S v OSBORNE 1989 (3) ZLR 326 (SC)

Court Supreme Court, Harare B

McNally JA, Manyarara JA & Korsah JA

Criminal appeal C

26 September & 4 December 1989

[zFNz]Flynote

Appeal - remittal to trial court for further evidence - when Supreme Court's right should be exercised. D

Criminal law - Parks and Wild Life Act 1975 - s 47(2)(a) - hunting without a permit - section does not cover situation where hunter contravenes term or condition of permit.

Criminal procedure - verdict - competent verdicts - whether conviction E for contravening s 110(8) of Parks and Wild Life Act competent on charge of contravening s 47(2)(a).

[zHNz]Headnote

Under s 47(2)(a) of the Parks and Wild Life Act 1975, it is an offence to hunt animals except in terms of a permit issued under subs (4). Section 47(2) governs situations where a hunter does not possess a permit granted by F the appropriate authority for the land where the hunting took place. It does not govern the situation where a hunter who possesses a permit hunts more than his allocated quota of animals. This situation is governed by s 110(8) of the Act, which makes it an offence to contravene any term or condition of any authority, permit or licence granted or issued in terms of the Act. G

Since an offence under s 110(8) is less serious than one under s 47(2)(a), on a charge of contravening s 47(2)(a), a verdict of contravening s 110(8) could be substituted, provided that no prejudice would result to the accused: ss 210 and 211 of the Criminal Procedure and Evidence H Act [Chapter 59].

1989 (3) ZLR p327

KORSAH JA

Before A the Supreme Court, on appeal, or a trial court may convict a person of a lesser offence than that actually charged, it is necessary that there be evidence upon which such an alternative verdict might be granted. If a verdict of contravening s 110(8) is to be reached, it would be essential for the State to produce the terms and conditions of the permit to establish that the accused was in breach of them.

The B Supreme Court has the power, given by s 15(d) of the Supreme Court of Zimbabwe Act 1981, to set aside a conviction and to remit the case to the court a quo for further hearing. However, where there has been no mistrial, this power is

sparingly exercised. Where the prosecution wishes to lead evidence that it ought to have led at the trial, the following requirements must be met:

(a) there C should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence was not led at the trial;

(b) there should be a prima facie likelihood of the truth of the evidence;

(c) the evidence should be materially relevant to the outcome of the trial.

Cases cited: D

Gelberg v Miller [1961] 1 All ER 291 (QBD)

S v Liberty Shipping & Forwarding (Pty) Ltd & Ors 1982 (4) SA 281(D)

S v de Jager 1965 (2) SA 612 (A)

R v Chirisa 1965 RLR 467 (AD) E

S v Mavingere 1988 (2) ZLR 318 (SC)

R v Boshoff 1956 R & N 61 (SR)

R v Jones & More 1926 AD 350

R v Wood 1927 AD 19

R v Gireyi 1947 SR 137

S v Black 1975 (1) RLR 355 (GD) F

J B Colegrave for the appellant

M T Boylan for the respondent

[zJDz]Judgment

Korsah JA: G The appellant was arraigned on four counts charging him with contravening s 47(2)(a), as read with subs (5) of the Parks and Wild Life Act No. 14 of 1975, as amended by Act No. 35 of 1985. He was acquitted on the first count, but convicted on Counts 2,3 and 4. These three counts being taken as one for the purpose of sentence, he was sentenced to pay a fine of $1 000 or, in default of payment, serve two months' imprisonment with H labour. He was also convicted on a count charging him with the common law

crime of fraud and sentenced to pay a fine of $300 or, in default of payment, A serve thirty days' imprisonment with labour. He appeals against his conviction on all counts.

The appellant has, for the past fifteen years, been the holder of a professional hunter's licence. He was, for the twelve years preceding the alleged offences, employed as the managing director of Buffalo Range Safaris in Chiredzi. B

During the 1987 hunting season, the appellant obtained permits from the Department of National Parks on behalf of his employers. These permits entitled him to enter into the Omay and Gokwe Communal Lands to conduct hunts for his foreign clients. The company's permit for the 1987 hunting season stipulated a quota of six bull elephants and other animals, such as C lions. It was common cause that the terms and conditions of the permit required the appellant to maintain a register - which, in the parlance of the trade, is called the "Kill Records" - of all animals slaughtered, and the location of the slaughter.

It D was alleged by the State that on 6 July 1987 the appellant shot and killed a cow buffalo, which he wanted to use to entice a lion that he wanted shot by his foreign client. The buffalo was not registered by the appellant as required by law in the Kill Records; no trophy was taken from it; and it was left there to rot. The failure of the appellant to register such a kill, it was said, meant that his company's allocation of buffalo was untouched, and so the buffalo E was poached These were the facts on which the second count was based.

The facts giving rise to the third count were that on 7 July 1987 the appellant shot and killed a cow elephant, which was tuskless, to use as bait for a lion which he still had not found for his foreign client. He did not register this animal in his Kill Records. The effect was that his quota of cow elephants F was unaffected by the slaughter of this elephant. The State alleged that the failure to register the killing of this cow elephant meant that the elephant was poached.

The fourth count was founded on the following facts. On 16 August 1987 the appellant and his team of hunters accompanied a client, by name Mr Eder, G who wanted to shoot a cow elephant. The hunt party came across a herd of elephants. A group of elephants came close to the hunt party. Two trackers noticed that the elephant which Mr Eder was aiming to shoot was a bull. One of the two trackers, Mafiosi Dzoro, who was near the appellant, whispered to the appellant that the animal was a bull elephant. He said the appellant, H

nonetheless, A gave the go-ahead to Mr Eder, by nodding, to shoot. And Mr Eder shot dead the bull elephant.

It was alleged by the State that, after the bull elephant had been shot, the appellant ordered Mafiosi to remove the tusks and wash them down by the river, which is not the normal procedure, the normal procedure being that a B special cleaner of tusks is provided for in the camp. It was further alleged that the appellant hid the tusks in the camp of a co-hunter of Buffalo Safaris. Finally, it was alleged that, after killing a bull elephant instead of a cow elephant, the appellant never bothered to report and

did not register the tusks until it was discovered by the National Parks Officers during an investigation.

The C single theme which runs through all these three counts is that the appellant, by failing to register immediately in his Kill Records the animals he slaughtered, had poached them. The allegation was not that he did not have the permit to kill the animals, but rather that his failure to record them D timeously evinced an intention to add to the allotted quota of animals on his permit and so inferentially these animals were not slaughtered in terms of the hunting permit granted to the appellant by the appropriate authority.

Section 47(2)(a) of the Parks and Wild Life Act, under which these charges were preferred, recites that: E

"(2) Subject to the provisions of subsection (4), no person shall -

(a) hunt any animal on any land; or

(b) ...

except in terms of a permit issued in terms of paragraph (c) of subsection (4)."

And F subs (4)(c) of the section provides that:

"(4) Subject to the provisions of this Act, the appropriate authority for any land may -

... G

(c) issue a permit to any person to hunt any animal on any land or remove any animal or any part of an animal from the land..."

The crisp issue was, therefore, whether or not the appellant hunted in terms of the permit issued to H him.

1989 (3) ZLR p330

KORSAH JA

It seems to me that s 47(2) of the Act is intended to govern situations where A a hunter is not the possessor of a permit granted by the appropriate authority. It does not appear to me to envisage a situation where a hunter, possessed of a permit issued by the appropriate authority, hunts outside his allotted quota of animals. I say so because, if one were to paraphrase the section, it says no more than that no person shall hunt any animal on any land except in terms of a permit issued to him by the appropriate authority. B

Of course, it may be argued, with some justification, that, as a quota exists only within a permit, a person who hunts outside his quota hunts not in terms of the

permit granted to him and, therefore, without a permit. But the provisions of s 110 of the Act appear to militate against such a construction being placed on s 47(1)(a). C

Section 110 of the Act stipulates the authorities which may issue permits or licences, the terms and conditions upon which such permits or licences may be issued, the right of the issuing authorities to cancel or amend any permits or licences, and provides that: D

"(8) Any person who contravenes any term or condition of any authority, permit or licence granted or issued in terms of this Act shall be guilty of an offence."

If, in the circumstances, s 47(2)(a) and s 110(8) are to co-exist in the same E statute, s 47(2)(a), which says "No person shall hunt any animal on any land except in terms of a permit issued to him by the appropriate authority", must be restricted to situations where the hunter has no permit or licence authorising him to hunt. And s 110(8) must be taken to govern a situation where a person, who has been granted an authority, permit or licence to hunt, contravenes the conditions or terms of the authority, permit or licence. If the F intendment of the Legislature had been to categorise a person who contravenes a term or condition of his permit as a poacher under s 47(2)(a), it would have been unnecessary and superfluous to enact s 110(8), which specifically provides for sanctions against a person who contravenes the terms and conditions of his permit.

It G is a principle of the interpretation of statutes that the construction of the provisions of a section must not so strain the words as to include cases plainly omitted from the ambit of the section by the natural meaning of the words used. It would be straining the provisions of s 47(2)(a) to construe it as covering cases where a person possessed of a permit hunts in breach of the terms H thereof.

1989 (3) ZLR p331

KORSAH JA

Another A aid to the interpretation of statutes is that its provisions must be construed to avoid collision with other provisions in the same statute. Thus, in Gelberg v Miller [1961] 1 All ER 291 (QBD), s 54 of the Metropolitan Police Act 1839 created, by para 6, an offence of obstructing the thoroughfare and made it "lawful for any constable ...to take into custody, without warrant, any person who shall commit any such offence within view of any such B constable". By s 63 of the same Act it was provided that: "It shall be lawful for any constable ...to take into custody, without a warrant, any person who within view of any such constable shall offend in any manner against this Act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable". Lord Parker CJ said at p 295G of the report that "...it is reasonably plain that s 63 is, in C effect, dealing with other offences than those which are covered by s 54".

Here also, in the instant case, I am of the view that it is reasonably plain that while s 110(8) in effect deals with contraventions of the terms of a permit by a person

authorised to hunt, s 47(2)(a) covers offences by those who have no D permits or licences authorising them to hunt.

If need be, the headings to the various parts of a statute may be looked at for assistance in the resolution of any ambiguity in a section that falls under them. So, in S v Liberty Shipping & Forwarding (Pty) Ltd & Ors 1982 (4) SA 281(D), DIDCOTT J observed at 285D of the report that:

"The E relevance of such captions depends, according to a trio of early judgments by the Appellate Division, on whether they take the form of headings or marginal notes. The heading to a section may be brought into account, so it has been said, to resolve an ambiguity in or doubt raised by the text. That was decided in Chotabhai v Union Government & Anor F 1911 AD 13 at 24 and in Turffontein Estates Ltd v Mining Commissioner, Johannesburg 1917 AD 419 at 431. The same does not apparently go for marginal notes, however, which were put beyond the pale in Durban Corporation v Estate Whittaker 1919 AD 195 at 201-2."

The G heading to Part X of the Act, under which s 47(2)(a) falls, reads:

"Hunting, Removal, Viewing and Sale of Animals and Animal Products".

The heading makes no reference to permits or the contravention of their terms and conditions. I am thus fortified in my belief that s 47(2)(a) was intended H to regulate the situation where a person, who is not armed with a permit or

licence, indulges in the hunting or removal of animals. A

As it was common cause that the appellant had been issued with a hunting permit when the alleged offences were committed, the charges brought against him under s 47(2)(a) of the Act were ill-founded.

On the other hand, Part XV, under which falls s 110(8) of the Act, is headed B simply "General", which I construe to mean: dealing with all other matters not specifically dealt with by other parts of the Act.

The evidence adduced in support of counts 2, 3 and 4 clearly established that all the animals hunted by the appellant were covered by a permit issued to him in that behalf, but that he failed to register them in his Kill Records. The C appellant explained that the deferment in the registration of the animals he slaughtered in his Kill Records was because of an arrangement, known to and sanctioned by the Department of Parks and Wild Life, which existed between Buffalo Safaris and Grobler Safaris. D

The arrangement with Grobler Safaris was that Grobler Safaris live and have their camp in the Mashumbi Pools Area. About 130 kilometres away, Buffalo Range Safaris have camps in Units 1 and 2 of the Omay Area. Both safari companies had

permits to hunt in both the Mashumbi Pools and the Omay areas. For the past ten years it had been a policy, endorsed by the Parks and Wild Life Department, to allow the two safari companies to exchange quotas so as to avoid E one safari company travelling 130 kilometres south for a shooting expedition, while the other travelled 130 kilometres north for a similar operation.

If Buffalo Range Safaris shoots an animal held by Grobler Safaris on Grobler permit, it is said that Buffalo Range safaris is hunting for Grobler Safaris and payment for the slaughtered animal is routed through Grobler Safaris. F Conversely, if Grobler Safaris shoots an animal held on a Buffalo Range Safaris permit, payment for the slaughtered beast is routed through Buffalo Range Safaris. It seems to me to be self-evident that by such an arrangement a slaughtered animal cannot immediately be registered in the Kill Records of either company for some time.

Mr G Drury, the Provincial Warden of National Parks, confirming that this arrangement had the blessing of his Department, said:

"Where one has a quota that he does not need, he can give it to someone else but it must still be reflected in his register. We authorised that where H

there A is distance involved, a swap of animals was allowed as long as it is reflected in the correct registers and this was granted from Independence to Buffalo Range Safaris and Grobler Safaris."

This is eloquent testimony of the existence of the practice, "provided the animals are available in corresponding numbers and sex and specified in the B permits".

Now, Exhibit 7 represents Grobler Safaris' schedule of its 1987 Pool Quota Distributions for Unit II, which was sent to National Parks and Buffalo Range Safaris. It is dated 24 December 1986. The schedule stipulates the allocations of animals to be hunted by Paul Grobler Safaris in one column, C and those to be hunted by Buffalo Range Safaris in another column. Of Exhibit 7 Mr Drury had this to say:

"...this is Paul Grobler's animals from Unit 2 as opposed to the Pool area which he would recover from animals allocated to Buffalo Range Safaris in the Pool area."

Exhibit D 6, likewise, is Grobler Safaris' quota distribution of animals in the Pools area for 1987. Similar details as in Exhibit 7 are set out therein, supporting the averment that the exchange of animals between the two companies does take place and is sanctioned by National Parks and Wild E Life.

Mr Macfarlane, a senior ranger employed by National Parks, was compelled to concede that the appellant had the right to shoot the animals he killed, and that his concern was the failure of the appellant to keep proper and timeous records of his kills.

There F is no exhibit in the record of the permit issued to the appellant or even a sample of the form which such permit takes. The trial court, as well as this court, was deprived of having sight of the relevant document in order to acquaint itself of the exact terms upon which the issue of a permit is G conditioned. And no assistance in this respect was gained from the following extract from the testimony of Felix Matenda, who is an investigations officer with National Parks:

"Q. So professional hunters keep register(s) of their hunts?

A. Yes, it is an administrative H thing.

Q. Is it embodied in any piece of legislation? A

A. No, it is just an instruction from the Department and the Hunters' Association.

Q. Does the animal have to be entered on the day that it is shot?

A. No, but at some suitable time."

Mr B Boylan, for the respondent, was quick to appreciate the tremendous difficulties confronting him in any endeavour to support the convictions founded on a contravention of s 47(2)(a) of the Act. Accordingly, he submitted in the alternative that the evidence proffered discloses offences against s 110(8) of the Act and so, by the powers reposed in this court by s 12(2) of the Supreme Court of Zimbabwe Act No. 28 of 1981, which recites C that -

"(2) Where an appellant has been convicted of an offence and the trial court or tribunal could on the indictment, summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence had been alleged D as an alternative count, and on the findings of the trial court or tribunal it appears to the Supreme Court that the trial court or tribunal must have been satisfied of facts which proved him guilty of that other offence, the Supreme Court may, instead of allowing or dismissing the appeal, substitute for the judgment of the trial court or tribunal a judgment of guilty of that other offence, whether or not the appellant had been E acquitted of that offence in the trial, and may -

(a) pass such sentence; or

(b) remit the case to the court or tribunal concerned for the passing of such sentence;

in substitution for the sentence passed at the trial, whether more or less severe, as may be warranted in law for that other offence", F

a conviction under s 110(8) may be substituted.

I am in agreement with Mr Boylan that -

(a) s 110(8) of the Act creates a lesser offence than s 47(2)(a) of the Act, G since the penalty for contravening s 110(8) is less grave;

(b) s 210 of the Criminal Procedure and Evidence Act [Chapter 59] permits of a conviction of part of the offence charged, if that is what was proved and not the actual offence charged; H and

(c) under A s 211 of the Criminal Procedure and Evidence Act an alternative verdict is permissible where no prejudice will result to the accused.

It seems to me, however, that a prerequisite for applying any of the remedies specified above to any proceedings under attack is that there is evidence before the trial court upon which such an alternative verdict can be grounded B

The appellant appears to have conceded in his extra-curial statement, Exhibit 17, that he had committed an offence, but Exhibit 17 relates to Count 1, on which he was acquitted because of the confusion surrounding the borders of the safari area. Again, in his extra-curial statements, Exhibits 18 and 19, the appellant seemed to admit that his failure to register in his Kill Records C animals shot on 6 and 7 July 1987, by 8 October 1987, was in contravention of the terms of his permit. But his testimony was as follows:

"Q. In Exhibit 18, was your failure to pay or record at that time a contravention of the terms of the permit?

A. No. D

Q. Was there any condition on that permit that required you to pay for or record the animal by 8/10/87?

A. No.

Q. So why did you say that there had been a contravention of the permit?

A. I was being convinced that I had committed an offence." E

It is crucial to any prosecution of an offence of this nature, alleging that non-compliance with the terms and conditions of a permit constitutes a crime, for the State to produce the terms and conditions of the permit to establish, beyond a reasonable doubt, that the accused was in breach of them and was F guilty of the offence alleged.

Once again, Mr Boylan was alive to the fact that the omission to produce the permit bearing the terms and conditions, which the appellant was alleged to have breached, was a fatal flaw in the prosecution's case, and suggested that G the convictions may be quashed and the matter remitted for the necessary evidence to be adduced.

The power of this court to set aside a conviction and to remit the case to the court or tribunal of first instance for further hearing is derived from s 15(d) of the Supreme Court of Zimbabwe Act. H

1989 (3) ZLR p336

KORSAH JA

The policy of criminal justice, as has been perceived for more than a century, A has always been that a man may not be called upon to stand trial twice for the same offence. For that reason, the power to remit a case for trial afresh is sparingly exercised where there has been no mistrial. The power may thus be exercised under very stringent conditions.

The general rule is that a new trial will not be granted on the ground that B evidence has not been given that might have been given at the trial; for the prosecution ought, if unprepared with its evidence, either to apply for a postponement or withdraw the charges. In S v De Jager 1965 (2) SA 612 (A) at 613A-referred to in R v Chirisa 1965 RLR 467 (AD) - HOLMES JA said this of the power to hear fresh evidence (a power which this court is also imbued with) and the power to remit for fresh evidence to be led: C

"This Court can, in a proper case, hear evidence on appeal; see R v Carr 1949 (2) SA 693 (A); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of further evidence, as was done for example in R D v Mhlongo & Anor 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses... Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be E summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. F

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial...

Non-fulfilment of any one of these requirements would ordinarily be fatal to the application, but every case must be decided on its particular merits..." G

Turning now to the submission that the matter may be remitted for the prosecution to mend its fences, as it were: apart from the obvious second risk that such a course may put the appellant in, this is not a case in which some new evidence has come to light which was not dreamt of in the course of the H

trial. A The gravamen of the State's case, from the start, was the non-observance by the appellant of the terms and conditions of the permit which it now seeks to produce by re-opening its case.

Nor is the absence of the permit a mere technicality. It cannot be said that the dispute between the parties would inevitably be silenced by its production, B as was the case in S v Mavingere 1988 (2) ZLR 318 (SC) and in R v Boshoff 1956 R&N 61 (SR) at 64.

That permit was always available to the State, and no satisfactory explanation has been advanced for its non-production at the trial. It would indeed require some very remarkable circumstances to justify this court in ordering that the C matter be re-opened so that the guilt of the appellant, which was not established in accordance with standards of criminal justice, may now be established beyond a reasonable doubt. This court has no power to order a new trial in such circumstances.

As D far as the common law crime of fraud in Count 5 is concerned, Mr Boylan graciously conceded in his heads of argument that the conviction cannot stand, as the failure to aver prejudice was a fatal defect in the charge, which defect was brought to the attention of the trial court before judgment. This concession was properly made. See the cases of R v Jones and More 1926 AD 350 at 354; R v Wood 1927 AD 19 (Headnote); R v Gireyi 1947 SR 137; E S v Black 1975 (1) RLR 355 (GD).

Accordingly the appeal succeeds. The conviction on each count of which the appellant was found guilty is quashed and the sentences imposed in consequence of such convictions are all set aside. F

McNally JA: I agree.

Manyarara JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners