S v MANYARA & OTHERS 1983 (2) ZLR 313 (HC)

Court High Court, Harare B

McNally & Scott JJ

21 November 1983 C

[zFNz]Flynote

Criminal procedure - sentence - Parks and Wildlife Act 14 of 1973 - hunting of animals - distinction between snaring and hunting by other means.

D

[zHNz]Headnote

It is clear from the authorities that, when it comes to the question of sentence on a charge of unlawful hunting under the Parks and Wildlife Act 14 of 1973, a distinction should be drawn between cases involving the snaring of animals and those involving hunting by other means. In the latter cases, the principle is that the Court will first consider whether a fine, together with a suspended sentence of imprisonment, would be appropriate. Only where there are aggravating features will an effective sentence of imprisonment E be imposed.

Cases cited:

S v Mutiza HC-S-48-82;

S v Mangandi & Another AD 175/77.

Mrs S Jarvis, for the appellants. F

P Haxen, for the State.

[zJDz]Judgment

McNally J: These five appellants were charged and convicted before the Magistrate in Kadoma, on the 8 August 1983 of contravening s 47(2) (a) of the Parks and Wildlife Act No 14 of 1973. They all pleaded guilty G to the offence which involved hunting with guns on a ranch resettlement area. At the end of that hunt they were found in possession of two male kudus, one duiker, one wart-hog and one blue wildebeest.

They H were convicted under subs (a) of the section in relation to all these animals and were sentenced accordingly. However, it has been pointed out on appeal by Mrs Jarvis and not disputed by Mr Haxen for the State that in the agreed statement of facts, it is alleged that the blue wildebeest

was already dead when they found it and was stuck in some mud in a dam. It must be accepted that that is the true state of affairs and therefore it is clear that the

accused were wrongly convicted in respect of that animal. They should have been convicted, in respect of the blue wildebeest, of A a contravention of s 47(2) (b) of the Act.

The notice of amendment introducing this point was apparently served on the magistrate and we were advised that the magistrate's reasons in relation to the amendment had been forwarded to the Registrar of this B Court. We have not seen them. In the circumstances, however, it does not appear to us that they are of any relevance because there is very little that the magistrate can say in relation to the facts that I have just enumerated. It is clear that they must be accepted as facts; it is clear that he has overlooked this point and therefore we are prepared to condone C the fact that there are no reasons of the magistrate before us in relation to this aspect of the argument.

While dealing with technical points we should also add that the compensation payable will have to be amended because compensation is not D payable in terms of the Act, resulting from an offence against s 47(2)(b). Therefore, the compensation awarded in respect of the wildebeest will have to be struck out. The compensation in respect of the remaining animals comes to a total of $440, ie $400 in respect of the two male kudu, $25 in respect of the wart-hog and $15 in respect of the duiker. E

I come finally to the main point of the submission put before this Court by Mrs Jarvis, which was that the accuseds should have been given the option of a fine. As a result of the factor relating to the blue wildebeest to which I have already referred, this Court is at large in relation to F sentence. The cases to which Mrs Jarvis has referred the Court seem to me to make it clear that in general where the hunting and killing of animals involves the use of dogs, spears or guns, the principle to be applied is that the Court will first consider whether a sentence of a fine coupled with a suspended sentence of imprisonment would be appropriate and only G where there are aggravating features will the Court determine upon an effective sentence of imprisonment.

The cases cited as authority by Mr Haxen are undoubtedly more recent in that they are 1983 cases, by and large, but they are decisions on review H and in many of them at any rate - I refer particularly to the 1983 decisions - the magistrate imposed a sentence of imprisonment and the matter of sentence was simply not dealt with on review. The review deals,

in other words, with other aspects of the cases. Naturally, the Court will be guided, and indeed bound, more by appeal decisions where the matter has been considered and where the Court has had the benefit of argument A as is the case for example in S v Mutiza, HC-S-48-82 and S v Mangandi and Another AD 175/77.

It seems to me therefore, looking at the authorities, that we are bound by the approach set out in Mutiza's case and Mangandi's case and that B is not the approach that was followed by the magistrate. It seems clear that there is a

distinction drawn between snaring of animals on the one hand and hunting of animals by other means on the other hand. Whether this is due to the element of cruelty involved in the snaring or whether it is due to the wastefulness, as Mrs Jarvis suggests, of the method of C snaring, or a combination of those two factors, I do not know, but I think it must be accepted that the Courts have a different approach to sentencing in relation to cases on the one hand involving snaring and on the other hand involving the other means that I have mentioned.

Taking these factors into consideration and bearing in mind that we D are at large, it is my view that this is a case in which a sentence of a fine coupled with a sentence of a suspended sentence of imprisonment would be sufficient to meet the needs of the case. I bear in mind that the persons concerned are persons of standing in their community, although not necessarily persons of wealth because it does not appear to be a wealthy E community. They are people who are councillors and headmasters and civil servants. Only one of them is unemployed. The Court must take a serious view when persons like these set a bad example for others, but in view of the factors to which I have referred, we are satisfied that this seriousness can be adequately recognised by the imposition of fines.

We F have given some thought to the question of the differentiation of fines as between the five persons involved. None of them, as I have indicated, appears to be wealthy. The first appellant seems to have done almost all the shooting with his .303. He is a councillor and a shop-owner G but in a drought year like this a rural shop-owner need not necessarily be a very wealthy person. The second appellant shot one of the smaller animals with his .22 rifle but he is an elderly man of 65 and he is apparently unemployed. The third appellant was the driver of the vehicle and was a senior clerk in the civil service. The fourth and fifth appellants were H primary school headmasters who do not appear to have taken any positive part apart presumably from helping to load the animals on to the vehicle.

Both Counsel take the view that it would not be fair on the appellants

to make any distinction between them on the basis of who took what part in this joint expedition, although we have been urged to give special consideration to the elderly and unemployed person who is the second appellant. In view of that approach, I think it reasonable to treat them all the same, except for the second appellant, who, as I have said is A unemployed, and who says that he has savings of $100 together with eight head of cattle. I bear in mind too that he is married with seven children.

In these circumstances I would allow the appeal and set aside the B sentences of imprisonment on all the accused. I would sentence them instead, with the exception of the second accused to a fine of $200 each, together with a sentence of 4 months imprisonment with labour, suspended for three years on condition in each case that the appellant is not convicted of contravening s 47 of the Parks and Wildlife Act, or of any offence involving the hunting of animals, committed during that period, for C which he is sentenced to a term of imprisonment without the option of a fine.

In regard to the second appellant, that is Mhukayesango Mandizvidza, D the fine will be $150 and he is also sentenced to 4 months imprisonment with labour suspended on the same conditions.

In respect of all the accuseds and at the request of Mrs Jarvis they will be given time to pay and the warrant will be suspended until 2 January E 1984. The order of forfeiture in relation to the weapons will stand and it is further ordered in respect of compensation that the Appellants should pay compensation to the appropriate authority for Mulota Ranch, Battle fields in the sum of $440, jointly and severally, one paying the others to be absolved. F

Scott J: I agree.