IN THE HIGH COURT OF SWAZILAND

Crim. Appeal No. 56/97

In the matter between:

PHOYISA AMOS TSABEDZE APPELLANT

V

THE KING

CORAM: S.W. SAPIRE, A C J

J.M. MATSEBULA, J

JUDGMENT

(10/2/97)

The appellant was charged in the subordinate court for the District of Lubombo held at Simunye, on three counts citing contraventions of the Game Act.

The first count alleged that in contravention of Section 8(4) read with 8(5) he on the 23rd April 1996 and at or near Hlane Game Reserve hunted Royal Game to wit, a Steenbok without a valid permit or licence. To this count he pleaded guilty.

The second count alleges a contravention of Section 26(1) of the Game Act particulars of which are that on the same day as in count one and at the same place the appellant hunted one Impala without a licence. In the same sentence a further offence is alleged citing the possession trophies to wit three skins of Impalas and one skin of a Red Duiker. It is not proper or acceptable to present charges for different offences in one count, for it is embarassing, and open to exception on this ground. The appellant did not however so except to the charge but pleaded not guilty.

Count three cited a contravention of Section 11(1) and 11(8) of the arms and ammunition act particulars of which were the Appellant's possession of a single barrel shot gun in the Hlane Game reserve without the necessary licence or permit. To this the Appellant pleaded Guilty.



The prosecution led evidence of the commission of the offences. The Appellant and two companions were seen poaching in the Hlane Game reserve. The rangers were able to apprehend only the appellant who was in possession of the shot gun. The carcasses of a Steenbok and Impala were found having been dropped in the chase. The appellant's companions escaped. This evidence the Magistrate found to be sufficient to establish the commission of the offences alleged in counts one and three. He also found that in so far as count two cited the hunting of the Impala this too had been proved. The appellant was accordingly found guilty on all three counts.

George Mbatha, the Game Ranger who discovered the Appellant, in flagrante delicto also testified that after the Appellant had been arrested he was taken to his house. Here a search was conducted.

There and then he says three skins of Impala and one of a Red Duiker were found as well as a round of ammunition for a shot gun The skins appeared fresh to him. His evidence was confirmed and

corroborated by that of a colleague who was on patrol with him when the Appellant was discovered and arrested.

The appellant contested this aspect of the case and cross examined the rangers, putting to them that the trophies and ammunition had not been discovered in his possession but had been planted on him.

He also gave evidence to this effect. For reasons which I for one do not find convincing ,the Magistrate, believed the Appellant's account in preference to that of the two rangers. On count two he found the Appellant guilty, but only in so far as the hunting of the Impala was concerned. On appeal nothing was made of the confusion which was brought about by the combining of the two offences in one charge. As no prejudice or injustice has been caused I will confine myself to the observations which I have already made.

The Appeal is against both the convictions on counts one and two, and against the sentence on count three. The only point made attacking the convictions is, and I quote the wording of the amended Grounds of Appeal:

"The learned Magistrate erred in law in finding that the offence was committed in as much as there was no expert evidence to prove beyond all reasonable doubt that the animals in question were "indigenous to Swaziland" within the meaning of the word "animals" in the definition section of the 1991 amendment to the Game Act."

In submitting argument in support of this contention, Mr Maziya, who appeared for the Appellant, referred us to the judgement dated 31/3/93 in the unreported case of Antonio Manana v The King, (Criminal Case # 19/92 ). This case is not in point at all. It is certainly not authority for the proposition that in order to prove that the Steenbok alleged to be Royal Game in Count one and which is mentioned by name in the second schedule to the act, is in fact Royal Game, it is not necessary to prove by expert evidence, that the species is indigenous to Swaziland. The Steenbok is Royal Game because it appears on schedule 2. The case cited by counsel turned on the failure of the legislature to mention the Elephant in the second or third schedules to the Act as it then read.

It is true that Royal Game is defined as any animal which is named in the Second Schedule, "Animal' is in turn defined as "any vertebrate animal which is indigenous to Swaziland". The definition of animal has this serious defect in that it seeks to define in terms of what is to be defined. Simply it says an animal is an animal. What is decisive is that both the Steenbok and the Impala are specifically mentioned in the schedules in which they are classified as Royal game and Common Game respectively. Once their names appear on the schedule the creatures may not be hunted at all without a licence. The appeal against the convictions on counts one and two must



in my view fail.

There is more merit in the appeal against the sentence imposed by the magistrate on count three..

The Sentence of five years imprisonment in default of the payment of the fine of E5 000 is a minimum prescribed by statute. One must presume that in allowing the alternative of a fine the Magistrate must have had in mind that a first offender such as the Appellant should be given the opportunity of avoiding incarceration. He should therefore have brought it to the attention of the Appellant that the fine could have been paid in instalments. He should moreover have enquired into the ability of the Appellant to pay the fine. The unhappy inference may be drawn from the outcome of the present case is that the wealthier the accused who can pay the fine can avoid spending time in jail, while the poor man like the Appellant seems to be has on account of his poverty and inability to pay the fine to

undergo a long term of imprisonment. There cannot be one law for the rich and another for the poor.

Where as in this case, the firearm was used for poaching and the Appellant is to be punished for the illegal hunting ,the possession of the firearm is not as serious as it would have been if robbery or other violence against human beings had been the use to which it was put.. The Appellant has been in custody since 27th April last year and that has to be taken into account in reassessing the proper sentence to be imposed at this stage. Because the Magistrate has misdirected himself in the manner outlined in the previous paragraph it is open to us to set the sentence on count three aside and sentence the Appellant afresh.

The Appellant we have ascertained has no means and no income. He has dependants who have no doubt suffered from his imprisonment. He has practically served his sentences on Counts one and two. We will accordingly suspend E4 000 of the fine and four years of the imprisonment.

The sentence on count three is altered to:-

A Fine of E5 000 or in default of payment thereof five years imprisonment of which E4 000 or four years imprisonment is suspended for a period of three years, from today's date on condition that the Appellant is not here after convicted of an offence involving the unlawful possession of firearms or the use of firearms for the purpose of illegal hunting, committed during the period of suspension. The imprisonment is to date from the date of Appellant's arrest. It should be pointed out to the appellant that if there is any remaining portion of his sentence still to be served this can be commuted by paying a proportionate amount of a fine.

I AGREE

S.W. SAPIRE — J. M MATSEBULA

ACTING CHIEF JUSTICE — JUDGE OF THE HIGH COURT