CONSTAIN HAMWENDA v THE PEOPLE (1980) Z.R. 63 (S.C.)

SUPREME COURT
GARDNER AG. D.C.J., BRUCE-LYLE, J.S. AND CULLINAN AG. J.S.
11TH MARCH, 1980
S.C.Z. JUDGMENT NO. 6 OF 1980

Flynote
Criminal law and procedure - Manslaughter - Hostile intent and recklessness - Consideration of.

Headnote
The statement of facts revealed that the appellant, a soldier in the Defence Forces, had discharged what he thought was an unloaded pistol at the deceased. The pistol had been produced by the appellant's comrade soldier, and the appellant had, as he thought, unloaded the pistol, not realising that a live round of ammunition remained in the firing chamber. The appellant was in the process of playing with the pistol when it discharged.

Held:
(i) For the act to be unlawful it must constitute at least a technical assault.*R.v Lamb* followed.

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(ii) It had not been shown that the appellant had any hostile intent or that he had been reckless.

Case referred to:
(1) R. v Lamb (1967) 51 Cr. App. Rep. 417

For the appellant: G.M. Sheikh, Senior Legal Aid Counsel.
For the respondent: F.Mwiinga, Assistant Senior State Advocate.

Judgment
CULLINAN, AG. J.S.: delivered the judgment of the court.

The appellant was convicted of manslaughter on his own plea of guilty and was sentenced to ten years' imprisonment with hard labour.

The learned Assistant Senior State Advocate, Mr Mwiinga, has indicated that the State does not support the conviction.

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appellant's comrade soldier, and the appellant had, as he thought, unloaded the pistol, not realising that a live round of ammunition remained in the firing chamber. The appellant was in the process of playing with the pistol when it discharged.

The facts of this case are on all fours with those in the Court of Appeal case *R. v Lamb* (1). In that case Sachs, L.J., in delivering the judgment of the court observed (at p. 421) that the trial judge had fallen into error when he took the view that,

> "the pointing of the revolver and the pulling of the trigger was something which could of itself be unlawful even if there was no attempt to alarm or intent to injure."

Sachs, L.J., observed (at pp. 421/422) that the correct view was that,

> "for the act to be unlawful it must constitute at least . . . 'a technical assault'."

In the present case the appellant had no hostile intent. The fact that he did not induce fear in those present is exemplified by the statement of facts which indicates that those present were laughing while he was playing with the pistol.

Again, there is nothing in the statement of facts to indicate that the appellant was reckless. He took the precaution indeed of emptying the pistol, or so he believed. There was nothing to indicate that the appellant's belief was unreasonable. There was certainly no expert evidence before the court to illustrate this. Indeed, the learned trial judge made the assumption that although the appellant may not have received advanced training in the particular weapon, he must have obtained practical experience during his stay in the Defence Forces. There was nothing to show however that the appellant had ever received any training, or had gained any experience in the use of the particular weapon.

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Under the circumstances we consider that the learned trial judge should have entered a plea of not guilty. We have considered the question of ordering a re-trial. The learned Senior Legal Aid Counsel, Mr Sheikh, has submitted that this is not an appropriate case for making such an order. As we see it, no offence was disclosed by the statement of facts and we are of the opinion that this is not an appropriate case in which to order a re-trial. The appeal is allowed and the finding and sentence of the court below are set aside.

Appeal allowed
