THE STATE
versus
CHALI MUPO

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 24 & 31 October 2016; 21 November 2016 & 2 December 2016

Criminal trial – application for discharge at the close of the State case

Assessors: Messrs Dhauramanzi & Mushuku

T. Chikwati, for the State
F. Chirairo, for the accused

MAFUSIRE J: The accused was employed as a "game scout" by a private wild life conservancy. His duties entailed the protection of wild life. These were predominantly anti-poaching functions.

He was charged with murder. He shot and killed a man poaching fish from a dam within the private ranch. The ranch was part of a cluster of private conservancies under the Chiredzi River Conservancy. It was common cause that such private conservancies are under the direct authority and supervision of the Parks and Wild Life Management Authority [hereafter referred to as "***Parks***"].

The accused pleaded not guilty. The mainstay of his defence was the indemnity that is conferred on certain State and quasi-State functionaries in terms of the Protection of Wild Life [Indemnity] Act, *Chapter 20:15* [hereafter referred to as "***the Indemnity Act***"]. He also pleaded mistake and, rather vaguely, self-defence.

Initially, the State had listed five witnesses. None of them was from Parks. The first, Ngomani Chamunorwa ["***Ngomani***"], was the accused's assistant. He had been on patrol together with the accused when the incident occurred. The rest of the potential witnesses were two police officers that had arrested the accused; a medical doctor that had conducted the post mortem examination; and the police forensic ballistics expert that had examined the accused's firearm and cartridges. The summaries of these other witnesses were admitted without objection.

However, after Ngomani had testified, the State decided to call a specialist witness from Parks.

Ngomani's evidence was this. On the day in question, he and the accused were on patrol duties around the dam in question. Accused was armed with a twelve bore Remington shot gun. As they approached the dam, they saw the deceased casting nets from a canoe. He was inside the dam, but close to the edge. Fish poaching was rife in the area. Fishing nets were prohibited.

On seeing the deceased, the two conferred. It was decided to arrest him. They were about four hundred metres away from him at the time, but on the other side of the dam. The time was around past 17:00 hours. They walked stealthily around the dam and closed in on the deceased. The accused was in the lead. When they were about twenty five metres short of the deceased, Ngomani stood behind. The accused pressed forward, slowly and stealthily.

Meanwhile, the deceased had come out of the dam and of the canoe. He had lit a fire and was smoking a cigarette. He must have sensed the accused's presence. When the accused was about ten to twelve metres away from him the deceased suddenly grabbed a piece of burning firewood and hurled it at the accused. It must have been thrown with so much force that it landed somewhere between the accused and Ngomani. At about the same time, Ngomani heard the accused cocking his gun and firing instantly. The deceased yelled and fell down. The accused came back to where Ngomani stood and directed that they should leave the area immediately. He said people from the nearby villages would have heard the sound of gun fire and the deceased's yell. They could come and cause trouble.

A report was made to the police. The deceased's body was collected the following day. The post mortem report said the cause of death was respiratory failure secondary to hemopneumothorax. The deceased had sustained multiple perforations on the chest wall; three fractured ribs; perforated lungs and perforated heart.

The witness the State called from Parks was one McLean Yakobe ["***Yakobe***"]. He was a Senior Investigations and Security Officer with twenty four years' experience.

Yakobe's evidence touched on a wide range of issues. Among other things, he confirmed the ranch was one of a number of private wild life conservancies under Parks. Anti-poaching activities by such private players are authorised and supervised by Parks. Their game scouts receive the relevant training from Parks, or their designated agents.

Yakobe was quite categorical that as an employee of such a conservancy, the accused was one covered by the indemnity conferred by the Indemnity Act.

Nothing material turned on the rest of the witnesses' evidence whose summaries had been admitted without objection

After Yakobe, the State closed its case. The accused applied for a discharge in terms of s 198 [3] of the Criminal Procedure and Evidence Act, *Chapter 9:07*. The section says that if at the close of the State case, the court considers that there is no evidence that the accused committed the offence charged, or any other offence of which he might be convicted, it shall return a verdict of not guilty.

The law on this subject, particularly the test to apply, is now well settled. In a nutshell, where the State has adduced no such cogent evidence as would lead a reasonable court, acting carefully, to convict, the accused is entitled to his discharge without being called to his defence. It was held in *S v Tsvangirai & Ors*[1] that where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit. There are three basic considerations. The court ***shall*** discharge at the close of the State case:

i/ where there is no evidence to prove an essential element of the offense [*Attorney-General v Bvuma & Anor*[2]];

ii/ where there is no evidence on which a reasonable court, acting carefully, might properly convict [*Attorney-General v Mzizi*[3]]; and

iii/ where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely convict on it [*S v Tarwirei*[4]].

From its preamble, the purpose of the Indemnity Act is, *inter alia*, to indemnify and protect certain persons against criminal liability in respect of acts or things done, or omitted to be done, by them in good faith for the purposes of, or in connection with, the suppression of the unlawful hunting of wild life. Section 3 of the Act says:

> "No criminal liability shall attach to any person who, at the relevant time, was an **indemnified person**, in respect of any act or thing whatsoever advised, commanded, directed or done or omitted to be done by him, whether before, on or after the date of commencement of this Act, **in good faith** for the purposes of or in connection with the suppression of the unlawful hunting of **wild life**."

[1] 2003 [2] ZLR 88 [H]
[2] 1987 [2] ZLR 96 [S], @ p 102
[3] 1991 [2] ZLR 321 [S], @ p 323B
[4] 1997 [1] ZLR 575 [S], @ p 576

I have purposefully highlighted "indemnified person" and "in good faith" because the expressions formed the bulwark of the State's case in its entirety, and its opposition to the application for discharge in particular.

In s 2, the Act defines "**indemnified person**" to include the following functionaries:

> "[a] the Director of National Parks and Wild Life Management appointed in terms of **section 107 of the Parks and Wild Life Act [*Chapter 20:14*]**…; or
>
> [b] any person designated an officer, inspector or employee in terms of **section 109 of the Parks and Wild Life Act [*Chapter 20:14*]**; or
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> [c] …….; or
>
> [d] any police officer;
>
> [e] …….; or
>
> [f] …….; or
>
> [g] any person assisting and acting under the direction of a person referred to in paragraphs [a] to [f]."

I have also highlighted the reference to sections **107** and **109** of the Parks Act because these were repealed in 2001 and the State said that, as I understood the argument, with those repeals, the offices created by them had also been abolished.

The State's argument was two-legged. The one leg was that the accused was none of the persons identified by s 3 above. This was in spite of the State's own witness, Yakobe, saying the accused was indemnified under paragraph [g] ["*any person assisting and acting under the direction of a person referred to in paragraphs [a] to [f]*"], as read with paragraph [b] ["*any person designated an officer, inspector or employee* …"]. Yakobe said he himself was the designated officer and the accused the "… *any person assisting and acting under the direction of* [the designated officer] …".

In addition to claiming indemnity under paragraph [g], the accused argued that he was also covered under paragraph [d] ["*any police officer*"]. This argument was cued from what Ngomani had said in evidence. He said before becoming a game scout at the private ranch, the accused had been trained as a police constabulary under the Zimbabwe Republic Police and had been a member of the neighbourhood watch committee. Defence Counsel argued vigorously that in terms of s 4 of the Police Act, *Chapter 11:10*, the police force is composed

of a regular force, a police constabulary and ancillary members. Defence Counsel also referred to s 27[4] of the Police Act that says:

> "A Constabulary member shall, while he is on duty, have the same powers, functions and authority, and be subject to the same responsibilities, discipline and penalties as a Regular Force member and shall be liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances if he were a Regular Force member, and shall have the benefit of any indemnity to which a Regular Force member would in the same circumstances be entitled".

In my view, the reference to the Police Act, and the argument that the accused could claim indemnity as a police constabulary, was unnecessary clutter. If he was a police constabulary, which in any case was not Ngomani's evidence, he could claim all such benefits, including indemnity, as are accorded regular force members only **while on duty** as a police constabulary. That is what s 27[4] of the Police Act unambiguously says.

Defence Counsel's argument that a police officer is on duty twenty four hours a day and seven days a week, and his reference to the South African case of *Minister of Police v Rabie*[5] where the court held the State liable for the delictual acts of an off-duty police mechanic on the basis that as an attested member of the force, he was always on duty as a peace officer, were manifestly a misdirection. *Rabie* is plainly different. Among other things, the court noted that the miscreant had been employed, not as a mere mechanic, but as a duly attested member of the regular force. In contrast, even if the accused herein could be said to have been on duty when he shot and killed the deceased, he had not been on duty as a police constabulary. He had been on duty in his private employment as a game scout.

At any rate, Ngomani's evidence was not that the accused had been attested as a police constabulary, let alone that on the day in question he had been on duty as such. All that he said was that the accused had received training as a police constabulary as a neighbourhood watch committee member. Therefore, the accused could not claim indemnity under paragraph [d] of s 3 of the Indemnity Act.

The major reason why the State opposed the accused's claim to indemnity under any provisions of the Indemnity Act was that s 107 of the Parks Act [relating to the appointment of the Director of National Parks], and s 109 of the same Act [relating to the appointment of designated officers, inspectors, employees, etc.] had been repealed in 2001. Mr *Chikwati* so forcefully put his argument to Yakobe that it appeared as if he was now cross-examining his

[5] 1986 [1] SA 117 [A]

own witness. In spite of holding certificates as such, and in spite of all of them in Parks continuing to act in terms of their old designations, Yakobe ended up doubting his own authority as a designated officer after he was continually quizzed on the repeals. In apparent despair, he said he had not realised that the amending Act had not been aligned and that, as such, he now felt that all of them in Parks were no longer "*clothed*".

Mr *Chikwati's* argument, as I understood it, was that because sections 107 and 109 of the Parks Act had been repealed, there no longer existed such offices as were referred to in s 3[a] and [b] of the Indemnity Act. He referred to the case of *City of Harare v Zvobgo*[6] where the appointment of a committee for certain tasks by a commission purporting to be running the affairs of the City of Harare at that time after its legal tenure had lapsed, was set aside by the Supreme Court on the basis that the commission itself was in office illegally and that the court could not condone actions taken without regard to the governing statute.

However, the State's argument herein is thoroughly misguided. The repealed s 107 of the Parks Act merely set up the office of the Director of Parks as a public office, and set out his functions, powers and duties. The repealed s 109 also set up the office of officers, inspectors or employees, also from the public service. It also set out their functions, powers and duties. It is absurd to suggest that the repeal of an appointing provision in an enactment means, *ipso facto*, the abolition of the office of the appointee.

At any rate, the repealed sections were mere duplications. Section 10 of the Parks Act provides for the appointment of the Director-General. Section 11 provides for the appointment of officers, inspectors and other employees. Both provisions sufficiently "*clothe*" such offices with their respective powers, functions and duties. So, I do not understand why Yakobe should have felt "*unclothed*".

Defence Counsel referred to two cases in which the accused persons, both Parks employees, successfully invoked the Indemnity Act against murder charges in respect of poachers, or suspected poachers, shot and killed by them in the line of duty.

In the first case, *Bowa v S*[7], the accused, a game ranger, had been convicted of murder with actual intent and sentenced to death for the death of one member of a suspected poaching syndicate who the accused had shot and killed after he [the deceased] had charged at him armed with an axe as the Parks team had surrounded their homestead to flush out the

[6] 2009 [1] ZLR 218 [S]
[7] 2014 [1] ZLR 835 [S]

suspected ring-leader. On appeal, the Supreme Court overturned the entire judgment and clothed the accused with immunity.

Similarly, in the second case, *S v Never*[8], this court, at the close of the state case, discharged the accused, also a game ranger, who had shot and killed one of a group of poachers that he had surprised during their illegal hunt in a game reserve. The accused successfully invoked s 3 of the Indemnity Act.

In none of the two cases above did the courts even concern themselves with the repeal of sections 107 and 109 of the Parks Act.

I am satisfied that at the relevant time, the accused herein was "*any person assisting and acting under the direction of a person referred to in paragraphs [a] to [f]*" within the meaning of paragraph [g] of s 3 of the Indemnity Act. From the evidence led for the State, the accused was acting under the delegated authority of the designated officer, inspector or employee of Parks, if not the Director-General himself.

The second leg of the State's case and argument against the application for discharge was that even if the accused might have been covered by the indemnity envisaged in the Indemnity Act, in the circumstances of this case, he had not acted in good faith. The reason for the State saying this was that the accused had allegedly refrained from engaging the deceased first before shooting him. It was argued that it was at night and that the deceased had not seen the accused. It was argued that the accused had not fired any warning shot.

The State's argument stemmed from what Yakobe had said in evidence. In describing standard operation procedures before apprehending suspected poachers, Yakobe said the game ranger or scout must first engage the culprit verbally to assert the intention to apprehend him. Depending on the reaction, the game ranger may fire a warning shot in the air or away from the direction of the culprit to avoid maiming or killing him. Again depending on the reaction, the use of the firearm must be a last resort. Even then, the predominant intention must be to overpower the culprit to effect an arrest. However, where the game ranger senses that his life is in danger, the use of a firearm in self-defence will be justified.

However, these standard operating procedures are to me mere dictates of common sense. Yakobe stressed that every case depends on its own circumstances. In my view, it may be a travesty of justice to adopt an armchair, one-size-fits-all standard in such situations. Quite often grave peril awaits the men and women reposed with the duty to protect our wild life and who, from time, have to confront armed and dangerous bandits in the thick jungles.

[8] 2010 [1] ZLR 222 [H]

Sometimes decisions have to be made on the spur of the moment to immobilise dangerous situations.

In casu, it is contradictory to say the deceased had not seen the accused. The State's evidence, which Counsel actually notes in his argument, was that the deceased threw a burning log at the accused. So he must have seen the accused. However, since no weapon was ever recovered from him, the deceased must have been unarmed. But this is knowledge in hindsight. At the crucial moment, the accused had no knowledge that the deceased was unarmed. Furthermore, he maintained in his warned and cautioned statement and defence outline that his intention in discharging the firearm had been to scare the deceased by shooting sideways but that the deceased had run into the line of fire. Ngomani was quizzed on this. He could not refute it. He said he could not have seen the direction of the accused's aim because firstly, he himself had remained some ten metres behind, and secondly, because it was getting dark.

The Indemnity Act does not say who, between the State and the accused, the onus lies on to prove good faith. In *Never* above, KUDYA J said the onus was on the State to prove that the accused had acted dishonestly. I agree.

In *Bowa*, GARWE JA said a person claiming indemnity under the Indemnity Act has to satisfy two requirements: [1] that he was acting in good faith, and [2] that the act done by him was for the purposes of, or in connection with the suppression of the unlawful hunting of wild life. The two requirements must be read conjunctively. No indemnity attaches if one of them is missing.

"*Good faith*" is the absence of bad faith. It is *mala fides*: see *Bowa,* at p 846F. The expression is used to denote honesty, or the absence of an ulterior motive: see *S v Gwevera & Ors*[9]. In *Bowa*, the learned judge of appeal said[10]:

> "In short, good faith is the subjective state of mind that a certain set of facts genuinely exists on the basis of which it becomes necessary to act in a manner most right thinking people would consider appropriate given those facts. A disproportionate reaction given a particular set of facts may well justify an inference that such reaction was not actuated by good faith."

The words "*… for the purposes of or in connection with the suppression of the unlawful hunting of wild life*" include anything linked to, related to, or connected with attempts to suppress the unlawful hunting of wild life.

[9] 1978 RLR 466 [GD], @ p 467G
[10] At p 846G

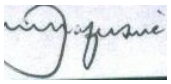
Both the Parks Act and the Indemnity Act define the term "*wild life*". In the Parks Act "*wild life*" means all forms of animal life, vertebrate and invertebrate, which are indigenous to Zimbabwe, and the eggs or young thereof other than fish. "*Animal*", in the same Act, means any kind of vertebrate animal and the eggs and young thereof, whether live or dead, other than domestic animals and fish.

In the Indemnity Act, "*wild life*" means all kinds of vertebrate animals and the young thereof, other than domestic animals.

Thus, whilst the Parks Act excludes fish from the definition, there is no such exclusion in the Indemnity Act. Fish, of course, is a vertebrate animal. It has an internal skeleton made of bone. So fish is "wild life" for the purposes of the indemnity under the Indemnity Act.

In the circumstances, I am satisfied that the State has not laid out such a *prima facie* case against the accused as to warrant him being put to his defence. I am satisfied that the accused is covered by the indemnity conferred by s 3 of the Indemnity Act. The State has failed to show that the accused acted dishonestly, or with an ulterior motive when he shot and killed the deceased. In short, it has failed to show the absence of good faith. Therefore, the accused is hereby found not guilty of murder, or any other offence of which he might be convicted, and is hereby discharged.

2 December 2016



National Prosecuting Authority, legal practitioners for the State
Saratoga Makausi Law Chambers, legal practitioners for the accused