

SOUTH AFRICA / JUDGMENT

Liang v S (A344/2015) [2016] ZAWCHC 64; [2016] 3 All SA 571 (WCC) (1 June 2016)

[2016] ZAWCHC 64**COURT**

Western Cape High Court, Cape Town

BEFORE

Samela, Cloete

CASE / FILE NUMBER

A344/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****CASE****NO.: A344/2015****DATE:**1 JUNE 2016
REPORTABLE
In**the matter between:**CHENG
JIE
LIANG.....Appellant
And
THE
STATE.....Defe
ndant**Court:**

Samela J et Cloete J

Heard:

13 May 2016

Delivered:

1 June 2016

JUDGMENT

SAMELA, J

Introduction

[1] On 28 October 2013, the appellant was charged in the Khayelitsha Regional Court for the contravention of the following. Ad Counts 1 and 2, contravening s 42 (1) (b) of the Nature and Environmental Conservation Ordinance 19 of 1974, alternatively s 4 (2) (a) of the Ordinance. Ad Count 3, contravening of s 44 (2) of the Marine Living Resources Act 18 of 1998 alternatively, contravening Regulation 36 (1) (a) promulgated under the Act.

[2] The appellant who was legally represented throughout the trial pleaded not guilty to all the counts. After evidence was led, on 5 September 2014, the appellant was found guilty on the main charge in respect of counts 1 and 2 and guilty on the alternative

charge in respect of count 3, and sentenced as follows:

2.1 counts 1 and 2 were taken together and he was sentenced to ten (10) years imprisonment, of which three (3) years were suspended on condition that the appellant paid the sum of five (5) million rand, regarded by the court a quo as a fair portion of the proven commercial value of ivory, within twelve (12) months from the date of sentence;

2.2 on count 3, the appellant was sentenced to two (2) years imprisonment, the ivory and abalone were forfeited to the state;

2.3 count 3 was not to run concurrently with counts 1 and 2; and

2.4 five (5) million rand was directed to be paid to the Cape Nature Board, and that the Police Department had to deal with the division of the money.

[3] The application for leave to appeal on the 19 November 2014 against both conviction and sentence was refused by the court a quo. On petitioning the Judge President, leave to appeal was granted by this court on the 17 March 2015. The appeal is against the convictions and sentences.

Factual**Background**

[4] The only evidence on record of the court's proceedings is the one led by the state. The defence submitted that the court a quo's summary of the evidence was sufficient.

[5] The appellant who drove an Audi vehicle, later found to be registered in the name of Mien Shu Wu was stopped by the police, as he drove away from the scene and was brought back to the scene. The appellant was found in possession of keys to Units 12 and 349 and cell phones. The Manageress of the Storage Spot, Ms Kapp had identified the appellant as a

regular visitor to Unit 12, and informed the police that the appellant was at the aforementioned unit shortly before (their arrival). She further testified that Unit 12 was leased by Mr Wu who left South Africa to China on 13 September

2012. Mr Lieu leased Unit 349 and could not be traced.

- [6] On one of the seized cell phones from the appellant, photos of the whole elephant tusks were found, which were enhanced by the forensic laboratory expert, and had certain inscriptions on them. Captain Brink was able to determine that photos of the whole tusks were taken on the 13 September 2012 at 16h17. Appellant's finger and palm prints were found on both Units 12 and 349 boxes. Mr Paul Geldenhuys had noticed during the weighing process of each ivory item in the photo from the seized cell phones that markings were similar on certain pieces cut up. He had noted that the whole tusks seen on the photos from the appellant's cell phone had been locally cut, a day, two or three before the arrest date. He was of the opinion that ivory poaching was syndicate related, and everybody in the chain was remunerated for their deeds, and that the appellant was one of the links in the chain.
- [7] The police had observed the remarkable carrier bags with Orlando Pirates and Big Five (5) logos. The appellant on being advised to call a legal representative had requested to use his own cell phone. When Constable Nyamana on the 3 October 2012 was removing large ovens in Unit 349, he had found another box which contained ivory.
- [8] Relevant to count 3, the following evidence is important. A Caravelle registered in the appellant's name was found parked in one of the garages. The police found inside, abalone. Ms Wermich had lifted the appellant's prints from the boxes and plastic bags carrying abalone. At the Coral Road scene, empty boxes similar to the ones found at Storage Spot and Orlando Pirates bags were seen. That was the state's case.
- [9] After the closure of the state's case, the defence without calling the appellant or witnesses closed its case without any evidence being led.

Issues

To Be Decided

[10] This court is called upon to decide the following, whether:

10.1 the court a quo was correct in convicting the appellant on both counts 1 and 2 or whether this amounted to splitting the charges;

10.2 the fine of R5 million imposed exceeded the court's monetary jurisdiction;

10.3 the sentence of two years imprisonment on count 3 was too harsh; and

10.3 the conviction and sentence should be in any event be upheld.

Applicable La

[11] Hiemstra's Criminal Procedure LexisNexis at 24-100 states that s 235 of the Criminal Procedure Act 51 of 1977(CPA) only provides as to how the record of judicial

proceedings can be proved, not what evidence is admissible: see *S v Nomzaza* 1996 (2) SACR 14 (A) at 16f-g. See also *S v Dlamini and Others* [1999] ZACC 8; 1999 (2) SACR 51 (CC) at para

[96] where the Constitutional Court referred to *Nomzaza* and at para [87] stated that 'In the narrow context of the right to be released from detention the crux of the issue is that ss 60(11B)(c) not only makes the record of the bail proceedings part of the subsequent trial record, but makes any evidence the accused elects to give at the bail hearing admissible against him or her at trial provided the court hearing the bail application had warned the accused of the risk of such use. The first part of ss (11B)(c), which automatically incorporates the bail record in the trial record, is an unremarkable procedural provision which merely allows a shortcut: under s 235 of the CPA a certified copy of the bail record can in any event be handed in at the trial'. Compare *S v Balkwell and Another* 2006 (1) SACR especially paras [40] – [41] where the bail proceedings had been formally admitted in terms of s 220 of the CPA and were therefore held admissible despite the absence of prior warning.

[12] The Magistrate in his judgment said (in the court a quo) the appellant was not properly informed during the bail proceedings in accordance with s 60(11B) (c), and the evidence of the appellant by way of affidavit during the bail proceedings was thus

inadmissible. He relied on *S v Cloete* 1999 (2) SACR 137 (C) [accused not warned sufficiently in bail application and bail application record thus ruled inadmissible]; and *S v Sejaphale* 2000 (1) SACR 603 (T) [non-compliance with the requirements of s 60(11B) (c) rendered the record of the bail proceedings inadmissible]; see as well *S v Balkwell and Another* [supra]; and *S v Agliotti* 2012 (1) SACR 559 (GSJ). In *Agliotti* it was stated at paras [20] and [21] as follows:

'In our application at hand, the admissibility of bail proceedings in this subsequent trial is in issue. Section 235, in my view, may be of relevance, as it also deals with previous judicial proceedings; however it does not relate to the admissibility of the contents of such proceedings at an accused's subsequent trial. I find the section consequently not directly relevant to the enquiry we are dealing with presently. The case quoted by the state, viz *S v Nomzaza* 1996 (2) SACR 14 (A), ruled that the evidence given by the accused at a bail application can be allowed at a later trial "if such evidence is otherwise admissible.

[21] The rider used in the case "if such evidence is otherwise admissible", in my view illustrates the point I made above, that the admissibility of the bail evidence is the paramount consideration, not just the admission or proof of the previous record through section 235 of the Criminal Procedure Act ...'

[13] S 41 of Ordinance 19 of 1974 ("the Ordinance") provides:

‘No person shall donate or sell any wild animal or the carcase of any such animal to any other person unless, when he or she delivers such animal or carcase to such other person, he or she furnishes such other person with a written document signed by him or her reflecting –

- (a) the full names and addresses of such first mentioned person;
- (b) the full names and address of such person;
- (c) the number and species of wild animals or carcasses so donated or sold;
- (d) the date on which such animal or carcase was so donated or sold; and
- (e) a statement by him or her that he or she has donated or sold such animal or carcase to such other person.’

[14] S 42 of the Ordinance provides:

‘Any person found in possession of any wild animal or the carcase of any such animal shall be guilty of an offence unless, in the event of –

- (a) the animal having been hunted by him or her on the land of any other person, he or she is in possession of the written permission contemplated by section 39; or
 - (b) his or her having acquired such animal or carcase from any other person, he or she is in possession of a written document contemplated by section 41.
- (1) The provisions of subsection (1) shall not apply in any case where a relative or full-time employee of any owner of land is found in possession of a wild animal or the carcase of any such animal such relative or employee has hunted on the land of such owner with his or her permission or which such owner has sold or donated to such relative or employee.’

[15] S 43 of the Ordinance provides:

‘Every document referred to in section 39 and 41 shall be retained by the person to whom it was furnished for a period of at least two months from the date on which it was so furnished or while such person is in possession of the wild animal or carcase to which it relates, whichever is the longer period.’

[16] S 44 (2) of the Marine Living Resources Act 18 of 1998 reads as follows:

‘No person shall land, sell, receive or possess any fish taken by any means in contravention of this Act.’

and

[17] Regulation 36 (1) (a) provides:

‘No person shall during and following fishing or related activities, transport any abalone that is –

- (a) Not in the whole state, except on the authority of a permit.’

[18] S 90 of Act 51 of 1977 (as amended) provides:

‘In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negated in the charge and, if so specified or negated, need not be proved by the prosecution.’

[19] Defining statutory offences Du Toit et al Juta (Revision Service 55, 2015) at 14-32 provide:

‘In defining statutory offences, prohibited conduct is often cast in the form of a general prohibition. The general prohibition is then made subject to a series of exceptions. These exceptions may, for example, relate to factual situations, a person’s sex, age, profession or to the racial group to which he belongs. Section 90 is applicable to this sort of statutory provision. Where the legislature makes use of this procedure, the State need only allege and prove essential elements of the offence. An accused who alleges that he is excluded from the scope of the provision by an exception, exemption, proviso, excuse or qualification (‘exception’ will henceforth be used to encompass all of these items) will, however, have to prove the same. The State does not even have to allege that an accused is protected by an exception or other limitation. The reason for this particular provision in s 90, in regard to the burden of proof, lies in its efficiency. While it is easy for an accused to prove that exculpatory factors operate in his favour, the State would face insurmountable problems in proving that an exception or other limitation would not apply in a particular case.’

[20] In *S v B M* 2014 (2) SACR 23 (SCA) at para [3], the court in dealing with duplication or splitting of charges said the following:

‘It is apparent that charging Mr BM with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. It has been a rule of practice in our criminal courts since at least 1887 that “where the accused has committed only one offence in substance it should not be split up and charged against him in one and the same trial as several offences”. The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment. Its operation is well illustrated by the example given in *R v Kuzwayo*, of the theft of 10 apples from an orchard on one occasion, where there is only a single offence, and the theft of one apple a day over 10 days, where there are 10 offences. Here, if there were an offence it was patently a single offence committed with a single intention. It should not have been split into two charges’.

[21] In *Goldberg v Director of Public Prosecutions, Western Cape* 2014 (2) SACR 57 (WCC) a full bench dealt with the meaning of ‘acquired’ and ‘found in possession’ for purposes of s 42(1)(b).

It was held at para [67] that “In order for the appellant to have been convicted it was necessary for the state to prove beyond reasonable doubt that the appellant ‘acquired’ the ivory items from another person. It was also necessary to prove beyond reasonable doubt that the appellant was ‘found in possession’ of the ivory items”. At para [74] it was held that the word ‘acquired’ in s 42(1)(b) means that the person found in possession should have obtained ownership from a disposer or should at least have a vested right to obtain ownership from the disposer. At para [74] it was held further that the form of possession contemplated in s 42(1)(b) is possession for one’s own benefit. Possession is unlawful unless the person found in possession has a statement of origin as contemplated in s 41. Only the person who holds for his own benefit would be in possession of the statement of origin, and the statement of origin would confirm that such a person is the one who acquired the item in question. A person who has custody of an item on behalf of another would not himself be in possession of a statement of origin. Possession for the benefit of another does not constitute “possession”

for purposes of s 42(1).

Witness’ right to silence

[22] S 35 (1)(a) of Act 108 of 1996 (the Constitution) provides:

‘Everyone who is arrested for allegedly committing an offence has the right –

(a) to remain silent;’

[23] In *S v Boesak*

[2000] ZACC 25; 2001 (1) SACR 1 (CC) the court said at para [24]:

‘The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such

an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

Sentence

[24] In *S v Zinn* 1969 (2) SA 537 (A) at 540G-H court said:

"What must be considered 'is the triad consisting of the crime, the offender and the interests of society.' The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act, which includes drug trafficking where the value of the drug exceeds a certain amount.'

[25] S 86 (1) (b) of the Ordinance provides:

'A contravention of section 27 (1), 29, 31, 40, 41, 42 (1) 44(1) (a),

(b) or (e) or 46 involving an African elephant, to a fine not

exceeding ten years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of any African elephant or the carcass thereof in respect of which the offence was committed.'

[26] S 58 (4) of the Marine Living Resources Act 18 of 1998 provides:

'A regulation made under this Act may provide that a person who contravenes or fails to comply with a provision thereof, shall be

guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 2 years.'

[27] In *S v Mpofu* 1985 (4) SA 322 (ZHC) at 329H-330C the court stated:

'Inquiries by the court, or evidence given may indicate that there is no possibility of the accused repaying the complainant, and the passing of a suspended sentence to allow for restitution may be considered therefore to be a complete waste of time. Even so I fail to see how such a provision would cause any prejudice to the accused or anyone else and the accused would at least be given the chance, should the opportunity arise unexpectedly and subsequently, to secure the benefit of a reduced sentence. To put it another way, in the context of a condition relating to compensation, the justification of the sentence is not dependent upon there being a reasonable prospect that the condition imposed will be met, for the purpose of the order is based on a different footing altogether . . . the accused is encouraged to perform the act by the carrot that is held in front of him. His blameworthiness is reduced by meeting the condition, and a lesser penalty is, therefore, appropriate. If he is unable to perform the act required of him, he will not suffer any additional penalty, but will merely be unable to earn the reduction offered to him.'

[See also *S v Kok* 2015 (2) SACR 637 (WCC) at para [15]. See also *S v Grobler* 1992 (1) SACR 184 (C).]

Discussion

[28] The appellant's core grounds of appeal were the following:

28.1 there was a duplication of charges on counts 1 and 2;

28.2 the court a quo erred in finding that the appellant had acquired and possessed the ivory;

28.3 the court a quo was incorrect that the appellant was in possession of abalone;

28.4 the court a quo misdirected itself in rejecting the bail proceedings;

28.5 the court a quo was incorrect that the state had proved the charges beyond reasonable doubt;

28.6 the trial court was too harsh in sentencing the appellant to two years on count 3, and committed an irregularity with regards to the sentences on counts 1 and 2.

[29] During argument the state conceded that the conviction on counts 1 and 2 amounted to a duplication of charges, but submitted that the court a quo otherwise correctly convicted and sentenced the appellant. The state requested this court to confirm the convictions

on counts 1 and 3 as well as the sentence, and to dismiss the appeal.

[30] Boxes of ivory were found in storage Units 12 and 349 on 14 September 2012 and thereafter the appellant was arrested. Constable Mnyamana on the 3 October 2012 had found another box containing ivory when he removed the large oven in Unit 349. This resulted in the appellant being charged with two (2) separate counts of unlawful possession of ivory. However there was no evidence that the appellant or any other syndicate member had placed the ivory found on count 3 in Unit 349 after the 14 September raid. I am of the view that the appellant was correct that counts 1 and 2 should not have been split and that the appellant should have been acquitted on count 2. The prejudice to the appellant lies in the duplication of the convictions (irrespective that the 2 counts were taken as one for purposes of sentence) and the state's concession was correctly made.

[31] The appellant submitted that the only issue between the state and the defence in respect of counts 1 and 2 was whether the appellant had 'acquired' the ivory from another person and had been in 'possession' thereof. In respect of the abalone referred to in count 3, the only issue was whether the appellant had been 'unlawfully and wrongly engaged in keeping and/or controlling and/or storing and/or transporting and/or being in possession' of the 1138 dried abalone. The state argued that the court a quo, relying on s 90 of Act 51 of 1977 (as amended) and in interpreting s 42(1)(a) and (b) in light of the relevant case law arrived at the correct decision that the appellant was in possession of the ivory (counts 1 and 2) and abalone (count 3). The state's evidence proved the following:

31.1 a cell phone (seized from the appellant) had photographs depicting the whole elephant tusks;

31.2 the only reasonable inference to be drawn was that the appellant was involved in taking the photographs on 13 September 2012, hours prior the elephant tusks were found cut up in Unit 12;

31.3 Mr Paul Geldenhuys' opinion regarding syndicates of several persons, each of whom formed part of a chain for their individual financial benefit, was supported by Colonel Potgieter;

31.4 Ms Kapp's evidence was that the appellant regularly visited Unit 12, and on the 14 September 2012 had been there at 13h55;

31.5 the appellant's fingerprints were found in both storage Units 12 and 349;

31.6 the appellant's prints were also found on the box and plastic bag containing the abalone; and

31.7 the abalone had been found in the vehicle registered in the appellant's name.

[32] In the absence of contradictory evidence to the above facts, I am of the view that the court a quo correctly decided that the appellant had acquired and was in possession of the ivory and the abalone. Consequently, I am of the view that the appellant had a case to answer, however, he elected not to testify.

[33] The appellant submitted that although during the bail application he was not warned by the Magistrate in terms of s 60(11B)(c) of Act 51 of 1977 (as amended) the bail record should still have been admitted because it was handed in by agreement in terms of s 235 of the CPA. The respondent submitted that the court a quo ruled correctly that the evidence contained in the bail record was inadmissible, because the appellant had not been warned of his rights. It is my view that the court a quo correctly excluded the bail proceedings (as a matter of law) because the Magistrate had no discretion (in the absence of appellant's warning). The bail proceedings were not admitted in terms of s 220 but in terms of s 235, and it was therefore not necessary for the Magistrate to have ruled on the admissibility of its contents before the state closed its case.

[34] The appellant submitted that the respondent failed to prove all the charges beyond reasonable doubt. The respondent argued that the court a quo correctly held that the state proved the charges on counts 1 and 3 beyond reasonable doubt. I am of the view that in the circumstances count 1 and the alternative charge in count 3 were proved by the state beyond reasonable doubt.

[35] The appellant submitted that a fine not exceeding three times the commercial value of the ivory amounted to an additional sentence and the Magistrate should not have sentenced the appellant to a fine coupled with an alternative period of imprisonment. Also that the Magistrate should have conducted an inquiry regarding the appellant's ability to pay a fine. The respondent pointed out that the appellant was not a first offender on the abalone count and also showed no remorse, and submitted that the court a quo correctly sentenced the appellant. The court a quo took the following into account (in sentencing): (i) the prescribed penalty as well as the commercial value of the ivory which was in excess of R21 million; (ii) the court a quo applied the provisions of s 86(1)(b); (iii) the quantity of the ivory in count 2 had a value of R146 348 as compared to the value of the ivory in count 1 of in excess of R21 million and, even if the conviction on count 2 was set aside, the difference would have been very minimal. However I refer to the findings of my sister in relation to sentence with which

I agree.

CLOETE J

[36] I support my brother's findings and add the following. It was argued on behalf of the appellant that, although the bail record was admitted in terms of s 235 of the CPA, the fact of his consent dispensed with the 'if such evidence is otherwise admissible' requirement referred to in Agliotti.

[37] To my mind the fact of the appellant's consent does not solve his problem, because its basis was what is contained in s 235. The authorities referred to by my brother make it clear that s 235 is nothing other than a procedural provision and it does not detract from the requirement of prior warning in s 60(11B)(c). In other words, the record itself may be admitted (whether by consent or otherwise) in terms of s 235, but the admissibility of its contents is another matter entirely. In Balkwell the position was different, because the bail record was admitted in terms of s 220 of the CPA, which rendered its contents

admissible despite the absence of prior warning.

[38] It was common cause during argument before us that the appellant did not give oral testimony during the earlier bail proceedings but instead deposed to various affidavits. Given that the purpose of s 60(11B)(c) is to ensure that an accused person receives a fair trial, the remarks of the court in Agliotti at paras [39] and [40] are instructive:

'[39] It is my considered view that, even where an accused or applicant, in a bail hearing concerning schedule 6 offences, intends to use an affidavit, it is a peremptory duty of the court, right at the beginning of the proceedings, to warn him fully and comprehensively

of the provisions of s 60(11B)(c). That would allow the applicant/accused to make an informed choice before he decides on testifying viva voce or making use of an affidavit. It does not make sense to me to want to utilise evidence obtained through both oral testimony and affidavit, but expect the owner of such evidence to be warned only when he testifies orally. As I stated before, both oral evidence and affidavit are evidence that may be used in the subsequent trial. As such, the requisite warning should be issued by

the court to the accused before he elects to testify orally or to use an affidavit. If he has been properly warned, then those bail proceedings should be admissible in his subsequent trial. That is why in the Commentary (supra) and *S v Van Wyk* (supra) the words "(w)here an accused who was properly warned elects to testify", in my view, lend such an interpretation.

[40] I reiterate: the warning must be issued before the accused makes an election whether to testify viva voce or through an affidavit. That would in my view remove the possibility of any absurd interpretation of the section, and also ensure a fair trial for an accused person.'

[39] In the present case the appellant made a number of s 220 admissions during the course of the trial. If it had been his

intention to admit the content of the bail record he would surely have done so in terms of s 220. He was represented by two experienced

attorneys. Counsel for the state (who also appeared in the trial) candidly informed us that the sole purpose of requesting the court to admit the bail record as an exhibit in terms of s 235 was to use it to cross-examine the appellant if he chose to testify during the course of the defence case. That was the reason it was handed in before the state closed its case. As it transpired, no further reference was made to the bail record because the appellant chose not to testify.

[40] If the appellant had testified then the admissibility of the contents of the bail record would have been canvassed at that stage. But not a murmur was made by the defence about the contents of that record during their case or even in argument before conviction. The defence thus clearly had no intention of having regard to the content of that record and, as was found in *Agliotti*:

‘[34] I have listened attentively to all the proceedings in this court thus far: defence counsel did not once refer to the bail proceedings. The state argues that Clinton Nassif referred once to them in his testimony. That could be so, but Clinton Nassif is a state witness, not a defence witness. As a consequence, I cannot find and rule that the defence has lifted its shield, justifying the admission or use of the bail proceedings in this trial.’

[41] In further support of his argument counsel for the appellant relied on *S v Ramavhale* 1996 (1) SACR 639 (A) at 650i-651g. However there the court was dealing with the admissibility of hearsay evidence within the context of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, and it is therefore distinguishable. Here the contents of the bail record were inadmissible as a consequence of s 60(11B)(c) because the record itself was only admitted by consent in terms of s 235. In my view it was not incumbent on the trial court to rule on its admissibility. If the appellant wished to rely on the contents at any stage then he should have made this clear to the Magistrate.

[42] The trial court was therefore correct in excluding the content of the bail record when evaluating the evidence, and the submissions made on behalf of the appellant regarding the weight, if any, to be attached to his affidavits tendered in the bail proceedings need not be dealt with.

[43] It was also submitted on behalf of the appellant that the state failed to prove that he held the ivory for his own benefit, because the possibility could not be excluded that he did so on instructions. As to the meaning of ‘found in possession’ for purposes of s 42(1) of the Ordinance, the following passage in *Goldberg* is apposite:

‘[76] Mr Tarantal also submitted in his note that an employee who has physical control over the items in a shop exercises such control for his own benefit, ie in order to earn a salary, even if he simultaneously exercises control for the benefit of the owner. I reject that submission. The functions which an employee carries out in the course of discharging his duties are all performed for the benefit of the employer. The employee places himself at the disposal of the employer

during the agreed hours to carry out the latter's lawful instructions. Provided he does so, he is entitled to the agreed wage or salary. The amount of his salary is not dependent upon or related to any specific task he may happen to perform during the course of his day. Furthermore, I can see no rational distinction in that regard between employment as a manager and employment in an inferior position.'

[44] There was no suggestion, either during the trial or the appeal that the appellant was carrying out the lawful instructions of an employer in relation to the ivory. He had access to storage units in the middle of a city containing the partially

worked tusks of 9 freshly slaughtered African elephants. If he received instructions as an "employee" to hold the ivory

then these instructions were patently unlawful. It could not have been intended by the court in Goldberg, nor for that matter, the legislature, that a person in the position of the appellant could escape scot free under s 42(1) in such circumstances. Indeed the specific reference in Goldberg to 'lawful instructions' makes this clear.

[45] Turning now to the sentence imposed on the ivory counts.

[46] The Nature and Environmental Conservation Ordinance 19 of 1974 was promulgated on 21 February 1975 and commenced on 1 September 1975.

[47] The administration of the whole of the Ordinance was under Proclamation R115 of 1994, published in Government Gazette 15813 of 17 June 1994, assigned to the Province of the Western Cape with effect from 17 June 1994 in terms of Item 14(1) of Schedule 6 to the Constitution.

[48] The entire text of Ordinance 19 of 1974 was substituted by s 1 read with Schedule 1 of the Western Cape Nature Conservation Laws Amendment Act, 3 of 2000, which was assented to on 23 March 2000 and which commenced on 1 April 2000. It is now called The Nature Conservation Ordinance, 1974 and I will hereafter refer to it as 'the Ordinance'.

[49] S 86(1)(b) of the Ordinance provides that a person convicted of a contravention of s 42(1) thereof, involving an African elephant, shall be liable to a fine of R100 000.00 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, and to a fine not exceeding 3 times the commercial value of any African elephant or the carcase thereof in respect of which the offence was committed.

[50] S 2 of the Ordinance defines "carcase" in relation to any wild animal to also include the whole or any part of the tusks of a wild animal.

[51] "Wild animal" is defined in s 2 of the Ordinance to mean any live vertebrate or invertebrate animal, excluding any ostrich used for farming purposes, belonging to a non-domestic species and include such animal which is kept or born in captivity.

[52] S 287(1) of the Criminal Procedure Act 51 of 1977 reads as follows:

‘287 Imprisonment in default of payment of fine

- (1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction:

Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.’

[53] S 92(1)(b) of the Magistrate's Court Act, 32 of 1944 regulates the penal jurisdiction of lower courts and reads as follows:

‘92 Limits of jurisdiction in the matter of punishments

- (2) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence -
- (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division;
- (b) by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph (a);
- (c)
- (d) by correctional supervision, may impose correctional supervision for a period as contemplated in section 276A(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (3)
- (a) The Court shall have jurisdiction to impose any punishment prescribed in respect of an offence under an ordinance of a province or the territory which relates to vehicles and the regulation of traffic on public roads, notwithstanding that such punishment exceeds the jurisdiction referred to in subsection (1).
- (b) Where a person is convicted of culpable homicide arising out of the driving of a vehicle as defined in any applicable ordinance referred to in paragraph (a), the court shall have jurisdiction to impose any punishment which the court may impose under that paragraph in respect of the offence of driving a vehicle recklessly on a public road.’

[My emphasis].

- [54] According to footnote 28 to s 92(1)(b) in the Butterworths publication of the Magistrate's Court Act the penal jurisdiction of the regional courts in respect of fines was increased from R300 000.00 to R600 000.00 by GN 217 published in Government Gazette 37477 of 27 March 2014, with effect from 1 February 2013. Jones and Buckle, *The Civil Practice of the Magistrate's Courts in South Africa* (10th Edition) states that the increase to R600 000.00 was effected by GN R63 published in Government Gazette 36111 of 30 January
2013. Both these dates seem to be incorrect. According to GN 217 the increased jurisdiction to R600 000.00 became effective on 1 June
2014. The increase in monetary penal jurisdiction does not operate retrospectively (see *Veldman v DPP, Witwatersrand Local Division* 2006 (2) SACR (CC) at paras [26], [28] and [34]).
- [55] Accordingly, the jurisdiction of regional courts relating to the imposition of fines at the time the appellant pleaded to the charges on 28 October 2013 was R300 000.00 (as determined by GN R1411 published in Government Gazette 19435 of 30 October 1998).
- [56] S 1(1)(a) of the Adjustment of Fines Act 101 of 1991 provides that where a person on conviction for an offence may be sentenced to pay a fine, the maximum for which is not prescribed, or in the alternative to undergo a prescribed maximum period of imprisonment, the amount of the maximum fine which may be imposed shall be an amount which, in relation to the period of imprisonment is in the same rate ratio as the ratio between the amount of the fine which the Minister may determine in terms of s 92(1)(b) of the Magistrate's Court Act and the period of imprisonment as determined in s 92(1)(a) thereof for a court that is not a regional court. Similarly, s 1(2) of the Adjustment of Fines Act provides that where a person may upon conviction for an offence, be sentenced to pay a fine of a prescribed amount or a maximum amount which may be determined by the Minister, or in the alternative, to undergo a prescribed maximum period of imprisonment or be sentenced to both such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall be an amount calculated in accordance with the same ratio.
- [57] At the time the appellant pleaded to the charges against him, the fine which the Minister of Justice determined for lower courts other than regional courts in terms of s 92(1)(b) of the Magistrate's Court Act was an amount of R60 000.00. In terms of s 92(1)(a) a district court can impose a sentence of imprisonment of up to three years. The ratio so calculated is thus R20 000.00 for each year of imprisonment.
- [58] Applied to an offence in terms of s 42(1) read with s 86(1)(b) of the Ordinance the maximum fine of R100 000.00 can therefore be increased to R200 000.00 (10 years x R20 000 per year = R200 000.00). However the Adjustment of Fines Act does not apply to a fine imposed with reference to the value of the ivory seized. The court is instead limited to its ordinary penal jurisdiction as prescribed in terms of s 92(1)(b) of the Magistrate's Court Act at the time when the accused pleaded which, in this case, was R300 000.00.

[59] S 287(1) of the Criminal Procedure Act, 1977 then provides that the court may impose a sentence of imprisonment as alternative to such a fine for a period within limits of its jurisdiction which, in the case of a regional court, is 15 years. However, in terms of the proviso to s 287(1) of the Criminal Procedure Act, such an alternative sentence of imprisonment may not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by the Ordinance for such an offence, which in this case is 10 years imprisonment.

[60] No provision is made in the Ordinance for a lower court to impose a fine which exceeds its monetary jurisdiction in s 92(1)(b) of the Magistrates' Court Act, whereas, for example, the Marine Living Resources Act 19 of 1998 provides as follows at s 70(3):

‘(3) Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any

penalty prescribed by this Act.’

[61] S 92 of the Magistrates' Courts Act contains a similar provision in s 92(2)(a), namely that a lower court shall have jurisdiction to impose any punishment prescribed in respect of an offence under an Ordinance of a province or territory which relates to vehicles and the regulation of traffic on public roads ‘notwithstanding that such punishment exceeds the jurisdiction referred to in subsection (1)’.

[62] Counsel for the state, while conceding that the absence of a similar provision in the Ordinance itself is problematic, sought to persuade us that the words ‘save as otherwise in this Act or in any other law specifically provided...’ in s 92(1) empowers a lower court to nonetheless impose a fine exceeding the limit set out in s 92(1)(b).

[63] I am unable to agree. The approach to interpretation of a statutory instrument was set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at para [18] as follows:

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the

divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

- [64] If it was the legislature’s intention that s 92 of the Magistrates’ Court Act be interpreted in the manner proposed by the state, there would have been no need for s 92(2)(a) to have been included, nor would there have been any need for the inclusion of provisions such as s 70(3) of the Marine Living Resources Act in other statutory instruments.
- [65] The indications are that the omission of a similar provision when the text of Ordinance 19 of 1974 was substituted by the Western Cape Nature Conservation Laws Amendment Act was inadvertent. Given the consequences of this omission, if this is indeed the case there is clearly a pressing need for legislative correction of this oversight.
- [66] I am therefore compelled to conclude that the trial court exceeded the powers conferred upon it by s 92(1) of Act 32 of 1944 in imposing the fine of R5 million. Furthermore, as submitted by counsel for the Appellant and conceded by the state during argument, the trial court should not have ‘telescoped’ the imposition of a fine into a condition of suspension of the term of imprisonment. S 86(1)(b) provides for the imposition of two separate categories of penalty, the first being a fine not exceeding R100 000 or imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment; and the second, to a fine not exceeding three times the commercial value of the ivory.
- [67] That having been said, there is no basis to interfere with the sentence of 7 years direct imprisonment imposed in respect of the ivory counts. Even though there was a splitting of charges, counsel for the appellant correctly conceded that the quantity of ivory on count 2 was insignificant when compared to the quantity on count 1. Furthermore the trial court took both counts as one for purposes of sentence. As far as the amount of a fine is concerned, it is my view that, having regard to the particular circumstances of the matter, the most severe fine that a regional court can impose is appropriate, which would be R300 000.
- [68] As to the abalone count, regulation 96 of the regulations promulgated under the Marine Living Resources Act 18 of 1998 provides that:

‘96 Offences and penalties

Any person who contravenes or fails to comply with any provision of these regulations, shall be guilty of an offence and liable on conviction to a fine not exceeding R800 000 or to imprisonment not exceeding 2 years.’

- [69] The appellant was previously convicted on 24 February 2004, i.e. 8 years earlier, of unlawful possession of abalone and sentenced to a fine of R80 000 or 12 months imprisonment, with a further 12 months imprisonment suspended for 5 years. He apparently paid the fine of R80 000 to avoid incarceration. The suspended portion of that sentence expired in January 2009.

He was apprehended for the present offence in September 2012, just 3 ½ years later. His earlier sentence clearly had no deterrent effect and the trial court, after carefully weighing all relevant factors, cannot be faulted for imposing the maximum period of imprisonment of 2 years.

[70] In the result the following order is made:

1. The appeal succeeds in part.
2. The conviction in respect of count 2 is set aside.
3. The sentence in respect of count 1 is set aside and substituted with the following:

‘The Accused is sentenced to 7 (seven) years direct imprisonment, as well as to a fine of R300 000 (three hundred thousand rands), and failing payment of such fine, 24 (twenty four) months imprisonment in terms of section 287(1) of Act 51 of 1977. The sentences shall not run concurrently and are antedated to 5 September 2014 in terms of section 282 of Act 51 of 1977.’

4. Save as aforesaid the appeal is dismissed. The convictions on counts 1 and 3 are upheld as is the sentence imposed in respect of count 3.

M.I. SAMELA

Judge of the High Court

J. CLOETE

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