

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 17/2018

In the matter between

THE KING

V

SIPHO FRANCE SCHOLES

Neutral citation: *The King v Siphon France Scholes (17/18) [2024] SZHC 42 [2024]*
(14th March 2024).

Coram : Tshabalala J.

Heard : 31/03/21, 07/04/21, 08/04/21, 16/04/21, 31/05/21,
23/08/23, 24/08/23, 12/09/23

Delivered : 14/03/24

Summary: The Accused was arrested and charged with suspected crimes of poaching a kudu in contravention of the Game Act 51/1953 as amended, Murder and unlawful possession of fire arms and ammunition, in contravention of the Arms and Ammunition Act 24/1964 as amended, as well as trespass in contravention of the said Game Act.

JUDGMENT

- [1] The Accused person Sipho France Scholes was initially charged together with one Bhekumusa Sibiya. They faced indictment comprising seven counts as depicted below. When the matter came before court for trial on the 30 March 2021, charges were withdrawn in respect of the 1st Accused Bhekumusa Sibiya.
- [2] Subsequently the Accused pleaded to the following seven charges:

Count 1

Murder of one Sibusiso Elijah Dlamini it being alleged that on or about the 19 November 2017, at or near Ndukuyamangedla farm in the Lubombo Region, the Accused "activity jointly and in furtherance of a common purpose with others who are at large did unlawfully and intentionally kill" the deceased. The Accused pleaded not guilty to the charge.

Count 2

The Accused plead not guilty to the offence of *Contravention of Section 8 (4) as read with subsection (5) of the Game Act No. 51/1953 as amended, it being alleged that on or about the 19 November 2017 at or near Ndukuyamangedla in the Lubombo the said Accused acting jointly in common purpose with others at large, unlawfully hunted and killed a Royal Game to wit a kudu.*

Count 3

The Accused pleaded guilty to this charge of *contravention of Section 11 (1) as read with Section 11 (8) (a) (i) of the Arms and Ammunition Act 24/1964 as amended, it being alleged that on the said date 19 November 2017, at Ndukuyamangedla, acting jointly for a common purpose with others at large, and not being a holder of a valid permit or licence to possess a fire arm he unlawfully had in his possession a shotgun 12 bore serial no. 07026417.*

Count 4

The Accused pleaded not guilty to the offence of *contravening Section 11 (1) read with Section 8 (a) (i) of the said Arms and Ammunition Act, wherein it is alleged that on the 19 November 2017 at Ndukuyamangedla, acting jointly for a common purpose with others at large, he unlawfully, not being a holder of a valid permit/licence to possess a firearm, had in his possession a shotgun 12 bore serial no. 04051468.*

Count 5

The Accused pleaded not guilty to the offence of *contravening Section 11 (1) read with Section 11 (8) (a) (a) of the Arms and Ammunition Act, in that on the 19 November 2017 at or near Ndukuyamangedla farm, he acting jointly in common purpose with others at large, and not being holder of a valid licence to possess a firearm, did unlawfully possess a shotgun 12 bore serial no. 93065.*

Count 6

The Accused pleaded guilty to this count, wherein it is alleged that he *contravened Section 8 (c) (i) of the said Arms and Ammunition Act of 1964 as amended in that on the 19 November 2017 at Ndukuyamangedla farm, he acting jointly for the common purpose with others at large, and not being a holder of a valid permit/licence to possess ammunition, he unlawfully had in his possession two (2) live rounds of ammunition.*

Count 7

The Accused pleaded not guilty to the offence of *contravening Section 21 (1) read with Section 26 (2) of the Game Act 51/1953 as amended, in that on the 19 November 2017 at Ndukuyamangedla, he, acting jointly for a common purpose with others at large, and without a valid permit/licence or written permission of owner, he unlawfully trespassed on the said farm in search or pursuit of game.*

[3] The Crown led evidence of seven witnesses. At the close of the Crown case an application was moved for the discharge of the Accused in terms of Section 174 (4) of the Criminal Procedure and Evidence Act / 1938 as amended. After submissions by both the Crown and the defence the court issued a detailed judgment dismissing the application and then called the Accused to make his defence on all the seven counts.

[4] The Accused gave evidence under oath as the sole witness in his defence. The Accused gave evidence that was in complete contrast to that of the Crown witnesses, on how he ended up in the hands of two Hlane game security guards at the scene of the shooting where the deceased was wounded, and game meat together with fire arms were found.

- [5] The Crown evidence on the alleged commission of the offences was given by PW1 Mkhambatsi Madonsela and PW2 Bhekimpi Masango, both game security from Hlane Game Reserve. The common thread through the two witnesses' testimony was that they were led to the scene by one gunshot sound that was followed by chopping sounds from Ndukuyamangedla farm. They were initially for Siphumlweni where they were assigned to carry out a patrol. On their way they heard the above mentioned sounds and then changed course to the direction to investigate. According to the evidence Ndukuyamangedla cattle farm and Hlane game reserve lie on the same farm. They are separated by two fences with a strip of land between them. A rail line runs through the land strip. Ndukuyamangedla operates as a cattle rearing farm while the other as the name denotes is a game reserve.
- [6] PW1 and PW2 then came upon a site where they saw five men busy handling game meat. There was kudu carcass on the ground, hooves and head with its long spiralling horns. It is PW1 and PW2's testimony that PW1 shouted and announced their presence and that they were game security. The men fled the scene prompting PW1 to fire a warning shot in the air, but the men continued in their flight. One of the men made his way to the direction the firearms that were leaning against a tree. PW1 fired a shot in the direction where firearms were placed. He states that he did that to prevent the man from getting hold of a firearm, which would have endangered their lives. PW1's fire hit the man. The man later died enroute to hospital.
- [7] According to PW1 and PW2 another man one of the five who fled the scene made his way back towards the direction of the firearms. He was stopped by fire from PW1. He then ran to the direction of PW2 who fired a warning

shot into the air. The man raised his hands in surrender and pleaded for his life to be spared. This was the Accused. PW2 walked to the Accused to the scene where there was game meat, about 30m from where PW2 apprehended him.

- [8] The Accused and the injured man (deceased) both told the game security that they were in the area looking for their stray cattle. The witnesses disbelieved them because they were found at the scene where there was a killed game together with others who fled.
- [9] PW1 reported the incident to their supervisor via radio. The supervisor, came to the scene with Simunye police. According to PW1 and PW2 they found at the scene, three firearms leaning against a tree and one lying on the ground a short distance away. There was also a bush knife and okapi knife among other items. Accused produced from his pocket a cellphone, one round of ammunition and a lip ointment. There was meat on the ground, kudu head.
- [10] PW3 detective constable, Ntokozo Mdletshe was Scenes of crime officer, took photographs after which the injured suspect was taken away to hospital. According to PW3 the deceased was injured on the waist.
- [11] PW6 detective constable Musa Sifundza was the investigating officer. Upon receipt of report from the Hlane game ranger via 999 hotline, he and other officers including PW3 left Simunye police station for the scene at Ndukuyemangedla farm. He found Accused and the injured person, the latter was bleeding and wailing in pain. The two suspects told him that they were on the farm looking for cattle. They failed on demand to produce a licence for hunting game and for being within the farm. The injured man

was taken to hospital. PW6 later learnt that he had died. PW6 charged the Accused first with offences related to hunting without a permit in contravention of the Game Act, possession of firearms and ammunition without a licence, respectively trespass, and subsequently with murder of the deceased, after receiving directive from the Director of public Prosecution. PW6 confirmed under cross examination that he was informed by PW1 that he shot the deceased in circumstances described by PW1 in his testimony before this court.

- [12] PW4 D/Inspector Marvin Mbingo testified in relation to the counts on unlawful possession of fire arms and ammunition. He was a ballistic expert stationed at police Headquarters. He received sealed packages of exhibits for Simunye police station, containing firearms ammunition. His task was to examine them and determine if they were serviceable. He applied expertise and skill in determining this and subsequently authored a sworn report on his findings.
- [13] PW4's findings were that all five firearms were serviceable, including one with serial no. 97026417, a "*12 guage calibre top break and open single barrel Baikal shotgun....*" This is the firearm in respect of Count 3 to which the Accused pleaded guilty. There is a slight difference in the serial no quoted in count three and PW4's report. The difference appears in the first digit – viz a "9" appears in the report while "o" appears in Count 3. This discrepancy was not noticed during trial. The court is of the view that there is a typo either in PW6's report or in the indictment. It is not clear which. Nonetheless the court is satisfied that despite this minor discrepancy, the indictment and ballistic report refer to the same firearm. There is no prejudice to the Accused.

- [14] PW4's evidence is further that the two rounds of ammunition are live. They relate to count 6, to which the Accused also pleaded guilty. From the evidence of PW4, offences in count 3 and 6 have been respectively proved.
- [15] PW7, Richard Siboniso Ginindza was farm manager of Nzotho farm, another name for Ndukuyamangedla farm. According to this witness Hlane game reserve and Nzotho farm lie on the same farm bearing the same farm Number. However, the two have distinctly different operations and purpose, Nzotho being cattle rearing farm and Hlane game reserve. They are separated by respective perimeter fences. PW7 told the court that although Nzotho was solely for cattle farming, game from Hlane occasionally comes in and out of the farm. Farm management has arrangement with Hlane in terms of which game security from Hlane assist with apprehending persons, including farm staff who illegally hunt and kill game on the farm.
- [16] It is PW7's evidence that cattle from nearby communities venture into this farm from time to time. Cattle owners are required to claim their cattle through an identifying procedure involving local veterinary office and the police. Farm management causes stray cattle to be collected and kept at the farm kraal, and then engages police and the vet officers to help trace owners. PW7 explained that identification, and claim of cattle by community members is regularly carried out every week, on Tuesdays and Wednesdays. PW7 emphasized that community members are not allowed or supposed to enter the farm to look for their cattle outside the outlined procedure. PW7 did not, in the present case authorize anyone to enter the farm to look for cattle.

Defence Evidence

- [17] In his evidence the Accused disputes PW1 and PW2's evidence that they found him at the scene. He was never part of the five men the two Crown witnesses said fled from the scene. Accused's evidence is that on the day in question, the 19 November 2017, he and two other men, set out from their village of Matsetsa. His companions were Bhekumusa Sibiya (erstwhile co-accused of the Accused in this matter) and Sikhumbuzo Dlakubi. Each of them carried a firearm. Sibiya and Dlakubi's firearms were unloaded. Only the Accused had ammunition, one bullet was loaded in his firearm and he carried one in his pocket.
- [18] Accused's explanation for carrying firearms was because of the possibility that their cattle had been taken by Mozambican cattle rustlers who were usually armed with guns. The Accused and company followed the cattle tracks on the ground which led them to the area between Hlane game reserve and Ndukuyamangedla farm perimeter fences. At this point they heard a gunshot coming from the direction of Ndukuyamangedla farm. They opined that Mozambican rustlers were shooting their cattle. Bhekumusa Sibiya and Sikhumbuzo crossed the fence into Ndukuyemangedla to investigate. The Accused remained behind because he had running stomach.
- [19] Accused's winding story is that Bhekumusa Sibiya later phoned him and invited him to come. Sibiya told him not be afraid, because they came upon three people from Siteki. The Accused said he crossed the fence and walked closer to the scene. Before he got there he heard several gun shots. Shortly thereafter a game ranger appeared and fired a shot at the Accused, but the bullet missed him, only grazed the top part of his jacket. The ranger ordered him to put his firearm down, which he did. Accused complied with the ranger's further instruction to sit down. The ranger tossed handcuffs at him and instructed him to handcuff himself which he did. At this stage of his

evidence the Accused's version changed as he said the ranger ordered him to cross the fence and then led him to the scene. It is noted that the Accused earlier said he came across the ranger after crossing the fence while heading to the scene.

- [20] Accused's further evidence is that at the scene the ranger threw Accused's firearm to the ground. At the scene the Accused found the deceased lying down crying asking for water. The Accused saw chunks of kudu meat, 2 firearms, bush knives, a knife and a cellphone, and a pool of blood. Another ranger appeared and asked the Accused what he was doing there, to which he responded that he was looking for cattle. The Accused gave his name as Siphon Maziya from Matseta. The Accused explained that Maziya was a surname from his mother's side where he grew up. He later assumed his father's surname Scholes as an adult.
- [21] The Accused responded to the ranger's inquiry and told them that the injured man (deceased) was unknown to him. Likewise, the deceased told the rangers that he did not know the Accused. The Accused went on to say the deceased told the rangers that he was from Siteki.
- [22] It is Accused's evidence that when police came to the scene with game rangers' supervisor Mbatha the deceased told the police in response to their question, that he was there looking for his cattle.
- [23] The Accused confirmed evidence of the first two Crown witnesses that he was in possession of one round of ammunition which he produced from his pocket. He also confirmed PW6's evidence that Accused's firearm was loaded with one round of ammunition. He also confirmed Crown evidence that the other three firearms at the scene were unloaded.

- [24] The Accused claimed that PW2 told police at the scene that he apprehended the Accused along the fence from where he brought him to the scene. It is noted that this piece of evidence like the rest of Accused's version of events that differ from that of Crown witnesses, was never put to these witnesses.
- [25] Another Accused's claim is that during questioning the deceased told the police that he did not know the Accused and that he, the deceased was with Sandile Dlamini or Dlakubi and another whose name he did not know.
- [26] Accused's evidence was that two of the firearms that were at the scene were claimed by their respective owners: the firearm that PW6 testified as belonging to a soldier named Matsenjwa, according to the Accused had been in the possession of Accused's companion, Bhekumusa Sibiya. It was Accused's evidence that the second firearm from the scene which was in the possession of Accused's other companion Sikhumbuzo Dlakubi belonged to an unnamed elderly man who had given it to Dlakubi for the purpose of taking it for repairs.
- [27] Accused's explanation for the firearm that was in his possession, was that one Gazi Ntshangase had sold it him. The Accused had in 2016 started the application process for firearm ownership, he had not finalized acquisition of a licence or permit to his name. The permit was still in Ntshangase's name.
- [28] The Accused denies killing the deceased, he never killed him.
- [29] Accused disputes the charge of trespassing. He claims that he never entered Ndukuyemangedla farm. Accused claims that people freely enter and exit

[29] Accused disputes the charge of trespassing. He claims that he never entered Ndukuyemangedla farm. Accused claims that people freely enter and exit the farm in contrast to PW7's evidence. Accused said people enter the farm to collect fire wood, because there is no signage against trespassing on the farm. Accused produced photographs taken by himself in September 2023 depicting signage identifying ownership of the farm only.

CROWN'S ARGUMENTS

[30] The Crown submits that it has proved by evidence beyond a reasonable doubt the guilt of the Accused in all seven counts. In relation to counts two to seven the Crown urges the court to accept the evidence given by Crown witnesses and to reject the version of the Accused which only came to light when he took to the witness box, but was never put to the Crown witnesses. The Crown submits that Accused's evidence which contradicts the Crown witnesses' testimony should be rejected as afterthoughts.

[31] On the murder charge the Crown's case is based on *dolus eventualis*. The Crown submits that the Accused and his alleged accomplices "*saw the possibility of death resulting from their actions and the weapon they were carrying for the hunting...*" Citing **Bilakulu and Another v The State**¹ the Crown stated that "*it is actually a declaration of war when a poacher went into a hunting spree in a protected area. It is clear from this case that anyone on either side of the poachers or the side of the personnel manning security could die after being shot at. Relying on dolus eventualis, whether someone is shot by game ranger or suspects themselves and even if that person is a poaching or game ranger, the poachers are responsible for causing the death of whosoever dies.*"²

¹ CC 129/13

² Para 4 of Crown's head of argument.

Defence Arguments

- [32] Defence Counsel submitted that based on Accused's evidence, the Accused was not liable any of the offences except for the counts he pleaded guilty to, viz possession of a firearm and 2 rounds of ammunition.
- [33] Defence submits that Accused's guilt for murder of the deceased has not proved in the light of PW1's admission that he shot the deceased and therefore caused his death. Defence argues that the Accused told the court that he was brought to the scene by PW2 and that he was not part of the group found by the rangers, and that even the deceased was unknown to him.
- [34] Defence further submits that Accused cannot be held liable for murder in circumstances where it is apparent that the deceased was shot and at the back while fleeing from the game rangers. The defence argues that the deceased fled to avoid confrontation and therefore the game security were in no danger when they fatally shot the deceased. Further that the Accused raised his hands in surrender when apprehended.
- [35] The defence alleges further that the Crown case is based on circumstantial evidence and that as such the inference sought to be drawn must be consistent with all the proven facts, failing which then the inference cannot be drawn. Defence contention is that an inference can be drawn from the facts, namely the pathologist's report that deceased was shot on the lower back, "*that the Accused, and may be the deceased were fleeing to avoid confrontation and as such rangers were not in eminent danger to warrant any fatalities.*"³

³ Defence closing submissions at paragraph 7.4

Analysis and Findings

- [36] The Crown led witnesses for all the seven counts of the indictment. The witnesses were cross examined at length by defence Counsel, particularly PW1, PW2, PW3, PW6 and PW7. However, at no stage of the cross examination was accused's defence put to these witnesses. For instance PW1 and PW2's evidence was not challenged on their account on how the Accused was apprehended. It was never suggested to these two witnesses that their evidence was incorrect that the Accused was one of the five men found at the scene who fled from the game security. Their evidence was not challenged to the effect that the Accused returned and tried to make his way to where the firearms were. It only came out for the first time when the Accused gave evidence that he was not at the scene and was only brought there from the fence by PW2.
- [37] When it was put to the Accused by Crown Counsel that his evidence was untrue because it contradicted the evidence of Crown witnesses that was not challenged, his response was something to the effect that, even if his version was not put to those witnesses, the important thing is that the court heard his version directly from him. In short, the relevant evidence that implicated the accused went unchallenged and was only disputed by the Accused in his testimony. This is problematic for credibility of Accused's evidence. The Accused claimed under cross examination that he told his attorney that he was apprehended outside the farm while on a mission to look for his cattle. However, as pointed out, this was not borne out by cross examination of the witnesses.
- [38] There is a plethora of authorities by this court, the Supreme Court and from South African cases on the effect and consequences of a failure by an

Accused to put to the opposing witnesses relevant parts of his defence and to dispute parts of their evidence that differ from his version or defence. This court finds no justification why crucial evidence that implicated the Accused was not challenged, nor his version put to them for their reaction.

[39] In the Supreme Court case of **Bataria v Rex**⁴ the court had this to say about failure to put defence case to Crown witnesses:

“...The law is settled on this point where a party fails to put so much of his case to his opponent’s witnesses where necessary under cross examinations. The court will be entitled and justified to draw an adverse inference against such evidence as an afterthought...”

[40] In **Rex v Dominic Mngometulu and Others**⁵ Hanna CJ, as he then was, had this to say:

“Counsel for the defence is therefore, under a duty to put the defence to prosecution witnesses... failure by Counsel to cross examine on important aspects of a prosecution witness’s testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of cross examination, his instructions were that the unchallenged item was not disputed by the Accused. And if the Accused subsequently goes into the witness box and denies the evidence in question, the court may infer that he has changed his story in the intervening period of time...”

⁴ Case No. 65/2014

⁵ Criminal Case No. 94/1990 at page 16.

- [41] From the foregoing articulation, this court is satisfied that the Accused's failure to put relevant parts of his defence to the Crown witnesses and in so doing challenging their evidence that implicated him, support the view that his version was an afterthought. The court therefore accepts the unchallenged evidence of the Crown in preference to that of the Accused. The Accused failed to challenge such evidence, when he had the opportunity through his lawyer to do so. This leads to an adverse inference that such witnesses' evidence was not challenged by cross examination because Accused's instructions to his lawyer at the time was that the evidence was not disputed, and that the Accused later changed his mind with regard to it as an afterthought.
- [42] I now proceed to consider the individual charges in their chronological order, except that count one for murder will be dealt with last. Each count will be dealt with on its own merits and the guilt or otherwise of the Accused will be judged by weighing the crown and defence evidence that relate to it.
- [43] **Count 2:** This count relates to unlawful hunting and killing a royal game, to wit a kudu. Particulars of the charge are laid out above in paragraph [2]. According to the unchallenged evidence of PW1 and PW2 five men including the Accused were found dealing with the meat of a kudu in contravention of the Game Act 1953, Section 8 (4) of which reads:

"No person shall hunt or attempt to hunt, or be in possession of a trophy of any royal game unless he is in possession of a valid permit..."

[44] The evidence shows that the Accused together with others were in possession of a trophy of a kudu, a royal game at the material time. According to PW6 who subsequently charged the Accused for the offence, the Accused failed to produce a permit upon being asked to do so. The court rejects the evidence of the Accused that he was brought to the scene and that he had nothing or knew nothing about kudu carcass or meat. The Accused is convicted as charged in Count 2.

[45] **Count 3** relates to unlawful possession of a shotgun 12 bore serial no. 07026417 in contravention of Section 11 (1) read with Section 11 (8) (a) (i) of the Arms and Ammunition Act 24/1964. The Accused pleaded guilty to this offence. Commission of the offence was proved by PW4 Detective Inspector Mbingo who examined the firearm in question and testified that it was serviceable. The Accused is accordingly found guilty of the offence in Count 3.

[46] **Counts 4 and 5** relate to alleged possession of two other firearms in contravention of the said Section 11 (1) read with Section 11 (8) (a) (i) of the Arms and Ammunition Act 24/1964. Particulars of this charge are laid above in this judgment at paragraph [2]. The evidence led of PW1 and PW2 is that Accused and 4 others fled the scene where three firearms were found.

[47] The crown alleges joint possession of the firearms for a common purpose by the five men who fled the scene, including the Accused who was apprehended. The Accused denies possession and knowledge of the two firearms.

[48] It is noteworthy that Accused's conviction for unlawful hunting and killing of the kudu in count two, is independent of the inquiry in relation to possession of the firearms that Accused denies liability for.

[49] Description of the concept of common purpose is aptly stated in *Mawala v The State*⁶ as conceptual and "...a legal construct to aid the state in prosecuting fractured cases in which the evidence is insufficient to link offenders to each other and consequently to the crimes..."⁷

[50] In the South African Supreme Court of Appeal case of *Leshilo v The State*⁸ the court dealt with allegation of joint possession of illegal firearms and ammunition and the principles relevant thereto:

"The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the Accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond a reasonable doubt, the inference that the Accused possessed the firearms jointly with them. In SV Nkosi , it was held that this is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor had the intention to hold the guns on behalf the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole."[Emphasis supplied].

⁶ Case No. AR 267/16 KZN Division of the High Court sitting on appeal from regional magistrates court.

⁷ Case No. AR 267/16 supra.

⁸ Case No 345/2019.

[51] In further elucidation of the issue the SCA then pointed out that where the offence is “*possession*” of a firearm (or in the case of a hand grenade) it is not the principles of common purpose that have application, but rather those relating to joint possession.”⁹

[52] The SCA in Leshilo’s case noted with approval the observation made by the constitutional court in **Makhubela v S Matjeke**¹⁰ that there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession and that this was due to inherent difficulty in proving that the possessor had the intention of possessing the firearm on behalf of the entire group.¹¹

[53] *In casu*, there are no facts before this court from which an inference can be drawn for intention of joint possession of the said firearms, by either the Accused or his accomplices in the illegal hunting expedition. It is the finding of this court that the Crown has failed to prove the offences in counts 4 and 5 of the indictment. The Accused is accordingly acquitted on both counts.

[54] **Count 6** relates to unlawful possession of 2 rounds of ammunition in contravention of Section 11 (2) read with Section 11 (8) (c), precise particulars of which are laid out above in para [2]. The Accused pleaded guilty to this charge. Commission of the offence was proved by PW4 Detective Inspector Mbingo, the ballistic expert who examined the two rounds of ammunition and confirmed in his testimony that they were both live. The Accused is accordingly found guilty as charged in Count 6.

⁹ Leshilos case at para [12]

¹⁰ [2017] ZACC 36; 2017 (2) SACR 665 (cc)

¹¹ Loshilos case at paragraph [13]

[55] **Count 7** relates to the offence of trespassing as particularized at paragraph [2] above. The Accused is alleged to have entered Ndukuyamangedla farm without authority. The Accused contradicted himself in evidence on how he got to the scene. In the first instance he said that he entered the farm by crossing the fence by himself in response to the invitation to the scene by Sibiya. It was while on his way that he encountered PW2. In the second version he claimed that his encounter with PW2 happened while he was along the fence on the other side. That PW2 ordered him to jump the fence and then led him to the scene. None of these scenarios were put to Crown witnesses during cross examination. The court accepts PW1 and PW2's evidence that the Accused was apprehended within the farm. It is common cause that the Accused had not obtained any authority from farm management to enter the farm. Even if his purpose was to look for his cattle, that alone did not give him authority to enter private property by scaling the fence without permission.

[56] Section 21(1) of the Game Act reads:

"No person shall be upon any land at any time in pursuit of or in search of game whether or not he is the holder of a licence issued under this Act, unless he has permission in writing of the owner of such land."

Section 21 subsection (2) reads:

"Any person who contravenes subsection (1) shall be guilty of an offence."

[57] This court has already found that on the evidence presented, the Crown has proved beyond a reasonable doubt that the Accused committed an offence under the Game Act, of unlawful hunting and killing the kudu, the subject matter of count two.

[58] The crown has proved commission of the offence of trespass in terms of the Act as charged under count 7.

Count One

[59] Count one relates to murder of the deceased who was shot by PW1 and subsequently succumbed to his injury.

[60] The Crown submission on this count goes as follows:

"The Accused is guilty of the crime of murder of Sibusiso Elijah Dlamini. The Accused and his accomplices saw the possibility of death resulting from their actions and the weapons they were carrying for hunting."

[61] The Crown, quoting from the South African Supreme Court of Appeal case of **Bilankhulu v The State** further states that:

" ...Relying on the principle of dolus eventualis whether someone is shot at by game ranger or the suspects themselves, and even if that person is a poacher or grand range ranger, the poachers a responsible for causing the death of whosoever dies"¹²

¹² Crown's Heads of Arguments at paragraph [4].

[62] In **Bilakulu and Another v The State**,¹³ the appellants partook in a poaching expedition of a rhinoceros in a protected game reserve in Limpopo. During a shoot-out between the game rangers on one hand and police back-up on the other hand, one of the game rangers was fatally shot. Crown evidence failed to establish exactly who fired the bullet that killed the deceased. It could have been from firearms carried by any of the appellants, or the rangers in the confusion of a shoot-out.

[63] In holding that the appellants were liable for murder of the deceased; among other crimes, the SCA ruled that intent in the form of *dolus eventualis* had been proved beyond a reasonable doubt. The court found that the Crown had proved beyond a reasonable doubt that each of the appellants had the intention to kill the deceased, noting that the matter concerned subjective mental state of the appellants.

[64] The court in **Bilakulu** embarked on an inquiry concerning *dolus eventualis*, that, is whether the appellants knew that someone might be shot and killed, and reconciled themselves to that eventuality.

[65] *In casu*, the facts are not so straightforward that the Accused was on a poaching expedition. The court is open to the probability that the Accused may have entered the farm looking for his cattle and, in the process, ended up or got involved with a killed kudu. It came out from the evidence of Crown witnesses that the Accused and the deceased told them that they came to the farm to look for cattle, but PW1 and PW2 disbelieved them because they found them next to kudu meat. Accused's conviction in count 2 for unlawful hunting of the kudu is based on the evidence that he was found

¹³ ZASCA 188/20

with others where there was a killed kudu. In terms of the Game Act, possession of a trophy by a suspect constitutes *prima facie* evidence that the said person hunted such game.¹⁴

- [66] The particular circumstances of Accused's case do not depict him as a person who set out to poach game on the material day. Accused's explanation that he was looking for cattle, as stated earlier in this judgment, is not incompatible with the fact that he also engaged in the activity of unlawful hunting of game. Hunting game may not have been, in Accused's circumstances, the primary mission on the farm.
- [67] It is also noteworthy that Ndukuyemangedla is not a game reserve but a cattle ranch. According to PW7 game from neighbouring Hlane game reserve does occasionally venture on the farm. It is therefore does not make much of a sense that persons intent on poaching game would do so in a cattle ranch rather than a neighbouring game reserve. The fact that the Accused and companions were on a cattle farm negates Crown's submission that the Accused and his accomplices must have foreseen confrontation with game rangers and that exchange of fire would ensue which might lead to shooting and death of one of them.
- [68] To prove *dolus eventualis* the Crown must show, in the absence of direct evidence that the Accused knew that a confrontation with rangers was possible. At least on a conspectus of the evidence, it must be established that the Accused foresaw the possibility of the rangers pouncing on them and fatally shooting one of them. The fact that they were on a cattle ranch raises doubt on foreseeability of the danger that unfolded. Indications are

¹⁴ Section 24 (1) Game Act.

that they were complacent about the risk involved in their adventure. This is fortified by the relaxed manner in which they conducted themselves, laying down their fire arms, taking the time to dismember the kudu into chunks.

- [69] In **Mawala v The State**¹⁵ the court concluded that the poachers' plans could not have included an agreement to resist arrest by the security forces. The court noted that the poachers' firearm was dysfunctional, and that their other weapon, an axe and sharp iron would have been no match for the superior weaponry of the security forces. The court further concluded that if the poachers had planned what they would do if they were caught, the stronger inference was that they agreed to flee rather than fight.¹⁶ The court's conclusion gained traction from the evidence that the appellants and his accomplices ran off in different directions after the deceased was shot.
- [70] There are parallels to be drawn from **Mawala** and the case *in casu*, and this court is inclined to the reasoning of the court in that case in determining whether *dolus eventualis* has been proved against the Accused. In *casu* not only did the Accused flee from the game security, but their firearms, except for one, had no ammunition. In short, the Accused and his accomplices were no match to the game security. The reasonable conclusion from this set of facts is that the Accused could not have planned or foreseen a deadly confrontation during their mission.
- [71] The court comes to the conclusion that the evidence before court falls short of proving beyond a reasonable doubt that the Accused and or his accomplices who are at large had intent to murder, either direct intent or in

¹⁵ ZAHC KZN Division Case No.AR 267/16.

¹⁶ Mawalas case supra at paragraphs [30] to [31]

the form of *dolus eventualis*. The Accused is acquitted and discharged of murder in count one.

[72] In the result the court returns the following verdict:

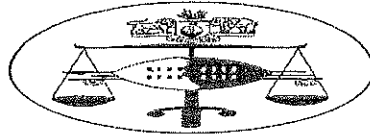
1. Count 1 (Murder)
Acquitted and discharged.
2. Count 2 (unlawful hunting a royal game)
Guilty as charged.
3. Count 3 (unlawful possession of firearm serial no. 07026417)
Guilty as charged.
4. Count 4 (unlawful possession of firearm serial no. 04051468)
Acquitted and discharged.
5. Count 5 (unlawful possession of firearm serial no. 93065)
Acquitted and discharged.
6. Count 6 (unlawful possession of ammunition)
Guilty as charged.
7. Count 7 (unlawful trespass)
Guilty as charged.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala
Judge

For the Crown: S. Mchuli (DPP's Chambers)

For the Defence: M. Sibandze (Mongi Sibandze & Partners)



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 17/2018

In the matter between

THE KING

V

SIPHO FRANCE SCHOLES

Neutral citation: *The King v Siphon France Scholes (17/18) [2024] SZHC 42 [2024] (14th March 2024).*

Coram : Tshabalala J

Heard : 14/03/2024

Delivered : 14/03/2024

SENTENCE

- [1] On the 14 March 2024 the Accused person was convicted on several counts and acquitted on some including Murder. The court gave ex tempore judgment on sentence with reasons as it appears hereunder.
- [2] The court takes into consideration mitigation factors advanced on behalf of the Accused by his Counsel, viz that he is a breadwinner for 4 children who are in school.
- [3] The court takes into account that he is a productive member of society as articulated by his attorney.
- [4] The interests of society are harmed when arms and ammunition laws are breached and firearms are in the hands of unlicensed people.
- [5] The court notes Accused's commitment and respect of bail conditions at all times. Further that he is a first offender.
- [6] The following order is made in respect of sentence:

Count 2 – E4,000.00 (Emalangeneni Four Thousand) fine failing payment imprisonment for Four (4) years.

Count 3 – E5,000.00 (Emalangeneni Five Thousand) fine failing payment Five (5) years imprisonment.

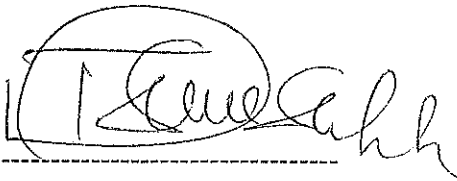
Count 6 – E2,000.00 (Emalangeneni Two Thousand) fine failing payment Two
(2) years imprisonment.

Count 7 – E200.00 (Emalangeneni Two Hundred) fine failing Three (3) months
imprisonment.

ORDER

All sentences shall run concurrently.

Bail amount to be converted to fine subject to production of valid receipt.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line. The signature is stylized and cursive.

D Tshabalala
Judge

For the Crown: S. Mdluli (DPP's Chambers)

For the Defence: N. Hlophe (Mongi Sibandze & Partners)