THE PEOPLE v LAWRENCE MUMANGA (1985) Z.R. 35 (H.C.)

HIGH COURT
(COMMISSIONER, N.N. KABAMBA)
20TH MARCH, 1985
(CASE NO HN/280/84)

Flynote
Criminal Law and Procedure - Manslaughter - Reckless acts as cause of.

Headnote
The accused and four other persons went hunting at night. They had hunting lamps. When the accused saw light emanating from certain direction, and without ascertaining that the light did not come from the hunting lamps of his fellow hunters, he fired at the source of the light and shot and killed a fellow hunter.

Held:
Where man acts recklessly and causes the death of another, manslaughter is the only reasonable finding.

Cases referred to:
(1) R v Beard [1920] A.C. 479.
(2) Musole v The People [1963-64] Z and N.R.L.R. 173.
(3) Andrews v D.P.P. [1957] 2 All E.R. 522 and 566

Other works referred to:
Archbold 35th Edn. Paras. 2518 and 2519.

For the State: Mr Patel, Assistant Senior State Advocate.
For the accused: Mr Arthur Chiinga, of Mwanawasa and Company.

Judgment
KABAMBA, COMMISSIONER: After stating facts which are not the subject of this report said;

It emerged from the evidence that the material facts were common to both parties. The accused in company with the four (4) others went on a hunting expedition and had carried with them two fire-arms namely; a muzzle loader and a short guard. When they reached the hunting ground they divided themselves into two groups. One such group was led by the accused person and the other by one called John Bwalya. The accused's party consisted of Joseph Muntanto and another man who was acting as a guide but whose name he did not know. In John Bwalya's group were Sebastian Mutale Mulenga, another man called Chomba and a guide whose name was also not disclosed. The two parties agreed on the first lap of their hunting to follow the banks of a stream. In this respect, the accused's party remained on the original bank while the other crossed to the other bank. They followed the stream hunting on their respective sides until they came to a road at the end of the stream were they had agreed to meet, apparently to compare notes and decide on what to do next. They decided to comb a bush which had not been traversed as yet by them. One party took the right while the other went to the left. They were to meet up-front. There was to be a third meeting and it was that meeting that proved to be a disaster. The accused shot Sebastian Mutale Mulenga who was in the other hunting party and killed him.

This aspect is not denied and the evidence which was led on it did establish that Mulenga was shot and wounded. The wounds, as found by the doctor during a post-mortem at Chilonga Mission

Hospital were multiple. There were two skin wounds on the left side of the chest and one on the right side. There was a big haematoma in the muscles between the skin near the nipple and ribs. The right ventricle of the heart was punctured by a small hole and so was the left atrium. There were two holes in the right lung one of which was described by the doctor as big. There was also a hole put by a bullet in the left lung. All these injuries resulted in a large collection of blood in the heart-sac. The heart became perforated and was rendered immobile. This caused the death of Sebastian Mutable Mulenga. It was thus established beyond all reasonable doubt that it was the accused who killed Mulenga.

The accused contended from the very beginning that he did not intend to kill Mulenga who was at any rate his brother-in-law. In other words, he was arguing at the Police Station that he had no malice forethought and could not therefore be considered a murderer. Here in court, the contention was enlarged to the position that the hunting having been a lawful exercise and the shooting having been done in the course of it, the whole episode should be dismissed as an inevitable accident. The Learned Advocate for the accused argued in the alternative that if the circumstances could not be seen by the court to amount to inevitable accident, then there is clear case of reasonable mistake of fact in that the accused thought honestly that what he was shooting at was an animal called Chisongo.

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I dismissed the idea of an inevitable accident. The accused shot the very object which he had aimed at by calculatedly pulling the trigger. He did not aim and shoot at something else and, by some kind of novus actus interveniens the bullet missed its intended target and shot the deceased; or the deceased suddenly run across the path of the bullet and got it in consequence. It was he that the accused aimed at and intended to shoot and it was he that he shot. The question of inevitable accident does not, in the slightest degree, arise.

The Learned Counsel for the Accused did not in fact pursue that line of argument seriously. He concentrated more on the reasonable mistake of fact as the Accused's defence. He submitted that the Accused honestly believed that what he was shooting at was Chisongo. He argued that where a man aims at an object which he believes to be an animal and shoots and upon doing that finds out later that the object was not what he had thought it was but a human being, he cannot be guilty of manslaughter or murder. The death of the human being would amount to unfortunate death by misadventure. He cited the case of *Mwape v the People* in selected judgments of 1972 and told me that it was held in that case to be excusable homicide where the Accused person was aiming at shooting a duck but ended up shooting a man who was ridding a motor car along the road across which the bullet was travelling. He contended that this was a situation similar to that in that the Accused intended to shoot Chisongo but ended up shooting a man. He also referred me to paragraph 3518 of Archbold 35th Edition in which examples are given of a man shooting game and accidentally ended up shooting another hunter and 25 the court held that killing to have been excusable homicide. He pointed out that the circumstances in which the Accused in this case shot Mulenga fell within the spectrum of these examples and the verdict must therefore reflect the opinions of the courts in the cases cited and return a verdict of not guilty.

The Learned Advocate for the People, Mr Patel countered that it is most unreasonable for anyone to believe that the light shining from a hunting lamp could possibly resemble the two eyes of the animal called Chisongo. He pointed out that this was more so when it was with the knowledge of the Accused that there was another hunting party combing the same area with a hunting lamp; that it came from the mouth of the Accused that apart from this hunting party which they were to meet with for the third time, there were also people camped amongst fields of cultivation along which the Accused's party and the others were hunting. He submitted that these aspects were sufficient reasons to put the Accused on alert and to exercise reasonable care not to shoot anything unless he ascertained that what he was shooting at was not a human being such as he expected to be in that area. He maintained that the behaviour of the Accused fell below the expected standard of care and amounted to gross negligence such as must merit finding of guilty of manslaughter at the very least. He urged me not to follow the decisions of the cases cited by the Defence for the simple reason that the defence of mistake of was fact not discussed by those authorities on its own merits. He referred me to

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Archbold in paragraph 2518 where an example is given of similar situation where a verdict of guilty for manslaughter was returned.

This defence of reasonable mistake of fact is an off-shoot of the presumption of intention:

> "Every sane man is presumed to have known and to have intended the natural and necessary consequences of his act."

If, for instance, X aims a pistol at the head of Y and pulls the trigger it is almost an irresistible inference that X intended to kill Y. The mere fact that he did not know that the pistol was loaded will not excuse the act. This inference could however be rebutted by the application of that refined level of thinking which suggests that only that specific intent which corresponds directly to the achieved consequence should be accepted as a criterion of intention *vis-a-vis* consequence. It will not be rebutted merely by proof that X never in fact intended that result to happen. But if X can show that the consequence, although physically inevitable, was not an obvious result of his act, or that it was only probable when certain circumstances co-existed, and he had no reason to know that some of them did exist, the presumption will be rebutted (see *R v Beard* [1920] A/C 479. (1). The principle test of the question becomes this then: Had the Accused no reason to know that some of the circumstances existed together with those that he supposedly knew existed? I refer to this test as the principal test. This is because there has been suggested another test regarding this defence of reasonable mistake of fact, which I shall mention shortly. The test I have just set out is cumulative in that it covers all such defence as rely upon the absence of *mens rea* e.g. insanity, intoxication and mistake of fact itself. But it is a test more applicable to the absolute defence of mistake of fact. The manner and style in which this defence has been framed in our Penal Code seems to favour this test too.

The defence of mistake of fact is contained in Section 10 of the Penal Code, Cap.146 and reads like this:

> "A person who does or omits to do an act under an honest and reasonable but, mistaken, belief n 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."

He is only answerable to the consequence resulting from his act or omission as they relate to the things as he sees then. The mistaken belief in the existence of things can only stand where the circumstances which surround that state of things offer no reason whatsoever to believe that there is any suggestive possibility that things other than those which are mistakenly believed to exist were actually co-existing. But where circumstances offer a reason patently or latently that there is preponderant probability that other circumstances co-exist or can co-exist though

unknown with those which are known, then this defence is not available except where it is shown that all necessary precautions were taken by the accused to eliminate any possible existence of other things. The co-existence of any things other than those which were mistakenly believed to exist must thus be shown to have been remotely improbable.

It could not be said in these circumstances which surround this case before me that eliminatory precautions were taken. There is no evidence to suggest that the Accused person did so. The position does not change even when we take the test suggested by Blagden, J.A., as he then was in *Musole v The People* (1963) Zambia and Northern Rhodesia Law Reports pages 173 and 183 (2):

> "It will be apparent that here again there are two tests to apply; the objective test of whether the mistaken belief is a reasonable one; and the subjective test as whether the Accused honestly held that mistaken belief."

The mistake was not reasonable and the Accused could not have held that belief honestly. Unfortunately, I have not been able to find the case: *Mwape v The People* which the Learned Advocate for the Accused relied on and I am therefore unable to comment on the reasoning that the court may have exercised in making its decision, but the examples given in Archbold paragraph 3518 were made available to me by the Librarian and that paragraph is talking about indictments for Jury and the production of records of cases as evidence admissible to prove perjury. I may have misunderstood Counsel on the paragraph and perhaps what he told me was paragraph 2518 which talks about homicide by misadventure. From this is stated:

> "If a person is killed without the intention in the doing of a lawful act without criminal negligence, it is misadventure."

There is another portion within the same paragraph which states:

> "If a man shooting at game, by accident kills another, is homicide by misadventure, merely, even though the party be unqualified."

In paragraph 2519, however, there is this portion:

> "Where an act of omission or commission, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party, whilst doing the act, acted without gross negligence, in that he used such a degree of caution as to make it improbable that any danger injury should arise from it to others; if not the homicide will be manslaughter at the least, the doctrine being well established that an act or omission arising from culpable neglect of duty and having a fatal result is manslaughter and if done by design or of malice aforethought would be murder."

This is the same point of gross negligence I alluded to earlier. The accused person knew that there was another hunting party with which he had come into contact twice. He knew too that they had agreed to meet again during

the course of the hunting exercise. His belief in the existence of things at the time he shot was not reasonable in that he took no precaution whatsoever to cause an elimination of the possibility of there having been other things co-existing with what he believed to be there before he shot. It is quite clear that the belief in the objective sense was not reasonable.

I am afraid I have to make the same finding on the honest of his belief subjectively. The accused knew the kind of light which the hunting lamp gives both with good batteries and with poor batteries. He, himself told me that just before the encounter which resulted in the death, he had changed the batteries in his hunting lamp so that it gave him a more brighter vision of the things ahead of him than before. His lamp gave him problems because of batteries and he must have known that the other hunting party would encounter similar problems with theirs. He knew too that the eyes of an animal during a hunting expedition at night both emit light from each eye and it is that fact which distinguishes an animal's light from a light from a hunting lamp. He should have known that the only source of light which came to his vision in one line reflected only one source which could only be the hunting lamp of the other hunting party. These facts, considered together with the absence of any evidence to suggest that the accused had earlier seen an animal called Chisongo during the hunting exercise going in that direction and was tracking it, can only lead to the conclusion that his decision to shoot was more than gross negligence. It was reckless. Where man acts recklessly and causes the death of another, manslaughter is the only reasonable finding. As Lord Atkin puts it in *Andrews v D.P.P.* [1957] 2 All E.R. 522 and 566 (3):

> "In practice, it has generally been adopted by judges in charging Juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony

> is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case."

Recklessness suggests an indifference to risk. The accused must have appreciated the risk and could have avoided it by making signs with his hunting lamp to see if there was a response to his signal to identify the other hunting party as they had done on two previous meetings that might. He did not do so. He just shot despite the fact that he did not ascertain or clearly see the eyes of Chisongo as two independent sources of light. He was certainly reckless. I am satisfied that the prosecution have proved

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him guilty on a lesser offence to which I reduce the charge, beyond reasonable doubt. I find him guilty of manslaughter in breach of section 199 of the Penal Code, Cap.146 and convict him of it.

Accused convicted of manslaughter