REPORTABLE ZLR (50)

Judgment No. S.C. 84/99
Crim. Appeal No. 36/99

NOBERT GRAHAMS v THE STATE

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, JUNE 17 & JULY 30, 1999

J C Andersen SC, for the appellant

H S M Ushewokunze, for the respondent

SANDURA JA: The appellant was charged in the Hwange magistrate's court with contravening two sections of the Firearms Act [*Chapter 10:09*] ("the Act"). In the first count, he was charged with contravening s 4(2) of the Act, the allegation being that on the day in question he was found in possession of a rifle in respect of which he did not have a valid firearm certificate. In the second count, he was charged with contravening s 27(b), the allegation being that he knowingly and without lawful cause pointed the said rifle at a man called Nyoni.

He pleaded not guilty to both counts but was convicted on the first count and acquitted on the second count. He was sentenced to a fine of $500.00 or, in default of payment, two months' imprisonment with labour. He now appeals against both conviction and sentence.

The background facts are as follows. The appellant, a German national, is the owner of two farms ("the property") in the Gwayi area of Matabeleland North Province. The property is surrounded by a farm ("Lion's Den") which is owned by the appellant's friend ("Vries"), a tour operator and professional hunter. At the relevant time, the property was occupied by a Mr Nel ("Nel"), but there was a dispute between the appellant and Nel as to whether Nel's occupation of the property was lawful.

In addition to being Vries's friend, the appellant was his agent who used to bring him clients from overseas.

On 6 September 1996 the appellant and his business partner from the United Arab Emirates ("Mohamed") arrived at Victoria Falls. They went to Lion's Den because Mohamed had come to the country for the purpose of hunting certain animals at Lion's Den and was a client of Vries.

On 7 September 1996 Vries took some forms to the Department of National Parks at Hwange National Park for processing. The processing of the forms was a requirement to be fulfilled before any hunting was undertaken. Before leaving for Hwange he instructed the appellant to take Mohamed to a spot on Lion's Den for target practice in order to check whether Mohamed could shoot straight. He gave the appellant a .223 rifle, one bullet and a Land Cruiser hunting vehicle. He also gave him a note authorising him to possess the rifle for target practice. The arrangement was that after the processing of the forms and target practice the three men would meet at the homestead on Lion's Den and then go hunting.

After the target practice the appellant decided to visit his own property as he had been informed that Nel was in the process of vacating it. However, when he and Mohamed got there, an incident occurred as a result of which the two charges were eventually preferred against him.

The appellant's argument in this Court and in the court *a quo* was that his possession of the rifle was lawful in terms of s 8(9) of the Act. That argument was rejected by the trial magistrate.

Before determining whether that decision was correct, I would like to examine the provisions of s 8(10) and s 8(19) of the Act which, according to the trial magistrate, did not apply to the appellant.

Section 8(10) reads as follows:-

> "A member of a gun club, rifle club or miniature rifle club may, without holding a firearm certificate, have in his possession a firearm and ammunition therefor when engaged as such a member or in connection with target practice."

The trial magistrate examined this exemption and concluded that it did not cover the appellant. In my view, that conclusion was correct. The exemption only covers "a member of a gun club, rifle club or miniature rifle club", which the appellant was not.

The trial magistrate also considered the provisions of s 8(19) of the Act, which reads as follows:-

"A client of a tour operator who -

> (a) conducts hunting safaris for tourists; and
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> (b) is licensed in terms of the Tourism Act [*Chapter 14:20*];
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> may, without holding a firearm certificate, have in his possession during a hunting safari any firearm or ammunition in respect of which the tour operator holds a firearm certificate, if the client is accompanied by and uses the firearm and ammunition under the direction of the person who holds the firearm certificate."

After carefully considering this exemption, the trial magistrate concluded that it did not cover the appellant. In my view, he was correct. In the first place, the appellant was not "a client of a tour operator". Although Vries was a tour operator and professional hunter, his client was not the appellant but Mohamed. Secondly, even if the appellant had been a client of Vries, the exemption would not have covered him because at the relevant time he was not accompanied by Vries, the holder of the firearm certificate.

I now wish to consider the exemption in s 8(9) of the Act. It reads as follows:-

> "A person carrying a firearm or ammunition belonging to another person holding a firearm certificate relating thereto may, without himself holding a firearm certificate, have in his possession that firearm or ammunition under instructions from and for the use of that other person for sporting purposes only."

As already indicated, the trial magistrate was of the view that the appellant was not covered by this exemption. He reached that conclusion because he was of the view that the rifle had not been in the appellant's possession for the use of Vries for sporting purposes.

It was common cause that at the relevant time the appellant was in possession of the rifle under instructions from Vries who held a firearm certificate relating to it. It was also common cause that the appellant was not the holder of a firearm certificate relating to the rifle. What was not common cause, however, was whether at the time that the rifle was in the appellant's possession it was for the use of Vries for sporting purposes only.

The first issue to consider is whether at the relevant time the rifle was for the use of Vries, and the second issue is whether it was for sporting purposes only.

Dealing with the first issue, the trial magistrate held that the rifle was not for the use of Vries because it was not Vries who was actually going to use it. With respect, I disagree with that conclusion. As already stated, Vries did not himself take Mohamed for target practice because he had to take some forms to the Department of National Parks at Hwange for processing. The forms had to be processed before any hunting was undertaken. In the circumstances, Vries instructed the appellant, who was his agent, to take Mohamed to a spot on Lion's Den for target practice.

In my view, the trial magistrate narrowly interpreted the word "use". It was common cause that Vries was a tour operator and professional hunter. His business involved taking clients to a spot on Lion's Den for target practice before taking them out for hunting. The target practice was, therefore, part of Vries's business. Its object was to prepare each client for the hunt which was to be conducted by Vries. The fact that the immediate physical use of the rifle was that of

the client does not mean that the rifle was not for the use of Vries. Clearly, it was for the use of Vries's business, and what was for the use of Vries's business must be for the use of Vries.

In the circumstances, the appellant's possession of the rifle on Lion's Den was under instructions from and for the use of Vries. However, what remains to be considered is whether his possession of the rifle after leaving Lion's Den was also under instructions from and for the use of Vries.

Before determining that issue, it is necessary to state what happened after the target practice. It is set out in paras 11, 12 and 13 of the appellant's main heads of argument as follows:-

> "11. The appellant had been informed that Reverend Nel had been moving his property from the appellant's farm. Hoping that the good Reverend had finally decided to vacate (the property), after target practice with (Mohamed) the appellant proceeded to his own farm … to check on the proceedings there.
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> 12. Upon arrival at the farmhouse, the appellant and his team were confronted by about six of Reverend Nel's employees led by MICAS WAYANI NYONI who threatened to assault the appellant before charging at him wielding an assortment of weapons including a chisel, logs and planks.
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> 13. At all material times, the rifle belonging to De Vries was in De Vries's Land Cruiser and upon being threatened by Reverend Nel's employees who were chasing him away, the appellant, with the assistance of his son, pulled out and displayed the rifle forcing the assailants to retreat and the appellant left."

The issue which arises for consideration is whether when the appellant took the rifle to his own farm "to check on the proceedings there" he was acting under instructions from Vries and for the use of Vries. I do not think so. The rifle had

been given to him "for target practice", and the visit to his farm had nothing to do with that. In fact the target practice had already been completed and the appellant should have returned to the homestead at Lion's Den to wait for Vries before going out hunting on Lion's Den. In addition, the use to which the rifle was put by the appellant when he visited his farm had nothing to do with Vries, nor had it been authorised by him. Quite clearly, the appellant was on a frolic of his own, and his possession of the rifle on his farm did not fall within the exemption provided by s 8(9) of the Act. On that basis alone, the appeal against conviction should be dismissed. It, therefore, becomes unnecessary to determine whether "target practice" and "hunting" fall within the meaning of "sporting purposes".

As far as the sentence is concerned, I do not think that a fine of $500.00 or, in default of payment, two months' imprisonment with labour, is so severe that it induces a sense of shock. It is clear from the comments made by the trial magistrate before he imposed that sentence that he took into account the technical nature of the offence.

In the circumstances, the appeal is dismissed in its entirety.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Webb, Low & Barry, appellant's legal practitioners