MULENGA v THE PEOPLE (1966) ZR 118 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, RAMSAY J

16th NOVEMBER 1966

Flynote and Headnote

[1] Criminal law - 'Maim' defined - English law inapplicable - Section 5 of Penal Code construed.

A non-permanent injury is, not a 'maim' in Zambia despite English decisions to the contrary.

[2] Criminal law - Defence of property - Arrest of thief included Section 18 of Penal Code construed.

The arrest of a thief, if it takes place in the actual course of the crime, constitutes a defence of property within the meaning of Penal Code, s. 18.

[3] Criminal law - Malice aforethought - Excessive force in course of lawful arrest not murder - Section 180 of Penal Code construed.

Where defendant is motivated not by a revengeful desire to cause grievous harm but rather by a lawful intention to arrest the deceased, excessive force in the course of this attempted arrest is manslaughter, not murder.

[4] Criminal law - Manslaughter - Excessive force in course of lawful arrest.

See [3] above.

Cases cited:

(1) *R v Howe,* 100 CLR 448; 32 HLJR 212.

(2) *Jackson v R* 1962 R & N 157.

(3) *R v Mackay* (1957) VLR 560.

(4) *Commonwealth v Beverly* (1935) 235 Ky. 35.

(5) *Yusufu al. Hema* s/o *Lesso v R* (1952) 19 EACA. 249.

(6) *R v Scully* (1824) 1 C & P 319.

(7) *R v Dadson* 2 Den. CC 35.

Statutes construed:

Penal Code (1965, Cap. 6), ss. 5, 18, 18A, 180.

Criminal Procedure Code (1965, Cap. 7), ss. 15, 27.

Judgment

Doyle JA: On the 17th May, 1966, we allowed this appeal for reasons to be given later. These reasons we now give.

This is an appeal against a conviction for murder by the High Court at Livingstone on the 16th February, 1966. The learned trial judge found the following facts. The appellant was a night watchman at a farm at Choma. There had been a number of chicken thefts at

Choma, and amongst his duties the appellant had the duty of guarding against such theft and if possible of arresting any culprit or culprits. Early on the morning of the 13th October, 1965, the appellant was awakened by his own chickens making noise. These chickens were in a chicken run near his house. He went outside with a loaded shotgun and saw the deceased hiding in the chicken run. Appellant shouted for assistance; deceased tried to escape and went into an old building adjoining the chicken run. Appellant went to the door of this building and fired a shot in the air. Deceased then tried to escape through a window and the appellant aimed at his legs and shot him at a range of about ten feet. Deceased ran a few yards and fell. He had suffered gunshot wounds in both thighs from which he bled to death in a few minutes. Deceased had offered no violence to appellant, and the latter's intention was to prevent an escape. The appellant was well accustomed to the use of the shotgun and knew the damage that it could cause at short range. The learned trial judge also assumed in the appellant's favour that the deceased was committing or was attempting to commit the offence of theft and that the appellant reasonably suspected him of committing a felony.

The learned trial judge went on to find:

(a) that the appellant could have grappled with the deceased or struck him with the gun and that he had used unnecessary force to effect the arrest;

(b) that the appellant's intention was to maim the deceased;

(c) that the appellant's intention was to do serious harm to the deceased;

(d) that the appellant knew that shooting deceased at short range with the shotgun would probably cause grievous harm;

(e) that the appellant had no intention of killing deceased.

He found that malice aforethought had been proved in satisfaction of paragraphs (a) and (b) of the definition in s. 180 of the Penal Code and he found the appellant guilty of murder.

The appeal has been directed to three issues:

(a) that the appellant had no malice aforethought;

(b) that the appellant was entitled to arrest deceased and used only necessary or at least excusable force;

(c) that even if unnecessary force was used, the offence only amounted to manslaughter.

[1] As regards (a) it was contended that there was no evidence that appellant intended to maim deceased. It appears that appellant was asked the direct question whether he intended to maim deceased, and he answered, 'Yes'. Upon this evidence the learned judge came to his finding. We have come to the conclusion that this finding of the learned trial judge was not justified. He appears to have overlooked the definition of maim. If he had noticed it he would surely have explained it to the appellant. 'Maim' is defined by the Penal Code as follows (s. 5):

' "maim" means the destruction or permanent disabling of any external or internal organ, member or sense.'

1966 ZR p120

DOYLE JA

All the appellant's evidence showed that his intention was to injure the deceased so that he would halt and be arrested. For that purpose it was not necessary that he should either destroy one of the deceased's legs or cause him to be injured so that he would permanently have an Impaired use of his legs. If he had been asked in express terms whether he intended either of these results we have no doubt that his answer would have been 'No' and that he would have stated as he did elsewhere in his evidence and in his statement to the police that his intention was merely to injure him so that he would stop running.

The learned trial judge seems in fact to have followed the definition of 'maim' in the English law. Paragraph 2654 of Archbold, *Criminal Pleading, Evidence and Practice,* sets out that 'maim' means to injure any part of a man's body which may render him in fighting less able to defend himself or annoy his enemy but that 'disable' means creating a permanent injury. In accordance with s. 4 of the Penal Code in construing the expression 'maim' one can pray in aid English decisions. Indeed one must unless it is inconsistent with the context or is otherwise expressly provided. 'Maim' is defined in the Penal Code as destruction of an organ or permanent injury to an organ. Clearly it would be inconsistent to accept in Zambia as a 'maim' a non-permanent injury. It follows that 'maim' in this territory in the Penal Code is not the same as 'maim' in England but in fact corresponds to the English term ' disable'.

This point, therefore, we find in favour of the appellant. This however, would not take the appellant out of the scope of s. 180 Even if the court held that the finding that because of his knowledge of firearms he had an actual intention to cause the actual damage done was not warranted - and we make no express finding on this point - there was ample evidence to support the judge's finding that even If the appellant had no actual intention to cause grievous harm he knew that such harm would probably be the result of his act. Such a finding on the evidence seems in fact inevitable.

Upon the trial judge's findings the appellant was entitled to arrest the deceased by virtue of s. 27 of the Criminal Procedure Code and to use all necessary force to do so by virtue of s. 15 of that Code. The measure of necessary force is provided by s. 18A of the Penal Code. The trial judge found that necessary force was exceeded, and this finding, which is amply supported by the evidence, disposes of any question that the appellant was entitled to an acquittal. If s. 180 applies to the facts of this case the appeal must totally fail. Is it however, the law that a person who is doing a lawful act but honestly though mistakenly exceeds his authority in any degree and thereby intentionally causes or knows that he will probably cause grievous harm is guilty of murder if that grievous harm results in death?

The legal effect of the use of excessive force was considered in the Australian case of *R v Howe* [1]. In that case the prisoner had shot a man whom he alleged had made a sexual assault on him. One of his defences was self defence to protect himself from further assault. The trial judge directed the jury that if the force used was excessive, i.e., greater than was necessary for mere defence, the defence of self

defence was not maintainable and the resulting crime was murder. He was convicted of murder. On appeal the Supreme Court of South Australia sitting as a court of criminal appeal held that this direction was erroneous and that the law was that a person who is subjected to a violent and felonious attack and who, in endeavouring by way of self defence to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter, not murder. On further appeal by the Crown, the High Court of Australia after an exhaustive review of English, Australian, Canadian and United States, decisions upheld the ruling of the Supreme Court.

In *Jackson v R* [2], the Federal Supreme Court also considered the same point and came to the same conclusion. The judgment of the Court was delivered by Briggs, F.J. and was largely based on *R v Howe* and the cases cited therein. A number of East African cases were also considered. The substance of the judgment is summed up in the following passage (at 166):

' In cases where all other necessary conditions for a defence of self defence exist, but more force than is necessary or proper is used and death is caused, I think the true principle of English law must be similar to that of the Scottish or the Roman - Dutch law. I would say that, because the assault is *prima facie* a lawful, not an unlawful, act, malice aforethought is not ordinarily to be inferred from an intent to cause grievous harm or even in some cases to kill. It must be shown either from collateral circumstances, such as an antecedent expression of intention or taking up an offensive weapon before the attack is anticipated, or from so gross a disparity between attack and means of retaliation as to show an intention, not to defend oneself but to take violent and murderous revenge. I do not think such a disparity is shown merely because in the heat of the moment the accused has used a dangerous weapon or instrument which chanced to be at hand. As Lord Oaksey says, Queensberry rules need not be observed. But in one way or another malice

aforethought must be established before a conviction of murder can result. And provocation as defined in either the English or the local law needs not be established in order to negative malice aforethought. The initial requirement for a defence of provocation is that the act causing death must be done "in the heat of passion". In cases of self-defence this is not at all necessary. Leaving aside the cases where there is real and imminent danger of death to the accused, it may be perfectly reasonable in some cases for him to cause, and intend to cause, injury sufficiently severe to come within the category of grievous harm. If without heat, but calmly and deliberately, he does so and contrary to his intention causes death, the defence of provocation is not open to him, for he fails in the first requirements of "heat of passion" or "loss of self - control". But if his acts are done in good faith and are only marginally in excess of what would be wholly excusable it seems contrary to all ideas of justice that he should be convicted of murder.'

1966 ZR p122

DOYLE JA

It is true that the last sentence of this passage seems to lay down two separate criteria, namely good faith and an objective test of marginal excess of force. It seems clear, however, from the earlier part of the passage and the reference to English law that this is not in fact so and that the extent of the excess is merely evidential in relation to the honest belief. Where the force was grossly excessive it would be strong evidence that the acts were not done in good faith but, in the earlier words of Briggs, F.J., showed an intention to take violent and murderous revenge.

This court does not consider it necessary to repeat the exhaustive consideration already given in the cases of *Howe* and *Jackson.* It is satisfied that the English law is as stated by the High Court of Australia and the Federal Supreme Court. It is true that both these cases deal with excessive force in self defence, but it is logical that in English law the same principle applies to defence of property and apprehension of a felon where the use of force is *prima facie* lawful.

Indeed in both *Howe* and *Jackson* reference is made to *R v Mackay* [3] where Lowe, J said, ' If the occasion warrants action in self defence or for 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', and to the Kentucky case of the *Commonwealth v Beverly* [4], where the court said:

' . . . the court should have instructed that the jury might find the defendant guilty of voluntary manslaughter upon the idea that he had used more force than was necessary or reasonably necessary to prevent the commission of the felony described and to protect his property.'

The same principle is to be found in the case of *Yusufu al. Hema s/o Lesso v R* [5], where the Court of Appeal for Eastern Africa, though on the facts it rejected the appeal, said in relation to the use of excessive force in effecting an arrest (at 251):

' It cannot be validly contended that the learned trial judge did not correctly direct himself on this aspect of the law, for in his judgment, after referring to the two relevant sections of the Code, he says: "If the accused's intention was merely to effect the arrest of the deceased, the

degree of force which he used was unnecessary and grossly excessive in the circumstances. One blow with the bill - hook might have been justified, but not the series of blows which he rained upon the deceased." Had that been all and had the learned judge come to the conclusion that the appellant had merely exceeded his right to arrest and used an unreasonable or unnecessary degree of force, he might properly have found him guilty of manslaughter only, but the judge did in fact - and here the assessors were of the same opinion - reject the view that the appellant was seeking to effect an arrest. He says: " The nature of the attack, however, indicates clearly to my mind that the accused's dominant intention was to kill the deceased in retaliation and not merely to effect his arrest." This is an inference drawn from the proved and admitted facts which we, sitting as Court of Appeal, cannot say was

unreasonable and with which indeed we agree. From that finding, a conviction of murder necessarily followed.'

The ' two relevant sections' referred to are sections corresponding to ss. 15 and 27 of the Criminal Procedure Code of this territory.

If the law as laid down in these cases applies in this territory, the trial judge did not apply the correct test in relation to the actions of appellant. He did consider many of the cases referred to in this Judgment but came to the conclusion that because of the actual intent to cause grievous harm the resultant crime was murder. He relied on *R v Scully* [6], but being on sessions could not have had to hand the actual report of that case but merely the references to it in *Archbold* and *Russell.* The report shows that the crime charged in *Scully*'s case was manslaughter, not murder. Indeed, Dixon, CJ in his judgment in *Howe*'s case cites Scully as an example where both prosecution and judge considered that unlawful death caused in these circumstances only amounted to manslaughter.

Section 18 of the Penal Code reads as follows:

' Subject to any express provisions 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.'

[2] In the opinion of this court, the arrest of a thief, at least where such arrest takes place in the actual course of the crime, is a defence of property. A thief may already have in his possession stolen property. On this view the English law applies to this case by virtue of s.18. It is true that s.18A expressly deals with the measure of excessive force in effecting an arrest and to this extent qualifies s.18. It is not, however, in conflict with s.18. It is a necessary addition to that section to ensure that cases such as *R v Dadson* [7], which assumed that, if the person to be arrested were known to be a felon, it was lawful to shoot him, is no longer good law.

For the purposes of this appeal, it is unnecessary to decide what the position would have been if the appellant had not been acting in defence of property when he was attempting to arrest the deceased.

[3] [4] The facts and the judge's findings in this case show that the appellant was moved not by a revengeful desire to cause grievous harm but by his lawful intention to arrest the deceased. In these circumstances his honest though mistaken use of excessive force does not result in murder.

Accordingly we allowed the appeal, substituted a verdict of manslaughter and sentenced the appellant to two years' imprisonment with hard labour.

Appeal allowed and sentence of manslaughter substituted