IN THE HIGH COURT OF SWAZILAND

REVIEW NO.286/02

LUBOMBO CASE NO. M8/02

In the matter between:

REX

VS

ZWELI MAHLOBO AND OTHERS

CORAM : ANNANDALE J

JUDGMENT ON REVIEW

25TH NOVEMBER 2002

Since late August 2002 when this matter first came before me on automatic review, it has gone back and forth between the High Court and the Magistrate's court at Simunye to have plain straightforward and uncomplicated queries attended to. This followed on the conviction in June 2002 and sentences of the accused who illegally hunted a zebra in contravention of Section 12(1) of the amended Game Act of 1953 (Act 5 of 1993). The first accused alone was also convicted of the illegal possession of ammunition for a shotgun, though not also of the shotgun itself.

The inordinately long delay with the review proceedings was caused by a number of factors, the first being that instead of the statutory period of "...not later than one week next after the determination of the case..." (Section 80(2) of the Magistrates Courts Act 1938) (my underlining) the matter took from the 12th June 2002 until the 22nd August 2002 to be filed with the Registrar. No reasons for the delay were given.

Following my written queries, which were most inaccurately typed, the magistrates reply was eventually returned to me last week, the 21st November. After I queried the inordinately long delay in the middle of October a period a five months to have a matter dealt with on review is not acceptable and in conflict with the interests of justice. The Registrar of the High Court is directed to ensure that the statutory limits of Section 80(2) of the Act be complied with by all magistrates courts. To this end, the Judges of the High Court has already made significant concessions pertaining to the presentation of proceedings in that as an interim measure, the whole record need not be typed.

The penalty clause of Section 12(1) of the Game Act is contained in Section 26. In addition to a fine, imprisonment or both, Section 26(3) reads:-

> "In addition to any penalties imposed under sub-section (1), any person who contravenes the provisions of Section 6(2) of 12(1), shall be required by the court to either replace the game in respect of which the offence is committed or to compensate fully for the replacement value specified in relation to such game in the First, Second, or Third Schedule, failing which such person shall be liable to a further term of imprisonment of not less than one year but not exceeding three years".

The zebra which was poached by the accused persons as subject matter of the first count is listed in the Third Schedule of the Act as having a common name of "Burchells Zebra", scientific name of "Equus burrcheiii" and a replacement value of E2 000".

The record of proceedings that was submitted on review is clearly incomplete. There is no recording of events that the learned magistrate refers to in his answers.

> "When the matter was registered in court for the first appearance the zebra carcass was brought in and the owner which is IYISIS was given the whole carcass and only required to preserve hooves and skin which were brought as exhibits in the trial. This was reflected in the police exhibit register. In short, the carcass was returned to the owner of the IYSIS. Therefore, (the) court could not have enriched the owner twice by ordering compensation".

Court records must be complete and accurately reflect all events that occur in any particular criminal trial. At minimum, one would have expected to have a recording of the fact that at the first appearance of the accused in court, the exhibit (a zebra carcass) was shown to the presiding officer and that its owner applied for its release to him and whether either the ownership or the release is contested by the accused or not – application of the *audi alteram partem* principle. The police exhibit register does not form part of the proceedings sent on review, since the learned magistrate explains that the release under "...was reflected in the police exhibit register".

Furthermore, the reply does not in any way assist in solving the queries. The provisions of Section 26(4) of the Game Act are mandatory. It does not even provide for the holding of an enquiry as to whether the accused is to be ordered to compensate/replace, or not. It is not a discretionary proviso. For the learned magistrate to state that no compensation or replacement is to be ordered because the owner cannot be twice enriched shows a lack of grasping that it goes against the provisions of the Act. It also is not logical to state that the owner of the game will be "twice enriched" where his game has been poached as in the present case. The owner if the animal is not replaced is a misdirection by the *court a quo* which requires rectification on review.

A further aspect that was raised in the query sent to the learned magistrate, which admittedly was very badly read and typed in the Registrar's office and which may well have contributed to the confusion, is the aspect of the shotgun.

According to the evidence heard at the trial, PW2, 2122 Sergeant H. Dlamini testified that the first accused produced a number of incriminating exhibits, *inter alia* a shotgun and some nine rounds of ammunition for it. Somehow he was not charged for the illegal possession of the 12-bore shotgun itself, as he "failed to produce a licence for the items". Nevertheless, apart from the zebra hooves and skin that he handed in as exhibits, he also handed in the nine rounds of ammunition for the shotgun. The trial court saw fit to have all the items this witness handed in, some seventeen items in all, marked "collectively as exhibit 1".

Such a practise is unsound and confusing. The learned magistrate is to appraise himself of the proper manner in which courts exhibits are to be numbered. The failure to have done so may partly explain the terse reply which reads:- "3 and 4. It is not clear as to which enquiry is being referred to since the law is just straightforward. The exhibits in any conviction shall be forfeited to government by order of court that had been done. There is an order of disposal of exhibits in the record". To this end, the last few words of the court reads:- "exhibits forfeited to the state".

Should the learned magistrate have applied his mind to the content of the query instead of going on his defence and repeating the obvious, quoting the incorrect and incomplete court record, he may well have assisted in having his mistakes corrected and learning in the process. It is to this end that he was asked to state if any enquiry was held in respect of the forfeiture of the shotgun (having regard to Section 12(4) of the Game Act).

Collective exhibit number one, item number 2, is a 12 bore shotgun with a stated serial number. Quite possibly, it was used to commit an offence, but not conclusively so, which is borne out by the fact that the prosecution did not charge any of the four accused persons for its illegal possession. The first accused was nevertheless charged with contravening Section 11(2) of the Arms and Ammunition Act 24 of 1964, arising from both wrongfully and unlawfully possessing a round of 12 bore ammunition.

As formulated, the charge is defective and objectionable. It does not follow the wording of the Act and fails to state one of the *essentialia* of the offence, namely that such ammunition is not to be possessed *"...unless he is the holder of a current permit or licence to possess the firearm for which such ammunition is intended, or is otherwise permitted to possess such ammunition under this Act".*

The italicised words are conspicuously absent in the wording of count 3. Apparently the defect was not noted in the trial court and no mention of it was included, in the reasons for judgment. It was neither rectified nor condoned. An accused person may very well be prejudiced in his defence in the absence of such a necessary allegation.

Having regard to the fact that the first accused, who was charged with possession of the ammunition, was not also charged with unlawful possession of the shotgun from which the 12 bore cartridges could have been fired, leads to the inescapable conclusion that the shotgun would have had to be properly licenced to himself. If not, he would have been charged. Yet, the police sergeant testified that he was asked but failed to produce a licence "for the items".

Although the abovementioned defect in count 3 is serious enough to readily justify it being set aside, I am constrained not to do so, even if only on the pretext that "technicalities" should not prevail in this jurisdiction as elsewhere in the world. It is with constrained reluctance that the defect is condoned and the conviction in count 3 sustained.

Section 12(4) of the Game Act requires forfeiture of any firearm and ammunition which was in possession of the offender at the time of the commission of the offence. Disposal by public auction is prescribed in the Act. There is no evidence that the firearm was stolen beforehand and it properly reported to the police. It was accordingly forfeited to the Government (sic: State) which forfeiture is also confirmed, despite the absence of a proper enquiry in which the provisos have been explained to the accused inorder to afford him the opportunity if being heard to the contrary if so desired.

It is ordered on Review that the convictions and sentences of all the accused persons in case number M8/2002 be confirmed on review. In addition to the sentences imposed in count 1, it is further ordered, in terms of Section 26(3) read with Section 12(11) and the Third Schedule of the (amended) Game Act, 1953 (Act 51 of 1953) that each of the accused jointly and severally, the one to pay the other be absolved, be ordered to either forthwith replace the zebra mentioned in count 1 to its lawful owner, Inyoni Yami Swaziland Irrigation Scheme, or if not done so within thirty days hereof fully compensate the owner in the amount of E2 000 (two thousand Emalangeni) failing which the accused shall be liable to a further term of imprisonment of one year.

The record is returned herewith.

J.P. ANNANDALE

Judge