S v TARR 1999 (2) ZLR 308 (HC)

1999 (2) ZLR p308

Citation	1999 (2) ZLR 308 (HC)
Case No	Judgment No. HH-216-99
Court	High Court, Harare
Judge	Bartlett J, Gwaunza J
Heard	October 21, 1999
Judgment	November 3, 1999
Counsel	Miss W T Miles, for the appellant
H Ushewokunze, for the State	
Annotations	None

Criminal appeal B

[zFNz]Flynote

Criminal law - statutory offences - Parks and Wild Life Act [Chapter 20:14] - s 24(1)(b) - hunting in a national park - what is a national park - animal shot on shore between Lake Kariba and high water mark fixed by Minister - such shoreline not C part of national park - "hunt" - what is

[zHNz]Headnote

The appellant, a professional hunter, and his client shot an elephant on the shore line of Lake Kariba. The lake itself is a national park and the Omay Communal Lands abutted the lake at the point where the elephant was D shot. It ws not clear whether the elephant was shot in the Omay Communal Land at a point between the edge of the water and the designated full supply level of the lake. But under s 20(2) of the Act, exposed land between the full supply level and the actual water level is deemed to be part of the land abutting onto the lake, that is, in this case, the Omay Communal Land. The appellant held a permit to hunt, issued by the controlling authority for the communal land in question. He was charged with hunting in a national park without a permit. E

Held, that the appellant had authority to hunt in the communal land and could not be convicted of hunting in a national park. The only basis on which he could have been convicted, taking account of the wide definition of "hunt" in s 2 of the Act, would have been if the evidence showed that he had searched for the elephant while he was on the lake -even if the elephant was shot in the Omay Communal Land.

[zSTz]Statutes Considered

Legislation considered: F

Parks and Wild Life Act [Chapter 20:14], ss 20 and 24(1)(b)

[zCIz]Case Information

Miss W T Miles, for the appellant

H Ushewokunze, for the State

[zJDz]Judgment

Bartlett J: As dusk descended across the Ume River on 6 November 1998, a lone bull elephant stood near the G water's edge. A small boat and canoes approached through the fading light. The occupants saw the elephant and the boats drew into the riverbank. Tarr, a professional hunter, and his client from Woodstock, Virginia, clambered ashore. They approached to within about eleven metres of the elephant and firing their hunting rifles killed it as it grazed peacefully and quietly by the river. What it is in the minds H

of some human beings that takes pleasure in destroying a beast of stately splendour in such circumstances is A not for me to ponder. I can only observe that the Good Lord has created a diversity and tells us that there is a purpose to everything under heaven.

Photographs show members of the hunting party smiling proudly while sitting astride the carcass of the fallen elephant lying in the dry and dusty earth. Human pride certainly takes some strange forms. The question argued B before this court is whether that earth on which the elephant died is part of the Omay Communal Lands or the Lake Kariba Recreational Park. If it is the former, it is common cause that Tarr, the appellant, hunted the elephant in accordance with a lawfully issued permit. If it is the latter, then it is also common cause that he was unlawfully hunting in a national park and is guilty of contravening s 24(1)(b) of the Parks and Wild Life Act [Chapter 20:14] ("The Act"). The magistrate found that the land on which the elephant died was part of the Lake C Kariba Recreational Park and convicted Tarr, fining him $1000 or 3 months' imprisonment and imposing a 4 months' suspended prison sentence. Tarr has appealed to this court against both conviction and sentence.

The evidence led by the State contained contradictions. The game ranger called insisted that the elephant was D shot whilst it was in the Ume River. He agreed that if it had not been in the water it would have been in the Omay Communal Land and no offence would have been committed. The authority for the Omay Communal Land had issued a permit for Tarr to kill an elephant in the communal land. A game scout for the authority who accompanied the hunt averred that the elephant was not shot in the Ume River but on dry land, part of the Omay E Communal Land. A policeman confirmed that he observed the carcass and that it was on dry land and could not

have been dragged from the water. Tarr and his assistant hunters all swore that the elephant was shot some eleven metres from the Ume River on Omay Communal Land. F

A surveyor was also called by Tarr from Bulawayo. He had prepared a plan from indications made by Tarr and those with him. The significance of this plan to the trial was that in terms of SI 274 of 1999 the appropriate minister had fixed the full supply level of Lake Kariba above mean sea level as 484.64 metres (Kariba datum) G and 483.95 metres (national datum). The plan showed the first shot had been fired at the unfortunate elephant when it was 484.02 metres above mean sea level. The significance of all this, according to Tarr's counsel at the trial, was that the elephant had been shot beyond any doubt above the full supply level of Lake Kariba and therefore was within the Omay Communal Land. Even if this were not so, it was contended that in terms of s 20(2) of the Act the land exposed between the full supply level and the actual edge of the water was deemed to be part of the Omay Communal Land. It was H

common cause that on 6 November 1998 the actual level of Lake Kariba at this point along the Ume River was A well below the full supply level.

Faced with all the contradictions in the State case, the trial magistrate could not but find that the elephant had been shot while on dry land. With no evidence from the State as to precisely where on the dry land the shooting had taken place, the trial magistrate similarly had little choice but to accept the indications on the surveyor's plan. But he nevertheless found that the elephant was shot on dry land at 484.58 metres above mean sea level. This B he found was well within the full supply level of Lake Kariba of 484.64 metres. He did not indicate why he had based his judgment only on the Kariba datum figure of 484.64 metres specified in the statutory instrument and ignored the national datum figure of 483.95 metres, also specified in the statutory instrument. He accordingly found that the elephant was shot within the full supply level of Lake Kariba. He disagreed with Tarr's counsel that C s 20(2) of the Parks and Wild Life Act deemed the land between the full supply level and the edge of the water to be the Omay Communal Land and convicted Tarr.

The critical issue in the argument as presented on appeal is whether the trial magistrate was correct in his interpretation of s 20(2) of the Act. If he was incorrect, the appeal must succeed on the basis of the arguments D as presented and on the basis of the evidence as led at the trial. If the trial magistrate's interpretation of s 20(2) was correct, consideration would need to be given whether it had been proved that the elephant had been shot within the full supply level of Lake Kariba. E

Section 20(1) and (2) of the Act provide as follows:

" (1) Where the land inundated by any lake or part of a lake has been declared to be part of the Parks and Wild Life Estate, the

Minister may, by notice in a statutory instrument, fix the height above mean sea level of the full supply level of such lake and may, in like manner, amend such height.

(2) Any land surface which is exposed at any time between a height fixed in terms of subsection (1) F and the edge of the water of the lake concerned shall, for so long as it is exposed, be deemed to be part of the land abutting on to the lake and shall be subject to any enactment relating to such land."

It is common cause that the Ume River at the point in question is part of the Parks and Wild Life Estate. It is specified as a recreational park, as part of Lake Kariba, in item 3 of Part 1 of the Fifth Schedule to the Act. A height has been fixed by the Minister by statutory instrument fixing the height above mean sea level of the full G supply level of Lake Kariba. The land exposed between the edge of the water of the Ume and the full supply level of Lake Kariba, is, for as long as it is exposed, deemed to be part of the land abutting on to the lake and subject to any enactment relating to such land. To my mind, the literal, grammatical interpretation of s 20(2) is abundantly clear. The land H

surface in question, as long as it is exposed, is deemed to be part of the Omay Communal Land. The A legislature could not, I believe, have expressed its intention more clearly.

I disagree that a literal interpretation, to quote the magistrate, "perpetrates the mischief which the legislature sought to remove". The Omay Communal Land bounds Lake Kariba, as defined in the Fifth Schedule of the Act. When the water of the lake is below the full supply level as specified, the exposed land is deemed to be part of B the Omay Communal Land for as long as it is exposed. As the water rises, the inundated land becomes part of the lake. The Omay Communal Land, according to the terms of the legislation, will always start where the water ends. There will always be an ebb and flow. The physical boundaries of the Omay Communal Land on Lake Kariba will depend on the level of the lake. The legislature has acknowledged and provided for this fact of nature C in s 20(2). The legislation is not absurd and any mischief aimed at by the Act is not compounded by this interpretation of s 20(2). The section clearly, simply and sensibly defines the boundary between the Omay Communal Area and the Lake Kariba Recreational Park.

Counsel for the State argues that the interpretation of waters in the definition section of the Act supports the trial magistrate's finding. "Waters" is defined as follows: D

"any river, stream, watercourse, lake, swamp, pond, dam, reservoir, pan, furrow or other collection of water, whether natural or artificial, together with the foreshores or banks thereof, but does not include -

(a) water in aquaria or ornamental ponds unconnected with any natural water; or

(b) water the sole and exclusive use of which under any law belongs to any person." E

It is State counsel's contention that because the definition of "waters" include "the foreshores or banks thereof" as part of any lake or river, that the bank or foreshore of the Ume is part of the Ume and hence part of the Lake Kariba Recreational Park. I am unable to agree with State counsel. Section20(2) is carefully worded and refers to the "edge of the water" of the lake concerned, as opposed to the edge of the "waters". In view of the definition F of "waters" in s 2, the use of the word "water" in s 20(2) as opposed to "waters" is hardly likely to be anything other than intentional. If the word "waters" had been used it would have made the section incomprehensible and completely contradictory to the definition stated above. By using the word "water", the section is clearly and easily understood. There are numerous sections of the Act where the word "waters" has been used, as opposed G to "water", and where the wide definition given to "waters" is clearly appropriate - see for example s 24(d)(iv) and Part XlV - ss 82-96.

Accordingly, I am satisfied that the word "water" is clearly intentionally used in s 20(2) by the legislature and that State counsel's reference to the H

definition of "waters" in s 2 is not relevant to the interpretation of s 20(2). If I am incorrect in that regard I am A nevertheless satisfied that the specific provision in s 20(2) must take precedence.

On the basis of the evidence as led, and on the legal argument as presented, the trial magistrate should have acquitted Tarr - and in fact should have done so at the close of the State case. The elephant was shot in the Omay Communal Land and it is common cause that Tarr had authority to hunt the elephant in the Omay B Communal Land. Accordingly, on the basis of the evidence led at the trial, and the legal issues argued at the trial, the appeal must succeed and the conviction and sentence are set aside.

But let me say this. The matter was poorly investigated by parks authorities and police and poorly prosecuted by the State. If the circumstances surrounding the hunt on 6 November 1998 had been carefully and fully investigated, there is at least a possibility - in my view a not insubstantial possibility - that Tarr may have been C at risk of conviction.

The police and the prosecutor based the whole matter on whether the elephant was in the Lake Kariba Recreational Park or the Omay Communal Lands when it was shot. Tarr, as would be expected, responded to D the evidence led against him and the legal arguments raised against him. There is, however, an alternative way the matter could have been looked at.

The definition of "hunt" in s 2 of the Act is very wide. It is as follows:

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

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

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

If Tarr, with intent to kill or shoot at the elephant, searched for it while he was in the Lake Kariba Recreational Park he would, in terms of para (c) of the definition of "hunt", be unlawfully hunting even if the elephant was ultimately shot while it was outside the Park. F

But the detailed definition of "hunt" is something of which the parks officials, the police, the prosecutor and the magistrate all appeared to be completely oblivious. Although it was a factor they should all have been aware of, and which should have played a significant role in the investigation and prosecution of the alleged offence. G

If the matter had been properly investigated, the parks officials, police and prosecutor would have examined in detail the circumstances surrounding the hunt that day. If Tarr and his hunting party had come direct from wherever their base camp was and used the boat and canoes only to transport themselves directly to the Omay Communal Land, and had seen the elephant as they made landfall at their destination, then their actions would clearly not H

have fallen under the definition of "hunt". But if Tarr used the boats to sail up and down the Ume, where it is part A of the Lake Kariba Recreational Park, searching for elephant or other game, and then on seeing such game on the Omay side of the Ume river, had landed and shot it there , those actions might well have fallen within para (c) of the definition of "hunt". A permit to hunt the elephant in the Omay Communal Land does not include the right to search for the elephant while the hunter is in the Lake Kariba Recreational Park. B

The evidence of the State witnesses, and the cross-examination of Tarr and the defence witnesses, was not, however, directed to ascertaining whether the circumstances indicated that hunting may have been carried out in terms of para (c) of the definition of "hunt". Tarr's bald statement that the boats were used for transport and not hunting was accepted without question and without investigation. C

On a general aspect and for the assistance of both hunters and Parks and Wild Life officials, I would emphasise that I do not consider the fact that the animal is shot just outside the boundaries of the national park means that a person acting within para (c) of the definition of "hunt", is not unlawfully hunting in a national park. If a person is within a national park, albeit close to the boundary of the Park, searching for an animal just outside the park in D order to shoot it, he is hunting within the national park in terms of para (c) of the definition of "hunt". As long as the hunting within para (c) of the definition of "hunt" is within the national park, the offence is committed.

Such hunting is not only a glaring contravention of the spirit of the law in regard to national parks but also of the letter of the law - and, in my view, would in appropriate circumstances not be regarded as only a technical E contravention of the legislation.

I would also point out that it is at any rate an offence in terms of s 8(d) as read with s 111 of the Parks and Wild Life (General) Regulations SI 362 of 1990 to possess a firearm within the Parks and Wild Life Estate (which includes the Lake Kariba Recreational Park) without the permission of an officer. F

In view of the attempt to provide general guidance copies of this judgment will be made available to officials of the Department of Parks & Wild Life as well as to the appellant.

Gwaunza J: I agree. G

Webb, Low & Barry, appellant's legal practitioners

Office of the Attorney-General, respondent's legal practitioners H