PATSON CHEMBO CHIMBALA v THE PEOPLE (1986) Z.R. 7 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND MUWO, JJ.S.
10TH DECEMBER, 1985 AND 11TH FEBRUARY, 1986
(S.C.Z. JUDGMENT NO. 3 OF 1986)

Flynote
Evidence - Defence of - Mistake of fact - Honest and reasonable belief - Effect of.

Headnote
The appellant a Police Officer at the time of the offence was detailed with many others to go to a house invaded by robbers who were still in the house. When they reached near the house noise was heard emanating from inside, and attributing this to the presence of robbers on the premises, warning shots were fired. Believing that the occupants of the house were in danger the Police forced their way in through a window after demands that the door be opened failed. Upon entry, the appellant saw a figure in one of the bedrooms (which figure was later identified as the deceased), trying to jump out of the window. The appellant ordered the deceased to put his hands up. The deceased tried to hide under a bed. Believing that he was an armed robber the appellant fired three fatal shots. The appellant was convicted of manslaughter. He appealed.

Held:
(i) Whenever the issue of mistake of fact arises; the question is not whether the accused acted reasonably, but whether he entertained an honest and reasonable, but mistaken belief as to the existence of facts, which if true would make the act or omission charged against him innocent.

p8

Cases referred to.
1. R. v Tolson [1889] 23 Q.B. 168
2. D.P.P. v Morgan 61 Cr. App. R. 136
3. Mutambo and Others v The People (1965) Z.R. 15
4. Sankalimba v The People (1981) Z.R. 258

For the appellant: In person.
For the Respondent: F. Mwiinga, Senior State Advocate

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

The appellant, who had been tried on an information containing one count of murder, was acquitted on that count but convicted of the lesser offence of manslaughter and sentenced to imprisonment for

four years. The appeal was against the said conviction, the only point at issue being whether the defence of mistake of fact was available to the appellant.

At the conclusion of hearing the appeal, we allowed it and said that we would give reasons for our decision at a later date; we now do so.

When this case arose, the appellant was a sergeant in the Zambia Police Mobile Unit. The undisputed facts on which his conviction was founded are set out here below.

On April, 17, 1982, a young man called Kennedy Nkhuwa, the victim in this case, visited his 21 year old friend, Stephen Mubanga, in Lubuto Township, Ndola. As fate would have it, Kennedy decided to stay overnight at the residence of Stephen's mother, Mrs Christine Mubanga, the first prosecution witness (hereinafter referred to as PW1). At about 01.00 hours, on April the 18th, PW1's house was besieged for a period of 45 minutes by a gang of at least six men. During that time, members of the gang broke burglar bars and smashed almost all the window panes of the house. Stones were hurled into the house, one of which struck PW1. PW1 and Stephen (PW2) shouted for help. But when no help was apparently forthcoming, PW2, his 18 year old brother (PW4) and Kennedy, resorted to the use of slashers and empty bottles and, in this way, they succeeded in warding off the attack. However, before the attackers could withdraw and go away, they said they were going to fetch a motor vehicle and that they would return to the house, kill someone therein and commit robbery.

Unknown to PW1, PW2 and PW4, PW3, a neighbour - heeded the call for help and, accompanied by his wife and a Mr Phiri, also a neighbour, went to Lubuto Police Post where the incident was reported to PW7, a constable, who in turn reported it to PW6, the Officer-in-charge. Then PW6, PW7 and about two other police officers, accompanied by PW3, went to PW1's house, using a private vanette. On arrival there, the Police confirmed that the windows of the house had been shattered. When they heard a noise emanating from the house, they attributed it to the presence of robbers on the premises.

They then fired warning shots, identifying themselves as police officers, but there was no response from the house. The police knocked at the door demanding that it be opened as they were police officers, but this was to no avail.

The police went back to the Police Post and shortly thereafter returned to PW1's house with more reinforcements, using two private motor vehicles. The reinforcements included the appellant. This time, the assistance of Mrs Gladys Banda (PW5), a neighbour of PW1, was enlisted to aid the police in their efforts to persuade the occupants of the house to open the door. PW5 came with a torch and gave assurances to PW1 about the presence of the police, asking her to open the door. Strangely enough, PW1 and the other occupants appear to have been oblivious to any such assurances and to have continued to labour under the mistaken belief that the assailants had come back again, bent on carrying out their evil threat.

In the meantime, PW1 and the other occupants, with the exception of Kennedy, had locked

themselves inside a bathroom for security reasons. On the other hand, however, and, in spite of PW2's persuasion that Kennedy should join him and others in the bathroom, Kennedy declined to do so, preferring to continue hiding under a bed where he said he was safe.

When PW5 called out to PW1, addressing her as "Mother of Mubanga" and the latter responded in a low voice saying "Mukwai" meaning "Madam/Sir", the police mistakenly believed that the lawful occupants were being held by intruders at gun-point. The police then decided to mount a rescue operation. There was complete darkness in the house. PW6 cautioned his officers to be careful as they neither knew the lawful occupants of the house nor the intruders.

The appellant was the first officer to enter the house through a shattered window and was immediately followed by two of his companions. All three officers went to a bedroom where they found scattered things but no human being. They came to a corridor where they could hear movements and human breath in a locked up bathroom. The appellant told his colleagues to keep watch while he went elsewhere in search of the intruders. He went to a bedroom where, seeing a human figure in the darkness, apparently going to jump out of the window, he told him to raise his hands. Instead of raising his hands, the figure hid under a bed and, believing that he was dealing with an armed bandit, the appellant fired three shots and shouted loudly saying:
"I have killed one of the thieves here." The victim died instantly. It soon became known that the victim was not a thief but Kennedy Nkhuwa.

On these facts, and, on the authority of *R v Tolson* (1) the learned trial judge accepted the maxim *ignorantiafacti excusat*. Consequently, he was unable to attribute to the accused any mens rea for murder, and

p10

so he acquitted him on that charge.

That was not all, for the trial judge went further and identified the bone of contention as being whether, in firing at the deceased, the accused had "acted reasonably". He then held that the accused had not "acted under an honest and reasonable belief' that the man he fired at was a thief. In his judgment, the accused was a trigger happy paramilitary police officer who had acted "unreasonably and negligently" and that, as such, he was guilty of manslaughter. This finding was clearly based on two premises: firstly, that it was unreasonable and negligent for the appellant to shoot at a person who was under a bed; and, secondly, that PW6 had given to his officers specific instructions not to shoot as they did not know who were the tenants and who were the criminals.

It is trite law that the defence of mistake of fact, that is, of an honest and reasonable, but mistaken belief, denotes the absence of mens rea and consists in an honest and reasonable belief entertained by the accused of the existence of facts which if true, would make the act or omission charged against him innocent. This is a common law principle which was propounded by Cave, J., in *Tolson* (1), and adopted by the House of Lords in *D.P.P v Morgan* (2). In this country, the principle was applied by the Court of Appeal in *Mutambo and Others v The People* (3), at page 29 (see per Charles, J.) and referred to by this Court in *Sankalimba v The People* (4), at page 260. The principle is reflected in Section 10 of the Penal Code, Cap. 146 and 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."

We hasten to point out that neither Section 200 (murder) nor Section 199 (manslaughter) of the Penal Code expressly or by implication excludes the operation of the said rule.

In our judgment, the trial judge misdirected himself in many ways. Firstly, it was an error for him to say that the bone of contention was whether the appellant had acted reasonably in firing at the deceased. Whenever the issue of mistake of fact arises, as here, the question is not whether the accused acted reasonably, but whether he entertained an honest and reasonable, but mistaken belief as to the existence of facts which, if true, would make the act or omission charged against him innocent. In this case, we have no difficulty in accepting the appellant's defence that he had entertained an honest and reasonable - but mistaken belief that the lawful occupants of the house were being held at gun-point by robbers and that, when he saw the human figure of the deceased in conditions of darkness, he honestly and reasonably, but mistakenly, believed he was dealing with an armed robber.

p11

Secondly, the trial judge misdirected himself by holding that it was unreasonable and negligent for the appellant to shoot at a person who was hiding under a bed, apparently after having intended to jump out of a window. This is so because, in so holding, the trial judge did not take into account the circumstance that, when the appellant shot at the victim, there was darkness in the house and that he honestly and reasonably, but mistakenly, believed that the victim was an armed bandit and that the appellant's own life was at stake. It is immaterial that the victim was apparently going to jump out of a window when, on being ordered to raise his hands, he hid under a bed, as an armed or other dangerous person may take such a precaution in the hope of positioning himself in such a manner as to gain advantage over an attacker or such other enemy.

Thirdly, it was an error for the trial judge to hold that PW6 had given "specific instructions" to his subordinates not to shoot as they did not know who the tenants or the criminals were. PW6 never gave any such instructions at all. All that he said was in these terms: "I told them to be careful as we did not know the owners of the house and who were criminals."

Fourthly and finally, it was a misdirection to hold that the appellant was a trigger happy para-military officer as nothing could be farther from the truth. The appellant had gone to PW1's house insider to rescue the lawful occupants of the house from criminal intruders; he had gone there as a saviour, not as a criminal, notwithstanding the subsequent turn of events that resulted in the unfortunate loss of life by an innocent victim. This was a case of mutuality of an honest and reasonable, but mistaken belief on the part of the appellant, in particular, and of the police

contingent, in general, on the one hand; and on the part of PW1 and the other occupants of her house at the material time, on the other. Had either side not entertained such a mistaken belief, it is highly improbable that this case would ever have arisen at all. As it turned out, the occupants of the house mistakenly believed the police personnel to be robbers, not saviours. On the other hand, the police mistakenly believed that the lawful occupants of the house were being held by robbers at gun-point. And, as we have held, when the appellant opened fire at the victim, he honestly and reasonably, but mistakenly, believed that he was dealing with an armed bandit. In the eyes of the law (that is, in terms of section 10 of the Penal Code), the appellant was not criminally responsible for the act and could thus not be convicted of murder or manslaughter.

It follows from what we have said above that the appellant's acquittal was inevitable. Accordingly, the appeal was allowed, the conviction was quashed and the sentence was set aside.

Appeal Allowed.
