IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.79 of 1993

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

B E T W E E N :

WILSON LEKO MWALA APPELLANT

Vs

THE PEOPLE RESPONDENT

Coram: Sakala, Chaila and Muzyamba, J.J.J.S.

5th October and 2nd November, 1993

For the Appellant : S.W. Chirambo, Senior Legal Aid Counsel

For the Respondent : E. Sewanyana, Assistant Senior State Advocate

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J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

The appellant was convicted on two counts of murder contrary to Section 200 of the Penal Code, Cap. 146 of the Laws of Zambia and sentenced to death by hanging.

The particulars of the offences being, on count one (1) that Wilson Leko Mwala on the 11th day of August, 1991 at Mumbwa in the Mumbwa District of the Central Province of the Republic of Zambia murdered Kenny Kapangila and on count two (2), that Wilson Leko Mwala on the 11th day of August, 1991 at Mumbwa in the Mumbwa District of the Central Province of the Republic of Zambia murdered Sailas Munkombwe.

He appealed to this court against conviction only.

The facts of the case are that on 10th August, 1991 eleven game scouts, two of whom were the deceased, were deployed in Kafue National

Park to check on poachers. On 11th August they came across a group of poachers camped. They fired some warning shots in the air in order to stop them from running away but the poachers ignored the warning shots and ran away while firing back at the scouts. They gave chase and caught two of them namely Mwala, not the appellant and Kakoma and recovered from them a rifle, muzzle loader and a shotgun. After that PW.1, Bernard Mvula saw one of the escaped poachers on an ant-hill aiming a gun at Munkombwe but before he could shoot him to disable him, he heard gun shots in succession from what sounded like an automatic rifle. Munkombwe then cried out saying 'I have been shot'. He also noticed that Kenny Kapangila had been shot dead. Both Kapangila and Munkombwe were later taken to Mumbwa. The latter died on the way to Mumbwa Hospital. Post-mortems were carried out on them and the cause of death was, in the case of Munkombwe bleeding shock due to firearm injury and in case of Kapangila multiple firearm injuries. Later, on 19th May, 1992 the appellant was apprehended in Kaoma District and an AK.47 rifle recovered from Mr. Mangangu alias Mangela. PW.2, Patrick Muzoka testified that the appellant led them to Mangangu.

The appellant's defence was one of the complete denial. He said that on 11th August, 1991 he never left his home. On that day some game scouts visited him at his house and he gave them five litres of beer which they drunk and then left. That before he was apprehended on 19th May, 1992 some game scouts had, on five occasions, visited him at his house asking for various items. He said that he did not know PW.9 Christopher Mangela and did not get a gun from him to go hunting.

Mr. Chirambo, learned Counsel for the appellant advanced two grounds of appeal namely that the appellant acted in self defence. In the alternative, that the learned trial judge erred in law by ignoring the appellant's defence that he was nowhere near the scene of the crime.

On the first ground Mr. Chirambo submitted that the exchange of fire between the scouts and poachers could be described as war, each side apprehending injury or death and that since the scouts were first to fire at the poachers then the appellant acted in self defence when he shot the two scouts. That the learned trial judge was therefore wrong to hold that the appellant did not apprehend any fear of being shot and that he did not act in self defence. In the alternative, he submitted that the learned trial judge was wrong to reject, without giving reasons, the appellant's defence of alibi, that he was at home and not at the scene of the shoot out. He further submitted that failure by the prosecution to call the captured poachers as witnesses and to offer an explanation why it took almost ten months to arrest the appellant was fatal to the prosecution case.

In response, Mr. Sewanyana submitted that the evidence in support of the conviction was overwhelming and that the failure by the prosecution to call the two captured poachers as witnesses was not fatal to the prosecution case. That it took a long time to arrest the appellant because he was hiding.

We have carefully considered the submissions by both Counsel and the evidence on record. According to PWs.1 and 2 they first fired warning shots in the air to stop the poachers from running away. This evidence is not contradicted. The exchange of fire according to PW.2 came after the poachers had run away. We do not therefore accept Mr. Chirambo's submission that the scouts fired at the poachers first to kill them. Moreover, if the scouts had intended to kill the poachers then nothing could have stopped them from killing the two poachers who were caught unharmed and taken into lawful custody.

With regard to self defence, this was considered by the learned trial judge and he rejected it and gave reasons for doing so. And we entirely

agree with his reasoning. Section 17 of the Penal Code, Cap. 146 as amended by Act No.3 of 1990 provides as follows:-

> "Subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person if the means he uses and the degree of force he employs in so doing are no more than is necessary in the circumstances to repel the unlawful attack."

It is quite clear from this Section that a person is entitled in law to act in self defence or defence of property or defence of another person or that person's property where the attack is unlawful and that a plea of self defence would stand if the force used to repel the unlawful attack is reasonable in the circumstances of a given case. In this particular case the appellant and other persons with him at the time were in the National Park illegally in that they had no permissio or licence to hunt and that the scouts were on duty when they confronted them. As such, the appellant was not entitled in law to shoot at the scouts who were lawfully excuting their duties. The learned trial judge was therefore right in dismissing the defence of self defence raised by the appellant.

The learned trial judge also considered the defence of alibi and dismissed it as an afterthought and gave proper reasons of doing so. Again we entirely agree with his reasoning because on more than one occasion the appellant confessed being at the scene of the shoot out and of shooting the two scouts. He confessed to PW.9, Mr. Christopher Mangela and to the arresting officer, PW.10 D/Sgt. Mubita Kaswela that he shot the scouts in self defence.

The warn and caution statement in which he gave a detailed account of how he got the gun from PW.9 and how he and the other poachers got to the National Park and how they were confronted by the scouts and how he shot the two scouts was admitted in evidence without objection. At the trial he suddenly made a U-turn and put forward an alibi. This defence was no doubt, as the learned trial judge found, an afterthought. We do not therefore agree with Mr. Chirambo that the learned trial judge did consider the defence of alibi raised by the appellant in his evidence.

On failure by the prosecution to call the two poachers who were caught as witnesses and to offer an explanation why it took 10 months to arrest the appellant we do not see what purpose this would have saved since the appellant confessed being at the scene and shooting the scouts in self defence.

Mr. Chirambo's submissions must therefore fail and we would dismiss the appeal against conviction and confirm the sentence.

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E.L. SAKALA
SUPREME COURT JUDGE

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M.S. CHAILA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE