

THE STATE  
versus  
BENJAMIN NEVER

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE, 9 March and 7 April 2010

ASSESSORS  
S. Tutani  
M. Mutambira

**CRIMINAL TRIAL**

*F Nyahunzvi*, for the State  
*W Zhangazha*, for the accused person

KUDYA J: This is an application made in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] for the discharge of the accused person at the close of the State case.

The accused person was (and still is) a game ranger employed by the Parks and Wild Life Management Authority at the time he shot Panganayi Muromba on the left thigh and killed him in the Mupfurudzi Game Park in Shamva. He was charged with murder after the Attorney General authorised his prosecution in terms of s 4 (b) of the Protection of Wild Life (Indemnity) Act [*Cap 20:15*]. The events leading to the death of the deceased on 29 October 2005 at 3 am were set out by the evidence of seven State witnesses. The evidence of Sergeant Simon Hlongwane, Sergeant Nala and Dr Kujinga were accepted into evidence by consent in terms of s 314 of the Criminal Procedure and Evidence Act, *supra*. Maxmore Mukubvu, William Mukubvu, Tawanda Magora and Marko Chimudende gave oral testimony of the events of that fateful morning. Dr Gwiza was called in the absence of Dr Kujinga to explain the meaning of the medical terms used in the post mortem report, exh 1.

Maxmore Mukubvu, William Mukubvu and Tawanda Magora left Muromba Village in Chief Nyajina's area in the Uzumba Maramba Pfungwe district of Mashonaland East Province in the company of the deceased in the early hours of 29 October 2005 to hunt for wildlife in the Mupfurudzi Game Park. They were armed with spears and axes and had a pack of 12 dogs.

In the game park they first killed a hare before they cornered a klipspringer which ran up a nearby rock. Maxmore went up the rock while his fellow hunters advanced from the right hand side of the rock towards their quarry. He saw the accused person grab hold of deceased by his belt and assault him with the butt of his rifle before he ran away from the scene. As he was running away he heard the sound of three gunshots fired in rapid succession. When he was a kilometer away he heard another round of three gunshots.

Under cross examination he averred that the accused first fired three warning shots into the air before he grabbed hold of the deceased. He saw all his colleagues take to their heels at the sound of the gun. As he scampered down the rock he saw the accused grab hold of the deceased and belabor him with the butt of his rifle. He changed his version and averred that the accused held the deceased with his left hand by his belt and used the right hand to fire three shots into the air while supporting the rifle with his right thigh. Thereafter he hit deceased with the butt of the rifle twice on his buttocks. The statement he gave to the police on 16 September 2006 was produced as exh 2. He told the police that his two friends who testified with him were on one side of the rock while the deceased was on the other side of the rock. He also stated in the statement that the accused set upon the deceased and hit him on his back above the waist with the butt of the rifle which he held in both his hands. He also told the police that after running for a kilometer he heard a gunshot.

The discrepancies in Maxmore's version demonstrate that he did not fully observe the actions of the accused person towards the deceased because he was busy scampering down the rock in a bid to make good his escape without detection.

William testified that as they were surrounding the klipspringer, the accused suddenly appeared and set upon the deceased whom he hit once on the back just above the waist with the rifle butt as he shouted the words poachers twice. The witness and Tawanda Magora ran away leaving Maxmore on top of the rock. The deceased never ran away from the scene where he was apprehended by the accused. As he was running away he heard the sound of three gunshots which were followed ten minutes later by another three shots. Under cross examination he stated that the accused was four metres from the witness when he fired the rifle in his direction. He conceded that he did not wish to shoot him as he would not have missed him at such a short distance. His version in court was different from the one he gave to the police on 16 September 2006 in exh 3, as regards the number of shots he heard. In his

statement he averred that he heard two shots fired in rapid succession and after he had run for a distance of 500 m he heard another shot.

Tawanda Magora was prompted to run off the scene by William who threw away his hunting weapons before he took to his heels. He had run for about 20 meters when he heard the sound of three gunshots. A fourth rang out after he had run for about five minutes. In his statement to the police in September 2006 he stated that he first heard two gunshots and then a single gunshot later.

Marko Chimudende testified that he was on anti-poaching patrol duties in the game park in question with the accused person. They divided the area of patrol between them and agreed to meet at a certain rendezvous in the game park. When he reached the rendezvous he heard the three gunshots ringing in the air in rapid succession. The accused made a report to him of how he shot one of the poachers as he tried to shoot one of the fleeing hunting dogs. The two went to check the deceased and found him in the throes of death bleeding from the thigh injury. When the police arrived, they picked three spent cartridges from the three different spots.

Dr Edmore Gwiza, a medical practitioner with the Family Support Clinic in Harare explained the medical terms recorded by Dr Kujinga in the post mortem report. The pathologist recorded that the deceased sustained a gunshot wound on the left upper thigh. The bullet entered from the side on the back of left upper thigh and exited from the middle of the front part of the same thigh. He concluded that death was a result of bleeding from that injury.

The State closed its case and Mr *Zhangazha* for the accused applied for his discharge and acquittal. He relied on the provisions of s 3 of the Protection of Wild Life (Indemnity) Act, *supra*, which reads:

### **“3 Indemnity**

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”.

The statute in question came into operation on 8 September 1989. The deceased was shot and killed on 29 October 2005 at around 3 am while he was poaching with fellow villagers. His partners in crime testified that they all knew that they were committing a

criminal offence by hunting in a game park without a requisite licence. That they were aware that they were not permitted to hunt in the game park was further demonstrated by the fact that they went to do so in the bewitching hours of the morning. The discrepancies in the testimony of Maxmore on what he saw the accused doing demonstrate his unreliability as a witness. It seems to me that as they were hunting in the dark it was difficult for him to clearly observe the actions of the accused in relation to the deceased. His version was at variance with that of his partner in crime William. It was clear to me that on sensing the presence of the accused amongst them, William took flight as did Tawanda. These witnesses' testimony demonstrated that the shots were first fired after they had commenced flight and not before they did so as stated by Maxmore. The probabilities seem to be that on sensing the presence of the accused amongst them all the poachers including the deceased ran away. After all, they were all engaged in the illegal hunting of wildlife.

The testimony of Marko showed that the accused was an employee of the Parks and Wild Life Management Authority who is an indemnified person as defined in para (b) of s 2 of the Protection of Wild Life (Indemnity) Act, *supra*.

In dealing with the Indemnity and Compensation Act, 1975 which was similarly worded BECK J with the concurrence of SMITH J in *S v Gwevera & Ors* 1978 RLR 466 (GD) at 467 G stated that:

“The words “in good faith” have been used in s 4 to accentuate the need for honesty, and hence for the absence of an ulterior motive, in relation to anything done for the purposes of, or in connexion with the suppression of terrorism.”

The onus lay on the State to prove a *prima facie* case against the accused person that he acted dishonestly or with an ulterior motive in shooting the deceased. The testimonies of the State witnesses lack evidence upon which a reasonable court, acting carefully, might properly convict. See *S v Kachipare* 1998 (2) ZLR 271 (S) at 276 D-E. It does not show that the accused was not acting in good faith or that he acted with an ulterior motive for the purposes of or in connection with the suppression of the unlawful hunting of wild life. The concession by Mr *Nyahunzvi*, for the State, for the discharge of the accused at the close of the State case was therefore properly made.

In the result, I decline to place the accused person on his defence. He is found not guilty and is acquitted of the charge of murder or any other competent verdict that might arise therefrom.

*Attorney General's Office*, legal practitioners for the State  
*Chinamasa, Mudimu, Chinogwenya & Dondo*, accused person's legal practitioners