S v SNYMAN 1989 (1) ZLR 89 (SC)

Court Supreme Court, Harare B

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal C

14 February 1989

[zFNz]Flynote

Criminal law - Parks and Wild Life Act 1975 - s 29(1)(a) - hunting in a D safari area without a permit - when proof that accused was in safari area may be dispensed with - s 84(15) - accused in possession of weapon deemed to have entered upon land for purposes of hunting - effect of section.

[zHNz]Headnote

The appellant was convicted of hunting in a safari area without a permit, in E contravention of s 29(1)(a) of the Parks and Wild Life Act 1975. He had on two occasions been in possession of a gun and had accompanied a hunting party which had the requisite permits to hunt in the Hurungwe Safari Area. His evidence was that he accompanied the hunting party to protect them, but had no intention of shooting any animals; he was acting an a gun-bearer. It was also argued on appeal that there was no evidence F that the hunting had taken place in the safari area mentioned in the charge. The point had not been taken in the trial court, although there was evidence that the incidents had taken place in the hunting party's approved hunting ground. It was also argued that he had discharged the onus placed on him by s 84(15) of the Act, which provides that a person G who is found on land on which there are animals in possession of a weapon capable of killing any animal by the discharge of any missile is deemed to have entered on such land for the purpose of hunting without authority, unless he proves that he was not there for that purpose.

Held, that the witnesses who gave evidence at the trial knew the safari area well, it being one of their hunting grounds. By his silence on the point, H the appellant accepted that he had been in a safari area.

1989 (1) ZLR p90

DUMBUTSHENA CJ

Held, further, that the word "deemed" used in s 84(15) can be interpreted to A mean, whatever may be the true purpose for his entering an area, that a person found in possession of weapons capable of killing animals entered the area for the purpose of hunting. To escape conviction, the appellant had to show that he had some other purpose, and this he failed to do; his admitted role was that of a co-hunter, for whom a permit is required. B

Cases cited:

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

Steel v Shanta Construction (Pty) Ltd & Ors 1973 (2) SA 537 (T)

R v Gilison; R v Matanda & Anor; 1968 (2) RLR 104 (GD); 1968 (4) SA 557 (R) C

R M Fitches for the appellant

Miss E F Ndewere for the respondent

[zJDz]Judgment

Dumbutshena CJ: The appellant was convicted of contravening D s 29(1)(a)(ii), as read with s 84(15)(a) and as read with s 115(2)(a) of the Parks and Wild Life Act No. 14 of 1975. He was sentenced to a fine of $400 or, in default of payment, two months' imprisonment with labour. He now appeals against both conviction and sentence.

By consent, the phrase "a male lion trophy" in the charge was amended to E read "a male lion".

The appellant is by occupation a safari outfitter. On 10 June 1987 Mr van Loggerenberg was issued with a hunting permit, No. 000354 (Exhibit 3), for which he paid $7 521,69. The name of Mr C Wood appears on the permit as a co-hunter. Mr van Loggerenberg was authorised to hunt in Hunt Number F "Nyakasanga" of the Makuti Area M10 Safari Area. The two were to hunt in the area between 10 and 19 June 1987.

Section 1 of the terms and conditions of the permit states:

"The holder of this permit and a person who is specified as a co-hunter G shall comply with the requirements of the Parks and Wild Life Act, as amended, and any regulations made thereunder."

Section 11 prohibits the holder of the permit or his co-hunter "to cede, sell, transfer or make over the rights to hunt any animal unless prior written H

permission A has been obtained from the Director". It is clear from s 11 of the terms and conditions that permission is given only "in cases of illness, compassion or for reasons beyond the control of the holder of the permit". Should permission be granted for these reasons, a new permit must be issued and the old permit nullified.

It B is said by the State that the appellant was a safari outfitter for Mr van Loggerenberg's hunting party. He was not allowed to carry a gun or hunt any animal in the specified Safari Area. Yet, between 12 and 14 June 1987 while in possession of a .375 H & H Magnum rifle he wrongfully and unlawfully hunted a buffalo cow and a buffalo bull in the Hurungwe Safari Area. He also hunted a male lion while he was in possession of a 12 bore shotgun. During C these dates and times the appellant was not a holder of a permit in terms of s 30 of the Act.

Mr C Wood, the co-hunter of Mr van Loggerenberg, was not present during these hunts. When a Mr Onias Bepe was giving evidence the defence counsel D said:

" ...the defence accepts that the accused carried the two guns and also accepts the purposes of the guns."

It was also common cause that the co-hunter may assist the hunter by E finishing off an animal that the hunter has failed to kill. The co-hunter also carries a gun for the protection of the members of the hunting party. He must himself be a professional hunter, registered with the Director of National Parks and Wild Life Management. Mr Bepe testified that the appellant was not a professional hunter and had no authority to protect members of a F hunting party.

Mr Bob Towel testified that Mr van Loggerenberg and the appellant were carrying guns and tested them. The appellant tested his weapon by firing twice. He also said Mr Wood was not present. He accompanied the hunting party. His testimony was never challenged. He testified that on the first day the appellant was carrying a rifle. On the second day he left the shotgun in the car. On the third day, when Mr van Loggerenberg and the G appellant were hunting a male lion, the appellant carried a shotgun. All this evidence is common cause.

From his own evidence it is clear that the appellant accompanied the hunting H party in order to protect them should they be attacked by a dangerous animal,

but he testified that he had no intention to shoot any animal. He said he was A a gun-bearer. Mr Wood, his defence witness, testified that he used Ginger as a gun-bearer. Why, then, was the appellant carrying a gun in the presence of Ginger? The magistrate did not believe the appellant. There was ample evidence to prove the appellant's guilt.

In spite of this, Mr Fitches, who appeared for the appellant, submitted that B there was no evidence to prove that the appellant had contravened s 29(1)(a)(ii) as read with s 84(15) of the Act. Section 29(1)(a)(ii) reads:

"No person shall -

(a) hunt any animal in a safari area...except in terms of - C

(i) ...

(ii) a permit issued in terms of section thirty".

Mr Fitches argued that no evidence was led by the State to prove that the appellant was carrying a gun contrary to s 29(1)(a)(ii) of the Act in a Safari Area. He said there was no evidence to show that he was in a Safari Area. D However, the particulars of the charge did allege that the appellant did hunt in the Hurungwe Safari Area.

The facts of this case are distinguishable from the ordinary run of cases in which the State fails to prove a technical point which is essential to prove the guilt of the accused. E

In this case, the appellants, Mr Bepe, Mr Towel and Mr Wood were people who knew the Safari Area very well. They were all involved in one way or another with the business of hunting. The area in which the appellant was in possession of guns was one of their hunting grounds. By this silence the appellant accepted the allegation that he was hunting in a Safari Area. If he F had not been in a Safari Area, one would have expected him to have challenged or denied the allegation.

The question is: should this court remit the case to the magistrates' court in terms of s 15(d) of the Supreme Court of Zimbabwe Act No. 28 of 1981? I G do not think so. The point is so technical that it can be resolved without remitting the case to the magistrates' court. Besides, remitting the case would result in the appellant incurring additional expenses by way of legal fees. See S v Mavingere 1988 (2) ZLR 318 (SC) a case in which McNALLY JA set out the law applicable in cases of this nature and in which the learned Judge of Appeal considered a number of cases on this particular point. H

DUMBUTSHENA CJ

In A any event, this court is satisfied that there is more than sufficient evidence on the record to support the appellant's conviction. Mr Fitches, properly in my view, abandoned his submission on this technical point.

Mr Fitches submitted that the appellant had discharged the presumption in s 84(15) of the Act, which places the onus of proof on the appellant to prove, B on a balance of probabilities, that he was not carrying a weapon capable of killing animals in a Safari Area.

Section 84(15) of the Act reads:

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

(a) on any land, on which there are animals, in possession of any weapon capable of killing any animal by the discharge of any 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 D 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 -

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

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

All E that the appellant was required to do was to adduce evidence to show that he was not in the Hurungwe Safari Area for the purpose of hunting and that he was not in possession of guns which fall into the ambit of s 84(15). This he failed to do, because he was in the area in the capacity of a co-hunter but F without a permit. In the appellant's written heads of argument it is said:

"1. The Appellant admitted carrying a weapon but specifically stated that it was to assist the hunter and for protection in case of attack by wild animal."

That G submission states the duties of a co-hunter, whose name must be included in the permit. Mr van Loggerenberg's permit, Exhibit 3, indicated that Mr Wood was the co-hunter and the appellant was not.

The appellant was in possession of weapons capable of killing animals by the discharge of missiles. In my view, when one considers that the word H "deemed" used in s 84(15)(b) can be interpreted to mean, whatever may be

the true position, that the person found in possession of weapons capable of A killing animals entered the prohibited area for the purpose of hunting, even if that may not have been the true purpose for this entering the area, the appellant was correctly convicted.

In Steel v Shanta Construction (Pty) Ltd & Ors 1973 (2) SA 537 (T) at 541A COETZEE J expressed the above thus: B

"When 'deemed' is used as meaning 'considered' or 'regarded' and not in one of its other meanings (such as, for instance, to 'think') it is a very strong word to denote, frequently exhaustively, that something is a fact regardless of the objective truth of the matter. It is an indispensable word, in legal parlance, to convey that enquiry into this truth is irrelevant C for the purpose of the particular instrument. Struggle as one may against such deemed meaning, it is inevitable that the struggle will be in vain (cf the remarks of HATHORN JP in Collins v Durban Corporation 1946 NPD 785 at 786)."

In the present case the words are clear. The appellant could still do something D about it. All he had to do was to prove the contrary was the truth. He did not do that. Instead he proffered a defence which, on the evidence before the court, could not be believed. He failed to prove that he was in the Safari Area for some purpose other than the hunting of animals. Mr van Loggerenberg's permit was for hunting animals in a specified Safari Area. His co-hunter was E not with him. It can be inferred from the surrounding circumstances that the appellant was performing the duties of a co-hunter. His own evidence supports that conclusion.

There is, besides this, sufficient evidence on the record that the appellant was in the Safari Area for the purpose of hunting. The appeal against conviction F must, therefore, fail.

The appeal against sentence does not deserve serious consideration. Mr Fitches submitted that the learned magistrate misdirected himself when he said: "The appellant's conduct in this case could cost the country thousands G of dollars in foreign currency". It is not clear what the magistrate meant. If what he said was a misdirection it did not influence him in assessing sentence. He went on to impose what I consider to be a lenient sentence.

In R v Gilison: R v Matanda & Anor 1968 (4) SA 557 (R), a case cited by Mr Fitches in his heads of argument, LEWIS J (as he then was), when considering H

an A appropriate sentence for contravening s 16(1) of the Wild Life Conservation Act [Chapter 199] (repealed by the Parks and Wild Life Act), said at 558A:

"In assessing the amount of the fine, regard should be had to the amount of the fee which the accused has avoided paying by his failure to obtain B the requisite licence. Unless the fine is in excess of this fee, then, of course, hunters are encouraged to take the commercial risk of continuing to hunt without taking out a licence because such unlawful conduct then becomes 'worth the candle'. This principle must prevail over the general principle laid down in R v Taurayi 1963 R & N 926, that the amount of C the fine must be related to the accused's means."

The hunting permit issued in terms of s 30 of the Act and which was issued to Mr van Loggerenberg was worth $7 521,69. Besides, s 115(2)(a) prescribes a fine of $1 500 or imprisonment for a period not exceeding eighteen months, or both such fine and such imprisonment. The fine imposed D by the magistrate was a mere $400 or, in default of payment, two months' imprisonment with labour. In terms of the principle laid down in R v Gilison supra a sentence of $400 or, in default of payment, two months' imprisonment with labour in the circumstances of this case can be regarded as a very lenient sentence.

It E was for these reasons that we dismissed the appeal against both conviction and sentence at the end of hearing argument.

McNally JA : I agree. F

Korsah JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners