to shoot at the figure, the court should distinguish between a man who is attacked and has to decide how to defend himself in the anguish of the moment and a man who has heard a disturbance in an out-building at a distance and has had time to challenge his intruder and also the court should consider the difference between these circumstances and those in which the occupants of a dwelling house hear a physical assault on an entrance at their house.

(iii) In the circumstances in which the appellant found himself, he was not faced with a moment of unexpected anguish such as that which would be experienced by a man subjected to direct assault and his belief that the intruders were armed robbers likely to attack him was unreasonable.

**Cases referred to :** 143
(1) Wasamunu v The People (1978) Z.R. 143
(2) Benmax v Austin Motor Co. Ltd (1975) A.C. 370.
(3) Challoner v Williams & Croney (1975) Lloyds Law Reports 124.
(4) Palmer v R. [1971] All E.R. 1077.
(5) R. v Mckay (1957) V.R. 560.
(6) The People v Trywell Julius Phiri HP/175/1972 (Unreported)
(7) Mulenga v The People (1966) Z.R. 118.
(8) R. v Scully 1 C. & P. 319.

For the appellant: E. J. Shamwana, S.C., Shamwana and Co.
For the respondent: K. C .V. Kamalanathan, Senior State Advocate.

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Judgment
**GARDNER AG. D.C.J.:** delivered the judgment of the court.

The appellant was charged and convicted of manslaughter and

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sentenced to three years' imprisonment with hard labour. The particulars of the charge were that on the 19th May, 1978, at Lusaka he unlawfully caused the death of Rhodwell Sinyangwe.

The prosecution evidence was to the effect that, a short while after midnight on the day in question, PW2, a neighbour of the appellant in Arakan Barracks, Lusaka, heard noises made by ducks, chickens and dogs, so she called for her servant, the deceased, who opened his window in the servant's quarters. She told him to find out what had caused the noises, and she then returned to bed. Later she heard a loud noise and went outside her house and saw two people standing in or near her neighbour's chicken run. She then again returned to her bedroom. A short while later, after hearing a shot and then a second shot, she went out of her front door and saw the appellant and his family running to and fro. She then went into the garden of the appellant's house where she saw her servant, the deceased, covered with blood and with his eyes closed. The deceased was put in the appellant's car and driven away.

PW5, an army medical officer stationed at Arakan Barracks, was called in the middle of the night by the appellant to go to the camp hospital, where he found the deceased, with a gun shot wound in his left thigh, bleeding severely. A dressing was applied to stop the bleeding and the deceased was taken to the University Teaching Hospital where, despite attempts to revive him, he died shortly after arrival.

A statement was taken by the Police from the appellant, who is a Lieutenant - Colonel in the Zambia Army, which reads as follows:

> "It was on the 19th May, 1978, at about 0015 hours, when I was awakened by barking dogs. I got up, got dressed, went to the sitting room, switched on the light. I then opened the

curtain of the back door window where the dogs were barking. I looked at the chicken run which is about 65 to 70 metres away. I noticed that the over flap fence which covered the door leading into the chicken run was open. The door leading into the chicken run was open. The door leading into the chicken run was wide open and the door of the chicken house which is inside the chicken run was also open. Then I saw a fully dressed man running away behind the servants' quarters. There was a lot of noise still in the chicken house. I then went back to my bedroom, took a pistol then got outside while on the back door verandah, I fired a shot into the air and then I said, 'who is there.' After that I walked towards the chicken run because I could not see properly what was inside as one side of the chicken run was covered by sacks. When I was about 20 metres away from the chicken house and outside the chicken run all of a sudden I saw a dark figure in the chicken house moving towards the chicken door. I stopped and aimed low at the dark figure in the chicken house and fired one round. The figure fell in a sitting position. I then ran round and entered the chicken run and looked into the chicken house and then asked, 'who is there', he answered, 'ninewo bwana ndebomba pa next door'. Then I asked him what he was doing in the chicken house, naked at that hour. He just



said, 'iyai bwana'. I then noticed that he was bleeding in the underwear. My servant and his friend had awakened and I asked them to assist me to carry him out of the chicken house to the car and then I rushed him to the camp hospital. I then contacted the doctor on call Dr Sinyangwe who attended to him and later, Dr Sinyangwe and myself rushed him to the University Teaching Hospital where he eventually died and later on I reported the matter to Kabwata police who I took to the scene. I and the police tried to look for the empty casings at the scene but we could not locate them because of the grass surrounding the yard.

The accused was then asked the question: 'The first time you asked: 'who is there?' Did you get any reply' the answer was, 'No'."

When called upon for his defence at his trial the appellant elected to remain silent.

There was no dispute as to the facts of this case and the learned trial judge properly approached the matter on the basis that the appellant was entitled to assume that the deceased was an unauthorised intruder in his chicken run and presumably a thief. In considering the defence put forward at the trial the learned trial judge considered whether the appellant was acting in defence of his property, and in so doing did not use excessive force, and secondly whether the appellant made a mistake of fact in thinking that the deceased or the other man who ran from the chicken run, or both, were armed or might have been armed so that the appellant was acting in self-defence. In this connection the learned trial judge noted the cross-examination of some of the prosecution witnesses concerning crimes of violence in Zambia, and tools judicial notice that there has been a noticeable increase in the Lusaka district of crimes of violence, and particularly of aggravated robbery, involving the use of firearms.

The learned trial judge held that the law relating to the matter was governed by s. 17 of the Penal

Code which reads as follows:

> "Subject to any express provision in this Code or any other law in operation in Zambia, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English law."

In conformity with this section the learned trial judge held, and we respectfully agree, that the Criminal Law Act of 1967 applies to this case.
Section 3 of the Criminal Law Act, 1967 reads as follows:

"1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in erecting or assisting in the lawful arrest of offenders or suspected offenders or of person, unlawfully at large.
2. Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

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In the course of the judgment the learned trial judge said as follows:

> "It is not suggested by the defence that the accused was preventing the commission of a crime, or was attempting to lawfully arrest the deceased. If he was the law permits the use of such force as is reasonable in the circumstances."

And further:

> "The contention by the defence that the accused was apprehensive or both, might have been armed and that his own safety could be in danger is not borne out by the evidence nor the accused's statement to the police. If there was any potential danger in the situation the accused would not hate walked towards the fowl run from his house. The evidence was that the fowl run as about forty-three paces from the accused's house; the accused had walked about twenty-three paces towards the fowl run when he saw the deceased move and fired at him. The accused's house and fowl run are situated within Arakan Barracks. The accused could have raised the alarm and help would undoubtedly have been readily forthcoming in an army camp; nor is there any evidence upon which the accused could reasonably hate thought that any danger existed. If the deceased was armed, this would in all probability have become apparent when the accused fired the warning shot and called out to him, and before he had reached the spot from where he fired the second shot. If the accused thought the deceased was trying to run away with some of the accused's fowls, the accused could at least have warned him that he would shoot if the deceased did not stop and even in those circumstances the shooting of the deceased would hardly be justified."

The learned trial judge then found that the shooting of the deceased was use of force wholly out of proportion to the necessities of the situation, that the shooting was not done by way of self-defence nor by way of defensive action of his property, nor was it reasonable for the purpose of preventing theft of his property or of apprehending the deceased.

Mr Shamwana, for the appellant, put forward a number of grounds of appeal, one of which was that the evidence did not disclose an offence in law. The argument in support of this ground was that, as the appellant was defending his property, which was lawful, he committed no thence by so doing. The law allows only the use of reasonable force in defence of person or property. Although the onus is on the prosecution to prove beyond reasonable doubt that the appellant exceeded the legitimate bounds of such defence, the offence is established if such bounds are exceeded.

A further ground of appeal put forward by Mr Shamwana was that the learned trial judge had misdirected himself when he said that it was not suggested by the defence that the appellant was preventing the commission of a crime, and that the evidence did not bear out the suggestion that the appellant was apprehensive, because in that every he would not have walked forward and would hare raised an alarm,



and, generally, that, in the passage from the judgment which we have quoted, the learned trial judge made unwarranted assumptions against the appellant which were not supported by the evidence Mr. Kamalanathan, for the State, properly conceded that the learned trial judge did so misdirect himself and we agree that the judge's approach as indicated by the remarks in his judgment amounted to a misdirection.

We bear in mind that the dictum of Baron, D.C.J., in *Wasamunu v The People* (1), that, as the question is purely one of inference from the facts about which there is no dispute, this court has both the right and the duty to substitute its own views for those of the trial judge. (*See Benmax v Austin Motor Co. Ltd* (2) and *Challoner v Williams & Croney* (3)).

A number of cases were cited to us and most of these related to convictions for murder and the absolute defence of self-defence to such a charge. In the case of *Palmer v R.* (4), the Privy Council considered some Australian cases, and in particular the case of *R. v McKay* (5), in which a caretaker of a poultry farm fired at a chicken thief, who was running away carrying some chickens; an act which resulted in the death of the thief. The Australian court held, after a trial for murder, that the caretaker wads guilty of manslaughter on the basis that -

> "If the occasion warrants action in self-defence or the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder."

The Privy Council held that there is no rule that a jury must be directed that they should return a verdict of manslaughter if they find that plea of self-defence fails because the force used in self-defence was more than a reasonable man would consider necessary. In the result, the Privy Council held that if a person is charged with murder and raises the defence of self-defence he must either be acquitted, if the force he used was reasonable, or convicted of murder, if the force he used was unreasonable.

In the case presently before this court the appellant was originally charged with manslaughter, and the question of whether a charge of murder can be reduced to manslaughter where excessive force is used in self-defence does not arise. However, the principles of reasonableness apply in this case as much as they would had the appellant been charged with murder, and, in applying such principles, we take note of the comments of Lord Morris of Borth - Y-Gest in the *Palmer* case (4), when he said at p. 1089:

> "If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action hod been taken."

Our attention has been drawn to the unreported case of *The People v Trywell Julius Phiri* (6), in which, in his judgment dated the 17th November, 1972, Muwo, J., held that the accused, who was charged with murder, WBS not guilty in circumstances where he heard a number of persons



walking round his house, and the breaking of a window in the house, whereupon he took a shot gun and unintentionally killed one of the would be intruders by firing at another window of the house with the intention of frightening them. We have also considered the cited case of *Mulenga v The People* (7), in which the Court of Appeal reduced to manslaughter a conviction for murder of a night watchman at a chicken farm, who found thief trying to escape in an old building adjoining a chicken run. After firing a warning shot in the air the night watchman fired at the legs of the thief who was trying to escape through a window. As a result the thief suffered gun shot wounds from which he bled to death. In the latter case, Doyle, J.A., quoted with approval the Australian case of *McKay* (5), and held that Mulenga was moved not by a revengeful desire to cause grievous harm but by his lawful intention to arrest the deceased so that, in the circumstances, his honest, though mistaken, use of excessive force did not result in murder, but in manslaughter only.

As we have mentioned, the cases to which we have referred relate to murder reduced to manslaughter, but there is one case cited by Mr Shamwana which relates to an original charge of manslaughter. In the case of *R. v Scully* (8), a watchman saw a man on his master's garden wall in the night, and hailed him. The man said to another, whom the prisoner could not see, "Tom, why don't you fire?" and then to the same person "Shoot and be damned", whereupon he fired at the legs of the man on the wall, whom he missed, and shot the deceased whom he had not seen because he was behind the wall. In his judgment, Garrow, B., said:

> "Any person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter."

It was Mr Shamwana's contention that because of the accepted situation.that crimes of violence by armed robbers are prevalent, the appellant was justified in fearing that the thief or thieves in his hen-run were armed, and it was reasonable for him to fire a shot aimed low at the legs of one of the intruders.

As the appellant did not give evidence, there was nothing except the surrounding circumstances to indicate to the court what was in the appellant's mind at the time he shot the deceased, and, before considering whether the circumstances were such as to render it reasonable for the appellant to act as he did, it is necessary for us to consider further the law in general as it relates to the circumstances in which the appellant found himself.

Section 10 of the Penal Code reads as follows:

> "10. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of



> things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

It will be seen therefore that the test to be applied in considering whether the defence of mistake is available to an accused person is whether he honestly and reasonably believed in the existence of a state of things.

Mr Shamwana has invited the court to consider this case on the basis that the appellant did in fact reasonably believe that the deceased was an armed robber and, consequently that it was reasonable to shoot at him. In default of more definite evidence from the appellant this court is unable to say what was in his mind at the time and, in fairness to the appellant, we will approach this case on the basis that the appellant honestly believed that the deceased was an brined robber who had an intent to use a weapon against the appellant. The question to be decided s whether the appellant's mistake was reasonable.

In the cases of *McKay* (5) and *Mulenga* (7) where chicken thieves were shot whilst they were obviously trying to escape, the courts had no hesitation in deciding that the shooting amounted to excessive force to the extent that men slaughter verdicts were appropriate, and, in the case of *Scully* (8), art incitement by one trespasser to another to fire at the accused was held to justify the action of the accused in shooting at the trespassers. Further, in the unreported case of *Phiri* (6), to which we have referred, the presence of an unknown number of potential intruders outside a private house, and the breaking of a window by one of them justified the dangerous action by the accused of firing a warning shot through another window. In order for the appellant to succeed in justifying his shooting of the deceased it is necessary for his mistaken belief and his action to be reasonable. The learned trial judge accepted evidence and took judicial notice of the fact that armed robbers are prevalent and we respectfully agree with this finding. Mr Shamwana further urged the court to

consider that, in view of the fact that most people in an army camp are likely to be armed, it is probable that any intruder in the camp would also be armed for his own protection in case of discovery. We can not accept that this argument must apply to all intruders in such a camp, and such a presumption must always depend on the particular circumstances of the intrusion. Having regard to the prevalence of armed robbers, we are of the opinion that in most cases it would be proper to take the view of the court in the *Phiri* case (6), that an actual assault upon a dwelling-house by the breaking of a window or other such manifestation of force would give rise to a reasonable fear on the part of the occupants that the intruders were likely to be armed robbers against whom the use of storms in self-defence would be justified. In the case at present before us there is evidence that there was in disturbance in the chicken run at the end of the garden belonging to the appellant, and the deceased, a servant from next-door, went unarmed into the chicken run to find out the cause of the disturbance. In so doing he presumably



frightened away a former intruder who was the fully dressed man seen running away behind the servants' quarters by the appellant. Having seen one man run away, the appellant went back to his house and obtained a pistol which he fired into the air as a warning. When he received no reply to his challenge "Who is there?", he walked about forty-five metres towards the chicken run until he saw a dark figure, inside the run, at whom he fired. In considering whether the appellant was reasonable in assuming that he was in danger to such an extent that it was necessary to shoot at the figure this court is bound to take into account the difference between a man who is attacked and has to decide how to defend himself in the anguish of the moment, and a man who has heard a disturbance in an out-building sixty-five metres away from his house, who has seen one man run away and who has had the presence of mind to go into his house, obtain a pistol and fire a warning shot in the air to accompany his challenge to the intruder. The court also has to consider the difference between these circumstances and those in which the accupants of a dwelling-house hear a physical assault on an entrance to their house. As we have said, in the latter circumstances the occupants of the house might well be reasonable in fearing that they were to be subjected to an attack by armed robbers. In the circumstances in which the appellant found himself we are bound to say that he was not faced with a moment of unexpected anguish such as that which would be experienced by a man subjected to direct assault, and we find that it was unreasonable for the appellant to believe that the intruders in the chicken run were armed robbers likely to attack him as against the consideration that chicken thieves are not, as such, likely to be armed, and armed robbers intent on robbing a dwelling-house are not likely to enter a chicken run where the noise of their intrusion amongst the chickens would undoubtedly be heard in the dwelling-house. We find that in the circumstances of this case the appellant's belief that the intruder was armed was quite unreasonable, and his shooting of the deceased therefore amounted to an excessive use of force which warranted conviction.

Despite the misdirection by the learned trial judge even have no hesitation in applying the proviso to s. 15 (1) of the Supreme Court Act. The appeal is dismissed.

With regard to sentence, the appellant was sentenced to three years' imprisonment with hard labour. The appellant has in effect been found guilty of gross negligence resulting in the death of a man,

but, although the tragedy of this case is that the deceased was an innocent servant from next-door, the basis upon which the appellant has been tried is that the deceased was an unauthorised intruder in a chicken run. We have already indicated by our finding that the killing of the deceased in the circumstances was certainly not justified, and cannot be condoned. However, it must be borne in mind that the appellant is a man of good character who did not deliberately commit the type of offence for which dishonest persons are sent to prison - certainly not for long sentences. For these reasons, and having regard to all the mitigatory factors in this particular case, the sentence of three years' imprisonment with hard, labour comes to us with a sense of shock, and we propose to allow the



appeal against sentence. We set the sentence aside end substitute therefore a fine of K500; in default, nine months' simple imprisonment.

In view of the fact that the appellant has already served over eleven months in prison the default order is satisfied and the fine will not be payable.

Appeal against conviction dismissed but sentence substituted

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