

SOUTH AFRICA / JUDGMENT

S v Chitiyo and Others (CC77/2019) [2022] ZAECKMKHC 69 (30 September 2022)

[2022] ZAECKMKHC 69**COURT**

Eastern Cape High Court, Makhanda

BEFORE

Bloem

CASE / FILE NUMBER

CC77/2019

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Policy**N****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, MAKHANDA****CASE****NO. CC77/2019****In**

the matter between:

THE
STATE
and
FRANCIS
CHITIYO
Accused 1
TRYMORE
CHAUKE
Accused 2
MISCHECK
CHAUKE
Accused 3
SIMBA
MISINGE
Accused 4

NHAMO
MUYAMBO
Accused 5
ABRAHAM
MOYANE
Accused 6

JUDGMENT

Bloem J.

- [1] Each of the accused faced four charges. In count 1 they were charged with statutory conspiracy to commit a restricted activity involving rhinoceros (rhino), in contravention of section 18(2)(a) of the Riotous Assemblies Act[1] and section 57(1) of the National Environmental Management: Biodiversity Act.[2] In count 2 they were charged with statutory conspiracy to commit theft of rhino horn, in contravention of section 18(2)(a) of the Riotous Assemblies Act. In count 3 they were charged with the unlawful possession of a firearm, in contravention of section 3, as read with sections 1, 103, 117, 120, 121 and schedule 4 of the Firearms Control Act,[3] as further read with section 250 of the Criminal Procedure Act.[4] In count 4 they were charged with the unlawful possession of ammunition, in contravention of section 90, as read with the above sections of the Firearms Control Act as well as section 250 of the Criminal Procedure Act.
- [2] The allegations against the accused in count 1 were that on 31 July 2018 and on the N2 highway near Makhanda they unlawfully and intentionally conspired with each other to commit the prohibited restricted activities of hunting and/or killing of rhinos (being a specimen of a protected species), and/or collecting and/or cutting and/or chopping off and/or having in possession and/or exercising control over and/or conveying and/or trading in and/or receiving and/or acquiring rhino horns, without a valid permit to commit those activities in contravention of the aforesaid legislation. In count 2 it was alleged that on the same date and place referred to in count 1 they unlawfully and intentionally conspired with each other to commit theft in order to steal rhino horn from the rhinos which they intended to poach and being the property or in lawful possession of unknown persons.

In count 3 it was alleged that on the same date and place referred to in count 1 they unlawfully and intentionally possessed a firearm, namely a Voere .375 Holland and Holland calibre rifle with an unknown serial number, while they were not the holders of a valid licence, permit or authorisation for that firearm. In count 4 it was alleged that on that same date and place referred to in count 1 they unlawfully and intentionally possessed nine rounds of .375 Holland and Holland calibre ammunition, while they were not the holders of a valid licence in respect of a firearm capable of discharging that ammunition or a permit or authorisation to possess that ammunition. The state furthermore alleged that at all times material hereto the accused acted in concert with a common purpose to perpetrate all the above offences.

- [3] All the accused pleaded not guilty to all the charges without disclosing the basis of their defence. It was only accused 2 who tendered a plea of guilty to having being in unlawful possession of a firearm and ammunition, as alleged in counts 3 and 4. Mr Coetzee, counsel for the state, informed the court that the state did not accept the factual basis upon which accused 2 pleaded guilty on counts 3 and 4. A plea of not guilty was accordingly also entered in respect of those counts.
- [4] The accused also made admissions in terms of section 220 of the Criminal Procedure Act. They admitted that on 31 July 2018 a silver Ford Ranger bakkie (the Ford) and a white Isuzu bakkie (the Isuzu) in which they were travelling were stopped and searched on the N2 highway near Makhanda by members of the South African Police Service at an authorised vehicle control point; that the Ford was registered in the name of accused 1 and driven by him, with accused 2, 3 and 4 as his passengers while the Isuzu, registered in the name of accused 5, was driven by him, with accused 6 as his passenger; that a dismantled, unlicensed Voere .375 calibre hunting rifle with erased serial number, a silencer and nine live rounds of .375 calibre ammunition for that rifle were found in the tailgate of the Ford; that the rifle, silencer and ammunition were found wrapped in black refuse bags; that none of the accused held valid firearm licences, permits or were authorised to possess the rifle or ammunition; that subsequent ballistic testing by the police forensic laboratory in Gqeberha established that the rifle had fired the bullets recovered from the illegally hunted and dehorned carcasses of one rhino on Kragga Kamma Game Reserve at Gqeberha (Kragga Kamma) at the end of June 2018 and two rhinos on Shamwari Game Reserve near Makhanda (Shamwari) during early July 2018; that the photographs taken at the scene of the arrest of the six accused by warrant officers Witbooi and Swartbooi respectively correctly depicted the scene and the items

found inside the two vehicles and on the accused; and that the cellphone data in respect of cellphones found on the accused were

lawfully obtained from the various cellphone service providers in terms of section 15(3) and (4) of the Electronic Communications and Transactions Act[5] and have been correctly and accurately captured on a compact disc, which was handed in as an exhibit. Save for accused 5, the other accused also admitted that the cellphone numbers set out in the list of admissions were used by them during the period between 2016 and their arrest on 31 July 2018. In respect of accused 5, he admitted only that he was in possession of three cellphones at the time of his arrest. He did not agree, as the other accused did, that those cellphones were used by him during the above period.

- [5] The first witness for the state was Francois Vos, a captain in the South African Police Service who was a group commander for serious and violent crimes at Makhanda. At the time of the arrest of the accused, he was attached to a rhino task team under the command of Mornay Viljoen, another captain in the South African Police Service. That task team was established to investigate rhino poaching in the Eastern Cape because poaching was on the increase since approximately 2016.

- [6] On 31 July 2018 he and captain Viljoen received information regarding two vehicles conveying persons who were on their way to poach rhinos. Their information was that the vehicles were travelling from East London in the direction of Gqeberha. They sought and obtained authorisation from the Makhanda station commander to set up the vehicle control point. They patrolled the road between Makhanda and Peddie. At approximately 15h00 they came across a stationary white Isuzu bakkie, facing Makhanda. He noticed people standing outside the vehicle. They did not stop but carried on because they were on the lookout for the Ford. They saw it approximately 5km from the stationary Isuzu, also travelling in the direction of Makhanda. Because of the heavy traffic on the road, they could not make an immediate u-turn. After they had ultimately made a u-turn, they found the Ford towing the Isuzu approximately 10km outside Makhanda. They stopped the two vehicles with the assistance of other police officers.
- [7] The vehicles, drivers and passengers of the vehicles were searched. The rifle, silencer, and ammunition were found hidden in the Ford. A new axe was also found in each of the bakkies. Rolls of black plastic refuse bags, knives, overalls and shoes in backpacks and ten cellphones were also found. The sum of R12 350.00 cash was found in the jacket of accused
1. The accused were arrested. Before they were taken to the police cells, photographs were taken at the scene of their
- arrest.
- [8] On 2 August 2018 captain Vos accompanied all the accused to East London where he searched their respective homes. Accused 1, 2, 3, 4 and 5 reside close to one another in the same street. Accused 6 lives in a different area. Their travelling documents showed that only accused 1 and 5 were in the country legally. At accused 1's dwelling he found black plastic bags and cellotape similar to those wrapped around the rifle, silencer and ammunition. He also found two side cutters, two hacksaws and two short handle axes. At accused 2's dwelling he found four SIM cards and shoes. Accused 3 and 5
- shared a one-roomed dwelling. He found three cellphones which accused 3 claimed as his. He also found an electronic scale belonging to accused 5 and registration documents relating to the Ford and Isuzu. Other documents indicated that, at some stages, the Ford and Isuzu had crossed the border into Zimbabwe. He took possession of the scale because it is one that could be used to weigh a rhino horn. At accused 4's dwelling he found shoes and a passport belonging to someone else. At accused 6's dwelling he found a pair of gloves and a pair of shoes.
- [9] Captain Viljoen testified that he is the co-ordinator of all rhino investigations in the Eastern Cape. He is also the lead investigator of all those investigations. He has visited all the scenes of rhino poaching since April 2015 to see how rhinos have been killed, how their horns have been removed and generally the modus operandi of the poachers. He has been accumulating his knowledge and information over the years through interviewing suspects

throughout South Africa. He is in contact with other investigators and stakeholders in anti-poaching, like SANPARKS and East Cape Parks. He also has a wide range of informers scattered throughout the country. Poachers transport rhino horns harvested in the Eastern Cape to Gauteng either by road or air. They are paid in cash once a rhino horn has been delivered in Gauteng. Thereafter those horns are distributed over the borders.

- [10] Based on the experience that he has gained as a result of various investigations into rhino poaching, captain Viljoen testified about the modus operandi of rhino poachers. Rhino poaching in the country is committed by two well-organised syndicates with ties in Zimbabwe and Mozambique. The syndicate bosses determine the location of the poaching and the number of rhinos that should be poached. Poachers have access to large game hunting rifles, like .458 and .375 calibre rifles. The serial number of those rifles are in most cases erased. Generally, the poachers are in the country illegally because they simply walk across the border from Zimbabwe and Mozambique into South Africa. Those who are in possession of passports have no record of their travel into and out of the country. The stamps in their passports usually do not correspond with the computerised register of the Department of Home Affairs. He has accordingly learned not to place much reliance on a stamp in the passport of a suspected poacher.
- [11] Poachers use multiple cellphones and SIM cards, the registration of which is based on false and corrupt information. One SIM card would be used over a long period by a poacher but when that poacher goes on a poaching operation, he would change the SIM card on that handset to make detection difficult.
- [12] Poachers have different roles. Some are shooters, some drivers, some handle high calibre firearms while others carry water or the harvested rhino horns. They use at least two vehicles when they poach. Drivers would drive far away from where they had dropped off the poachers and wait for a call before collecting the poachers and horns. Poachers obtain their information about the location of rhinos from private persons who reside on or near the property on which the rhinos are. They also obtain their information from contractors working on the property in question. The informers are paid by the poachers for that information. Horns are removed from rhinos either by sawing them off, chopping them off with axes or cutting them off with knives.
- [13] Captain Viljoen testified that on 31 July 2018 he and captain Vos were performing anti-poaching duties in the Makhanda area. As a result of information that they had earlier received, they were specifically on the lookout for two vehicles. They came across two bakkies just outside Makhanda. The Ford, driven by accused 1, with accused 2, 3 and 4 as his passengers, was towing the Isuzu, driven by accused 5, with accused 6 as his passenger. Having stopped them, he recognised accused 1 and 5 as persons who had previously been arrested near Tarkastad. Upon the search of the vehicles, drivers and passengers, he came across the items in the Ford about which captain Vos testified. There was no reaction or explanation about the rifle from either the drivers or passengers when the discovery was

made. A new axe with a yellow handle, still wrapped in plastic, a roll of black refuse plastic bags, two cans of Q20 oil, a pair of side cutters, a yellow knife, a smaller knife, a passport belonging to one Mondlane, R12 350.00 in the jacket of accused 1, two rucksacks with normal and work clothes (overalls and jeans) in them, three pairs of extra shoes in plastic bags and six cellphones were found in the Ford. Three of the cellphones belonged to accused 1, while his passengers had one cellphone each. Accused 3 also had a knife. There were four cellphones in the Isuzu, three of them in the possession of accused 5 and the other one in the possession of accused 6. A brand new axe, also wrapped in plastic, yellow latex gloves and one rucksack with clothing in it were also found in the Isuzu.

- [14] Four of the accused had previously been arrested near Tarkastad when accused 1 informed the police that his name was Moses Ngomveni and presented a Mozambican passport. Accused 3 said that he was Trust Mlambo and accused 5 said that he was Johannes Mlambo. Accused 6 did not give a different name. The accused were arrested for being in unlawful possession of a firearm and conspiracy to commit poaching of rhino.
- [15] After the arrest of the accused, captain Viljoen obtained all the data on the cellphones found during the search and at the homes of the accused, with the assistance of the cellphone service providers. He then compared that data with data which he had in his possession which he had gathered from previous rhino poaching incidents. The rifle and ammunition were also subjected to ballistics analysis.
- [16] As the state's case relied heavily on similar fact evidence, I shall now deal with each of the previous incidents of rhino poaching or suspected rhino poaching to which captain Viljoen made reference.

Great Fish Reserve on 27 and 28 March 2016

- [17] It was discovered on 31 March 2016 that a .458 calibre firearm was used to kill two rhinos at that reserve on the night of 27-28 March 2016. Only one rhino had its horn chopped off. The other was killed but not dehorned. That reserve is situated next to the road between Makhanda and Fort Beaufort. There are three towers along that road which would be triggered if a cellphone is used on that reserve.
- [18] The records of the cellphone linked to accused 5 showed that that cellphone moved from East London on 26 March 2016 and triggered the tower at the Koonap Reserve Farm on the road between Makhanda and Ford Beaufort at approximately 04h00 on 27 March 2016. It was switched on and off on occasion. It triggered the towers at Goverserskop on the road between Makhanda and King William's Town, the Koonap tower and the Skietkloof tower between approximately 16h21 and 04h26 on 28 March 2016, travelled around King William's Town at 06h04 and then from East London to Queenstown.
- [19] Captain Viljoen testified that accused 5's cellphone was near the scene at the time of the killing of the two rhinos.

Great Fish Reserve between 11 and 15 April 2016

- [20] On 14 April 2016 it was discovered that a .375 calibre rifle was used to kill three rhinos on that reserve. They had their horns chopped off.
- [21] The records of the cellphone linked to accused 5 showed that between 18h00 and 19h00 on 11 April 2016 it triggered towers on the road between King William's Town and Stutterheim. On 12 April 2016 it triggered a tower between Makhanda and King William's Town between 06h50 and 09h19, triggered the Govermerskop, Koonap and Tempu towers several times between 10h14 and approximately 04h21 on 15 April 2016 whereafter it moved in the direction of Queenstown and then further north in the direction of Gauteng. That cellphone was near the scene at the time of the killing of those rhinos.

Kleindoringberg Game Farm on 15 and 16 July 2017

- [22] The decomposed carcass of a rhino, which had been killed by a bullet found in the carcass fired from a .375 calibre rifle, was discovered during September 2017 on that farm, which is situated along the road between Cradock and Middelburg. Its horn had been chopped off. An axe, similar to the two axes which were found in the Isuzu and Ford, was found near the carcass. The state of decomposition of the carcass suggested that the rhino had been killed around 15 July 2017. That farm has a tower called the Kleindoringberg tower.
- [23] The records of accused 1's cellphone and the one linked to accused 5 showed that on 15 July 2017 those two cellphones travelled from East London and were near the scene of the killing on that day and moved back to East London.
- [24] The records of accused 1 cellphone number ending with 3258 show that during the early evening of 14 July 2017 it moved from Humansdorp in the direction of Gqeberha, it triggered a tower at Brakfontein at 22h33, was switched off at 01h00 on 15 July 2017 when it triggered the Raynerskop tower. It was switched on at 07h19 when it still triggered the same tower whereafter it triggered various towers in the Cradock area until 19h19 when it triggered the Baroda tower. The cellphone then moved to East London where it triggered a tower at 16h07.
- [25] The records of the cellphone linked to accused 5 (ending with 6681) showed that it triggered the tower at Swaershoek Pass on the road between Cradock and Gqeberha at 07h36 on 15 July 2017, but was switched off from 07h42 until 13h29. At 19h42 it triggered the Baroda tower which is on the road to Kleindoringberg, was switched off at 23h25 until approximately 05h00 on 16 July 2017. At about 06h02 it triggered the tower at Kleinplaas Farm which is situated just outside Cradock on the road between Cradock and Graaff-Reinet, whereafter it returned to East London.

- [26] Captain Viljoen testified that, based on the above records, the cellphones were moving around on the road between Cradock and Graaff-Reinet between 13h29 on 15 July 2017 and 06h02 on 16 July 2017. Those cellphones also did not reach Graaff-Reinet during that period. Captain Viljoen testified that there are no settlements, towns or houses where people live along the road between Cradock and Middleburg. The persons in whose possession those cellphones were accordingly did not go to that farm to visit people or to work.

Tarkastad arrests on 16 August 2017

- [27] It is undisputed that on 16 August 2017 a vehicle with four occupants was stopped by the police near Tarkastad. They were accused 1, 3, 5 and 6. The vehicle was not registered in the name of any of them. Cellphones, an unlicensed large game hunting rifle and a homemade axe were found in that vehicle and taken to Cradock for investigations. Accused 1 ultimately accepted liability for the rifle and the charges against the other accused were withdrawn.
- [28] The records of accused 1's cellphone showed that during the morning of 16 August 2017 it was moving from East London, past King William's Town, Alice, Bedford to Cradock where it triggered the Burnside tower near Kleindoringfarm at approximately 11h00. It triggered the Eskom tower at Cradock at approximately 15h00 and thereafter moved on the road between Cradock and Tarkastad. It was near Tarkastad at approximately 16h00.
- [29] The records of accused 3's cellphone showed that it moved from East London during the morning of 16 August 2017 and triggered the Baroda tower just outside Cradock on the road between Cradock and Middelburg at approximately 10h35. It triggered the Burnside tower at 13h03, the Eskom tower at Swaershoek Pass at 15h51 whereafter it was switched off.
- [30] The records of the cellphone linked to accused 5's cellphone, ending with number 6681, showed that at 05h33 on 16 August 2017 it was in East London and then moved past Alice and Fort Beaufort and triggered the tower at Kleindoringberg at 10h56 and the Burnside tower at 11h12. It moved to Cradock and thereafter to Tarkastad.
- [31] The records of accused 6's cellphone showed that at approximately 02h00 on 16 August 2017 it was in East London whereafter it triggered the Telkom tower near Cookhouse at 09h45, the Baroda tower at 10h30, the Eskom tower at Cradock at 11h53 and the Burnside tower at 12h56. It later also moved to Cradock and thereafter to Tarkastad.
- [32] The cellphone records of all four accused who were arrested near Tarkastad on 16 August 2017 show that those cellphones triggered the same towers between East London, Cradock, Kleindoringberg and Tarkastad on more or less the same times on that day. Captain Viljoen testified that those records do not support an inference that a rhino at Kleindoringberg was killed on 16 August 2017 because, when the suspects were stopped and ultimately arrested at Tarkastad on that day, a rhino horn was not found in their possession and the cellphones were not at Kleindoringberg for a long time on that day to support an inference that they spent sufficient time on that farm to kill a rhino.

Lourens de Lange Municipal Game Reserve between 24 and 25 December 2017

- [33] Between 23 and 25 December 2017 a heavily pregnant rhino cow was killed with the bullet fired from a .375 calibre rifle on that reserve, which is situated along the side of the road between Queenstown and Aliwal North. It had its horn chopped off.
- [34] The records of accused 1's cellphone showed that it travelled from East London to Queenstown on 24 December 2017 where it was active until about 11h00 on the following day. It was inactive until approximately 17h42 when it was located at the Mlungisi Stadium in Queenstown. It moved in the direction of East London where it triggered a tower at about 02h00 on 26 June 2017.
- [35] The records of the cellphone linked to accused 5 showed the same movement as accused 1's cellphone during the same period. It was inactive between about 09h00 until about midday on 25 December 2017. It became inactive again at approximately 14h13, but was located at the Mlungisi Stadium at approximately 16h35. It then moved in the direction of East London on 26 June
2017. The records of those two cellphones showed that they were near the scene at the time of the killing of that rhino.

Kleindoringberg Game Farm on 24-25 February 2018

- [36] During the night of 24-25 February 2018 two rhinos were killed on that farm by the use of a rifle that fired .375 calibre ammunition. They had their horns chopped off.
- [37] The records of accused 1's cellphone showed that on 23 February 2018 it moved from King William's Town to Alice and it later triggered a tower at Daggaboer near the road between Cradock and Cookhouse. It triggered the tower at Kleindoringberg from 00h01 until 00h42 on 24 February 2018, the Burnside Telkom tower until it was switched off at 11h50 until 21h53, the Kleindoringberg tower until 22h01 and was located in East London at 05h39 on 25 February 2018.
- [38] The records of the cellphone linked to accused 5 (ending with 7703) showed that until 21h07 on 23 February 2018 that cellphone was on the road between King William's Town and Alice. It triggered the Burnside tower at 21h37 and at 06h28 on 24 June 2018, the Kleindoringberg tower between 17h24 and 22h39, the Burnside tower at 22h49, a tower in Cradock at 23h11, the
- Raynerskop tower at 22h24, a tower at Daggaboer at 23h35 and a tower near Cookhouse at 23h51 when it was switched off until 01h35 on 25 February 2018 when it was in the East London area.
- [39] The records showed that those two cellphones followed the same route because they triggered the same towers from East London to the scene of the killing at Kleindoringberg and back to East London.

Thorndale Farm between 7 and 9 June 2018

- [40] The decomposed carcass of a dehorned rhino was discovered on 21 June 2018 on that farm near Kirkwood. It had been killed with a .375 calibre bullet, which could not be linked to any particular rifle because of the nature of the damage to that bullet. The remaining stump of the rhino had been chopped out of its head. Because of the state of decomposition of the carcass, it was suspected that the killing must have happened about 10 to 14 days before it was discovered.
- [41] The records of accused 1's cellphone showed that that cellphone was on its way from East London to Queenstown on 6 June 2018, but was back in East London at about 03h00 on 7 June 2018. However, it located at Kirkwood at about 06h45 on that same day. It moved between Kirkwood and Gqeberha and moved to Addo on that day. At approximately 14h33 on 9 June 2018 it triggered the Theescombe tower.
- [42] The records of the cellphone linked to accused 5 (ending with 8365) showed that that cellphone was located at Addo at approximately 06h26 on 7 June 2018 whereafter it moved to Kirkwood. Like accused 1's cellphone, it also moved between Kirkwood and Gqeberha via Kariega and was back in Kirkwood at 21h58 on 8 June 2018, where it remained on 9 June 2018. It essentially triggered all the towers that accused 1's cellphone triggered during that period, they remained in Gqeberha on the day of the killing of the rhino.
- [43] The records of those two cellphones showed that they were near the area when the rhino was killed.

Kragga Kamma Game Reserve on 28 and 29 June 2018

- [44] A rhino cow was dehorned during June 2018 with only its stump remaining. Its carcass was discovered on the reserve a few days thereafter on 29 June 2018. It was killed with a bullet that was recovered from the carcass and which was fired from the rifle that was found in the tailgate of the Ford. The rhino had the remaining stump of its horn chopped out of its nose during the night of 28-29 June 2018.
- [45] The records of accused 1's cellphone showed that at 20h16 on 25 June 2018 it moved between Makhanda and Gqeberha. At approximately 23h06 and later on 26 June 2018 it was located near the Theescombe tower, which is situated next to the site of the killing. It was thereafter on call forwarding. It was located at that same tower at 22h45 on 28 June 2018 whereafter it went on call forwarding again.
- [46] The records of accused 2's cellphone showed that on 25 June 2018 it also moved from Makhanda to Gqeberha. At approximately 16h37 on 28 June 2018 it triggered the Theescombe tower. At 18h36 that cellphone received an SMS while it was still near the Theescombe tower. The next record is only at approximately 05h00 on the following day, when that cellphone was in East London.
- [47] The records of accused 4's cellphone showed that that cellphone was in East London on 19 June 2018 and in Gqeberha on 20 June

2018. It was still in Gqeberha at 14h58 on 27 June 2018. It showed no activity on 28 June 2018 but triggered a tower in Gqeberha at 07h25 on 29 June 2018.
- [48] The records of the cellphone linked to accused 5 (ending 8365) showed that that cellphone moved from Makhanda to Gqeberha on 25 June 2018. At approximately 22h00 it moved in the vicinity of Dear Park, Stanford and Dora Nginza Hospital. Those areas are a fair distance away from the Theescombe tower. It was located near that tower between 00h07 and 00h12 on 29 June
2018. During that period there was a call from the cellphone linked to accused 5 to accused 1's cellphone. A few minutes thereafter accused 1's cellphone made a call to accused 5's cellphone, whereafter accused 5's cellphone called accused 1's cellphone, while accused 5's cellphone was at the Theescombe tower. The records show how that cellphone moved away from Theescombe, out of Gqeberha, past Makhanda and landed up in East London just after 16h00 on 29 June 2018.
- [49] The above records show that those cellphones, with the exception of accused 4's cellphone which was inactive on 28 June 2019, triggered various towers from East London towards Gqeberha, that they were located near the scene at the time of the killing of the rhino, and then triggered towers as they moved towards East London on 29 June 2018.

Shamwari Game Reserve on 2 and 3 July 2018

- [50] The carcasses of a rhino cow and a calf were discovered at Shamwari on 7 July 2018. It was determined that they were killed on approximately 2 or 3 July 2018 with the same .375 calibre rifle as the one which was found in the tailgate of the Ford. Both had their horns chopped off. During the course of his investigation, captain Viljoen came across the gate register which is kept in respect of vehicles travelling on the public road through Shamwari. That register showed that an Isuzu, with the
- same registration number as the one that was stopped on 31 July 2018, used that road and that the driver of the Isuzu entered his name as Johannes.
- [51] The records of the cellphone of accused 1 show that on 1 July 2018 that cellphone was on the N6 road between East London and Queenstown and in East London at 13h21. It located near Peddie at about 17h00. The last activity that was recorded on that cellphone was at about 17h47 on that day. The recorded activities commenced on 2 July 2018 at about 07h42 when the cellphone was located near the Olifantskop tower, Brakfontein in the Paterson/Alicedale area, where it was for most of that day. From about 19h32 on that day until 19h00 on the following day that cellphone was on a call forwarding setting. It was located on the N6 road leading to Queenstown at approximately 20h19 on 3 July 2018. At approximately 21h06 on that same day it was located in East London. The following day it travelled through the Free State and at approximately 08h45 it was near Centurion, Gauteng. It returned to East London on that same day, 4 July 2018.

- [52] The cellphone records of accused 2 show that at approximately 17h40 on 1 July 2018 that cellphone was on the N2 road near Peddie. At approximately 01h05 on 2 July 2018 it was at Alicedale, proceeded towards Olifantskop and back to Alicedale. Later that day it was located in Makhanda, but returned to Alicedale. It moved back to Makhanda, then moved in the direction of Gqeberha, but triggered towers near Salem and Port Alfred and back to Makhanda.
- [53] The cellphone that captain Viljoen linked to accused 5 show that on 1 July 2018 it was first located near Fort Beaufort, then East London and at approximately 17h44 it was on the N2 road near Peddie, like accused 2's cellphone. At approximately 10h00 on 2 July 2018 it was located near Patterson. Later that day it was near Olifantskop and at Alicedale at approximately 19h37. At approximately 23h10 on 2 July 2018 it was located in East London.
- [54] In summary, the cellphone records of accused 1, 2 and 5 show that between 1 and 3 July 2018 those cellphones moved from East London to Peddie to Olifantskop, which is near Shamwari, and back to East London. Those records showed that those two cellphones were on the scene of the killing of the rhino and its calf. Captain Viljoen was of the belief that the trip to Gauteng would suggest that a rhino horn or horns were transported to that province.
- [55] That concluded the evidence of the state. It was on the basis of the results of the analysis and comparison of the above cellphone records and other information, that captain Viljoen was of the view that accused 1, 3, 5 and 6 were involved in the poaching of rhinos in the Eastern Cape since 2016 and that all the accused were on their way to kill a rhino when they were arrested on 31 July 2018.
- [56] Accused 1 testified that on 31 July 2018 he was at home in East London when he received a telephone call from accused 5 who informed him that he was on his way to Gqeberha, that he was near roadworks on the road leading to Makhanda, that his vehicle had some mechanical problems and he required someone to tow the vehicle to a mechanic. He agreed to assist accused 5 who he knew very well for a long time. He could not give an estimated time of arrival because he had lent his vehicle, the Ford, to accused 2 who was running a business. He contacted accused 2 and requested him to return his vehicle. When accused 2 arrived, he told him that he would have to accompany him to assist accused 5. They left East London between 1 and 2 o'clock that afternoon and met up with accused 5 about two hours thereafter.
- [57] He towed the Isuzu with the Ford. Accused 3 and 4 became passengers of the Ford. Accused 5 was the driver of the Isuzu with accused 6 as his passenger as it was being towed in the direction of Makhanda. Having been pulled off by the police, at their request he granted them permission to search the Ford. The first place the police searched was the tailgate, where they found the rifle, silencer and ammunition. He knew nothing about those items. Before the search, accused 2 did not inform him that he had placed those items in the tailgate. The police also found R12 350.00 in his jacket which was found inside the Ford. A boilermaker in Zimbabwe had given him that money to buy some tools, a welding machine

and a grinder in South Africa. They also found a bag containing old clothes in the Ford. He testified that one must always anticipate a breakdown and the need to use old clothes to wear and to sleep in. He and his co-accused were arrested. He denied that he had conspired with any person to poach rhino. He testified that a person in his neighbourhood requested him to purchase an axe. Before they left East London on the day of their arrest, he purchased an axe.

[58] Accused 1 admitted that when he was arrested near Tarkastad on 16 August 2017, he used the name Moses Ngoveni and that he was using a Mozambican passport. His explanation for having used that name was that in 2017 “I was living in Zimbabwe, but I was living in Mozambique. So I was using them in Mozambique”. At that stage he had not obtained a Zimbabwean identity document, only Mozambican documents. However, he subsequently abandoned the Mozambican documents when he decided to reside in Zimbabwe. Despite having been asked by his counsel why he used the name of Moses Ngoveni when he resided in Mozambique, he offered no discernable explanation.

[59] He testified that he was unable to dispute that his cellphone triggered the towers, as testified to by captain Viljoen. His explanation therefor was firstly, that he would lend his cellphone to one Patrick Khumbane, his business partner since before his arrest near Tarkastad, and he was unaware as to which places he would be visiting. The reason that he made his cellphone available to Mr Khumbane was that, when he was unable to attend to his many customers, Mr Khumbane could attend to them. Secondly, he explained that he travelled extensively around the Eastern Cape to deliver goods for fellow Zimbabweans. In some

instances, he did not know the name of the town or city through which he travelled or the area in a city or town that he visited. He testified that, because he did not know where the Shamwari, Kragga Kamma, Thorndale and Laurence de Lange Game Reserves and

Kleindoringberg Farm were, he was unable to give an explanation for the fact that his cellphone triggered the towers in those vicinities. He testified that, although his cellphone might have triggered the towers in the vicinities where rhinos were

previously killed, he denied that he was at any of those scenes.

[60] He confirmed captain Vos’s evidence regarding the items that were found at his home, namely old axes. He found those axes in his landlord’s building when he moved in. The only difference was that, according to him, the axes were not wrapped in plastic. He used the other plastic, that captain Vos testified about, to wrap items of furniture or food items in his transport business, to protect them against the elements.

[61] Accused 1 testified that he could not remember that he travelled with accused 5 on the same day from Humansdorp and Jeffrey’s Bay to Cradock. He and accused 5 never travelled together on business trips.

[62] He testified that he sometimes travelled with Mr Khumbane to Kirkwood where he owned a shack where they would be accommodated. He could not deny that during June 2018 his cellphone and the one he claimed belonged to Mr Khumbane triggered towers near Kirkwood and Theescoombe at Gqeberha. That was about the time when, on the state's case, a rhino was killed near Kirkwood and on 28 June 2018 another rhino was killed at Kragga Kamma. Those cellphones triggered towers as they moved back to Kirkwood. His evidence was that he and Mr Khumbane travelled to Gqeberha on many occasions. They would travel from East London to Kirkwood before going to Gqeberha.

[63] Accused 2 testified that he arrived in the country from Zimbabwe in 2017. Prior to his arrest he lived in East London. He has known accused 1 for a long time as a friend and also a person with whom he had done business. He testified that about 4 or 5 days before their arrest, he went to a nearby bush to relieve himself. He saw something wrapped in black plastic.

Upon investigation he realised that it was a firearm. He concealed it in the bush for a few days.

[64] Three days before their arrest, accused 1 returned from Zimbabwe. On that same day accused 2 requested him to use the Ford. Accused 1 handed it over to him. During the night before their arrest, he put the rifle, silencer and ammunition that he had picked up in the bush, in the tailgate of the Ford, hoping to use accused 1's passport to report the discovery of those items to the police. He had not told accused 1 or the police about his discovery before their arrest.

[65] On 31 July 2018 he received a call from accused 1 who requested him to return his Ford because he had been required to tow another vehicle with it. Despite the records of the cellphones that he and accused 1 used when they communicated, showing that the first call was made by him to accused 2 at about 10h00 and that he was at Beacon Bay and China Town, he insisted that he was at his workplace at Chalumna, that he moved to China Town after he had received a call from accused 1 between 08h00 and 08h30 that day. He returned to accused 1 and handed the Ford to him. When he wanted to return to his workplace, accused 1 told

him that he must accompany him to assist the driver of the other vehicle. The two of them then set off to tow the other vehicle.

[66] He knew all the occupants of the Isuzu from the township in which they all reside. As they were towing the Isuzu, they were stopped by the police who searched them and the vehicles. They discovered the rifle and other items. The police found a Mobicel cellphone and about R200.00 in his possession. He claimed that the cellphone that was found in possession of accused 5 was also his cellphone. The explanation therefor, we were warned by accused 2, was a long one. He testified that he was with his wife before she travelled from East London to Zimbabwe in accused 1's vehicle driven by Mr Khumbane. He told Mr Khumbane that he wanted to buy a cellphone so that he could give his old cellphone to his wife to enable him to communicate with her while she was in Zimbabwe. Mr Khumbane told him that there was

no need to buy a new cellphone because he could use his (Mr Khumbane's) cellphone. He could then assist Mr Khumbane's customers if they called him while he was in Zimbabwe. Having handed his cellphone with the number ending 8365 to him, Mr Khumbane then left for Zimbabwe with his wife. When he was near his home, he saw people loading items in accused 5's vehicle. He assisted them.

When he arrived inside his house, he realised that he had misplaced the cellphone that Mr Khumbane had handed to him. He saw that cellphone thereafter for the first time when accused 5 used it at the place where they were arrested. He had no idea how the misplaced cellphone landed up in accused 5's possession. He testified that accused 5 had told him that he had left the cellphone in the Ford.

- [67] Accused 2 was unable to dispute that accused 1's cellphone number ending 1227 was saved on that cellphone under the name of Moses, that accused 4's cellphone number ending 5601 was saved under his first name of Simba and that his cellphone number ending 3282 was saved on that cellphone under his first name of Trymore. He initially testified that the only cellphone number that he gave to Mr Khumbane was the one ending 7909, but later changed to also include the one ending 3282.
- [68] He was unable to dispute that the rifle that was found in the tailgate of the Ford was ballistically linked to the killing of rhinos at Kragga Kamma and Shamwari. He testified that the rifle was in his possession since he found it in the bush until their arrest. He denied that he was involved in rhino poaching at Kleindoringberg during September 2017, Lourens de Lange between 23 and 25 December 2017, Kleindoringberg between 24 and 25 February 2018 or Thorndale between 6 and 10 June 2018.
- [69] He denied that he ever used a cellphone with either number [...] or [...], despite having made an admission in terms of section 220 of the Criminal Procedure Act that he had been using cellphones with those numbers since 2016.
- [70] He testified that when they arrived in Cradock before their arrest near Tarkastad, accused 5, who was the driver, dropped them off to buy food and said that he was going to meet someone. He returned a while later, picked them up whereafter they drove to a park outside Cradock. Although they were sitting round a table to have their food, he did not see accused 1 picking up the firearm.
- [71] His explanation for the cellphone number ending 6681 triggering the tower near Kleindoringberg on 16 August 2017 was because he had left that cellphone in the vehicle when accused 5 went to meet a person. The cellphones of the other occupants of that vehicle, excluding the one in accused 5's possession, also triggered that tower.

[72] He confirmed that, when he was arrested near Tarkastad, he gave the name of Trust Mlambo. He explained that Mlambo was his maternal surname, Trymore being his correct name and Chauke being his paternal surname. He furthermore explained that the reason that he did not inform the police of his other name and surname was because the police used Afrikaans when they spoke to

him, a language that he did not understand.

[73] He was unable to dispute captain Viljoen's evidence that, when he visited Gqeberha, he used the cellphone ending with number

3282. He said that he was with Mr Khumbane, but he denied having been near Kragga Kamma, although he had no idea where it was. He was furthermore unable to dispute that his cellphone triggered a tower at Kragga Kamma. He went to Gqeberha with Mr Khumbane on many occasions. Not once did accused 1 accompany them. He denied that he ever spent four days in Gqeberha with Mr Khumbane, albeit that the records of the cellphone ending with number 3282 and the one ending 8365 (and allegedly in the possession of Mr Khumbane) triggered a tower at Kragga Kamma between 25 and 28 June 2018. He denied that he ever travelled with Mr Khumbane to meet accused 1 in Gqeberha.

[74] Accused 2 did not dispute that, at the end of June 2018 after his return from Gqeberha, the SIM card of his handset was changed to a number ending 4124. However, he denied that he used a Samsung cellphone, despite the records showing that it was a Samsung cellphone.

[75] Accused 3 testified that he illegally arrived in the country from Zimbabwe a few months before his arrest. Upon his arrival in East London he resided with a person called Darkie, such accommodation having been arranged by accused 5, his brother-in-law. He did piece jobs in the construction industry. He knew accused 1, who he had met soon after his arrival in East London. Accused 1 had earlier transported his corrugated iron sheets to Zimbabwe. The next time he saw him was when he arrived in the Ford when they were stranded along the road. Darkie introduced him to accused 2 who thereafter invited him from time to time to do piece jobs with him. He and accused 4 saw each other in the street in which they lived. He asked accused 4 to bear him in mind if he managed to secure jobs. They thereafter did a few piece jobs together. He saw accused 5

when he visited his sister. He also did piece jobs with accused 6, who used to visit him at home.

[76] As at 31 July 2018 he resided alone in the house which his sister shared with accused 5, the latter having returned from Zimbabwe on that day. About three days before then, accused 4 had told him of a construction job in Valencia and invited him to accompany him. He in turn told accused 6 about the job. A day before they left for Valencia, he and accused 4 had agreed to hike to Valencia the following morning. He learnt that accused 5 was going to Gqeberha and asked him for a lift to Valencia. He agreed. The following morning, he contacted accused 4 and told him about accused 5. Later that morning he, accused 4 and 5 went in the Isuzu to collect accused 6 from his home. They went to China Mall where accused 5, who

was the driver, went into a shop and returned shortly thereafter. He did not see what he bought. The four of them then set off for Valencia in the Isuzu. He had a small bag containing work clothes, consisting of a pair of black trousers and a matching shirt. He also took along a trowel, a pickaxe and a shovel to build a shack. He did not take food, eating utensils or bedding along. Under cross-examination he testified that he forgot to give instructions to his counsel about those items, hence the absence of questions in that regard when the state witnesses testified.

- [77] Only accused 4 knew where Valencia was. On their way to Valencia, the Isuzu broke down. Eventually they were assisted by accused 1 who arrived in the Ford accompanied by accused 2. He and accused 4 moved to the Ford before it towed the Isuzu in the direction of Makhanda. After the police had pulled them over, they found a knife, a Mobicell cellphone and the small bag in his possession. He did not see the rifle or any other item that the state witnesses testified about which were removed from the vehicles.
- [78] A few days after their arrest the police took him to his sister's house where they found 3 cellphones and many other things. Those cellphones belonged to Darkie, who had requested him to take them in for repairs. He distanced himself from what was put to captain Vos, namely that Darkie had given those cellphones to him.
- [79] He testified that he has never been to Alicedale, Kragga Kamma, Kirkwood or Tarkastad. He did not know a person by the name of Trust Mlambo, only a Trymore.
- [80] Accused 4 testified that he learnt of a job in Valencia which required to be done by him and two other persons. About three days before their arrest, he and accused 3 discussed the trip to Valencia and that it would take about two months to complete the job. He told accused 3 on the day before their departure that they would be leaving the following day. He told him that they would be accommodated in a house and be provided with food and tools by the person providing the job. It was not for the first time that he worked for that person.
- [81] On the following morning accused 3 called him while he was still at home to inform him that he found someone who was going to Gqeberha, that that person was willing to give them a lift and that he should contribute R100.00 towards fuel.
- [82] Accused 5 testified that he has been in the country since 2016. He knew accused 1, 2, 3 and 6 before their arrest but met accused 4 for the first time on that day. He left for Zimbabwe on 9 June 2018. After his arrival in Zimbabwe a person by the name of Thomas arrived with the Isuzu in Zimbabwe. Thomas made a report to him about a cellphone. Since Thomas was not called as a witness to confirm what he had allegedly said to accused 3, the content of the report is hearsay evidence and

accordingly inadmissible. Thomas handed a cellphone to him. Thomas drove the Isuzu until he reached Pretoria from where accused 5 testified he took over. He arrived in East London on the evening of 29 July 2018. He could not enter his one-roomed dwelling because accused 3 was fast asleep inside. The landlord arranged for him to sleep in a different dwelling on the same premises.

[83] Accused 3 borrowed his cellphone when he saw him the following morning. Having handed his cellphone to accused 3, he then went to the carwash to have the Isuzu washed. At the carwash he discovered two cellphones in the cubbyhole of the Isuzu, one of them being a Samsung. He put those cellphones in his pocket before the Isuzu was washed. He also tried to hand

the cellphone that Thomas had handed to him to the owner thereof, but could not find him. He used that cellphone to call a person in Gqeberha and also to call accused 1 when the Isuzu broke down. Accused 3 also used that cellphone while they were travelling in the direction of Makhanda on the day of their arrest. He could not tell how many calls accused 3 made on that cellphone and to whom.

[84] He testified that he and accused 3 discussed the trip to Valencia for the first time that morning. Accused 3 told him of the job in Valencia and he said that he was on his way to Gqeberha to collect a sick person. Accused 3 asked for a lift and he agreed. Before he left East London he first went to China Town to buy an axe. His explanation for purchasing the axe before he left for Gqeberha was that his father had asked him to purchase an axe to be used in Zimbabwe. He feared that it might be too late to purchase it on his return with the sick person. He denied that he was with accused 1 when he purchased the axe at China Town. Accused 3, 4 and 6 were in the Isuzu with him when they travelled in the direction of Gqeberha.

When they were searched, the police found about R3 000.00 on him and took it. He knew nothing about the firearm that was found in the tailgate of the Ford. They also found three cellphones on him, the one that Thomas had handed to him and the other two that he had earlier found in the cubbyhole. He testified that he had no knowledge of a cellphone with the number 073 807 6681 and that he did not have a cellphone of his own. The last cellphone that he owned was the one that the police took when he was arrested near Tarkastad.

[85] Accused 5 denied that he made calls when he was at Cambridge and China Town or that he called accused 1 twice at about 09h00 on that day or that that cellphone was still in East London until 12h00. He later testified that he was unable to dispute the times when those calls were made, but testified that they may have been made by accused 3.

[86] He confirmed that, when the police searched his home, they found some plastic bags, an electronic scale and the three cellphones that accused 3 claimed belonged to him. His explanation for his possession of the scale was that he purchased it for the shop that he was operating in Zimbabwe.

[87] He furthermore confirmed that he also used the name of Johannes, but that he has never been to Shamwari. He was unable to explain why the registration number of the Isuzu was entered into the gate register at Shamwari on 24 June 2018 and why the driver indicated that his name was Johannes. What he knew was that he was at home on that day and that someone else might have used the Isuzu. He testified that the furthest point that he had travelled from East London was where they were arrested on 31

July 2018. He has accordingly never been to Gqeberha, Jeffrey's Bay or Kirkwood. He has been to Cradock on the day when they were arrested near Tarkastad. He has also driven past Queenstown and had no idea where the Lourens de Lange Game Reserve was.

[88] When he and accused 1, 3 and 6 were arrested near Tarkastad, he informed the police that he was Johannes Muya, which, according to him, was also his name and the correct spelling of his surname. However, the police recorded his surname as Mlambo. He testified that on occasion he also uses the name Sithole. His family know him as Johnny Sithole. He knows accused 1 as Johannes, not his surname.

[89] He testified that when they were arrested near Tarkastad, he was on his way to the North West while the other accused said that they were going to Johannesburg. He went via Cradock because he had to drop tools in Cradock. That is what he did in Cradock.

[90] He denied that he was on the road between Cradock and Middelburg on that day. He was accordingly unable to explain why the cellphones which were in his and the occupants' possession triggered the tower at Kleindoringberg, other than to testify that when he met the person who was meant to give him petrol money, that person only had a voucher. He then handed the vehicle to that person to drop off the tools while he went to the bank to exchange the voucher for cash. During his later evidence he testified that he left his cellphone in the vehicle when the other person went to drop off the tools. He had no idea where that person went.

[91] He testified that he used a cellphone with the number [...] until it was taken by the police when he was arrested near Tarkastad. He had no idea why accused 1 said in his warning statement to the police that he was in possession of that cellphone. He denied that he told the police that the cellphone with the number ending 6681 belonged to him. Accused 1 did not know his cellphone number and he did not know accused 1's cellphone number.

[92] He was surprised to learn that the cellphones ending 6681 and 3258 were active at Jeffrey's Bay on 13 July 2017 because, according to him, those cellphones were in his and his wife's possession at that time.

[93] Accused 6 testified that he arrived in the country in 1996 or 1997. Before their arrest, he knew only accused 2, 3 and 4 although he used to see accused 1 and 5 in the neighbourhood. He later testified that he had dealings with accused 1 before their arrest, because he had previously transported his wardrobe to Johannesburg and he was arrested with him near Tarkastad. About 2 or 3 days before their arrest accused 3 told him of the job in Valencia.

They had arranged to hike to Valencia. Accused 3 told him on the morning of the trip that he had managed to arrange a lift. He was later picked up from home. Accused 5 was the driver of the Isuzu. On the way to Valencia the police stopped them. The police found his cellphone and a bag containing two pairs of trousers, a fish line, a knife and his toiletries in his possession.

- [94] He testified that he was on his way to Johannesburg when he and others were arrested near Tarkastad. Accused 2 had told him of a vehicle that was going to Johannesburg because he knew that he wanted to go to Johannesburg. He had no dealings with either accused 1 or 5 in respect of the trip to Johannesburg. When they arrived in Cradock, accused 5 dropped them off at a supermarket and drove off. He, accused 1 and 3 bought food and waited for accused 5. After he had picked them up, they drove to a park outside Cradock where they had a meal. He did not see the firearm being picked up or placed in the vehicle.

He also did not see it inside the vehicle as they were travelling towards Tarkastad after the meal. Near Tarkastad the police

confiscated his cellphone which was never returned to him. He thereafter purchased a second-hand cellphone which was in his

possession on 31 July 2018. Its number, ending with 4901, was the same as the one that he used when he was arrested near Tarkastad.

- [95] On the day of their arrest outside Makhanda, he called accused 3 from his cellphone before they picked him up. He called accused 3 on the same cellphone number that he used when he told him that he had managed to arrange a lift. That was his evidence despite the fact that the cellphone records did not reveal a call from his cellphone to that number. Instead, those records showed that on that day he telephoned accused 1 five times between 07h00 and approximately 16h00 and accused 1 called him at 11h15. That concluded the evidence of the accused.

- [96] It is against the background of the above evidence that Mr Coetzee submitted that the accused should be convicted, whereas Mr Mqeke, attorney for accused 1 and 2, and Mr Stamper, counsel for the remaining accused, submitted that they should be acquitted because, so the submission went, the state failed to prove its case against the accused in respect of any of the counts, save for accused 2 who should be convicted on counts 3 and 4, Mr Mqeke submitted. At the conclusion of the hearing, Mr Coetzee conceded that the accused could not be convicted on both counts 1 and 2 because that would amount to a duplication of convictions. In my view, that concession was correctly made. Regard being had to the nature of the charges against the accused on counts 1 and 2 and the evidence that was adduced to prove them, it is clear that the same evidence required to prove the charge on count 1 is required to prove the charge on count 2. Mr Coetzee accordingly did not persist with count 1 but submitted that the evidence justifies a finding that the state proved its case beyond reasonable doubt on counts 2, 3 and 4.

- [97] The evidence of captains Vos and Viljoen was not seriously challenged. Captain Viljoen, in addition to giving evidence about his involvement in the investigations of rhino poaching since 2016 basically testified about the records of the various cellphones. That evidence was effectively admitted, save in respect of accused 5.
- [98] The evidence includes the admissions that the accused made at the commencement of the trial. Once the accused made those admissions they relieved the state of the duty to prove those facts. Of relevance for present purposes are the admissions that the rifle that was found in the tailgate of the Ford had fired the bullets that were recovered from the carcasses of one rhino at Kragga Kamma and two rhinos at Shamwari and, save for accused 5, that the cellphone numbers set out on a list, which had been handed into court as evidence, had been used by them between 2016 and when they were arrested on 31 July 2018. That list showed that during that period the following accused were in possession of the cellphones with the following numbers:
- 98.1. Accused 1: [...] and [...];
- 98.2. Accused 2: [...] and [...];
- 98.3. Accused 3: [...];
- 98.4. Accused 4: [...] and [...]; and
- 98.5. Accused 6: [...].
- [99] It was admitted by the accused that data contained in those cellphones was lawfully obtained from the various cellphone providers and that such data was correctly captured on compact discs which were made available to the court and the accused through their legal representatives. Both policemen made a favourable impression as witnesses.
- [100] The evidence as to what happened at the scene of the accuseds' arrest is largely undisputed. That evidence was that, as the Ford was towing the Isuzu, the police stopped them, searched the two vehicle and their occupants, discovered the items that captains Vos and Viljoen testified about, inclusive of a dismantled rifle, a silencer fitting that rifle and 9 live rounds of .375 ammunition hidden in the tailgate of the Ford. The search also produced a roll of black plastic refuse bags, two brand new axes, knives, extra clothing and shoes in three backpacks and eleven cellphones. The evidence relating to the search of the homes of the accused which was conducted by captain Vos was also largely undisputed. That search produced an electronic scale, side cutters, hacksaws, two more axes, black plastic refuse bags and cellotape similar to those wrapped around the concealed rifle. Captain Vos testified that his attention was drawn to the above items because they are classical tools of the trade in the poaching of rhinos. His evidence in that regard was corroborated by captain Viljoen.

[101] In addition to the above evidence, the state relied on similar fact evidence in respect of the events leading up to the arrest of some of them near Tarkastad, activity around the cellphones in the possession of the accused or linked to them at the occasions when other rhinos were killed and the ballistic evidence linking the rifle to previous rhino killings. The general rule is that similar fact evidence is inadmissible because it is inherently prejudicial. It will be admissible only if it is both logically and legally relevant and whether, when looked at in its totality, such evidence has sufficient probative value to outweigh its prejudicial effect. It is a matter of degree in each case.[6]

[102] Mr Coetzee submitted that the similar fact evidence that the state adduced should be admitted because firstly, it is both logically and legally relevant to the allegations that the accused committed the offences with which they have been charged; and secondly, the admission of that evidence outweighs the prejudicial effect on the accused. Mr Mqeke did not make any submission on the

admissibility of the similar fact evidence. Mr Stamper submitted that, as similar fact evidence constitutes, as a rule, a form of circumstantial evidence, the rules relating to inferential reasoning should apply. That submission contains a concession

that the similar fact evidence should be admitted, but such concession does not mean that the state proved its case beyond reasonable doubt. Mr Stamper submitted that, even after the admission of the similar fact evidence, the state failed to show that the inference sought to be drawn is consistent with all the proved facts and that those proved facts exclude every reasonable inference

save the one sought to be drawn.[7] In this regard, Mr Stamper submitted that, even after the admission of the similar fact evidence, it cannot be said that, the only inference to be drawn on the facts as to what transpired on 31 July 2018, is that on that day the accused had conspired amongst themselves and other persons to kill a rhino to steal its horn.

[103] In my view, if regard is had to the totality of the evidence, the similar fact evidence is relevant to the allegation that prior to their arrest on 31 July 2018, the accused had conspired to kill a rhino with the intention of stealing its horn, thereby depriving the owner thereof of such rhino and horn. The admission of such evidence far outweighs the prejudicial effect on the accused. An analysis of all the evidence justifies the admission of the similar fact evidence.

[104] As pointed out earlier, the evidence relevant to the cellphone records of the accused was largely undisputed. Accused 1 was unable to explain why his cellphone triggered towers near Queenstown on 24 and 25 December 2017, Kleindoringberg between 24 and 25 February 2018, Thorndale between 6 and 10 June 2018, Kragga Kamma between 28 and 29 June 2018 and Shamwari between 1 and 3 July 2018 at a time when rhinos were killed at those places. His evidence that his cellphone was possibly with Mr Khumbane did not assist him because it was pointed out that his cellphone and the one allegedly used by Mr Khumbane were not together, but the users thereof used those cellphones to communicate

with each other.

[105] He testified that when accused 5 called him before their arrest on 31 July 2018, it was for the first time that accused 5 used Mr Khumbane's cellphone to call him. His evidence was that he had not received a call from that cellphone since 7 July 2018 when he was on his way to Zimbabwe until the day of their arrest, although it was pointed out to him that the records show that he received calls from that cellphone on 29 and 30 July 2018.

[106] Accused 1 was unable to dispute that, according to his cellphone records, he was in Gauteng on 4 and 5 July 2018 and back in East London on 5 July 2018. He testified that before he left for Zimbabwe on 7 July 2018, he handed his cellphone to Mr Khumbane, who returned it to him on 15 July 2018 in Zimbabwe. He did not travel with Mr Khumbane to Zimbabwe. He has never travelled with accused 5 to Zimbabwe. He was also unable to dispute that the records of his cellphone as well as the one that he claimed belonged to Mr Khumbane (which was in the possession of accused 5 on the day of their arrest), showed that accused 5 was near Peddie at 12h53 while he was on the N6 between East London and Queenstown. He insisted that he received the first call from accused 5 at approximately 08h00 to assist with the Isuzu. He testified that he was in East London at the time. He contacted accused 2 and requested him to return the Ford. However, he was unable to dispute that the cellphone records showed that the first call between them on that day was one that was made by accused 2 who contacted him from a cellphone number ending 7909 at approximately 10h18 and that the first time that he called accused 2 was at approximately 12h38 when he (accused

1) was on the N6 between East London and Queenstown.

[107] He testified that he purchased only one axe at China Town in East London that morning. His cellphone records show that he was at China Town at 09h37 on that day. He was unable to explain why the records of the cellphone that was linked to accused 5 showed that accused 5 was also at China Town at 09h23 on that same day, while his evidence was that accused 5 had earlier called to report that the Isuzu had a breakdown. He denied that he and accused 5 were at China Town at the same time that morning.

[108] He testified that Mr Khumbane had his own cellphone with the number ending 8365. Mr Khumbane informed him, when both of them were in Zimbabwe on 15 June 2018, that he had left his cellphone with accused 2. According to him, when Mr Khumbane was in Zimbabwe, he used another cellphone which he saved on his cellphone, with the number ending 1227, under the name Patrick. He was unable to dispute that his cellphone did not show a number that was saved under the name of Patrick. It was pointed out to him that there were two names saved on his cellphone under the initial P, one as Pedrito and the other as Patra. He denied that any one of those was Mr Khumbane's number. He confirmed having saved the cellphone numbers of his co-accused as contacts on his cellphone. He explained that, because he is not a learned person, he wrote the names of his

contacts on his cellphone in a way that only he would be able to understand. When it was put to him that the cellphone number ending

8365 was saved on his cellphone under the name of Niamo, he was adamant that he did not misspell the name of either Mr Khumbane or accused 5. His evidence (whether he accepted or denied that the cellphone that he said belonged to Mr Khumbane was found in the pocket of accused 5 when he was arrested on 31 July 2018), was unclear. At one stage he accepted that it was found in accused 5's pocket, but he later denied that the cellphone was found in accused 5's pocket. In this regard it is pointed out that it was put to captain Viljoen, on behalf of accused 2, that the cellphone belonged to accused 2 but that accused 2 handed the cellphone to accused 5 when they were in the vehicle on their way to Gqeberha shortly before they were arrested.

[109] Regarding his arrest in Tarkastad in 2017, accused 1 initially testified that he had borrowed accused 5's vehicle from him to go to Pretoria because Mr Khumbane was using the vehicle, a yellow Nissan, belonging to their business. He later testified that accused 5 informed him on the previous day that he was going to Gauteng on the following day. He then decided to join

accused 5. He travelled with accused 2, 5 and 6 from East London. He had no idea what they were going to do in Gauteng.

Accused 5, who was the driver, told him that they had to go via Cradock where he had to collect money for petrol. As I understood his evidence, they did not travel through the town of Cradock before they travelled in the direction of Tarkastad.

[110] He confirmed that each one of them was in possession of a cellphone that was confiscated by the police when they were arrested near Tarkastad. He was unable to give an explanation why the cellphones which were confiscated from them on that day triggered the tower at Kleindoringberg shortly before their arrest on that day.

[111] He was initially unable to dispute that his cellphone number at the time ended with 3258 and that the police recorded that number under his personal particulars when he was arrested near Tarkastad. When he realised that that cellphone was one of the cellphones that triggered the tower at Kleindoringberg, he sought to distance himself from that cellphone and testified that the cellphone in his possession ended with the number 79. He could not remember the full number. That cellphone was not returned to him nor did he use that cellphone number after his release. He used only the cellphone number ending with 1227 after his release up to his arrest on 31 July 2018. He did not have a backup cellphone. When he lent his cellphone to Mr Khumbane, he used his wife's cellphone. He testified that he did not save Mr Khumbane's cellphone number on his cellphone under his name because he did not know how to spell it.

[112] The arrangement that he had with Mr Khumbane regarding the use of his cellphone is so improbable that his evidence in that regard must be rejected as false. He was unable to explain why Mr Khumbane had to have his cellphone number ending 1227 and his (Mr

Khumbane's) own cellphone ending with number 8365, in his possession when either one of them went away. It is difficult to understand why, when he was away on business, his customers could not call him on his cellphone number ending 1227 whereafter he could contact Mr Khumbane to assist those customers. It is furthermore difficult to understand why he could not simply

give Mr Khumbane's cellphone number ending 8365 to his customers while he was away and Mr Khumbane at the business.

Similarly, it is difficult to understand why Mr Khumbane could not simply give accused 1's cellphone number to his (Mr

Khumbane's) customers while he was away and accused 1 at the business.

[113] The undisputed evidence is that the four of them were arrested near Tarkastad because the police found an unlicensed firearm in the vehicle. His evidence was that after he had picked up the bag containing the rifle, he decided to hand it to the police in Pretoria. It was only three months after their arrest that he decided to plead guilty to the unlawful possession of that firearm and ammunition.

[114] Accused 2 denied that he was at any of the scenes when rhinos were killed. Despite the fact that, at the commencement of the proceedings, he admitted in terms of section 220 of the Criminal Procedure Act that he used cellphones which ended with the numbers 3282 and 7909, during his evidence he testified that he knew only of a cellphone number ending with 81. He testified

that that was the cellphone which was found on him upon his arrest on 31 July 2018.

[115] He testified that he misplaced the cellphone that Mr Khumbane made available to him, only for that cellphone to resurface in accused 5's possession on the day of their arrest. Despite accused 2 seeing that cellphone in accused 5's possession after some time, he did not approach accused 5 to enquire how the cellphone landed up with him or reclaim it. In my view, the versions of accused 1 and 2 regarding the alleged existence of Mr Khumbane is so improbable that it cannot be reasonably possibly true. It is no coincidence that the number ending 8365 was saved on accused 1's cellphone under the name of Njamo, close to accused 5's first name of Nhamo, and not under the name of Patrick or Khumbane. Accused 2's version of how Mr Khumbane made that cellphone available to him, how he misplaced it and how it resurfaced in the possession of accused 5

on the day of their arrest, only had to be heard to be rejected as false. The probabilities are that Mr Khumbane's existence was a fabrication, the aim being to protect accused 5 and the use by him of that cellphone. A reading of the evidence of accused 1 and 2 demonstrates beyond doubt the attempt by them to protect accused 5. Accused 2 testified that when he was arrested at Cradock, the police found in his possession a cellphone ending with number 6681. That is despite the fact that his warning statement showed that he gave the number ending 8415 as his cellphone number and despite the fact that accused 5 gave a cellphone ending with number 6681 to the

police a few minutes before accused 2 gave the number ending 8415 as his. The probabilities indicate that the Mr Khumbane that they referred to was in fact accused 5.

[116] The version of accused 3 and 4 that they were on their way to Valencia for employment purposes is improbable. Accused 3 testified that he did not know where Gqeberha and Valencia were and accused 4 testified that he did not know where Gqeberha was. Yet, when accused 5 said that he was going to Gqeberha, they decided to take a lift with him. Accused 4 was so hooked on the Valencia story that he testified that, after the Isuzu had broken down, accused 5 told him that they were going to be dropped off in Makhanda so that they could hike to Valencia while the Isuzu was being repaired.

[117] Accused 3 testified that he took tools with him that he was going to use in Valencia. He was also going to look for corrugated iron sheets to build a shack in which they would be accommodated. The police did not testify that they found a trowel, a pickaxe and a shovel in the Isuzu or Ford, neither was it put to them that that was going to be accused 3's evidence. Accused 4 testified that he also did not see those tools and that he told accused 3 that the person who provided the job would arrange for

accommodation and the tools to do the job.

[118] Accused 5 testified that he told the occupants of the vehicle that he would first go to Cradock to drop off some tools before heading to North West. That was the only reason that he went via Cradock. He later altered his evidence to include the collection of petrol money as a reason for going via Cradock, after that version was put to him. He testified that he did not tell the others in the vehicle about the petrol money. He was unable to explain why accused 1 knew about the petrol money if he did not tell him about it.

[119] Accused 5 testified that after the Tarkastad arrest, he did not have a cellphone until they were arrested on 31 July 2018. Yet, on the morning after his return from Zimbabwe on 29 July 2018, accused 3 borrowed his cellphone and he obliged. He was unable to explain how accused 3 knew that he had a cellphone.

[120] There is a striking similarity between the evidence of accused 1 relating to the alleged discovery of the rifle in the park outside Cradock and the evidence of accused 2 relating to the discovery of the rifle in the bush near his home. Once again, on his version, he was the only one who knew about the rifle before it was discovered by the police in the tailgate of the Ford.

If one must accept the evidence of accused 1 and 2 relevant to the rifles for which they accepted liability, one must also accept that they caused those who were arrested with them to be incarcerated for a long time knowing that they were innocent in so far as the possession of those rifles was concerned, yet, it was only in court that they accepted liability. That is so improbable that it must be rejected as false.

[121] When the rifle was found, it was wrapped in plastic with cellotape around it. The same plastic and cellotape were found at accused 1's home. It will be remembered that accused 2 claimed that he found the rifle in a nearby bush, concealed it in that same bush and then in the Ford the night before their arrest. It is highly improbable that the rifle was allegedly found in similar circumstances as the rifle which accused 1 found in a park outside Cradock and that, if it was discovered as accused 2 testified, yet its innocent discovery was not reported to the police. Accused 2's explanation for having concealed

the rifle in the Ford the night before their arrest was that he did not have an opportunity to ask accused 1 to accompany him to a police station, because he was in the country illegally. That explanation is so improbable that it cannot be reasonably possibly true. He could not explain how the presence of accused 1 was going to assist him to explain his illegal stay in the country to the police. Furthermore, that the same plastic and cellotape in which the rifle was wrapped were found at accused 1's home, demonstrates the complicity of at least accused 1 and 2 in that regard.

[122] It was put to captain Viljoen that accused 3 to 6 would testify that they told him that they were on their way to work in Valencia. However, they testified that they did not speak to captain Viljoen because they did not understand what he said to them because he used Afrikaans when he addressed them.

[123] None of the accused impressed as witnesses. They were warned on more one occasion not to give long and irrelevant answers to fairly straightforward questions. They were argumentative and had no hesitation to change their evidence as and when they pleased. The record speaks for itself in that regard. I have dealt with evidence of all the accused in detail to demonstrate that their respective versions were so improbable that they must be rejected as false. Their evidence was adduced with the sole purpose of creating the impression that accused 3, 4 and 6 were on their way to work at Valencia, having been given a lift by accused 5 who was on his way to Gqeberha and that accused 1 and 2 went to assist them after the Isuzu had broken down. The cellphone records linked to the cellphones

found in the possession of the accused did not support their versions. In addition, there was a deliberate attempt by the

other accused to distance themselves from the cellphone which was linked to accused 5, who seemed to have been one of the ringleaders

of their mission. The cellphone records of the accused on that day, as well as the cellphone records of accused 1, 2, 5 and 6 in respect of the days when rhinos had previously been killed, demonstrate that, had it not been for the intervention of the police on 31 July 2018, the accused, after having unlawfully conspired to do so, were on their way to kill a rhino with the intention of stealing its horn. In the circumstances, I am satisfied that the state proved its case against the accused on count 2 beyond reasonable doubt. They should accordingly be convicted on count 2.

[124] Can it be said that the state proved that, in addition to accused 2, the other accused also unlawfully possessed the rifle and ammunition

referred to in counts 3 and 4? The evidence in that regard is that the very same rifle had fired bullets recovered from the rhino carcasses at Kragga Kamma and Shamwari, it was discovered in the tailgate of the Ford together with other tools of the rhino poaching trade, as alluded to earlier. Accused 2's version of having picked up the rifle in a bush and his explanation for being in possession thereof until they were arrested, is rejected as false. The accused could not have gone to kill a rhino without a large game hunting rifle. All the accused must have known that, without such a rifle, their plan to kill a rhino would not be executed. It is found that they were all aware of the existence of the rifle. A successful kill required not only such a rifle; but also ammunition which could be fired from it. That was the situation in this case. In my view, and on the acceptance of all the evidence which has not been rejected, the only inference to be drawn from those facts is that each of the accused had the requisite mens rea concerning the unlawful outcome of their mission at the time the offence was committed. In other words, they intended the

unlawful killing of a rhino and with the intention of stealing its horn or they foresaw the possibility of the criminal conduct ensuing and each one nonetheless actively associated himself reckless as to whether the result was to ensue.[8] In other words, one accused is by association held liable for the criminal conduct of another. Such liability arises by operation of law. I am satisfied that the state established beyond reasonable doubt that the accused had the intention to exercise possession of the rifle and ammunition through the actual holder thereof, namely accused 2, on his own admission, and that he had the intention to hold the rifle and ammunition on behalf of the other accused. It means that each of the other accused is held to have intended to exercise possession of the rifle and ammunition through accused 2 and that he intended to hold the rifle and ammunition on behalf of the others.[9] Since the state proved beyond reasonable doubt that all the accused were in unlawful possession of the rifle and ammunition, each of them must be convicted on counts 3 and 4.

[125] In the result, it is ordered:

125.1. that each accused is found not guilty on count 1 and discharged;

125.2. each of the accused is found guilty on:

125.2.1. count 2, in that he conspired to commit theft of a rhinoceros horn.

125.2.2. count 3, in that he unlawfully possessed a .375 calibre hunting rifle, in contravention of section 3 of the Firearms Control Act, 60 of 2000.

125.2.3. count 4, in that he unlawfully possessed 9 rounds of .375 calibre ammunition, in contravention of section 90 of the Firearms Control Act, 60 of 2000.

G H BLOEM

Judge of the High Court

For the state:

Mr J C Coetzee of the office of the Director of Public Prosecutions, Makhandla.

For accused 1 and 2: Mr V Mqeke, instructed by Legal Aid South Africa.

For accused 3, 4, 5 and 6: Mr C Stamper, instructed by Legal Aid South Africa.

Date heard:

3, 4, 5, 6, 9, 10 and 11 March 2020, 20 and 21 May 2021 and 3, 4, 5 and 6 May 2022 and 14 July 2022.

Date of judgment:

30 September 2022.

[1] Riotous Assemblies Act, 1956 (Act 17 of 1956).

[2] National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004).

[3] Firearms Control Act, 2000 (Act 60 of 2000).

[4] Criminal Procedure Act, 1977 (Act 51 of 1977).

[5] Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

[6] *Savoi and others v National Director of Public Prosecutions and another* 2014

(1) SACR 545 (CC) at par 55 and *S v Ndlovu and others*

[2019] 2 All SA 773 (ECG) at paras 132 to 138.

[7] *Rex v Blom* 1939 188 AD at 202-203.

[8] *S v Thebus and another*

[2003] ZACC 12; 2003

(2) SACR 319 (CC) at par 49.

[9] *S v Makhubela and another* 2017

(2) SACR 665 (CC) at paras 46 and 47

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