IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Cr. App. No. 41/97

In the matter between

MSONGELWA MSIBI APPELLANT

and

THE KING RESPONDENT

JUDGEMENT.

(23/4/98)

TEBBUTT, J A

Appellant, as I shall for convenience refer to him, was convicted by the Acting Senior Magistrate of Manzini of

(a) contravening Section S(l), read with Section 8(2) of the Game Act No. 51 of 1953. as amended by the Game Amendment Act No, 4 of 1991 and Order No. 12 of 1993 in that on 1 October 1995 at Pamatha Ranch in the Manzini Region he was in unlawful possession of an Nyala, which is Royal game, without a valid licence or permit and

(b) contravening Section 11 (2), read with Section 11 (8) (c) of the Arms and Ammunition Act. No. 24 of 1964, as amended, in that on 3 October 1995 at Mliba in the Manzini Region he had in his possession two live rounds of ammunition for which he had no valid licence or permit

On the first count, he was sentenced to the minimum statutory sentence of five years' imprisonment provided for in Section 8(2) of the Game Act.

On the second count he was fined E500 or five months'' imprisonment.

Appellant appealed to the High Court against both his convictions and sentences. His appeal was dismissed and the convictions and sentences confirmed. He has now come before this Court, seeking this Court's interference with his convictions and sentences.

Although his approach to this Court was stricto sensu an application for leave to appeal to this Court, this Court treated the matter as an appeal. At the hearing before this Court, appellant's counsel did not pursue the appeal against the conviction and sentence on the second count i.e. of possessing two live rounds of ammunition. He was correct in not doing so. The ammunition was found in appellant's dwelling and there is a presumption in Section 11 (a) of the Arms and Ammunition Act that an occupier of premises in which there is any arm or ammunition shall, unless the contrary is proved, be presumed to be the possessor of such arm or ammunition. Appellant provided no satisfactory reason for his unlawful possession of the ammunition. The sentence, too, is a condign one. Indeed, Appellant has already served it. No more need therefore be said about the second count.

Insofar as the first count is concerned, the Court concluded that the Crown had not proved beyond reasonable doubt that Appellant was in possession of an Nyala and therefore allowed the appeal on the first count and set aside the conviction and sentence, intimating that it would give its reasons for so doing in due course. These are those reasons.

Before dealing with the facts, it is necessary to state that the Crown would appear to have charged the Appellant under the wrong section of the Game Act. It charged him with a contravention of Section 8(1), read with Section 8(2). Section 8(2) sets out the penally for a contravention of Section 8(1) and provides for a mandatory minimum period of imprisonment of five years with a maximum of fifteen years, without the option of a fine. It is a harsh provision but the severity is understandable when one has regard to what a contravention of Section 8(1) involves. That section reads thus;

"8(1) No person shall bunt or attempt to hunt or be in possession of a trophy of any specially protected game unless he holds a valid permit".

A "trophy" means any animal, dead or alive, or any part of such animal. "Specially protected game" is defined in Section 1 of the Game Act as -

"any animal which is named in the First Schedule of this Act or any part of such animal". The First Schedule names only four animals: white rhinoceros, black rhinoceros, elephant and lion. It is obviously these noble animals, that in some cases are facing extinction, that Section 8(1) and the harsh penalty provisions of Section 8(2) are designed to protect. No buck and certainly no Nyala are mentioned in the said First Schedule.

Nyala are named in the Second Schedule to the Game Act, which refers to Royal Game. The animals there come under the protective provisions of Section 12(1) of the Act, which reads as follows:

"12(1) Except as otherwise provided in this Section, any person who without valid licence or permit.....hunts or attempts to hunt or is in possession of a trophy of any game shall be guilty of an offence."

The definition of "game" in Section 1 of the Act states that it -

"Includes specially protected game, royal game and common game"

"Royal game", in its turn, is defined as

"Any animal which is named in the Second Schedule of this Act",

The Second Schedule includes Nyala, among the animals named therein. The penalty for a contravention of Section 12(1) is contained in Section 26(1) of the Act and provides that it is a fine of not less than E600 but not exceeding E2000 or, in default of payment, imprisonment of not less than six months but not exceding two years or both such fine and imprisonment.

From the aforegoing it is clear that Appellant was wrongly charged and as a result incorrectly sentenced to five years imprisonment. Had he been correctly charged and convicted of a contravention of Section 12(1) of the Act, as he should have been, he would have been liable to be fined between E600 and E2000 or to imprisonment of six months or, at the most, two years. His appeal, therefore, should have been successful on this aspect of the matter alone - certainly

insofar as sentence was concerned.

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His appeal should, however, in our view also succeed on the facts, to which I now turn.

Appellant was charged in the magistrate's court with another man. one Bulawayo Dlamini. Evidence for the Crown was that of two game rangers, James Nkomonye and Aaron Magagula, and by a sister of the former of them, Siphiwe Nkomonye who was PW2 at the trial.

The two rangers said that on the morning of 1 October 1995 at about 6a.m. they found distinct signs that an Nyala had been killed at a river where game go to drink. They found foot spoors which they followed to a place known as the Vilane homestead. They established that the footprints matched marks made by the shoes worn by Appellant. Precisely where those footspoors led is not clear on the record. Magagula said they led to where the Appellant was. Nkomonye's evidence reads as follows:

"Those footprints went past Vilane's homestead to another Vilane homestead" and again

"The footprints... went past the house where you found accused one? - Yes".

The rangers said they then called on the Induna of Vilane for assistance. With his aid they entered "the Vilane homestead". At the homestead they found Appellant, another man and three women. They searched five houses at the homestead and in one found a cooking pot in which there was the head of an Nyala. Nkomonye's evidence reads as follows:

"In the course of the search I found a pot which had the head of Inyala (sic) in the kitchen on the ground. The head had already been cooked and portions of it had been eaten. The pot was closed. I opened it and found an Inyala head with its ears. I knew that the head belonged to an Inyala because of its ears."

Under cross-examination Nlcomonye said he identified what he found in the pot as the head of an Nyala from the colour of the hairs on the ears. The colour of those hairs on an Nyala were, he said, red and white.

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Magagula's evidence was also to other effect that in the pot in the kitchen they found the head and ears of an Nyala. He recognised it as the head of an Nyah from the "red and white marks on the cheeks".

Siphiwe Nkomonye testified that on the morning of 1 October 1995 she saw Appellant and Bulawayo Dlamini in the vicinity of the river. Her evidence reads:

"Accused one (i.e. Appellant) was carrying his own game. Accused two (i.e. Dlamini) was also carrying his own game.... They were carrying game over their shoulders. Both were carrying red game. Accused one was carrying a red game with white stripes. Accused two was carrying a red game. This was my first time to see the game they were carrying".

She said she saw the two men go to their separate homes. Appellant "entered his parental home, that is, Vilane's homestead". She said she saw the men at 7a.m.

At the end of the Crown case the trial magistrate discharged Dlamini on the ground that the only evidence implicating him on the count of possessing an Nyala was that of Siphiwe Nkomonye who was unable to say what type of game he was carrying when she saw him.

The trial magistrate convicted Appellant on the evidence of the identification of the head of the Nyala by the rangers which they found "in a pot in the hut of accused one" and on the "supporting evidence of Siphiwe (PW2) who saw accused one carrying a red game with white stripes which on the evidence I found to be the Inyala in question".

In our view the latter finding can not be justified as having been proved beyond reasonable doubt. The rangers did not testify as to the time at which they found the Nyala head in the pot. It could, however, not have been late on 1 October 1995. They said that having seen the footspoors they followed them to the Vilane homestead. As they went on duty at 6a.m. this could not have been late on that day. They then sought the assistance of the Induna to search the homestead. Siphiwe Nkomonye said she saw the two men at 7a.m. and saw Appellant with the

animal he was carrying entering the Vilane homestead. It seems improbable, therefore, that when the search was made and the Nyala head found in the pot, that, if it was an Nyala that Siphiwe saw Appellant carrying, it was the latter that wound up in the pot. That would have involved chat particular Nyala being skinned, cooked, eaten and only the remnants of the head after the buck had been cooked and eaten, remaining in the pot. With no evidence as to the time of the search the possibility cannot be excluded of the Nyala head not being that of the animal seen by Siphiwe - again assuming that what she saw being carried was an Nyala.

Only two possibilities therefore exist as to Appellant's having been in possession of an Nyala: (i) his possession of the animal whose head was found in the pot; or (ii) his possession of the animal which Siphiwe Nkomonye saw him carrying.

As to the latter the only evidence she gave was that the animal was "red with white stripes". She said the stripes went round the stomach and waist and were on the ears, the neck and round the hind legs and front legs. Magagula said it was an Nyala which that red with white spots. On a young buck these did not go beyond the neck but they do go beyond the neck and reach the face on an old buck.

As there was no positive identification of the animal that Appellant was carrying other than the description by Siphiwe of it being red with white stripes, our view is that the evidence of the identification of that animal is so sparse that the Crown did not prove beyond reasonable doubt that it was in fact an Nyala.

As to the head of the animal in the pot it can, we feel, be safely found that it was the head of an Nyala. In our view, game rangers like Nkomonye, who was in daily contact with Nyala over a 9 year period, and Magagula, who was also in daily contact with them, would unquestionably be able to identify one. The question is, however, whether Appellant was in possession of it.

As set out above, Nkomonye's evidence was that Appellant's footspoors went past Vilane's home "to another Vilane homestead". Siphiwe Nkomonye said she saw Appellant "enter his parental home, that is, Vilane's homestead". It is not clear which of these premises Appellant

entered. Nkomonye said he found the Nyala head in a pot in the kitchen on the ground. He did

not say it was Appellant's pot. Nor did he say that Appellant had exclusive use of the pot. Indeed the contrary would seem to have been the position because when the head was found in the pot, the evidence is that the three women in the house ran away, suggesting that they knew something about the head that was at the time found in the pot.

Magagula in his evidence in chief said that "we found a pot at the kitchen of accused one (i.e. Appellant)", with the Nyala head in it. Under cross-examination his evidence reads as follows;

"Q: Whose homestead was that?

A: I do not know,

Q: Then why did you say in your evidence that it was the home of accused one?

A: Because, I found accused one there.

Q: What would you say if one were to come and say that the home belongs to one Vilane?

A: I cannot dispute that"

He, too, does not say that the pot was that of Appellant. It is true that Appellant in his evidence said that the pot was "inside his hut" but that also does not mean that It was his pot. He added that residing at the homestead were "four elders, eight children, myself and my wife". It is also true that Appellant said that what was found in the pot was not the head of an Nyala but of a goat. In so saying he was clearly not being truthful, However, the fact that a false explanation is given by an accused to the police, especially if given on the spur of the moment - and even if repeated at his subsequent trial - should weigh but little in the scales against an accused, for it is well-known and has often been recognised by the Courts, that accused persons are frequently loath to admit true facts because they fear that to do so may imperil them (see e.g. S. v Letsoko and others 1964(4) SA 768 (AD) at 776; S v Dladia 1980(1) SA 526(AD) at 530 D). The onus remains on the Crown throughout.

In the light of the evidence set out above, this Court is of the view that the Crown did not discharge the onus of proving that it was the Appellant who was in possession of the Nyala head found in the pot.

For all the above reasons the Court allowed the appeal against Appellant's conviction and sentence on count one i.e. possession of an Nyala. On count two, i.e. possession of two rounds of ammunition, the appeal failed and the conviction and sentence on that count were confirmed.

P. H. TEBBUTT, J A.

JUDGE OF APPEAL

KOTZé, P:

I agree

G. P. C. KOTZé P

PRESIDENT, COURT OF APPEAL

BROWDE, J A:

I agree

J BROWDE J A

JUDGE OF APPEAL