S v ROSEN 1983 (2) ZLR 334 (SC)

Court Supreme Court, Bulawayo

Georges CJ & Beck JA B

1 December 1983 C

[zFNz]Flynote

Criminal law - statutes - Parks and Wild Life Act 14 of 1975 - s 47(4)(c) - appropriate authority for land may "issue a permit" to hunt - written document must be produced - criminal procedure - sentence - hunting - with firearms - whether custodial sentence justified.

[zHNz]Headnote

In D terms of s 47(4)(c) of the Parks and Wild Life Act 14 of 1975, the "appropriate authority" in respect of land may "issue a permit" to any person to hunt any animal on the land. The phrase, "issue a permit", requires the existence of a physical object, so a written document must exist. Oral permission is not enough. The mechanism of control is indeed made more effective by the fact of documentation. No significant hardships flow from requiring a written document and much is gained in certainty.

On E a charge of unlawful hunting under the Act, the Courts take a far more serious view of poaching by means of snares than by poaching by means of hunting with guns and dogs. Snares kill and maim cruelly and indiscriminately, whereas hunting with a gun is comparatively skilled. Poachers who use snares are almost routinely sentenced to terms of imprisonment but the same does not apply to poachers who use guns unless there are other considerations such as massive destruction of game for commercial F gain. In appropriate circumstances a fine would be an adequate punishment.

Cases cited:

S v Staves G-S-165-80;

Jackson Stansfield & Sons v Butterworth [1948] 2 All ER 558;

S v Julius G-S-269-80.

S K M Sibanda, for the appellant G

P J Batty, for the respondent

[zJDz]Judgment

Georges CJ: The appellant was charged with having unlawfully and H without permission of the appropriate authority hunted and killed on Mambo Ranch two female kudus, one female impala, one female duiker and one male steenbok. He was found guilty in respect of the two kudus

and the impala. He was sentenced to seven months' imprisonment of which three months were suspended for five years on condition that he was not convicted of any offence contrary to s 47(a) of the Parks and Wild Life Act (the Act) committed during the said period for which he was sentenced A to a term of imprisonment without the option of a fine. He was also ordered to pay compensation in the sum of $170 to the owners of Mambo Ranch.

The appellant had been arrested on 12 December 1982 on a ranch adjoining B Mambo Ranch called Shemer's Ranch. He had in his possession five carcases of the game specified in the charge. A section manager of Mambo Ranch, Jack Robinson, testified that he could not tell on which ranch the appellant had killed the game but all the spoor was on Mambo Ranch.

The C appellant's case was that his parents were in the process of buying Shemer's Ranch and that they did not know that they were not allowed to shoot animals. He had gone to shoot on that ranch and had not realised that he had strayed on to Mambo Ranch. He admitted having killed D the two kudus and the impala on Mambo Ranch and the magistrate convicted him in respect of those.

In his brief judgment at the close of the evidence the magistrate made no reference to the appellant's evidence that he had permission to hunt E on Shemer's Ranch and had strayed on to Mambo Ranch. Clearly he did not give effect to the defence because he did not convict him except in respect of the animals which he admitted having killed on Mambo Ranch.

Mr Sibanda contended that the conviction was bad because the F magistrate did not consider whether there had been a genuine error on the appellant's part in straying on to Mambo Ranch. Mr Batty argues that that defence is in any event unavailing since the appellant did not have permission to hunt on Shemer's Ranch and once that was so he could not successfully advance genuine error in having strayed on to Mambo Ranch. G The determination of the issue requires an examination of parts of the Act.

Section 47 provides:

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

(a) hunt any animal on any land; or

(b) remove any animal or any part of an animal from any land;

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

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

(a) hunt any animal on the land; or

(b) remove any animal or any part of an animal from the land; or

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

"Appropriate authority" is defined as follows in s 2 of the Act: A

"(a) . . .

(i) in the case of alienated land -

A. the owner thereof; or

B. where the land is held under an agreement of purchase or lease, the purchaser or lessee unless the agreement otherwise provides;

and includes any person appointed to be an appropriate authority for the land B by such owner, purchaser or lessee, as the case may be;".

Mr Sibanda contended that the appropriate authority for Shemer's Ranch could be said under s 2(a)(i)(B) above to have been the appellant's father. I do not think the appellant's evidence comes anywhere near C establishing the proposition that his parents "held" the Ranch under an agreement of purchase or lease. He said no more than that his parents were buying the Ranch which could mean no more than that they were negotiating a purchase. He does not indicate that his parents were in possession of the Ranch. D

Even if this point is resolved in the appellant's favour I am satisfied that on a proper interpretation of the Act the appellant did not have a permit from the appropriate authority to hunt on the land.

Mr E Sibanda contended that oral permission from the appropriate authority would be enough and where as here the person hunting was the son of the appropriate authority his certainty that the appropriate authority would, if asked, have granted permission is sufficient under the Act. Mr Sibanda's argument was spread even wider. Not only could sons and F daughters hunt and remove animals but so could nieces and nephews and grandchildren and grandparents. I find such an interpretation unacceptable. Clearly if the appropriate authority did not wish to have someone who was hunting on his or her land prosecuted it would be most unlikely that a prosecution could be mounted since the authorities charged with G the protection of game would not know that an infringement had taken place. But this is not a relevant consideration in interpretation of the Act.

Section 47(4)(c) speaks of the "issue" of a "permit". The use of the H word "issue" can only denote the existence of a physical object. One does not "issue" oral

permission. One gives oral permission. The use of the word "issue" indicates that a written document must exist.

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GEORGES CJ

In a review judgment S v Staves G-S-165-80 BEADLE AJ stated:

"In the instant case the facts appear that the accused genuinely believed that he had permission from an employee of the farm on which he shot the impala to shoot the impala and that the employee was authorised by the occupier of the land to give such A permission. The permission was, however, given orally and the accused was not in possession of any permit. To that extent, therefore, he contravened the law."

There was no argument on the point but the proposition seems to me sound. In a matter decided in the Court of Appeal in England - Jackson B Stansfield and Sons v Butterworth [1948] 2 All ER 558 the word to be interpreted was "licence", a word close enough to "permit" to allow of application by analogy. In that case a regulation made certain types of building work unlawful -

"... except in so far as there is in force in respect thereof a licence granted by the Minister".

SCOTT C LJ (with whom ASQUITH LJ agreed) held that the expression: -

"... a 'licence' contemplates a concrete thing, ie, a document. Had oral permission been the intended condition, different language would have been used."

In D much the same way, the word "permit" connotes a concrete thing. Had oral permission been adequate the craftsman, instead of using the words "issue a permit", could have said "give permission".

The entire mechanism of control is also made more effective by the fact E of documentation. If stopped and questioned a hunter can produce his document. The permit may be limited to hunting a particular type of animal and to a particular time. I see no significant hardships which could flow from requiring a written document and I am satisfied that much would be gained in certainty, always a useful characteristic of criminal law.

If F a written permit is required to fall within the exception provided in sub s 47(4), then the appellant's defence could not succeed. If he had been lawfully hunting on Shemer's Ranch then one could consider whether he had accidentally strayed on to Mambo Ranch. If his hunting activities there G were not lawful then there is no basis for a defence of mistake in straying on to Mambo Ranch.

Accordingly I would dismiss the appeal against conviction.

Mr H Batty conceded that the magistrate misdirected himself on the question of sentence when he said that it appeared that the appellant had travelled from Bulawayo to the ranch for poaching. I agree that this is so. If

the magistrate meant Mambo Ranch there is no evidence that that was so. If he meant Shemer's Ranch the remark was not relevant to sentence since the appellant had not been convicted in respect of the animals shot there, and is was accepted that the appellant wrongly thought that he was A authorised to hunt game there. Mr Batty properly concedes that this was a grave misdirection and that this Court is as a result at large in assessing the sentence.

It is not disputed that the courts take a far more serious view of poaching B by means of snare than of poaching by means of hunting with guns and dogs. Snares kill and maim without discrimination. Usually they can cause more pain than does the comparatively skilled huntsman with his gun. Different considerations would obviously apply it the accused persons formed part of a large hunting party, heavily armed and obviously bent C on massive destruction of game for commercial gain.

It is also fair to say that poachers using snares are almost routinely sentenced to a term of imprisonment if prosecuted to conviction. The issue was whether in this case a sentence other than a custodial sentence could D be justified.

The determining factor in the decision was the fact that the appellant was well employed and had been for many years as a Haulage Overseer with the Bulawayo City Council. If he had had to serve a prison sentence E he would have lost his job. There is nothing to indicate that the jaunt which led to this contravention of the law was other than an isolated incident springing from the fact that his parents were at least negotiating to purchase Shemer's Ranch. On the other hand the appellant killed two kudus and one impala, having already killed a steenbok and a duiker on Shemer's Ranch. In that sense the contravention can fairly be described as grave F and not trifling.

In the final analysis it appeared to us that justice would best be done in this case by a heavy fine which, as was said in S v Julius G-S-269-80, can be an effective penalty, yet one which preserves the appellant's job. G

Accordingly the appeal against sentence was allowed, the sentence of imprisonment was quashed and there was substituted a fine of $300 or, in default of payment, six weeks' imprisonment with labour. The warrant of committal was suspended until 15 December 1983. The order for compensation was confirmed. H

Beck JA: I agree.