

SOUTH AFRICA / JUDGMENT

Hlungwane v S (BA 21/2019; RC121/2014) [2020] ZALMPPHC 34 (4 June 2020)

[2020] ZALMPPHC 34**COURT**

Limpopo High Court, Polokwane

BEFORE

Makgoba, Gphatudi, Semanya

CASE / FILE NUMBER

BA 21/2019

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REPUBLIC OF SOUTH AFRICA
IN THE IDGH COURT OF SOUTH
AFRICA
(LIMPOPO DIVISION, POLOKWANE)
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
APPEAL
CASE NO: BA 21/2019
COURT
A QUO CASE NO: RC121/2014
4/6/2020
In

the matter between: PETRUS
PATRICK
HLUNGWANE
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

MAKGOBA JP

[1] The Appellant and his five co-accused were convicted and sentenced in the Regional Court in Tzaneen on 13 December 2018. They were charged with contravening:

1.1. Section 57(1) of the National Environmental Management: Biodiversity Act No. 10 of 2004 read with section 101 (1) (a) as well as sections 1, 56(1), Chapter 7 and section 102 of the said Act, further read with section 250 of the Criminal Procedure Act No. 51 of 1977 in that the accused did on or about 5 August 2014 at or near Letsitele in the Regional Division of Limpopo unlawfully and intentionally carried out a restricted activity involving a specimen of a threatened or protected species by having, hunting, catching, capturing,

killing, gathering, collecting, plucking, picking, cutting, chopping off, uprooting, damaging, destroying,

importing, exporting, having possession, exercising physical control over; growing; breeding; propagating; conveying; moving; trans locating; selling; trading; buying; receiving; giving; donating; accepting; acquiring; disposing of parts of a rhino, to wit a rhino legs, being a threatened or protected species, without a permit issued in terms of Chapter 7 of the Act..

1.2. In the alternative, contravening of section 41(1)(a) of the Limpopo Environmental Management Act No. 7 of 2003, read with section 1, 112, 117 and 118 of the said Act, further read with section 250 of the Criminal Procedure Act 51 of 1977 in that upon or about 5 August 2014 and at or near Letsitele, the accused did unlawfully and intentionally commit a prohibited act relating to a wild animal by acquiring, possession, conveying keeping, selling, purchasing, donating or receiving as a gift two rhinoceros legs, being especially protected wild animal, without a permit to do so.

[2] All the accused were found guilty on the alternatively charge and sentenced to four years imprisonment each. The accused were all

legally represented during their trial. The Appellant was accused number 2 at the trial.

[3] In convicting the six accused on the alternative charge the Court a quo made a finding that the State had proved beyond reasonable doubt that all the accused committed a prohibited act relating to a wild animal by conveying and possessing two white rhinoceros legs being especially protected wild animal without a permit to do so. The Court a quo applied the principles of common purpose.

[4] The Appellant approaches this Court on appeal against the conviction only.

[5] The evidence for the prosecution was given by three police officers, all members of the Tactical Response Task Team in Tzaneen. Their version is that on the 5th August 2014 they received information which lead them to travel on the Tzaneen / Letsitele road in search of a

specified motor vehicle. At the Eiland Road turnoff they spotted the vehicle they were looking for, being a Hilux bakkie. There were five male persons on the back of that vehicle and a driver in the front. They stopped next to the vehicle which was stationary and ordered the people to get off the vehicle. Four of the people on the back of the vehicle alighted and the vehicle drove off with accused number 6 still on the back of the vehicle.

- [6] The four men, being accused number 2, 3, 4 and 5 were arrested and left to be guarded by Constable Masindi. The three other police officers, Constable Selelo, Constable Manganyi and Constable Makhubele persued the Hilux bakkie vehicle that drove along the Eiland Road. What followed was a high speed car chase of the police vehicle with sirens and flashing of lights trying to pull over the Hilux bakkie. During the chase accused number 6 tossed two black bags from the back of the bakkie. These two bags were recovered by the police officers. After a chase that spanned for about 14 to 15 kilometres, the bakkie driver (Accused number 1) who was being persued pulled over and the police officers apprehended accused number 6 who was on the back of the Hilux bakkie together with accused number 1.
- [7] The two bags recovered after having been tossed from the bakkie contained the legs of a white rhinoceros.
- [8] All the accused testified at the trial. Accused number 1, being the owner and driver of the Hilux bakkie testified that on that day he picked up hitchhikers, being accused number 2, 3, , 4 and 5. He picked up accused number 2 at Acornhoek and then later picked up accused 3, 4 and 5 at Hoedspruit. When he reached the turnoff on the Eiland Road the four, accused, 2, 3, 4 and 5 alighted. Accused number 6 then hitchhiked a lift from accused 1 at that stage.

Accused 1 testified further that he had no knowledge of any bags containing rhino legs that would have been on his vehicle. He stated further that he had no connection with any of his co-accused save for the fact that he gave them a lift.

- [9] The version of accused 2, 3, 4 and 5 is simply that they have no connection with accused number 1. That they do not know each other

and had nothing to do with each other. They were merely hitchhiking together. They did not notice anything on the back of the bakkie and were simply arrested by the police after alighting from the vehicle of accused number 1.

- [10] On the conspectus of evidence placed before the Court a quo the following facts are common cause:

10.1. The animal material contained in the two black plastic bags emanating from the scene of arrest of accused 1 and 6 are indeed the legs of the species white rhinoceros.

10.2. Accused 2, 3, 4 and 5 were arrested at the Eiland turnoff where they alighted from the vehicle driven by accused number 1.

10.3. Accused number 1, in his vehicle with accused number 6 on the back, left the spot at the Eiland turnoff where he was stationary and proceeded along the Eiland Road.

10.4. That approximately 14 to 15 Kilometres from where accused 2, 3, 4 and 5 alighted from the Hilux bakkie, accused number 1 and 6 were

apprehended.

[11] The Court a quo correctly rejected the versions of accused 1 and 6 and made a finding that the two bags containing rhinoceros legs were at all material times conveyed in the Hilux bakkie driven by accused number 1. It is common cause that accused 2, 3, 4 and 5 were passengers in the said bakkie. Their version that they did not notice the said plastic bags inside the bakkie cannot be reasonably possibly true and was correctly rejected by the Court a quo. However, the question that still remains to be answered is whether they were in possession of the two bags containing the two legs of rhinoceros.

[12] The Court a quo concluded as follows when convicting accused 2, 3, 4 and 5 of conveying and possessing the rhinoceros legs:

"All of them were in a position that can be inferred from the circumstances of direct physical control or in the least mediate control. And that they all had the required intent to be in possession. If I may be wrong in my conclusion in this regard, I do find that the principles of joint possession would in the least prove that accused 2, 3, 4 and 5 were in joint possession with accused 1 and 6 who had direct physical control as indicated in the evidence."

[13] The concept of possession is defined by Corbett JA in *S v Adams* 1986 (4) SA 882 (A) at 890G-891B:

"In general the concept of "possession" ("besit"), when found in a penal statute, comprises two elements, a physical element (corpus) and a mental element (animus). Corpus consists either in direct physical control over the article in question or mediate control through another. The element of animus may be broadly described as the intention to have corpus, ie to control, but the intrinsic quality of such animus may vary, depending upon the type of possession intended by the statute. At common law a distinction is drawn between civil possession (*possessio civilis*) and natural possession (*possessio naturalis*). Under the former the animus possidendi consists of the intention on the part of the possessor of keeping the article for himself as if he were the owner. Under the latter the animus need merely consist of the intention of the possessor to control the article for his own purpose or benefit, and not as owner. In penal statutes, however, the term "possession" would seldom, if ever, be construed as *possessio civilis* and this may, therefore, be left out of account. In the case of certain such statutes it has been held that "possession" connotes corpus and an animus akin to that required for *possessio naturalis*. In others the courts have interpreted "possession" to comprehend corpus plus the animus to control, either for the possessor's own purpose or benefit, or on behalf of another (this latter alternative being equivalent to what is often termed "custody" or *detentio*) or as meaning "witting physical detention, custody or control (see *S v Brick* 1973 (2) SA 571 (A), at p 580C)."

[14] In the present case it was stated in the charge sheet that the State would rely on the doctrine of common purpose in prosecuting the accused. It is against this backdrop that the Court a quo made a finding that "It clear from the circumstances of this case as accepted by the Court through the evidence of the prosecution witnesses that all of the accused persons were in the presence of these bags containing the rhino legs, were aware of the contents of these bags and intended to be in control of these bags".

[15] In my view the Court a quo erred in drawing an inference that the accused were in possession and control of the two bags merely because the said bags were in their presence. This cannot be the only inference which can be drawn in the circumstances of this case. Even if the Court a quo were to find that accused number 1 and 6 were in possession and conveyed the two bags, it will be wrong for the Court to apply the doctrine of common purpose and conclude that the other passengers in the Hilux bakkie were also in possession of the two bags containing two rhinoceros legs.

[16] The application of the doctrine of common purpose in matters relating to joint possession was jettisoned by the Supreme Court of Appeal in the case of *S v Mbuli* 2003 (1) SACR 97 (SCA) where Nugent JA at para 71 said:

"[71] What is prohibited by both those sections is the existence of a state of affairs and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of the state of mind will differ in each case....".

[17] In the Mbuli case the principles relating to joint possession were crystallized when it was decided that the issues which arise in deciding whether a group possessed a prohibited thing / object must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that

- (a) the group had the intention (animus) to exercise possession of the thing through the actual detentor and
- (b) the actual detentors had the intention to hold the thing on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors[1] .

See also *S v Nkosi* 1998 (1) SACR 284 (W) at 286h-i.

[18] In my view joint possession would require proof of the animus possidendi on the part of each of the accused. In the present case there is no suggestion thereof in the evidence on record. Mere knowledge by the Appellant that accused number 1 and 6 might have possessed the two bags in the bakkie does not imply an intention to possess those bags jointly.

[19] In *S v Motsema* 2012 (2) SACR 96 (GSJ) it was held that:

1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery, joint possession of the weapons used in the robbery is to be inferred. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:
 - (a) Each participant in the common purpose to rob who had physical control of a weapon intended not merely to use it but also to possess it, both for himself and also on behalf of one or more other participants; and
 - (b) Each alleged joint possessor who did not himself have physical control of a weapon intended that one or more of the weapons should not merely be used but should also be possessed by another participant on his behalf[2].

[20] On the basis of the decisions in *Mbuli*[3] and *Nkosi*[4] the above ratio decidendi in *Motsema*[5] is now settled law.

[21] In the circumstances I do not agree with the finding of the Court a quo that the only reasonable inference from the evidence is that the Appellant, accused 3, 4 and 5 possessed the two legs of rhinoceros

jointly. It is equally possible that the two legs of rhinoceros were possessed by only accused number 1 as the owner and driver of the Hilux bakkie or accused number 6 who tossed them from the bakkie when the police officers were advancing the bakkie. Mere knowledge and even acquiescence by the Appellant and accused 3, 4 and 5 in the presence of the two legs of rhinoceros in the bakkie is not sufficient to make them joint possessors.

The evidence on record does not establish which of the six accused was in actual possession of the two bags containing the two legs of rhinoceros, save for the fact that it can be inferred that the two bags were conveyed in a motor vehicle belonging to and driven by accused number 1.

[22] I am therefore of the view that the State has not proved facts from which it can be inferred as the only reasonable inference that the Appellant as well as accused 3, 4 and 5 intended to possess either individually or jointly the two legs of rhinoceros conveyed in the motor vehicle driven by accused number

1. In the result the appeal against conviction should succeed.

[23] Although there are no appeals by accused 3, 4 and 5 it is appropriate in the light of our findings that their convictions should be reviewed. The State conceded that the appeal be upheld and that the convictions in respect of the Appellant as well as accused 3, 4 and 5 be set aside.

[24] For these reasons I would make the following order:

1. The appeal is upheld.
2. The Appellant's conviction is set aside.
3. The convictions of Accused 3 (Lucas Macheke), Accused 4 (John Chauke) and Accused 5 (Adolph Ndlovu) are reviewed and set aside.

EM MAKGOBA

JUDGE PRESIDENT OF THE

HIGH COURT, LIMPOPO

DIVISION, POLOKWANE

I agree

M GPHATUDI

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

M V SEMENYA

JUDGE OF THE HIGH COURT,

APPEARANCES

Heard on

: 29 May 2020

Judgment

delivered on : 4 June 2020

For the Appellant

: Mr EH Ludick

Instructed

: EHL Attorneys

For the Respondent

: Adv. ME Muliwa

Director of Public Prosecutions,

Limpopo Division.

[1] Mbuli, paragraph [71] AT 114h-115e

[2] Per Joffe J at paragraph [29].

[3] S v Mbuli 2003 (1) SACR 97 (SCA)

[4] S v Nkosi 1998 (1) SACR 284 (WLD)

[5] S v Motsena 2012 (2) SACR 96 (GSJ)

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