S v MARANGA & ORS 1991 (1) ZLR 244 (SC)

Court Supreme Court, Harare B

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal C

14 March & 16 May 1991

[zFNz]Flynote

Criminal law - statutory offences - Parks and Wild Life Act 1975 - s 47(2) - illegal hunting - onus on prosecution to prove necessary intent. D

Criminal procedure - consequences of prosecution failure to inform accused person of case he has to meet.

Evidence - circumstantial evidence - dangers inherent in drawing conclusions therefrom - similar fact evidence - general purpose. E

Statutory presumption of guilt - circumstances in which onus on accused to prove that it does not apply.

Legislation - Parks and Wild Life Act 1975 s 2 - s 47(2) - s 84(15) - presumption of guilt cast upon accused - onus on accused - when presumption can be invoked. F

[zHNz]Headnote

On a charge of illegal hunting in contravention of s 47(2) of the Parks and Wild Life Act 1975 the evidence merely established that the first and second appellants had just alighted from the vehicle on a public road and that there were five kudu grazing about fifty metres from where they stood. Their loaded rifle was in the vehicle. G

Held, the evidence tendered was not probative of an intention on the part of the first appellant to hunt.

Held, further, that when the first appellant was arrested he had not yet committed the offence charged.

Held, further, that accordingly, none of the other appellants were guilty of any offence. H

1991 (1) ZLR p245

KORSAH JA

Cases A cited:

S v Green 1962 (3) SA 886 (A)

Teper v R [1952] AC 480; [1952] 2 All ER 447 (PC)

R v Difford 1937 AD 370

R v Hlongwane 1938 NPD 46

S B Mushonga for the appellants

A Guvava for the respondents

[zJDz]Judgment

Korsah JA: The appellants were convicted of illegal hunting in contravention of s 47(2) of the Parks and Wild Life Act 1975 ("the Act"), and sentenced to varying terms of imprisonment. They appealed against their convictions and sentences imposed. C

The facts are that on 15 October 1989 the five appellants left the first appellant's home in Kadoma in a Peugeot pick-up driven by the first appellant. The second appellant, Mackenzie Bizbani, sat in the passenger seat next to the driver; while the other three appellants, all of whom were women and two of whom were the wives of the first and second appellants respectively, sat in the body of the pick-up. D The first appellant had with him, to the knowledge of the other appellants, a .22 rifle, No. LA 55976.

At or near Twin Tops Ranch at Battlefields, fifty kilometres from Kadoma, E the first appellant stopped the vehicle. Mr Douglas Kok (the complainant), who runs a safari business on the nearby ranch, for reasons which shall hereafter be given, followed the appellants' vehicle when first sighted near the ranch by his scouts up to the point where the appellant stopped his vehicle. The time was about 4.30 pm.

The complainant said that about fifty metres from the spot where the first F appellant had parked his vehicle were five kudus grazing by the roadside. The first and second appellants were out of the vehicle when he got to them. He asked the first appellant why he had stopped his vehicle in that vicinity and was informed by the first appellant that he had stopped because the engine was boiling. The complainant checked the engine and found that it was not boiling. He said he enquired of the first appellant whether he had a firearm and the first appellant denied having a weapon. It was only when the complainant G threatened to search his vehicle that the first appellant admitted being in possession of a firearm and produced the 22 rifle from the floor beneath the driver's seat and handed it over to the complainant. The rifle had a live round in the chamber, the catch was off, and it had four rounds in the magazine. H

The A complainant asked for the destination of the appellants and the first appellant informed him that they were going to the next resettlement area, which was a further twenty-five kilometres from the Ranch. The complainant arrested the first appellant and drove him in his (the complainant's) vehicle to Battlefields Police Station. Although the second appellant, at the request of the complainant, had agreed to follow them to the police station in the first appellant's vehicle, he did not do so. B

The complainant said that he followed the first appellant's vehicle because of certain information that he had received from his scouts and a neighbour's son. Part of the

information upon which the complainant acted emanated from Kudakwashe Masere, who is one of his game scouts residing at Twin Tops Ranch. C

Kudakwashe testified that at about 4.30 pm on 8 October 1989, just a week before the arrest of the appellants, he saw the same blue Peugeot pick-up drive past their compound with four people in it. About three kilometres from the compound the Peugeot pick-up turned into a road leading to a dam nearby. He followed the vehicle and heard two shots being fired. As he D approached the vehicle, the vehicle drove past him with only two persons on the vehicle. They lay in wait for the vehicle all night, expecting it to return for the other two occupants, but it did not return. He made a report of the incident to the complainant. E

On 15 October 1989 Kudakwashe observed the same motor vehicle drive past their compound at around the same time as on 8 October 1989. He informed the complainant, who instructed the game scouts to get into his vehicle, and then proceeded to tail the appellants to where the first appellant had stopped his F vehicle. Kudakwashe had, however, to admit under cross-examination that not once, on the occasions that he saw the first appellant's vehicle, did he see the vehicle transporting any game, but also said that on all the occasions that he had sighted the first appellant's vehicle never had he observed it carrying vegetables.

The road passing through Twin Tops Ranch and on which the first appellant G parked his vehicle is a public thoroughfare. The appellants all denied that they were on that road with the intention to hunt or kill any animal. The onus was, therefore, on the prosecution to prove that they possessed the necessary intent.

The first appellant said he was the owner of a vegetable market at Kadoma. H

On A 15 October 1989 he wanted to go to the resettlement area to buy vegetables. He drove his car to the Battlefields area and took the road to the resettlement area. They drove past a ranch where there were humps on the road. Having passed the ranch he noticed that there was a motor vehicle following them. After a distance of three kilometres from the ranch the vehicle trailing him overtook him and stopped him. The complainant asked why he was driving so slowly and he told the complainant that he was having problems B with his motor vehicle. He said the complainant asked him whether he had a rifle, he answered in the affirmative, but refused to give it to the complainant; whereupon the complainant checked the front part of the driver's seat and recovered the 22 rifle from the floor.

I must state here and now that insofar as discrepancies appear in the accounts of the complainant and the first appellant, I am inclined to give greater C credence to the testimony of the complainant than to that of the first appellant; not only because the complainant had nothing to gain by fabricating a story against a man who was a stranger to him but also because the complainant's testimony was fully corroborated by that of Kudakwashe and had a ring of truth about it. But even so, was the

evidence proffered by the prosecution probative of an intention on the part of the first appellant to hunt? D

The definition of "hunt" in s 2 of the Act is:

"(a) to kill, injure, shoot at or capture; or E

(b) with intent to kill, injure, shoot at or capture, to wilfully disturb or molest by any method; or

(c) with intent to kill, injure, shoot at or capture, to lie in wait for, follow or search for;"

Of F these heads the one most likely to apply to the appellants is (c), as the accepted facts were that the appellants were trailed and found standing by their car on a public thoroughfare with kudus grazing fifty metres from where the car was parked. The State's case could be put no higher than that.

The learned trial magistrate reasoned that: G

"Accused accepts that he had driven past the same ranch on previous occasions and that this is a road used by other motorists proceeding to the resettlement area. But it is clear from the evidence of the State witnesses that this particular motor vehicle attracted specific attention of the game scouts. It could not have been because of its colour or white tyre alone H

but A its movements. Its movements must have led the game scouts to suspect or believe that it was being used in poaching. So convinced was the second State witness that the motor vehicle was being used in poaching that he put it to Accused No. 1 that he had a firearm in the motor vehicle. The Accused had no good reason at all for the possession of the rifle. Accused No. 1 knew that it was supposed to be kept at home under lock and key. If he was going to the resettlement area to buy vegetables he had no pressing reason to arm himself. He admits that he had live rounds. In fact he had a bullet in the chamber. He B also had a few rounds in the magazine. Surely if he was not on a mission whose object was to use the firearm would he have had to prepare the firearm in readiness for use at any given time during the course of the journey? He obviously would not. I am satisfied that the fact that Accused No. 1 had the loaded rifle conveniently placed on the floor of the motor vehicle just below the driver's seat was because he intended to use it when need arose." C

The learned trial magistrate came to this conclusion because of the overwhelming weight of the circumstantial evidence placed before him. D

Firstly, the learned trial magistrate placed great reliance on similar fact evidence and rightly emphasised in his reply to the grounds of appeal against conviction that he was legally entitled so to do. Ogilvie Thompson JA observed in S v Green 1962 (3) SA 886 (A) at p 894B-C that: E

"For, as was stated in R v Katz & Anor, supra, and reaffirmed in R v Roets, supra, the general exclusionary rule that the prosecution may not prove that the accused has committed crimes other than the one charged is not an absolute one. In the words of Watermeyer CJ in R v Katz & Anor, supra, at p 79: F

'It only operates to exclude such evidence when such evidence is solely relevant to show that the accused, by reason of his bad character or his commission of other crimes, had a criminal propensity and was, therefore, likely to commit the crime with which he was charged. If, for any other reason, it is relevant to the question before the Court it is admissible'." G

In the instant case the fact that the first appellant's vehicle had previously been observed in suspicious circumstances may assist in drawing the inference that he was once again in the vicinity of the ranch for some illegal purpose. But from the circumstantial evidence adduced, inclusive of the H

similar A fact evidence, all that one can really infer is that the first appellant was there for some unlawful purpose, possibly even with an intention to hunt, but does that constitute the offence charged? Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. Lord Normand observed in Teper v R [1952] AC 480 at 489 that: B

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' "mouth of the youngest," C and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

I D ask myself, is the inference that the first appellant was hunting at Twin Tops Ranch the only one to be drawn from the circumstantial evidence? While the circumstantial evidence leaves me with a strong suspicion that he was up to no good, it cannot be said that the circumstantial evidence proffered excludes any other conclusion. Even if the first appellant's explanation that he was on his way to purchase vegetables from the resettlement area does not have a ring E of truth about it, it still is not inconsistent with the circumstantial evidence and remains a possible explanation of his presence on a public thoroughfare adjacent to the ranch. At best, the circumstantial evidence raised no more than a very strong suspicion that the first appellant was there to hunt. The learned trial magistrate could not have been satisfied that the explanation was false. R v Difford 1937 AD 370. The learned trial magistrate fell into error when he concluded that the circumstantial evidence

adduced led irresistibly to the F conclusion that the first appellant was guilty of a contravention of s 47(2) as charged.

It seems to me that the State appreciated the error into which the learned trial magistrate fallen and attempted to mend its fences by raising in its heads of G argument, for the first time on appeal, the presumption of guilt which subs (15) of s 84 of the Act casts upon the first appellant. The said section recites that:

"(15) If any person is seen or found -

(a) on any land, on which there are animals, in possession of any H

weapon capable of killing any animal by the discharge of any A missile or with a free ranging dog; or

(b) within one hundred metres of any waters in possession of any gear, device or appliance capable of being used for fishing;

he shall be deemed to have entered upon such land for the purpose of hunting or fishing, as the case may be, without authority in terms of this Act unless it is proved that he - B

(i) had such authority to enter upon such land for the purpose of hunting or fishing;

(ii) was not upon such land for that purpose." (Emphasis supplied.) C

To begin with, at no time during their trial were the appellants apprised of the onus that lay on them. It seems to me that an accused person is entitled to be informed of the case which he has to meet and failure on the part of the prosecution to so inform him may result in the prosecution proving nothing against the accused. See R v Hlongwane 1938 NPD 46. On the other hand, D the State may proffer sufficient evidence in support of the offence to cast upon the accused the onus of proving that the presumption does not apply. The question is: Did the prosecution lead sufficient evidence to raise the presumption that the appellants were hunting?

The presumption can only be invoked if any a person is found on any land E on which there are animals. The appellants were found on a public thoroughfare and not on Twin Tops Ranch. But even if the phrase any land can be stretched to cover a public thoroughfare adjacent to a safari area, there is still another obstacle which the State failed to surmount. The State should at least have adduced evidence that the first appellant did injure, shoot at or F capture, or lie in wait for, follow or search for any animal in terms of the definition of "hunt". All that the evidence established was that the first and second appellants had just alighted from the vehicle and that there were five kudus grazing about fifty metres from where they stood. The rifle was still

in the vehicle. Even though there was a live bullet in the chamber it can hardly be said that they were lying in wait for any animal when they were arrested G by the complainant. Perhaps if the complainant had waited for the first appellant to take the rifle out of the vehicle one may have been persuaded to the view that they were lying in wait with intent to kill, injure, shoot at or capture an animal. It seems to me, for want of a better phrase, that the complainant jumped the gun, when he arrested the first appellant in the circumstances that he did; for he had not yet committed the offence charged. H

If A the first appellant was not guilty of the offence charged, then none of the other appellants were guilty of any offence.

In the result, the appeals succeed; the convictions are quashed, and the sentences imposed are set aside.

McNally JA: I agree. B

Ebrahim JA: I agree.

Mushonga & Associates, appellants' legal practitioners C