REPORTABLE ZLR (22)

Judgment No. S.C. 23/85
Crim. Appeal No 11/85

BOB JONES MPOFU v THE STATE

SUPREME COURT OF ZIMBABWE,
DUMBUTSHENA, CJ, GUBBAY, JA & McNALLY, JA,
BULAWAYO, APRIL 2, 1985.

N.J. Pattison, for the appellant

B.N. Sigidi, for the respondent

McNALLY, JA: The appellant was charged with one count of murder and one count of attempted murder, but eventually his plea of guilty to culpable homicide on the first count was accepted and he was acquitted and discharged on the second count was sentenced in the High Court in Bulawayo to two years imprisonment with labour, and he appealed against that sentence.

At the hearing the appeal was allowed and the sentence reduced to 12 months imprisonment with labour. The facts of the case and the reasons for our decision are as follows:

The appellant was a soldier on active service in an area where there were dissidents present. He was sent out at about 8 pm on the evening of 10 February 1983, after he had just returned from a four day foot patrol, with instructions to stop a vehicle suspected of carrying dissidents on a track which intersected with the road from Legion Mine to Bulawayo.

The appellant, a corporal, took his platoon and seems to have set up some sort of ambush just on the Bulawayo side of the intersection of the track with the main road. The facts, which are to be gleaned from an agreed statement of facts plus a sketch/

sketch plan, are not altogether clear, but it seems further that a vehicle came from the direction of Bulawayo, on the main road, heading for Legion Mine, and drove into the ambush position.

The appellant at this stage was in combat uniform, standing or walking on the side of the road. He decided to stop this vehicle to ask the occupants whether they had seen dissidents. It appears, therefore, that he did not suspect that the vehicle might be carrying dissidents.

The agreed statement continues as follows-

> "The Accused gave an indistinct signal for the vehicle to stop.
>
> The car slowed down slightly to approximately 80 kms per hour but showed no signs of stopping altogether.
>
> The Accused then shot at the vehicle from the hip when it was level with him.
>
> The shot ricocheted and as a result ROY LAHEE was killed."

In fact the bullet fragmented. Portions of it hit and wounded Mrs Lahee and other portions tragically killed her four year old son.

I have no doubt that there was a proper basis for the plea of guilty and the conviction for culpable homicide. The appellant was negligent both in making an indistinct signal and in firing from the hip as he did. It must be accepted, however, that he did not aim to kill or hit a person. Had the bullet not fragmented and ricocheted, no-one would have been hurt. Never the less, the mere firing of a gun at the moving vehicle was dangerous and clearly involved a risk to life.

The learned judge who sentenced the appellant took into consideration a number of facts. He was acutely and properly conscious of the difficulty of weighing in the balance the interests of the State in putting down dissident activity and the interests of individual civilians moving innocently in areas where dissidents are active. He gave proper attention also to the interests of the appellant, his state of fatigue and possible "edginess", his blameless life up to that moment, and his wife and two children. He noted that the appellant had been in custody since the event, a matter of some 18 months. It is a matter for adverse comment that so straightforward a case should have taken so long to come to court.

It seems to me that there is a further matter to which attention should be drawn. The setting up of "road-blocks", whether by the police or by the military authorities, is an inherently dangerous operation. I have no doubt that policemen who do so are normally given both adequate instructions and adequate equipment in the way of signs and lights. One cannot expect the military authorities, acting in an emergency and without the appropriate police training, always to be as thorough and to maintain as high a standard of care as the police. But it is desirable, I think, that the facts of this case be brought to the attention of the Director of Legal Services, Ministry of Defence, so that he may consider whether steps can be taken to improve the briefing of those members of the Army who are instructed to interfere with the free passage of motor vehicles on the roads of Zimbabwe. An instructive case on the dangers to the public arising from the setting up of inadequate road-blocks is S v Nel and Anor 1980 (4) SA 28.

It may be therefore that some of the blame for this most unfortunate accidental killing can be moved from the shoulders of Corporal Mpofu to those of his superiors. It may be noted that

the Army authorities did not come forward in mitigation. However, on the facts before the Court his own negligence was high. In the first place, by making an indistinct signal from the side of the road he may well have created the impression either that he himself was a dissident or that he was asking for a lift. He certainly failed to convey a clear and authoritative order to stop. He thus created a situation in which it was very likely that the driver of the vehicle would do exactly what he did - namely drive on.

Having created that situation, and bearing in mind that he had no reason to suspect the car of being connected with dissidents, as indeed it was not, he was in no way justified in firing a shot. It is not clear why he shot at all, and the agreed statement of facts says rather obscurely "he should have shot lower than he did to avoid injury to the occupants of the vehicle". The fact is that his instructions were to stop vehicles travelling on the track. He had no instructions to stop vehicles travelling on the main road. He merely wanted to ask the occupants of the vehicle whether they had seen dissidents. I can see no reason to justify his shooting at or near the car at all. Nor did he advance any reason to justify his action.

In such circumstances I would hesitate before saying that, in general, a sentence of two years imprisonment with labour was inappropriate. I agree with the learned judge that not much guidance is to be obtained from the cases referred to in argument Edward Ngwenya v S Appellate Division Judgment No. 283/77, and S v Rademeyer 1981 (1) SA 1205. The former case involved a gun being pointed as a joke and fired with fatal consequences. The latter involved a corporal, temporarily in charge, killing a fellow soldier negligently while both were at an army rifle range practising shooting. S v Carvalho Appellate Division Judgment No. 199/78, referred to on appeal, was a case involving civilians in a cafe. But I am of the view that not sufficient

account was taken of the inordinate period spent by the appellant in custody pending trial. Eighteen months in the remand prison is in some ways the equivalent of a 27 month sentence, bearing in mind that a convicted prisoner in practice earns an automatic remission of one third of his sentence in consequence of the provisions of s 113 of the Prisons Act [Cap 21].

We were informed at the hearing of the appeal that the appellant had been serving his sentence since his trial and had not been released on bail pending appeal. He had therefore been in custody for almost 26 months. Our discretion was thus in practice severely circumscribed.

In these particular circumstances we considered the sentence of two years imprisonment with labour to be excessive and we made an order reducing the sentence, as earlier indicated, to one of 12 months imprisonment with labour, which will have had the effect of causing his release, subject to "satisfactory industry and good conduct" within a few days of the hearing.

The Registrar is requested to send a copy of this judgment to the Director of Legal Services at Army Headquarters.

DUMBUTSHENA, CJ: I agree.

GUBBAY, JA: I agree.

Webb, Low & Barry, appellant's legal representative