IN THE SUPREME COURT OF NAMIBIA

In the CRIMINAL APPEAL of:

CARLOS M PEREZ REDONDO Appellant

and

THE STATE Respondent

Coram:

BERKER, C.J.
MAHOMED, A.J.A.
ACKERMANN, A.J.A.

JUDGMENT

ACKERMANN, A.J.A.

This is an appeal against the appellant's conviction in the High Court on a charge of contravening section 22A(4)(b) of the Sea Fisheries Act, No. 58 of 1973, as amended, (the "Sea Fisheries Act") read with the Territorial Sea and Exclusive Economic Zone of Namibia Act, No. 3 of 1990 (the "Namibian Act 3 .of 1990") and his sentence to a fine of R250 000 (two hundred and fifty thousand rands) or 3,5 years (three and a half years) imprisonment, as well as against an order declaring forfeit to the State, in terms of section 17 of the Sea Fisheries Act, the ship the "Frioleiro" with all its equipment and implements and 20,849 metric tonnes of the fish on board the aforesaid ship.

The accused, a 34 year old male Spanish National was charged with contravening section 22A(4)(b), read with sections 1, 6, 16, 17, 18, 22A ana 24(1) of the Sea Fisheries Act as amended and further read with sections 1,4, 5, *1* and 8 of the Namibian Act No. 3 of

1990 and sections 90 and 250 of the Criminal Procedure Act, No, 51 of 1977 (the "the Criminal Code") in that:

> ".... on or about or between 18 November 1990 and 24 November 1990 (he) wrongfully and unlawfully used the said vessel (the fishing vessel FRIOLEIRO) as fishing boat and/or factory within the Exclusive Economic Zone and within the area of jurisdiction of the High Court of Namibia without a permit having been issued in respect of the said vessel".

The appellant was also charged on an alternative count which is not relevant to the present appeal. Further particulars as well as further and better particulars to the indictment were sought and furnished.

Before pleading, an objection was taken on behalf of the appellant in terms of section 85 of the Criminal Code to the main and alternative charges-. The objection to the alternative charge was upheld but that directed against the main charge dismissed. The objection to the main charge was that a contravention of section 22A(4)(b) of the Sea Fisheries Act read with the riamibian Act 3 of 1990 did not constitute an offence in Namibian law.

The same objection had been taken previously in a similar case, namely, S. v Martinez (reported in 1991(4)SA 7^1 (NmHC)) and dismissed by Levy, J who presided both in the Martinez anc in the present case. In furnishing his reasons for dismissing the objection to the main charge m the present case Levy, J did not derail his reasons but simply stated that they were those furnished in s. v Martinez, The learned judge in effect

incorporated by reference his reasons in s. v Martina? into his judgment in the case presently under appeal.

Thereafter the appellant pleaded not guilty to the main charge and a written statement of admitted facts was, in terms of section 115 of the Criminal Code, handed in on the appellant's behalf. In this statement, while denying that a contravention of Section 22A of the Sea Fisheries Act disclosed an offence in respect of the area of the sea between twelve and two hundred nautical miles (as measured from the low water mark) from the coast of Namibia, the appellant admitted all the material facts pleaded in the main charge, which admissions were recorded in terms of section 220 of the Criminal Code. No evidence was adduced by either the State or the defence. On the basis of the aforesaid admissions, and in the light of his earlier dismissal of the objection to the main count, Levy, J accordingly found the appellant guilty on this count. The learned Judge, in his reasons for convicting the appellant, relied on the abovementioned admissions made by the appellant in terms of section 115 of the Criminal Code and his previous ruling on the law when dismissing the objection in terms of section 85 of the Criminal Code, and naturally did not repeat the reasons for such legal ruling which, as previously stated, were merely a confirmation and incorporation of an identical ruling in S. v Marlines. I shall, for the sake of convenience and in order to avoid unnecessary circumlocution, treat those portions of the judgment in JL__v Martinez- which deal with the legal issues relating to conviction (including the dismissal of the objection

to the main charge) as though they have been incorporated in the judgment of the Court *a quo* in this case. When referring to passages in ▫L_v Martina? such reference must be understood in the above contex. It should also be noted that Levy, J also gave judgments on identical legal issues in S. v Curras (in unreported judgments dated the 7th and 13th February 1991 respectively).

The main thrust of the present appeal against the appellant's conviction falls within a narrow legal ambit and raises in substance only one question of law, namely, does a contravention of section 22A(4)(b) of the Sea Fisheries Act read with the Namibian Act 3 of 1990 constitute an offence in Namibian Law? A second, and alternative, contention on the merits is that, at worst for the appellant, the aforesaid contravention only constitutes an offence in that portion of the exclusive economic zone of Namibia contiguous to the port and enclave of Walvis Bay. It is common cause that the actions of the appellant relied on by the State in support of the conviction took place outside this zone (i.e. outside the zone contiguous to the port and enclave of Walvis Bay).

In the charge sheet the offence is alleged to have taken place "on or about or between 18 November 1990 and 24 November 1990". In his aforementioned statement in terms of section 11.5 of the Criminal Code the appellant only admitted performing the acts in question from the 20th to the 24th November. On the 18th March 1931 Levy, J convictec the accellant on the main count "as charged" but in his jucgment on sentence the learned Judge made

it plain that the conviction related only to the period of the 20th to the 24th November 1990.

The central issue in the appeal against conviction relates to the issue whether section 22A(4)(b) of the Sea Fisheries Act applies to the entire national territory of Namibia and its maritime zone, or only to Mthe enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia" (hereinafter for convenience referred to simply as "Walvis Bay") and its maritime zone or to no portion of the national territory of Namibia. If, on a proper construction of the relevant statutes, it appears that the aforesaid section 22A(4)(b) of the Sea Fisheries Act does not apply at all to the national territory of Namibia and its maritime zone, or if it is found to apply only to the territory of Walvis Bay and its maritime zone, then the appellant's conviction cannot be sustained because, as al readying catec, the facts which would constitute a contravention of section 22A(-I)(D) all occurred outside the territory and maritime zone of walvis Bay. Some of the issues to be dealt with have been discussed by CFP Briesch & DM Powell in a lucid and instructive note on the Maritinez and Curras judgments entitled Fighjna for Convictions: The Namibian Maritime Zonal Regime and

ii2s—Incorporation_Of__the__▫&a__Fisheries Act 58 of 1973 _____into.

NamibianJjaw in 109 (1992) SALJ 129, to which I will refer again in the course of this judgment. Reference may also usefully be made to a publication by Prof. DJ Devine Maritime- Zone UgigiatLLojiJLar a new South Africa: Historical, Contemporary and International Perspectives, a Special Publication No. 17 (1992)

of the Intitute of Marine Law, University of Cape Town (hereinafter cited as "Maritime Zona Legislation") and to an article by Prof. Devine Some_____Observations on South____African Maritime Zone Legislation in Sea Changes No. 1 (1985) at 107.

Article 1(4) of the Constitution defines the national territory of Namibia as follows:

> "The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including_____tils enclave, harbour and port of WalVJS__Sax*__&a__W□.D__as__the off-shore islands__of Namibia , and its southern ooundary shall extend to the middle of the Orange River" (emphasis added).

Article 140(1) of the Constitution contains the following provision in relating to laws which were in force immediately before the date of Independence (i.e. immediately before the 21st March 1390):

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> "Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

The Territorial Waters Act No. 37 of 1363 applied, by virtue of section 8 thereof, to "the territory cf . South-West Africa". Being a statute cf the Recuolic of South Africa the legislature would have intended the phrase 'in the territory of South-West

Africa" to exclude Walvis Bay. 8/ the same token howe-zer "Walvis Bay would of course have beer, included in *references* to the Republic of South Africa. In terms of secticn U'iii) "Republic"

included "the territory of South West Africa". This act created three maritime zones:

3) six nautical miles from low water mark "territorial waters" (section 2);

4) a "fishing zone", outside the territorial waters* but within a distance of twelve nautical miles from low-water mark, in respect of which the Republic would, in relation to fish and the catching of fish have and exercise the same rights and powers as in respect of its territorial waters (section 3). Briesch and Powell, *op* c/t, refer at p. 130 to this zone as the "exclusive fishing zone"; and

5) a zone, corresponding in area to the exclusive fishing zone, in which the Republic would have any powers which might be necessary to prevent contravention of any fiscal law or any customs, emigration or sanitary law. To this zone Briesch and Powell, *ibid* refer as the "contiguous zone" (section 4 read with section 3).

In 1373 the Administrator-General of South West Africa issued a proclamation (Proclamation AG 32, Official Gazette Extraordinary of South West Africa 4034 of 7 November 1373) which would have had the effect of extending the territorial waters and fishing zone to the 12 and 200 nautical mile limits respectively. Doubts have been expressed as to whether this proclamation ever came into force (Devine, Some Observations on South African Maritime Zone Legislation, *supra,* at 120 note 3; Devine, Maritime Zone Legislation, *supra,* at 12-13 and Briesch & Powell, *op* eft, 130). Proclamation AG 32 of 1373 was made in terms of powers conferred by Proclamation 181 GG 5713 of 13th August 1377 which in turn was made under section 38(1) of the South West Africa Constitution Act Nc. 33 of 1368, Section 38(2) of this lastmentioned Act (as amended by section Kb) of the South West Africa Constitution Amendment Act No. 35 of 1377) provided that

> "If any authority is by any law made in terms of subsection (1) empowered to make laws, a law made by any such authority by virtue of that power, shall not be of force and effect until it has been approved by the State President".

Both Devine, *ibid* and Briesch & Powell, *ibid,* observe that there is no indication that the State President in fact consented. It is fortunately unnecessary to pronounce on this point in the present case because Proclamation AG 32 of 1979 was repealed by-section 7 of the Namibian Act 3 of 1990.

In 1977 the South African legislature enacted the Territorial Waters Amendment Act No. 98 of 1977, which came into operation on the 1st November 1977. Section 4 of this Act expressly excluded from its operation "the territory of South West Africa", but preserved the operative effect of the principal Act in South West Africa. The South African legislature, by section 4 of the amending Act, did not of course exclude Walvis Bay from the amending Act's operation. Insofar as Walvis Bay is concerned, the effect of the amending Ac; was to provide for 12 nautical miles territorial waters (section 2); a 200 nautical mile contiguous zone anc a 200 nautical mile exclusive fishing zone (section 3 read with section 2).

If, after Independence, and by virtue of the operation of Article 140(1) read with Article 1(4) of tne Constitution, the provisions of the Territorial Waters Act relating to Walvis Bay (referred to above) became part of the law of Namibia, a "differantiated maritime zonal regime" (see Briesch & Powel":, *op cit%* p. 131; would have come into existence for Namibia. The Territorial

Waters Act 1963, as amended, would have remained in force in Walvis Bay, (providing for the aforementioned zones of 12 nautical miles, 200 nautical miles and 200 nautical miles respectively), while the unamended provisions, providing for the more limited zones, would have remained in force in the rest of Namibia.

Article 100 of the Constitution amended the maritime zonal regime by providing that

> "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

As Briesch & Powell, *op cit,* p. 131 point out:

> "(t)he article refers to an exclusive economic zone (EEZ5. No such zone existed before independence. The Constitution must therefore be construed as having created an EEZ of an unspecified extent".

It is unnecessary for purposes of this judgment to decide what this somewhat unusual provision meant, for the position was clarified when the Namibian Act 3 of 1990 came into operation *on* 10 July 1990. This now governs the Namibian maritime zonal regime and provides for the following three zones:

(a) in terms of section 2(1) for a 12 nautical mile territorial sea;

lb) in terms of section 4(1) for a 200 nautical mile Exclusive Economic Zone; and

(c) in terms of section 4(3)(b) for a 200 nautical mile contiguous zone.

Whatever doubts may exist as to. the incorporation, on Independence, into the law of Namibia of the law in force in Walvis Bay immediately before the date of independence, it is clear that, when sections 1(4) and 140(1) of the Constitution are read together in conjunction with the Namibian Act 3 of 1390, it was certainly the intention of the legislature that the latter Act would apply to the entire national territory of Namibia. Upon independence, therefore, there was created, in the words of Briesch & Powell

> Ma uniform maritime zonal regime along the entire Namibian coastline ..... M

at least insofar as the provisions of the Namibian Act 3 of 1930 were concerned.

The Sea Fisheries Act, 1973 came into operation on the 12th October 1373, In terms of section 1(i;<) "fishing zone" is defined as meaning

> "the territorial waters of the Republic and the fishing zone as aefined in sections 2 and 3, respectively, of the Territorial Waters Aci, 1353 (Act No. 87 of ises)*'.

The "fishing zone" was (before the Territorial Waters Amendment

Mv w VI i 3' # # A.-*- .-..? iQ77 -^me inc operation) the sea within a distance of

twelve nautical miles from low-water mark. In terms of section 1(:<x) "Republic" included "the territory of Scuth West Africa" and in terms of secticn lixxvii) "territory" meant "the territory of South West Africa". In terms of section 24.(1} the Act and any amendment thereof were (wit:i %a:i exception net relevant to this case) also applicable in the territory of South West Africa. The

Act deals with a wide range of matters relating to the control of sea fisheries including, *inter alia,* the appointment of fisheries advisory councils; the appointment of various categories of policing officials; the registration of fishing boats and the licensing of boats and factories; restrictions on the catching of fish; the creation of offences and the imposition of penalties; the forfeiture and seizure of fishing vessels and matters relating thereto. The Act contained no provisions in any way 1 imitating or restricting foreign vessels from fishing in the exclusive fishing zone of South Africa or South West Africa.

The Gea Fisheries Amendment Act, No. 99 of 1977, which came into operation or. 1st November 1977, introduced section 22A into the principal Act, sub-sections (4) and (5) whereof providing the following:

> "(4) Any person using a vessel registered in a foreign State as a fishing boat or factory -
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> 6) within the territorial waters;
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> 7) within the fishing zone without a permit having been issued in respect thereof in terms of subsection (2);
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> 8) within the fishing zone in contravention* of or without complying with any condition or restriction on which a permit has been issued in respect thereof in terms of sub-sect i on v •! 7,
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> shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 7 years or to both such fine and such imprisonment.

'fishing zone' means the fishinc zona, as defined in section 3 of the Territorial Waters Act, 1963

> (Act No. 87 of 1963), of the Renuhlic excluding ibs___territory; 'territori ai waters' means the territorial waters, as defined in section 2 of the Territorial Waters Act, 1963 of the Republic excluding the territory". (emphasis added).

In this way section 22A of the Sea Fisheries Act excluded from its operation the geographic area then known as South West Africa but included Walvis Bay. Although the Sea Fisheries Act was repealed and replaced, under South African law, by the Sea Fisheries Act 12 of 1938, the law relating to South West Africa and Namibia was not (at least for present purposes) effected by provisions cf Act 12 of 1888. The only sections of this latter Act which came into operation prior to the *Independence of* Namibia were sections 7 to 14 (dealing with the recognition of, and provisions concerning, industrial bodies and other interest groups in different, branches of the fishing industry) and sections 27-29 (dealing with the Sea Fisheries Fund, its appropriation and various levies on fisn), which sections came into operation or. the 1st September 1380, All other sections (including the penal provisions (secticn 47): the forfeiture and seizure provisions (section 48); and ^he restriction on the use of foreign vessels as fishing ooats ana factories in fishing zones as well as the penal provisions relating tnereto (section 52)) only came into operation on the 1st July 1390 after the Independence of'Namibia. In terms of sect:ion 54 (read with Schedule 2) of whis Act, the Act applied to Walvis Bay and the Penguin islands. Inasmuch, however, as section 54 also only came into operation on 1st July 1930, i.e. after Namibian Inceoenaence, none ot the provisions of Act 12 of 1938 could have become incorporated into the law of

Namibia by operation of the provisions of Article 1(4) read with Article 140(1) of the Constitution.

Immediately prior to Independence, therefore, section 22A of the Sea Fisheries Act applied to Walvis Bay,- but not to any other area which subsequently became the territory of Namibia on Independence.

The Namibian Act 3 of 1990 came into operation, as already indicated, on the 10th July 1990. Section 4(4), on which a great deal of the debate in this appeal focussed, reads as follows:

> "Any law in force in Namibia at the commencement of this Act relating to any fishing zone, shall apply-within the exclusive economic zone of Namibia, and any reference in any such law to any fishing zone shall be deemed to be a reference to the exclusive economic zone as defined in this Act[M].

By virtue of section 7, read with the Schedule to the Act, various sections of the Sea Fisheries Act were amended or replaced, including the following:

Section 17 was replaced with the following section:

> "17 (1) The court convicting any person of any offence in terms of this Act may, in addition to any other penalty it may impose, declare any fish, sea-weed, shells or implement or any fishing boat or other vessel or vehicle in respect of which the offence was committed or which was used in connection with the commission thereof, or any rights of the convicted person thereto, to be forfeited *zo* the State, and cancel or suspend for such period as the court may think fit, any registration done in respect of the convicted oerson or any licence or permit issued or granted to sucfi person in terms of this Act: Provided that such a declaration of forfeiture shall not effect any rights which

any person other than the convicted person may have to such implement, boat, vessel or vehicle, if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence.

9) The provisions of section 35(3) and (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall mutatis mutandis apply in respect of any such rights,

10) Any fish, seaweed, shells, boat, vessel, vehicle or implement or any right thereto forfeited to the State under the provisions of this section or section 6(6), may be sold or destroyed or may be dealt with in such other manner as the President may direct".

Section 22A was amended in the following respects: Firstly, the maximum fine provided for in sub-section (4) was increased to one million rand and the phrase "or to imprisonment for a period not exceeding 7 years or to both such fine and such imprisonment" in sub-section (4) deleted. Secondly, sub-section (5) (which had, for purposes of section 22A, defined "fishing zone" in a manner which had excluded South West Africa and defined "territorial waters" in a manner which excluded the territorial waters of South West Africa) was repealed and replaced with the following sub-section:

"(5) (a) The President may by notice in the *Gazette* make regulations in respect of vessels authorized in terms of sub-section (2), relating to any of the matters *referred* to in sections 10(1), 11(a), (b) and (c) and I3d) (a), (c;, (d), (f), (g), (h), (i), Cj), (1), (m) and (n) of this Act.

(b) Different regulations may under paragraph (a) be made in respect of different vessels or vessels of different foreign States or in respect of different species of fish or fish products.

(c) Any person using a vessel authorized in terms of sub-section (2) in contravention of or without complying with any regulation referred to in paragraph (a) of this sub-section, shall be guilty of an offence and liable on conviction to the penalty prescribed in sub-section (4)[M].

Against this background I consider the relevant portions of Levy, J's judgment in the Martinez case.

Three arguments were raised before the learned Judge in support of the contention that, although section 22A of the Sea Fisheries Act had applied to Walvis Bay, section 4(4) of the Namibia Act 3 of 1990 Act 199Q did not have the effect of extending the law which had been applicable in Walvis Bay to Namibia. The first (I summarise) was that the extensive manner in which the definition of the national territory of Namibia in section 1(4) of the Constitution is qualified by the phrase "The whole of the territory recognised by the international community through the organs of the United Nations as Namibia" means that the Constitution did not regard Walvis Bay as having previously been legally part of the Republic of South Africa. Hence the Constitution does not recognise that the legislative enactments of the Republic of South Africa would *ipso facto* apply to Walvis Bay and that, accordingly, when section 4(4) of the Namibian Act 3 of 1990 refers to "any law in force in Namibia" this cannot be taken to include enactments of the Republic said to be applicable in Walvis Bay indirectly because Walvis Bay was part of the Republic. Secondly, and in the alternative, it was argued that the phrase "any law in force in Namibia" was not intended to

include a law applicable only in Walvis Bay and not in South West Africa as this could lead to a multiplicity of legislative enactments on the same subject matter and potential conflict. Thirdly, and also in the alternative, it was argued that (see p. 749 F-G):

> "..... if the Constitution intended to incorporate the laws of the Republic of South Africa because they were in force in respect of the Walvis Bay enclave, and because they were restricted to the enclave and did not extend to South West Africa, the framers of the Constitution must be deemed to have intended these laws to have continued to have effect to the same extent as they did prior tc the Constitution and the enactment of Act 3 of 1930, i.e. to have effect only in the enclave of Walvis Bay. On the basis of this argument section 22A could only be contravened in the fishing rone adjacent to Walvis Bay".

Levy J dealt with and rejected these arguments as follows at p. 749 H-750 G:

> "Mr. *Hofrneyr's* first argument turns primarily on the meaning to be given to article 1(4) of the Constitution. His interpretation of that article is that it implies that the Constitution did not recognise that Walvis Bay had been legally part of the Republic of South Africa and therefore the legislative enactments of the RSA would *ipso facto* not apply to Walvis Bay. Therefore even though the Constitution recognised Walvis Bay as oart of Namibia, the laws of the enclave were not recognised.
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> This cannot be read into the article. All that the article did was to specify the entire extent of the territory of Namibia. The phrase 'recognised by the international community through the organs of the United Nations' Qualifies the 'whole of Namibia' and the *whole* of Namibia includes Walvis Bay. Whether it was or was not previously regarded as part of Namibia is irrelevant to these proceedings. As from 21 March 1990, the date of independence from the RSA, Walvis Bay was part of Namibia and therefore the laws applicable in and to Walvis Bay were the laws of Namibia.
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> Article 140(1) of the Constitution simply provided for the perpetuation of existing laws.

The result of this was that Namibia recognised s 22A of the Sea Fisheries Act 1973 as being the fishing zone of Walvis Bay as defined in that Act, but *not* applicable to the rest of Namibia. However, inasmuch as Walvis Bay is part of Namibia, s 22A was (and is) part of the law of Namibia although at that stage confined to the area of Walvis Bay.

The Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990 became law on 10 July 1990. Firstly, that Act defined Namibia for the purposes of the Act as meaning 'the Republic of Namibia *as defined in article 1(4) of the Namibian Constitution'.* There was therefore no doubt that the Act related to Walvis Bay. Secondly, it redefined the territorial waters (also renaming it 'territorial sea') and redefined and renamed the 'fishing zone' to be the * *exclusive economic zone*[1]*.* Section 4(4) then provided that any law in force in Namibia would apply within the EEZ and *any* reference in such law to *any* fishing zone was defined to be a reference to the EEZ as defined in that

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The laws in force in Namibia as at 10 July 1990 relating to *any* fishing zone were to apply to the EEZ of Namibia and included section 22A of the Sea Fisheries Act 1973.

This conclusion is inescapable and the use of varying terminology such as 'any law of Namibia' or 'any law in force in Namibia[1] cannot and does not change the meaning.

To sum up, I am satisfied that, as from 21 March 1990, s 2 2A of the Sea Fisheries Act 1973 related to a fishing zone of Namibia, albeit the fishing zone around walvis Bay, and that the effect of s 4(4) of Act 3 of 1990 was to provide that all laws applicable to *any* fishing zone from then on related to the exclusive zone (EEZ) of Namibia.

The difference in terminology does not alter the ultimate meaning of the relevant section of Act 3 of 1990.

The objection taken in terms of s 35 of the Criminal Cede to the main charge was therefore dismissed".

Against this the arguments raised in the present c o n s i d e r e u • appeal can be background

The claim of legal right to Walvis Bay embodied in Article 1(4) of the Constitution is disputed by the Republic of South Africa which occupies Walvis Bay. Although Resolution 435 does not *refer* to this issue Security Council Resolution 432 of 27 July 1378, adopted unanimously and without abstentions, provides, *inter alia,* that "the territorial integrity and unity of Namibia must be assured through the reintegration of Walvis Bay within its territory" and GA Resolution 32/9D declares Walvis Bay to be an "integral part of Namibia" (See Gerhard Erasmus, Die Grondwet YSn Namibia in Stellenbosch Law Review 1930(3)277 at 231-231). Whatever uncertainty or anomalies may exist in International Law (as to which see Erasmus, *op cit,* and Faris The Administration of Walvis 3sy in 1373 South African Year Book of International Law 63 and Berat Walvis Bav - Decolonization and International Law (1330)) there can be no doubt that the Namibiah legislature and courts are bound by the provisions of Article 1(4) of the Constitution to exercise jurisdiction over Walvis Bay, whatever-difficulties there may be in the execution of such jurisdiction*

For convenience I repeat the provisions of Article 140(1) of the Constitution dealing with the laws which were in force immediately before the date of Independence (i.e. immediately before the 21st March 1330):

> "Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a comoetent Court'.

The application of Article 140(1) to the territory of Namibia (excluding Walvis Bay) does not appear to present difficulties. Pre-Independence Laws in force in this part of Namibia which conflict with the Constitution can either be repealed or amended or declared unconstitutional by a competent Court. *Pre-*Independence laws which do not conflict with the Constitution can be amended by the Namibian Legislature as it thinks fit (subject, of course, to the Constitution).

In S. v Curras (1) (the first of the two judgments (both unreported) delivered by Levy, J in the Namibian High Court on 7 and 13 February 1991 respectively) the history of Walvis Bay is conveniently summarise as follows at pp. 10-11:

> "On 7 August 1884 by the Walvis Bay and St John's River Territories Annexation Act (Act 35 of 1884) the enclave was annexed to and formed part of the Colony of the Cape of Good Hope and was administered and legislated for as such until 30 May 1910. With the formation of the Union of South Africa in 1910, the Union claimed that the said enclave was part of the Union and the settlement formed part of the Province of the Cape of Good Hope being administered and legislated for as such until 30 September 1922. As from 1 October 1922 and in terms of the South West Africa Affairs Act, 1922 (Act 24 of 1922) passed by the Parliament of the Union of South Africa, the said port and settlement were administered and legislated for as part of the Territory of South West Africa the inhabitants being regarded as the inhabitants of the said Territory.
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> See S. v Offen 1935 AD p. 4
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> S. v Akkermann 1954(1) SA p, 195
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> By Proclamation of the Republic of South Africa (R202 of 31 August 1977) issued in terms of section 38 of Act 33 of 1383 as amended by Section 1(a) of Act 95 of 1377, the Republic of South Africa maintained that it was expedient and desirable as from that date to administer and legislate for the said port and settlement as part of the" Province of the Cape of Good Hope and legislated accordinly. By Proclamation R202

> of 31 August 1977 Walvis Bay was placed under the jurisdiction of the Supreme Court of South Africa, Cape Provincial Division.
>
> It is clear therefore that the Republic of South Africa regarded Walvis Bay as an integral part of that country and as from 31 August 1977 the laws of the Republic of South Africa were applied to and in the enclave and settlement of Walvis Bay as if it were part of the said Republic".

In certain cases statutes were passed by the South African legislature for South West Africa which merely had the effect of incorporating existing South African statutes into the statute law of South West Africa. In other cases statutes were passed.by the South African legislature which applied both to South Africa as well as to South West Africa (The Sea Fisheries Act, with the exception of section 22A, is an example of such an act). I know of no statutory instrument, however, passed by a South West African legislative authority which purported to legislate for Walvis Bay before 1 October 1922 or after 31 August 1977. The legislative assembly, in adopting clause 140(1) of the Constitution, must have been aware of this fact and that the only statute law applicable in Walvis Bay from the time of its annexation to the Caoe in 1884 until 1922 and from 1977 until Namibian Independence was statute law enacted by the Caoe and South African Legislatures.

In terms of Article 140(1) of the Constitution the preserved laws are those "which were in force immediately before the date of Independence". The sub-section does not expressly couole the laws which are sought to be preserved with a particular territory but the implication seems% unavoidable that the territory concerned must be that of Namibia: and in terms of Article 1(4)

such territory is referred to as "the National territory of Namibia" and includes Walvis Bay. Article 140(1) provides that the pre-Independence laws "shall remain in force". Clearly they were intended to remain in force in the national territory of Namibia. The object of Article 140(1) is to establish legal continuity. No reason presents itself why, if the Constitution expressly includes Walvis Bay in Namibia's national territory, it should not wish to preserve legal continuity there as well or exclude Walvis Bay for any other reason from the operation of Article 140(1). The submission advanced, however, is that the Constitution did not regard Walvis Bay as having previously been legally part of the Republic of South Africa and that therefore the Constitution did not recognise that legislative enactments of the Republic of South Africa would *ipso facto* apply to Walvis Bay, I agree with Levy, J that this cannot be read into the Article. It is one thing to claim that Walvis Bay is or has become part of Namibia but quite another to claim that it was not effectively annexed by the Cape or that South Africa did not subsequently exercise authority and legislative power effectively over it. The second claim is not implicit in the first. If the Constitution recognises the validity subject to amendment, repeal or declaration of unconstitutionality of all the statutory instruments enacted in respect of South West Africa by the South African legislature (and this it clearly does) it would seem that its recognition of legislation by the South African legislature fcr walvis Bay would be an a *fortiori* one.

Article 66(1) of the Constitution contains a similar provision, providing that both the "customary law and the common law of Namibia" in force on the date of Independence, shall remain valid to the extent to which it does not conflict with the Constitution or any other statutory law. ~Section 1(1) of Proclamation 21 of 1919 enacted that:

> "The Roman-Dutch Law as existing and applied in the Province of the Cape of Good Hope at the date of coming into effect of this Proclamation shall, from and after the said date, be the Common law of the Protectorate, and all laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this section be repealed".

I has been authoritatively pronounced by a Full Bench in R v ~~QvScb~~ 1956(2) SA 696 (SWA) (per Claassen, JP at 700C-D) that the intention of the Legislature in passing Section 1(1) of the Proclamation was:

> "to introduce in this Territory (i.e. South West Africa) the law of the Union of South Africa, as existing and applied in the Cape of Good Hope, which law has for its basic structure the principles of the Roman Dutch Law. Where those principles have been applied in the Cape of Good Hope differently from the rest of the Union, this Court must to the best of its ability endeavour to interpret and apply those principles as it considers the Appellate Division will interpret and apply them in a case coming before it on appeal from a decision of a Court in the Cape of Good Hope. Just as the Appellate Division will take into consideration changes introduced into the common law by-statute law binding in that Province so this Court will similarly have to take such statute law into consideration as was decided in Tittsl's case, 1921 S.W.A. 58. See also the case of Krueoer v Hogs. 1954(4) SA 248 (S.W.A.)".

This view was confirmed in a judgment of the Full Bench of the Supreme Court of South West% Africa (Berker, JP Mouton, J and Strydom J) in Binga v Administrator General s.W-A- *and* Others

1984(3) SA 949 (SWA). At p. 972 C-E Strydom, J (as he then still was) said the following:

> "Although our judicial structure has to a certain extent undergone a change, such change is more apparent than real. The final say in respect of appeals does not rest with us but is still in the hands of the Appellate Division of South Africa. The common law in this territory is still the Roman Dutch law which is the common law of the Republic of South Africa. (See section 1(1) of Proc. 21 of 1919 and R v Goseb 1956(2) SA 696 (SWA). That decision was given at a time when the Court was still the High Court of South West Africa). A great part of our statute law originated in the Republic or was South African statute law which was made applicable to the territory. It further follows that our statute law is to be interpreted against the background of our common law which is, as stated above, the same as that of the Republic of South Africa, (see Estate Wags v Strauss 1932 A.D. 76-80)".

Mouton, J delivered a separate concurring judgment in which he did not deal explicitly with the above issue. There is nothing in his judgment however which conflicts with the above view and in fact his finding (at p. 963 C-F) that the South West Africa Supreme Court is bound by decisions of the Appellate Division of the Supreme Court of South Africa given both before and after the promulgation of Proc. 222 of 1981, is tacit acceptance of the above view, Berker JP, as he then still was, concurred in both judgments, I do not take the phrase Mour common law which is ..... the same as that of the Republic of South Africa" in the above *dictum* of Strydom, J to be intended to be (or to constitute) a departure from the views of Claassen, JP quoted above.

Both Mouton J (at 363 C-F) and Strydom, J (at 973 D) came to the conclusion (concurred in by Bferker, JP) that the (then) Supreme

Court of South West Africa was bound by the decisions of the Appellate Division of the Supreme Court of South Africa. The position of the Supreme Court of Namibia (and indeed the position of the High Court and Lower Courts) under the Constitution and after Independence is of course quite different. In terms of Article 78(2) of the Constitution these Courts are stated to be

> "independent and subject only to this Constitution and the law".

The expression "the law" of course includes *inter alia,* both statute law and common law. By virtue of Article 140(1) read with Article 66(1) of the Constitution the provisions of Section 1(1) of Proclamation 21 of 1913 continue to remain in force until repealed or amended by Act of Parliament or until declared unconstitutional by a competent Court. Consequently "the Roman-Dutch Law as existing and applied in the Province of the Cape of Good Hope" (as that expression has been explained in the cases of Goseb and Binaa. *supra)* continues to apply in Namibia, with the important qualification, however, that it is for the Courts of Namibia to interpret and pronounce on the content and development of such common law in Namibia, which Courts are no longer bound by the decision of the Appellate Division of the Supreme Court of South Africa.

It follows from the aforegoing that, immediately prior to Independence, the "common law" applicable in South West Africa was identical to the common law in Walvis Bay, save that differing statutory regimes had made different inroads into such common 1 aw.

Nonetheless, if the argument under consideration is correct, (namely that the Constitution did not regard Walvis Bay as having previously been legally part of the Republic of South Africa and consequently did not recognise the legislative enactments of the Republic of South Africa) it must also apply to the post-Independence recognition of the common 1 aw in Walvis Bay. This would in my view lead to such absurdity that it could *newer* have been the intention of those bringing the Constitution into being. On this argument there would be a legal vacuum in Walvis Bay and would confront the Namibian Courts with an intractable conundrum of having to decide what laws were in force in Walvis Bay immediately before the date of Independence. The only other possible alternative to finding that a legal vacuum existed would be to hold that the common and statute law of South West Africa was applicable. This, however, would only serve to render the impasse more inescapable. The common law of Namibia was determined statutorily by Proc. 21 of 1319 under South African authority and as pointed out by Strydom, J in fiinga's case in the passage quoted above "(a) great part of our (South West African) statute law originated in the Republic or was South African statute law which was made applicable to the territory". This would, in a devious way, result in the recognition of the very law which, on this argument, the Constitution had set its face against. It has never been doubted, nor challenged in these proceedings, that such common law and statute law, was the valid and enforceable common and statute law, "in force immediately before the date of Independence" in South West Africa for purposes of Article 140(1) oT the Constitution or "in force on

the date of Independence" for purposes of Article 66(1) of the Constitution. There can, as I see it, be no conceivable reason why the Constitutional founders would have been prepared to recognise such law and its continuance for Namibia (excluding Walvis Bay) but not for Walvis Bay itself. On the contrary, if Walvis Bay was, upon Independence, to be regarded in Namibian law as part of Namibia in terms of Article 1(4) of the Constitution (which of course Article 1(4) explicitly decrees) and if, as a necessary corollary, the Courts of Namibia were obliged to exercise jurisdiction over the territory of Walvis Bay, (whatever practical difficulties might exist regarding the enforcement of such jurisdiction) it was essential for the Constitutional founders to identify what legal regime would apply to this territory. Having regard to the fact that South Africa still occupied, *de facto* controlled and laid legal claim to Walvis Way, it seems to me, with due respect, eminently sensible for the founders (and in the interests of the inhabitants of Walvis Bay) to accept and recognise the continuance after Namibian Independence of the laws in force in Walvis Bay before Independence. Levy J was accordingly correct in not upholding this leg of the argument.

It was further argued before us that such recognition would, because of the application of sub-articles (2) to (5) of Article 140 of the Constitution lead to a result which would offend against the presumption against the extra-territorial operation of statutes. Sub-articles (2) to (5) of Article 140 of the Constitution read as follows:'

"(2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.

11) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission *referred* to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

12) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission *referred* to in Article 112 hereof or the public service of Namibia.

13) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General apoomted by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, *&rid* any reference to a Minister or official of such Administration shall be deeded to be a reference to a corresoonding Minister or official of the Government *zf* the Republic of Namibia".

It was contended that if Section 22A were to.be construed as a law "in force immediately before the date of Independence" in Vi'al v i s Bay w i th i n the mean i rfg of Article 14.0 (!) ₣ the prov i s i ons

of the above sub-articles would be applicable thereto. This would undoubtedly be so. It was further contended in appellant's heads of arguments, however, that the result of such application would be to:

(a) "confer upon the President of Namibia the power to enter into agreements in terms of section 22A(1) in respect of the fishing zone of the Republic of South Africa";

(b) "confer upon a corresponding Minister of Namibia the power to issue permits in terms of section 22A(2) in respect sf the fishing zone of the Republic of South Africa";

(c) "construe any permit issued bv a Minister of the Republic of South Africa in terms of section 22A(2) as being a permit issued by the corresponding Minister of Namibia" (emphasis added} •

It was also urgued that a further result of construing section 22A as law "in force immediately before the date of Independence" within the meaning *of* Article 140(1) of the Constitution "would be to make it an offence in Namibia for any person who contravenes section 22A(4) in respect of the territorial waters and fishing zone of the Republic of South Africa"-

Nowhere in the Constitution is sovereignty or jurisdiction claimed for Namibia over any territory in regard whereto the Republic of South Africa claims sovereignty or jurisdiction other than Walvis Bay. In construing sub-articles (2) to (5) of Article 1~Q of the Constitution one ought clearly to do so, if possible, in a way which prevents extra-territorial operation of

our; ^wilou ; wv.L luft.

These sub-articles do contain expressions of wide import such as "(a)ny powers"; "all powers, duties and functions"; "(a)nything done"; and "any reference". The question is whether these expressions must be interpreted strictly literally or whether it is permissible to construe them in a manner which avoids extra-territorial operation. It is a we11-recognised canon of statutory construction that the word "any", although upon the face of it a word of wide and unqualified generality, may nevertheless, depending uocn the subject-matter to which it relates or the context in which it used, be given a restricted meaning. (See R v Hugo 1326 AD 268 at 270-271; S v Wood 1976(1) SA 703(A) at 706 F-H and Arorint Ltd v Gerbsr Goldschrnidt SA Ltd 1933(1) SA 254 (A) at 261 8-E).

In the present case the context in which the word "any" or similar words are used is a provision in the Constitution for maintaining in force certain laws upon Independence. The subiect-matter is the transitional regulation of powers previously vested by such pre-Independence Statutes in representatives and functionaries of the South African Government. The object of such regulation is to ensure that such powers can, after Independence, by exercised by the corresponding representatives and functionaries of the Namibian Government and that acts performed in the past are deemed to have been performed by the corresponding tNamibian representatives and functionaries. In this context it is not only ccssible, but essential, to construe the provisions referred to in contentions (a) and (b) aoove in SUCH a way that, the "powers there mentioned are limited

in their exercise, in terms of section 22A(1) and (2)), to the fishing zone of Walvis Bay; and in the case of the permit referred to in contention (c) to a permit issued in respect of the Walvis Bay fishing zone or to that part of a permit relating *~ *he Walvis Bay fishing zone. As far as the fourth contention is concerned it does not follow that because section 22A is held to be a law continuing to be in force that this results in a person who contravenes section 22A(4) in respect of the territorial waters and fishing zone of the Republic of South Africa committing an offence in Namibia. The Constitution seeks no operation in any territory other than in the national territory of Namibia as described in Article 1(4) of the Constitution. When section 22A(4) (as it stood on the date of Independence) is construed in Namibia the expressions "territorial waters" and "fishing zone" must be interpreted as relating only to the territorial waters and fishing zone of Walvis Bay as they existed at that date.

The second argument addressed to Levy, J in the »Martinez case in support of the contention that section 22A was not introduced s& al1 into post-Independence Namibian law was based on the assumption that the framers of the Constitution sought to avoid "a multiplicity of legislative enactments relating to the same subject-matter and in some cases being incompatible and conflicting". Multiplicity of enactments which might also be Incompatible and conflicting is not avoided merely by denying section 22A operation in post-Independence Namibian law. Such difficulties are inherent in "the claim of right, *in* section 1(4)

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of the Constitution, that Walvis Bay forms part of the National territory of Namibia. It is the consequence of this provision (and not the incorporation of section 22A of the Sea Fisheries Act) that brings about potential conflict between the law in force in Walvis Bay and that in force in the rest of Namibia. The framers must undoubtedly have *been* aware of this but nonetheless deliberately included Walvis Bay in the national territory of Namibia. How such conflicts are to be resolved is not a matter that this Court *need* pronounce on. It is also significant that Article 56 of the Constitution envisages that different law might apply to different parts of Namibia and at different times. Sub-article (2) of Article 66 provides that, subject to the terms of the Constitution, any part of tne common law or customary law may be reoealed or modified by Act of Parliament, and that, "trie acolication thereof may be confined to particu i ar parts or riamiuia or ^o carticuiar cerioos

The '.nclusion of Walvis 3ay as part of the National territory of

that Namibia neitner *CZCJOIBS* nor controls Walvis Bay, is not a

out, Art i c 1 e 2 et* tr.e • r ~ sn Const ^ tut * on contai ns a p;,cv ,;Si en tha~

and others (cited by Professor Erasmus, *op cit,* at p. 291 and 292, fn 38) the Irish Supreme Court held in 1990 that

> "Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right".

The conclusion I reach on this part of the argument is that section 22A cf the Sea Fisheries Act, in the manner and to the extent indicated above, formed part of Namibian law upon Independence, but at that time was limited in its operation under Namibian law to Walvis Bay.

The remaining issue on the merits is whether Namibian Act 3 of 1930 had t.le effect of extending the provisions of section 22A to the exclusive economic zone of the whole of Namibia. In this regard Levy J said tne following in S. v Martinez at 750 C-G:

> 'The Te.T-'torial 3ea and Exclusive Economic Zone or •<arr,it~a Act 3 o~ 1330 became law on 10 July 1390. ' F*rs:;., tr.at Act defined Namibia for the purposes *cf* the Act as meaning 'the Republic of Namibia *as defined in article 1(4) of the Namibian Constitution' .* There was tnerefcre :c scuct that the Act related to Walvis 2a> . CeconcTy, :t redefined the territorial waters (also -er.amir.g .it 'territorial sea') and redefined and renames t;*e 'fisning zone' to be the 'exclusive trcortmic zcre'. Section 4(4) then provided that *any.* *a\% •".-! fzrcs* in Namibia wculd apply within the EEZ and ji / * > reference in such law to *any* fishing zone was e~f:rec tc ce a reference to the EEZ as defined *in* that

rce in Namibia as at 10 July 1S90 fishing zone were to apply to the

«. 3 !<£.•#« «H T^TUS I r" ™«~Tii"i^« «- =- :*:
'elating tc
EEZ and included section 22A cf the Cea fisheries Act 1373.

"his conclusion is inescapable and the use of varying term'roleg., sucn as 'any law cf Namibia' or 'an> law *in* force M Namibia' cannot and does not change the meaning.

> To sum up, I am satisfied that, as from 21 March 1990, section 22A of the Sea Fisheries Act 1973 related to a fishing zone of Namibia, albeit the fishing zone around Walvis Bay, and that the effect of section 4(4) of Act 3 of 1990 was to provide that all laws applicable to *any* fishing zone from then on related to the exclusive economic zone (EEZ) of Namibia.
>
> The difference in terminology does not alter the ultimate meaning of the relevant section of Act 3 of 1990.
>
> The objection taken in terms of section 85 of the Criminal Code tc the main charge was thereof di srnissed".

It is correct, as pointed out by Briesch & Powell , *op cit*$_t$ p. 134-135 that *in* the Brltc case Levy, J came to the above conclusion solely on a construction of section 4(4) of Namibia;! Act 3 of 1390 and witrout reference to section 7 of this Act ar.d the Schedule *referred zc* therein (quoted above). TVis latter section and Schedule *inter alia* repealed section 22A(5) and the geographical limitations therein which, for purposes of section 22A, had excluded the territory of South West Africa (but net Walvis Bay of course.. The authors argue that it. *ih* doubtful whether section 4(4} :;i its own had the effect cf removing this geographical limitation and at c. 125 state the following:

> "Applying the o"::nsr; *rii'~s* of statutory construction, the argument is as -c"lcws:
>
> Had section 7 net excress'y repealed section 22A(c), section 22A wculc have continue:: tc ape'y within the EEZ as Namibian "a., p) virtue cf section -(4; as • eac with arts 1(4} ar.c *4Qi *: ;* of tne Const I *Zuz* • or, Cut onl#--within that serf or. cf tne EEZ contiguous to Walvi* Bay, -he reason ce'r.g c*\ar :n tne absence cf cenf~ iut between the two sections, section 22 A (-nc'uding s^o-section (f : j ~usc oe *rezx* with section 4(4; *.^f* the ~'~:?Q Act. Arguac[1]/ c*ers is no conflict between these sections, since section 4-,i; ?nerel/ oro\ ! .:es for the general extension of : aws -in force in ~ne 'fishing cone' to the riewr *z^e^zad* EEZ, wnereas sue section (5) specifically ce.nancates 'the scope of application' of section 22A".

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While there may well be merit in this argument, it is unnecessary to pronounce upon it. The task of the Court is to construe the meaning and effect of Namibian Act 3 of 1990 having regard to all its provisions and in particular, for present purposes, sections 4(4) and 7 and the Schedule incorporated by reference into section 7. Whatever doubts there may be as to the geographical application of section 4(4) (i.e. as to whether or not section 22A of the Sea Fisheries Act applies to the Exclusive Economic Zone of Walvis 3ay only) are effectively removed by section 7 and the Schedule. In my judgment Namibian Act 3 of 1990 has the effect" of extending the provisions of section 22A(1) to (4) of the Sea Fisheries Act to the Exclusive Economic Zone contiguous tc the entire .Namibian Coastline.

In view of che conclusion reached that the effect of Articles •~0M) and :'*:) of the Constitution was to make section 22A of the Sea F^snenes Act cart of Namibian law on Independence, it is unnecessary tc consider the argument advanced on the construction *of* Namibian Act 3 of 1330 which was based on the contention that t!-e Legislature *passea* this latter Act on the mistaken belief that the Sea Tisheries Act formed part of Namibian Law.

Levy, j t^.erefcre correctly dismissed the objection taken in te:T.s of settien 35 of the Criminal Code to the main charge and, or t;^e facts admittec by the appellant, correctly convicted h?'m t:*! *zi'iB* main charge.

I deal next with the appeal against sentence.

The appellant, a Spanish national, and a married man with two children, was 34 years of age at the time of his conviction and a first offender. He left school when he was 17 years old and after attending a maritime training institution has been a sailor ever since. He became a ship's captain in 1337.

The *vessel* he commanded in committing the offence in Question was known as the "Frioleire", a vessel registered in Spain, and owned by a company styled Freiremar 3A. Appellant was in the employ of Freiremar SA ana at aM mater:a I rimes the master cf the Fishing vessel :Fricleire". The 'Frioleiro" had a carrying•capacity of between 520 and 650 tonnes of processed fish.

When setting cut on the fishing venture to Namibian waters in late October 1990 the appellant was aware that Namibia naa become independent :-r, the 21st March cf that year anc had proclaimed a 200 mile exc'us* ve economic zone, ie was further aware that he coula not fisn in :Ja~ioiar .-/acs-s w-thout oeing :n possession of the aporcpnats -is.iing lics.ice. He *ne^/er* obtained such a licence. The vessel 'FrsiIs • re", under the comma;:c of the appellant, fisr.eeillegal'./ ir. the Namioian exclusive economic zone -:i contra/ention of section 22A(4) of the Gea fisheries • Act fret the ear'/ hours of 20 Ne/emPer 1990 unti' *r.er* arrest at approximately OChOO on 24 No/ember 1990. The offence was clearly premecitateo, the acpellarc causing the narre cf the and *her* call-sign to be cartially ccncealed and eo"! iterates, p,*icr cc her *enzry* into Manifcian waters, with the intention of avciair.3 apprehension for ::ie 11'ega 1 % r :sh mg accivities he wa* jlanii:%.g

to embark upon. He also falsified the vessel's navigation log with the same end in mind. At the time of the arrest of the appellant on 24 November 1990, the vessel had caught and processed close onto 21 metric tonnes of fish which would have fetched a total price of R141 939 on the Spanish market in February 1991. The appellant would have received a commission of 1.3% on the selling price of all fish caught. On the basis of the fish caught as at 24 November 1990 and the selling price on the Spanish market in February 1991, the appellant would have* earned a commission of approximately R2 550. Had he not been arrested and had the vessel made a capacity catch of 630 metric tonnes the acpellant would have earned a commission of the order of R7 7 000 based on a catch which could have sold for R4 28S minion in February 1991. On the 24th November eight Spanish vessels were *seen* fishing illegally in Namibian waters.

Although the appellant, denied in his evidence that the owner of the" "F,~ei lei ro" was aware that the appellant intendeo fishing i1lega"1> in Namibian waters Levy, J rejected this evidence as false ana fcund as a fact that the owner at all times knew that the appellant intended fishing illegally with the "Freileiro" in tMami oi an waters .

The Government of Namibia does not presently have the financial' - escurces to patrol the Exclusive Economic Zone effectively and •ncurrea expenses of the order of R575 000 in order to spprehend_ ts-e -:ve Goar.isn fishing vessels, including the "Friclei -o". The State is only able to utilise two patrol boats, one wh:cn it owns

and one which is chartered. The boats are not well equipped. From time to time an aeroplane is chartered but this is very expensive. The Namibian waters have been heavily fished by foreign fishing vessels since 1969. On the evidence of Dr. Jurgens, the Namibian Director of Fisheries, 250 foreign vessels were fishing in the Namibian waters before Independence. Scientific assessments show that the total hake stock in Namibian waters was approximately 2,385 million metric tonnes in 1969 which had decreased tc approximately 0,486 million metric tonnes in 1990. When the hake population recovers to its full potential it will yield between 300,000 and 400,000 tonnes per year, generating a very substantial income for the Namioian economy, even if the gross price of the fisn is taken at the February 1991 Walvis Bay price of R5 116 oer tonne. On a yield of 300,000 tonnes *per* year this would generate a gross income of over R1.5 billion per year. wnilst otviously speculative these figures give some broad idea of hew potentially valuable Namibia's fishing resources are.

The Government did not take immediate action against ';!*e Spanish fishing vessels but c"cs sc-cnlv after representations had been made both to the International Commission for South East Atlantic Fisheries and tc tr.e Goanisft Government.

As a result of n:s ccnviction the acoellant mighc lose his employment ana forfeit vs captain's certificate. He *:s a man of fairly limited financial resources. He owns a *c&r* wo*th about :Vi0 500 and has a erect oafance of some R42 000 *r. the bank.

His wife earns the equivalent of R7 900 for six months each year. The appellant and his family live in a house which formerly belonged to his mother-in-law who is deceased.

In sentencing the accused the learned Judge in the Court a *quo* weighed *up* carefully the interests of the State, particularly relating to its national economy, the need to deter potential offenders from committing serious economic crimes against the fishing resources of Namibia and the personal interests and circumstances of the aooellant.

The principles governing the grounds on which a Court *of* appeal may interfere with the sentence of a trial Court were not \n u * s p u t e •

I- 3. v ds Jager a Anpther, 1365(2) SA 616(A) at 628 *in fin.* - ▫233, Hclmes, JA said the following:

> "It would not acoear to be sufficiently recognised that a Court of appeal does not have a general discretion tc ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which nas the discretion, and a Court of appeal cannot interfere unless the Discretion was not jtiaic.ia! !>• exercised, that is to say unless the sentence is /-•tiated by irregularity or misdirection or is so severe that no reasonable Court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passes and that which the Court of aopeal would nave irr.ooseo. It should therefore be recognised tnat appellate jurisdiction to interfere with punishment is net c "• scret i onar y Put on the contrary, is very limited".

As Van Winsen, AJA, however, pointed out in s. v Fazzie 1964(4) SA 673(A) at 684 B-C:

> M(w)here, however, the dictates of justice are such as clearly to make it appear to this Court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial court will be regarded as a misdirection on its part entitling this ccurt to consider the sentence afresh".

It must be remembered, however, that it will not be any misdirection which will entitle a Court of appeal to interfere with sentence.

> "Now the word 'misdirection' in the present context means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against senisnce, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion *proper*ly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence: it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that 'the dictates of
>
> the sentence afresn*

[illegible]

commenting on the above .cL

case). This approach has been confirmed in 5_,__v J 19U20) SA

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of appeal will also not reach "v differ from the Court 3 *quo* "n

its assessment either of the factors to be had regard to or as to the value to be attached to them (See S. v Fazzia. *supra* at 634 B and JL_Y Berliner 1967(2) SA 193 (A) at 200 D) and that to describe a sentence as severe is not necessarily a criticism of a sentence "for severily may be called for" (per Schreiner, JA in 'R- v Kara 1961(1) SA 231(A) at 238). There may indeed be circumstances where the deterrent aspect of punishment is of special importance (see S, v Berliner 1367(2) SA 133(A) at 200C). In S. v Pi 11 ay. *supra,* Troll ip, JA, in dealing with contraventions of the South African Exchange Control Regulations, stated the following in regard to sentence at 538 D-E:

> "The economic interest-of the State and general body of its citizens are prejudiced by offences of the present kind. As appears from the cases of S. v Nichas *SL*___& Thc-mat-PS. *supra,* and St V CaSQQJee, 1970(4) SA 527(T) at p. 523 A-8, the Courts rightly treat such contraventions, particularly in the present economic climate, as being *very* serious offences. Hence, in the assessment of the appropriate punishment to impose, the retributive and especially the deterrent elements must inevitaoly be the predominant considerations".

The nature cf the offence in the present case is one to which the above observations are a fortiori applicable, inasmuch as the unlawful depletion o^ Namioia's fishing resources effects all the inhabitants of Namibia, not only because fishing is source of food but an economic resource as well.

The sentence was attacked on aopellant's behalf before us on a number of grounds.

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captains arrested on 24 November 1990 and that accordingly the sentence imposed on him should have differed significantly from those imposed in other cases. The fact that appellant's catch was the smallest of all the Spanish vessels does not justify the inference that he would not have continued fishing illegally until the "Friolero's" capacity was reached, had he not been arrested. The learned Judge . a *quo* rejected the appellant's evidence that he had intended departing from Namibian waters in order to fish in the South West Atlantic. This finding was based on good and substantial grounds and was not challenged on appeal. This is not a case where the thief, through qualms of conscience, has voluntarily limited his booty. What stopped the appellant's depredations was police intervention. I do not think that such fortuitous intervention affords a sound basis, in this case, for treating the aopellant with greater leniency than others who were stopped at a later stage in their unlawful activities.

It was further contendec that the fact that Namibia's fishing resources were seriously depleted ouite legally prior to 10 July 1S90 cannot be .considered to be an aggravating factor tc ce laid

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regarded as treating such circumstance as an aggravating factor on the ground that the acoellant -s being punished for such earlier depletion. *The* fact of such depletion does however highlight how particularly vulnerable the fishing resources of Namibia were at the time and this heightened the objective seriousness of acoellant's offence and tne *neec* for deterrent, punishment.

It was also argued that the marked decline in the occurrence of this particular offence since the arrest of the appellant and the other captains (which decline was ascribed to the publicity attendent upon such arrest) was a significant factor which Levy, J ought to have taken account of in determining the extent to which deterrence needed to be emphasised in the imposition of sentence. I am unable to agree with this contention. It does not necessarily (or even probably) follow that the decline has taken place (and will persist) merely because of the arrest. Other potential offenders may well have adopted a "wait-and-see" attitude or might even have anticipated that a more—severe sentence would have been imposed.

It was submitted in appellant's heads of argument that there was no basis for the suggestion that appellant had plundered a dwindling resource because "(t)he resources became depleted as a result of legal fishing". This submission embodies a JQQQ seoultur. Either the resources had declined or not. In any event the point is not (nor did the court *a quo* so find) that the appellant had unlawfully caused this situation, but that the ~~fact~~ of this situation *rendered* the conseauences of appellant's conduct potentially more harmfu* .

7;-:e sentence was also criticised because the imposition of a substantial fine on appellant obviously went completely beyond r.is means. Although it was conceded that there might be cases where a fine within the means of an accused with very limited resources would not fit the 'seriousness of the crime, a court

would not readily impose such a fine. This principle is well formulated in S. v Kekana 1989(3) SA 513(T) at 518 D-G where Kriegler, J said the following:

> "It is also true that in the case of a crime committed for gain it may be proper to impose a fine ostensibly beyond the-means of the accused in order to make it manifest to him and to others of like mind that such activities are not worth the candle. R- v Mbale 1955(4) SA 203 (N) is an example of such a case. It is equally well settled that mere impecuniosity of an accused is no warrant for imposing a fine of such moderate dimensions that it does not adequately reflect the gravity of the offence in question. But when all is said and done the discretionary imposition of a fine patently beyond the means of an accused is open to the criticism that it is an exercise in futility - if not cynicism. As was said by Hiemstra, CJ in s. v Lekaoale & Another 1983(2) SA 175 (B) at 176 C-E:
>
> > CA fine is not an empty, meaningless gesture. It is supposed to be a device to keep a convicted person out of prison and yet to punish him.
> >
> > ... In general the option of a fine is given where the offence is not one of such gravity that imprisonment seems to be the only appropriate sentence.
> >
> > When an option is granted, it is desirable that it should be a real option, that is to say the fine must be such that it is reasonably possible for the accused to pay it, either from (i) cash recources of his own; or (ii) such money as he can borrow; or (iii) by the realisation of such assests as hy may possess'."

There are, on the facts of this case*, two answers to this line of argument- In the first place the crime is, for the reasons mentioned, a serious economic one committed in connection with important national resources. A fine which fell clearly within the appellant's resources would, from the point of view of deterrence and as a retributive reflection of the gravity of the offence, be quite derisory. *In* crimes of this nature the owner of the vessel, or the management of the company owning the

vessel, often work hand in glove with the master. That this occurred in the present case was found by the court a *quo* and not seriously challenged on appeal. The possibility of a fine being imposed in a case such as the present is often regarded as a business risk by the owner. The combination of these factors make it likely, that the owner will assist the master of the vessel in paying the fine. In the present case the owner put up the appellant's bail (R100 000) and paid for his legal defence. It may of course be that this was done because of the danger of the vessel being declared forfeited to the State on conviction of the appellant and that the owner was anxious to avoid a conviction of the appellant for this purpose. Nevertheless there is a communality of interest between the owner and the master of the ship in a case such as the present where any fine, other than a substantial one, would probably net serve a deterrent purpose. Under these circumstances the court *a quo* was justified in taking into account, as he did, the fact that appellant's bail and legal costs were paid for by the owner, ana therefore that the appellant might *sery* well have access to funding from sources other than his own.

Secondly, an imoortant distinction *in* the present case is that the penal provision in section 22A(4) (as amended by paragraph (b) (i) and (ii) of the Schedule as reac with section 7 of the Namibian Act 3 *of* 1990) provides that a person convicted of a contravention of sub-sectien 4(a), (b) or (c) of section *2ZA* is

"liable on conviction to a f:ne of one million rand";

which is a material change from the previous provision which provided for

> "a fine not exceeding R50 000 or to imprisonment for a period not exceeding 7 years or to both such fine and such imprisonment0.

Since its amendment, section 22A(4) does not provide for the imposition of imprisonment without the option of a fine. In the passage from ▫.,_*__Lskgoale & Another quoted in s. v Kekana. *supra,* Hiemstra, CJ stated that

> "A fine ... is supposed to be a device to keep a convicted person out of prison and yet to punish him,
>
> ... In general the option of a fine is given where the offence is net one of such gravity that imprisonment seems to be the only appropriate sentence".

These remarks are apposite when the choice between imprisonment ar.d a fine is *open.* In the present case imprisonment (without the- option of a fine; was not available. Consequently the decision in the present case to impose a fine cannot be seen as a desire to keep the offender out of prison, and accordingly the observations in Lekqoale's case and the invocation thereof in *Kekana*s* case, do net apply to the present situation.

The learned Judge *a quo* has dealt fully in his judgment on sentence with all materially relevant considerations and their relationship with one another. No judgment can be totally exhaustive. In my view Levy, J. exercised his sentencing discretion properly and judicially in the sense that he has not Tii sci rectec himself on any of. the facts materially relevant to sentence.

I consider finally whether the sentence imposed is of such a nature or severity that there is a disparity so striking between such sentence and the sentence that this Court would have imposed, that it justifies this Court in interfering with the sentence. By usual standards the sentence is indeed a severe one, but reference has been made to the various circumstances which justified, in my view, the Court imposing an exemplary sentence. It is appropriate, I believe, to refer to the serious light in which the South African legislature views the very similar offence embodied in section 52(4) of the Sea Fisheries Act, No. 12 of 19SS as amended by s. 13(a) of Act No. 98 of 1990, which amendments came into operation on the 19th October 1990. The amended section 52(4) provides, in substance, that an owner or master of a vessel registereo in a foreign state who uses such vessel as a fishing boat or factory, or prepares it for such use (a) within the fishing zone without a permit being issued in respect thereof, or (b) within the fishing zone in contravention of or without complying with the conditions on which the permit has been issued is guilty of an offence and

> "..... liable on conviction to a fine <u>of at least</u> R250 COO but not exceecing R1 000 000". (emphasis added).

I should not like to be thought to be advocating the *prescription* by legislation of minimum sentences which restrict the judicial discretion of a court in whose hancs the function of sentencing pre-eminently belongs. Reference is.made to th~3 penal•provision merely to indicate how ssr-<u>ous</u>lv a neighbouring country regards such an offence committed in its maritime zone on the same coast

and adjacent to that of Namibia. I also emphasise that reference is made to the above penal provision not because it is thought that the Courts of Namibia ought to be guided by the policy of another country's Legislature in this sub-continent. Manifestly not. it does however indicate, and this is a matter for legitimate observation, that a neighbouring state considers it necessary to impose a most substantial mandatory minimum punishment in order properly to protect its fishing interests. This is a reflection of the serious view taken by the neighbouring state of the dangers threatening those interests in this region. It would be unfortunate, to say the least, if there was such a disparity between sentences passed for comparable offences by the South African and the Namibian Courts that potential offenders considered it a substantially better risk to fish illegally in Namibian waters rather than in South African.

Having given the sentence in the present case due consideration I am unable to conclude that it manifests such a striking disparity in relation to one which I would have imposed that it warrants interfering with. In the result the appeal against sentence

One last matter recuires brief attention.

Appellant's Notice of Application for Leave to Appeal (on the basis whereof leave to appeal to this Court was granted) only purports *zs* be an application for leave to appeal "against his

(the appellant's) conviction and sentence". Yet in paragraph 12 of the grounds of appeal it is averred that

> "the Honourable Court erred in making the order of forfeiture".

This issue was not proceeded with on appeal, it being properly conceded that the appellant, who has no direct proprietary or other legal interest in the vessel the "Frioleiro", its equipment or implements, or its catch, has no *locus standi* in the matter. The most appropriate course would simply be to make no order at all on this "ground".

The appellant's appeal against both his conviction and sentence is accordingly dismissed and no order is made in respect of the issue referred to in paragrapgh 12 of appellant's grounds of appeal contained in his Notice of Application for Leave to Appeal dared the 2-ith April 1991.

L.W.H. ACKERMANN
ACTING JUDGE OF APPEAL

L.W.H. ACKERMANN'
ACTING JUDGE OF APPEAL

H.J. BERKER
CHIEF JUSTICE

I.
MAHOMED ACTING JUDGE
OF APPEAL