IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.14_00

In the matter between:

PETER McINTYRE & OTHERS VS

THE KING

CORAM LEON JP

STEYN JA

TEBBUTT JA

FOR 1st APPELLANT MR. PA VAN WYK

FOR 5th APPELLANT MR. C. NTIWANE

FOR 6th APPELLANT MR. L. GAMA

FOR THE CROWN ADVOCATE D.A. KUNY

JUDGMENT

Steyn JA:

The above appellants were three of six accused who originally appeared in the High Court charged with two counts of contravening Section 8(1) and 8(3) respectively of the Game Act 51 of 1953 as amended. Three of the six

accused were acquitted in the court a quo. The first appellant, who was also accused no.1 at the trial, was convicted on count 1 of being in possession of "two white rhino horns" and was sentenced to the prescribed minimum sentence of five years imprisonment. The second and third appellants (accused nos 5 and 6 in the court below) were convicted on count 2, i.e. dealing and trafficking in the said two white rhino horns. They were both sentenced to the prescribed minimum sentence of 7 years imprisonment. I will refer to the appellants as accused nos 1, 5 and 6 respectively.

Accused 2, 3 and 4 were discharged at the end of the Crown case on both counts. All three appellants have appealed against their convictions. Because of the mandatory provisions of the legislation in casu, there is no appeal against the sentences imposed.

In his heads of argument Mr. Kuny who appeared for the Crown made the following concession concerning the conviction of accused no.5.

"It is appropriate for me to say at the outset of this argument that, on a full and proper assessment of the

conviction of accused 5 and having regard to the unsatisfactory nature of the evidence against him, I am authorised to concede the appeal advanced on his behalf and to concede that his conviction and sentence should be set aside."

Counsel confirmed that this was his considered view also at the hearing of the appeal. See in this regard his detailed motivation set out below in this judgment. Having considered the evidence as well as the submissions made by both counsel for the Crown and accused no.5, we were of the view that the concession made by the Crown was both proper and fair. We therefore upheld his appeal and set aside his conviction and his sentence. Accused no.5 was accordingly found not guilty and discharged.

Certain further concessions were made by the Crown. These tended to narrow the issues to be decided by us. Moreover, Counsel for accused no.1 and no.6, whilst not abandoning any of the grounds of appeal, confined their oral arguments to certain key contentions. It will be appropriate to deal with these first.

Both defence counsel challenged the correctness of the finding of the court a quo that the Crown had discharged the onus of proving an essential element of the respective charges faced by them. It was incumbent on the Crown, so they contended, to prove that the rhino horns allegedly possessed by accused no.1 and allegedly dealt and trafficked in by accused no.6, were those of an animal "indigenous to Swaziland".

In his judgment the Chief Justice rejected the contention that the Crown had to prove that the rhino horns were those of an animal indigenous to Swaziland. He said the following concerning this submission:

"I dealt with this argument at the time of the application for discharge and pointed out that the offence related to animals or species, which are referred to as protected game in the first schedule which includes Rhinoceros of all species. There has been evidence that there are various species of Rhinoceros, which are indigenous to other parts of the world and have never been present in Swaziland in the wild state. But the schedule includes Rhinoceros of all

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species. And this is the case therefore where the context otherwise requires that an animal has to be indigenous before it falls within the section. For this and other reasons I dismiss this point at the conclusion of the crown case and I have reconsidered the matter and do not find any basis on which I should differ from the decision, to which I then came..."

This reasoning was not supported by Mr. Kuny who argued the matter on the basis that the Crown had to prove that the rhino horns were those of an animal "indigenous" to Swaziland. It is therefore not necessary to consider the correctness or otherwise of the court a quo's approach as cited above.

It was therefore common cause before us that if the Crown failed to prove this fact, both appellants would be entitled to have their appeals upheld. It is only in the event of the Crown having established beyond a reasonable doubt that the rhino horns in question were indigenous to Swaziland, that the other grounds of appeal would have to be considered by the court.

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The definition section of the Act contains the following relevant definitions: "game" includes specially protected game, royal game and common game, or any part of such game; "raw product" means the product of any animal or part of any animal which is still intact and unworked or unprocessed or unmanufactured..." "animal" means any vertebrate animal which is indigenous to Swaziland; "specially protected game" means any animal which is named in the First Schedule to this Act or any part of any such animal; "trophy" means any animal or bird, dead or alive, mentioned in the First, Second and Third Schedules or any part of such animal or bird ..... etc...."; (own emphasis).

The question that has to be answered was whether the horns were from an animal (see the definition of "animal" and specially protected game" cited above) which is indigenous to Swaziland.

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It was conclusively established that the horns were white rhino horns and not those of a black rhino. The evidence of the experts called by the Crown was to the effect that there are two sub-species of white rhino. The one sub-species is found in abundance in the southern parts of Africa - including Swaziland. The other - now virtually extinct sub-species - is to be found in the northern regions of Africa and is not indigenous to Swaziland.

It was the existence of this sub-species that opened the door for the defence contention that the horns in question may have been those of a white rhino from this non-indigenous sub-species and therefore not protected by the provisions of the legislation in question.

I propose therefore to examine the expert evidence adduced by the Crown in order to determine whether it established beyond a reasonable doubt that the animals from which the horns came were indigenous to Swaziland. Differently put, was there a reasonable possibility that these horns were from a sub-species of white rhino indigenous to northern Africa?

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The most important expert witness called by the Crown was PW11 referred to in the record as Dr.

Richard Angeley. (His correct surname, according to counsel for accused no.1, is Emslie). He has an honours and masters degree in Science from Cambridge University and a Ph.D. in Black Rhino Ecology from Stellenbosch University. His credentials as an experienced expert on both the white and the black rhino populations in the SADC region were impressive and were not challenged.

Part of his present professional duties is that of a scientific officer of the Africa Rhino Specialist Group (the group) which is funded by the World Wild Life Fund (W.W.F.) - more specifically from Denmark and the United States of America.

The mission of the group is to promote strategies that can lead to the recovery and conservation of African Rhino and to provide technical advice and support to "Range States". These States cover the major countries in which rhinos live in the wild in Africa. There are four Range States that have 97% of the world's black rhinos and the same four range states have over 99% of the world's white rhinos.

These states are South Africa, Namibia, Zimbabwe and Kenya. Swaziland is one of a few other countries that have a smaller number of white rhino.

Another one of the duties performed by the group is to compile the official continental statistics of rhinoceros populations.

According to the witness there are five species of rhino, three in Asia and two in Africa. The two in Africa are the white and the Black Rhino. He also stated that there are only two sub-species of white rhino. They are the Southern and the Northern White Rhino.

By 1984 the northern white rhino had been all but wiped out and their numbers reduced to 15. These were located in the north eastern part of what used to be called Zaire - now the Democratic Republic of Congo (DRC) -adjacent to the Sudanese border. At the last count these numbers had increased to 30.

The major trade routes in respect of rhino horns identified in respect of the northern white rhinos were northwards, going up to Khartoum in the Sudan through to Djibouti or Egypt. The Yemeni dagger handle constituted

one of the major refined products manufactured from this illegal northern African trafficking.

When cross-examined in regard to the possibility of the rhino horns in casu being the product of a northern white rhino the witness pointed to a number of salient features. In the northern DRC, where they are located, they are only to be found at the far northern tip of that country. This is what the witness called "a long long way from Kinshasa". He added that there were virtually no roads and there is no communication at all.

He was extensively cross-examined. It was suggested to him that with the war in Angola many rhinos were slaughtered - inter alia by the South African troops - and that the rebel forces financed this war effort by trading in rhino horns. The witness pointed out that the rhino in Angola were southern white rhino and that it was unlikely that even if the northern white rhino numbers were higher at that time, it was extremely unlikely, bearing in mind the logistics, the locality and the numbers involved that northern white rhino horns would have reached SADC countries via

this or other routes.

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At the conclusion of his evidence the witness was asked whether there was a possibility that the horns in casu could be that of a northern white rhino. He responded as follows:-

"I looked at the issue to come up with a better calculation on the probability it could be a northern or it could southern and also not assuming any knowledge about trade routes it could have gone anywhere, rhino horns could have gone in any particular direction on the principles I found from yesterday I went backwards through the whole period until 1960 and it turned out that the probability of them over that 42 year period if they came from somewhere through that window we don't know when was 99.963% it was reduced from the figure I gave yesterday which is probably a more realistic figure you are 2,224 more likely to be the southern white rhino from that period 1960 up to 2001 if say they look quite old horns they weren't probably in the last five years and we went backwards from 1996 to 1960 and you said there is an equal chance of it coming from any of

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those years the probability of it being a southern white rhino came out with 99.934% for 1,973 times more likely to be a southern than a northern if you looked at windows of ten years opportunities the biggest chance of it being a northern white rhino was from 1962 to 1971 were it was 516 times more likely to be southern white rhino from 72 - 81...it is a very remote possibility that it is northern; the chances increase as you get further back in time because there were more northern white rhinos and few southern white rhinos." (own emphasis)

He also emphasized that the likelihood of a northern rhino horn turning up in Southern Africa - including Swaziland - was also negatively impacted by the fact that there was a "big and vibrant market 20 years ago in Yemen and to a lesser extent in Amman" (in white rhino horn).

Other witnesses with experience and expertise in regard to the white rhino and its presence in Southern Africa gave evidence for the Crown. None of them were however, qualified to give evidence concerning the possibility

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of the horns in question being the horns of a northern as distinguished from southern white rhino.

The witness PW2, one Mario Scholtz, who works for the National Parks Board in Pretoria but also worked for one and a half years with the Endangered Species Protection Unit in the South African Police Force also testified. He said that the horns in question were the front and the back horns of a male white rhino and were not the horns of a black rhino. He also affirmed that the white rhino was an animal indigenous to Swaziland. DNA testing would prove beyond doubt that these were white rhino horns and not those of a black rhino. However, no DNA test was necessary because the white rhino is a grazer and the black rhino is a browser. The black rhino horn is for this reason totally round. The horns before court were typically those of a white rhino. In view of the fact that it was not argued that the horns in question were black rhino horns it is unnecessary to pursue this debate.

There is one aspect of PW2's evidence as an expert to which I need to refer. Counsel for the appellant contended that the Crown could and should have submitted these

horns to a DNA test in order to establish that they were not the horns of a northern white rhino. The witness who never qualified himself as an expert in the field of DNA testing and certainly had no experience of or exposure to northern white rhino, was asked the following question:

"Q: The way I understand it the horn is hair, that is why they determine it by DNA, the species and the sub-species. Is that not so?

PW2: That is precisely so, My Lord".

Now, it must be remembered that this witness was introduced to testify on the issue as to whether the horns were those of a sub-species - black or white rhino. His answer does therefore seem to me to be predicated on this assumption and should not be taken as affirmation that DNA testing would affirmatively have established that these horns were or were not the horns of northern white rhino but indeed those of a sub-species southern white rhino.

However, I am for present purposes prepared to accept that DNA testing may well have established beyond all doubt whether the horns were those of a northern or a southern white rhino. The question to be answered must

still be whether on all the evidence adduced there was a reasonable possibility that the horns in question came from a white rhino not indigenous to Southern Africa; i.e. a northern white rhino whose habitat was the northern DRC as set out above.

It is my view that the Crown, particularly via the evidence of Dr. Emslic (PW11) but also that of the other expert witnesses established that:

1. The horns in question were those of a white rhino;

2. White rhinos are indigenous to Swaziland;

3. There is a further sub-species of the white rhino -the northern white rhino - which is not indigenous to Swaziland;

4. The habitat of this sub-species is the northern DRC near the Sudan border;

5. This sub-species was at the time of these events virtually extinct and by 1984 had been reduced to 15;

6. At the time when there was trade in the northern rhino horns, the trade routes ran to the north -

not southwards. The phenomenon was due to both market conditions - the demand for horn for dagger handles - and the poor communication infrastructure to the South.

In addition to the significance of this expert evidence, the inherent improbability of these horns being from this rare northern sub-species and that they are indeed from a southern white rhino, is strongly supported by the abundance of this sub-species in Southern Africa and the fact that

these horns were possessed and traded in Swaziland itself.

I have given due weight to the fact stressed by counsel for the appellant that some of the evidence indicated that the horns were "old". I have considered the significance of making an allowance for the fact that a slaughter of the northern white rhino took place. However this was prior to 1984. It is also correct that some of the calculations made by Dr. Emslic concerning the various possibilities were made in respect of live rhinos only.

In considering the question of whether on the evidence viewed as a whole, the Crown had discharged the onus of

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proving this ingredient of the offence charged, I am mindful of what both the courts in the UK and in Southern Africa have said concerning the degree of proof referred in a criminal case.

In MILLER V MINISTER OF PENSIONS 1957(2) AER 372 at 373 Denning J (as then he was) said the following concerning the degree of proof "beyond a reasonable doubt"

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice".

In R V MLAMBO 1957(4) SA 727 (AD) at 738, Malan JA puts it as follows:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to

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be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed a crime charged. He must, in other words, be morally certain of the guilt of the accused".

I am firmly of the view that on the evidence presented at the trial, the Crown discharged the onus of proving beyond a reasonable doubt that the horns in question were those of a Southern white rhino, an animal indigenous to Swaziland. The possibility that these horns would turn up in a transaction in Swaziland, in the hands of people who live in this geographical region, and that they emanate from a remote region in the northern DRC, can appropriately be described as fanciful, remote or at best speculative.

The appeal on this ground can therefore not be upheld. I proceed to deal with two other grounds of appeal which counsel contended constituted irregularities and accordingly vitiated the proceedings in the court a quo.

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The first concerns an incident that took place during the course of the trial. In order to understand

the context it is necessary to record the following factual background. The prosecution arose from a trap set by certain game rangers. They gave evidence at the trial as to how and why the trap was set and the various events that took place in the process that concluded in an agreement of sale of the contraband rhino horns.

Whilst one of the Crown witnesses, the ranger Riley - PW4 - was being cross-examined, it appeared that PW1 had been carrying a pocket recording machine on which some of the conversations that had taken place in the course of the trapping operations may have been recorded. These tapes had been in the possession of the Crown at all material times. However Crown counsel had decided not to introduce them in evidence. The Judge a quo nevertheless insisted on listening to the tapes of the conversations that took place at one of the meetings - the meeting that occurred at a place called Ndzevane. He also requested Crown counsel to secure a transcription of the tape and make it available to the court. The Court rejected the

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defence objection to it mero motu calling for and listening to the tape and exercised its discretion in terms of Section 199 of the Criminal Code to call evidence which might assist in enabling it to reach a just decision in the matter.

It is clear that the trial Judge relied on the transcription of the conversations recorded on the tape to convict accused nos 5 and 6. Mr. Kuny, properly mandated to do so by the Crown, conceded that it was irregular for the tape and transcript (the second one only - which apparently differed in material respects from the first) to have been introduced in evidence. The court also erred, counsel also conceded, in relying upon them in view of the unsatisfactory features revealed by the evidence. These according to counsel included the following:

1. They were recorded on a small recorder operated manually.

2. They were far from distinct and there were portions which were inaudible or difficult to hear.
He also pointed to the fact that;

3. Once made, the tapes remained in the possession of Riley from 28th April 2001 until they were

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ultimately transcribed, for the first time, in January 2002 at the instance and insistence of the Court.

4. The evidence of the transcriber, Jennifer Jackson, (PW12) shows that there were in fact two transcriptions of the Ndzevane tape; an earlier one (the transcription of which was not before the court) and a later one which differed in many respects from the earlier one.

5. While she was transcribing the tape, Jackson found it necessary to replay some portions a number of times in order to hear what was being said and she had to rely upon Riley and PW1 to identify the voices.

6. She also served as translator in respect of those passages which were spoken in Siswati; her qualification for doing this was that she "understands Siswati" although she is "fluent in Zulu". She is not a sworn translator but said that she "had been conversant with Siswati since she was a child".

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7. It appears from the transcription that there were passages spoken in Shangaan which were so indicated but which were not translated in the transcript.

8. There are other passages which are inaudible. The concluding comments by counsel in support of his concession that the tape and its transcript should not have been admitted reads as follows:

"Having admitted the tape and the transcript, despite objection and in the face of the flaws in proving the accuracy of the recording and the transcript and despite the fact that the tape had been in the sole possession of the Crown witness (whose evidence, inter alia, it was intended to corroborate) who had also assisted in the transcription thereof, the Judge then relied upon it to convict accused 5 and 6".

Counsel added that whilst it was laudable for the Judge a quo to have sought to establish the truth about the meeting at Ndzevane, he erred in finding that the tape/transcript resolved any doubts he may have had concerning what may have occurred at that rendezvous.

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This was particularly so in so far as the cogency of the evidence against accused no.5 was concerned. He spoke only Portuguese and Shangaan, very little Siswati and no English. He apparently had to rely upon accused no.6 to translate for him and his understanding of what was taking place and the extent of his participation was therefore in serious doubt. The reliance upon the tape/transcript to convict no.5 was therefore an irregularity which vitiated his conviction.

It was the contention advanced on behalf of accused no.6 that the same considerations also applied in his case. When I deal below with the evidence tendered at the trial, I will address the question as to whether this submission should also be upheld when considering the sustainability of his conviction.

Counsel for accused no.1 referred to another irregularity which arose in the process of giving effect to the court's decree that the tape should be transcribed.

It is common cause that Crown counsel consulted with two of the Crown witnesses, one of whom was still under

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cross-examination. This conduct Mr. Kuny who appeared at the trial conceded, was "unethical, irregular and unwise".

Counsel for accused no. 1 contended that his client was seriously prejudiced by this irregular conduct and that his client had not received a fair trial.

This contention cannot be upheld. The circumstances in which the unfortunate incident occurred were fully investigated by the court and the explanation of Crown counsel (not Mr. Kuny who only appeared on appeal) was accepted by the court. It was clear that counsel had been trying to follow the court's directions in regard to securing a transcription of the tapes and required the witnesses to assist him in identifying the voices and to help in clarifying some barely audible sounds on the tape.

The trial court held as follows in this regard

1. It accepted the bona fides of Crown counsel.

2. There was nothing to suggest an "orchestration" of the evidence of the Crown witnesses. The testimony of PW1 (one of the witnesses) had already been concluded, and that of the other, PW4, almost completed.

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3. There was no evidence to be given by PW4 which "required correction or correlation".

4. In the circumstances, while the proper procedure had not been followed, the purpose for which the consultation had taken place was a bona fide one and no sinister inference could be drawn and no real possibility of prejudice could be envisaged.

It is also my view that counsel's conduct, whilst improper, did not prejudice the accused in any way. It cannot be said to have constituted an irregularity of such a nature as to have resulted in a failure of justice. Bearing in mind the reasons why the incident occurred, the events were reprehensible and unfortunate but could not reasonably be held to have vitiated the trial.

The next question to be considered is a two-fold one.

1. Was there acceptable evidence that proved the guilt of accused no.1 on the charge of possession of rhino horns beyond a reasonable doubt? and;

2. Would a court inevitably have convicted accused no.6 on the charge of dealing or

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trafficking in the protected rhino horns if it had been properly instructed and had not irregularly relied on the contents of the tapes/recordings improperly admitted in evidence?

I said earlier in this judgment that this case involved an entrapment of the accused. The rangers involved in this trap were Riley, and the rangers Mmema and Mbatha. Riley and his rangers received reports of the illegal possession of rhino horn from certain persons. An operation was launched by Riley which could best be described in colloquial language as a "sting". Mmema was sent in as the undercover "agent" and he made contact with some of the accused originally charged with the two accused whose appeals are before us. The "sting" was successful and some of the former accused took Mmema to a hamburger shop where he was introduced to no.1 as an agent for the potential buyer of the rhino horn.

The learned Chief Justice in his judgment summarises what next occurred as follows:

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"Accused number 1, so Mmema says, took keys from his pocket and opened a storeroom in a nearby yard. Mmema was the first to enter the room closely followed by accused number 1 and the others of the party. In the storeroom a bag or sack was pointed out and which the witness, Mmema, was invited to open. He did so and saw the two horns before the court which became exhibits "A1" and "A2". Having established the existence and whereabouts of the horns Mmema left to report to Riley. Phone calls passed between him and accused number 2 in the course of which they made arrangements for "the buyer" to come to purchase the rhino horns on the 28th April 2001, that is the following day.

On that day Riley, Mmema and George Mabila together with other rangers went to Lavumisa. Accused 2, 3 and 4 were found at a filling station in that town. Mmema approached them and introduced Riley as the buyer and Mbatha as his agent. All of them of course had assumed names and Riley in particular chose the name of Karl Marx".

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The learned Judge then describes the events that followed thus:

"They were told to go to the reception of the Lavumisa Hotel to await for accused number 2, 3, and 4. When they reached the hotel there was some difficulty in entering the reception but eventually accused number 1 who opened the locked door let them in. Present at that time were accused number 1, 2 and 3 as well as Riley, Mmema and Mbatha. According to Mmema accused told them that they would follow Aaron Vilane to a flat where they would find the rhino horn. Accused in this case was accused no.1. Accused no.1 did not require them to follow him to the place where the rhino horns were being kept but told them to follow accused 3 to the flat where the rhino horns would be produced".

When they arrived at the flat they found the accused and the sack in which the rhino horns were secreted. There was a debate about the price. On the Crown evidence accused no.l participated in the discussions although the true sellers appeared to be accused nos. 5 and 6. A price

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was agreed for the sale of the horns, but could not be finalised because accused nos. 5 and 6 could not be contacted. However once the price had been agreed the Crown witnesses revealed their identify and they arrested the three accused present, i.e. accused nos 1, 2 and 3.

The consummation of the transaction still had to take place. The court a quo describes these events as follows:

"After accused number 1, 2, 3, & 4 had been arrested and taken to the police station the rangers once again set forth to complete the trapping. Their quarry was the persons who have been referred to as the sellers or as the owners. Accused no.2 was persuaded to contact them over the cell phone and to arrange a meeting at a rendezvous on the side of the road. It is not clear why accused no.2 agreed to participate in this but he did so. It is clear that at the rendezvous agreed upon the rangers together with accused number 2 and the rhino horn waited for the arrival of the sellers. Accused nos. 5 and 6 arrived after sometime and were greeted by Riley and those who were assisting him. Discussion took place in respect

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of the rhino horn and after some quibbling a price was agreed upon. It is the Crown evidence that although accused no.5 is not conversant with Siswati or English he nevertheless was informed by accused no.6 what was going on. Once the sale was agreed upon Riley indicated that he required evidence of the sale in order to satisfy his principal. He would want to know that he had not received a greater price. Riley prepared a document, which purports to be an agreement of sale and in fact does record the sale of rhino horn by accused no.5 and 6 to the rangers. These persons were of course still under the impression that the rangers were buyers, and the 2nd accused was a seller. All parties put their signatures to this agreement. No sooner had this been done, the rangers revealed their identities and they arrested accused 5 and 6". This in broad outline was the evidence on which accused no.1 was convicted of contravening Section 8(1) of the Game Act (possession) and no.6 of the contravening Section 8(3) (dealing).

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Was the court a quo correct in convicting these two appellants as aforesaid? In the first place it is clear that the evidence of accused no.1's possession of the horns was overwhelming. The learned trial judge duly applied the cautionary rule when considering the evidence of the Crown witnesses who participated in the trapping exercise. After doing so, however, he says of these rangers that they gave their evidence in a consistent fashion and no real criticism can be levelled at their credibility because of material contradictions.

I stated above that counsel for first appellant did not pursue in oral argument his written submission that accused no.1's version could reasonably be true. Indeed the version was not only highly improbably but the account he gave of his conduct strained credulity. He attempted to distance himself from the events which admittedly took place in his presence. In this regard several aspects of his evidence were far-fetched and in my view rightly rejected as incapable of belief. In this regard I point to the following explanations which he gave as to:-

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1. how and why he came to have custody, in one of his storerooms, of the "parcel" which contained the horns;

2. why he arranged to bring the parcel, or gave instructions to have the parcel brought to, the flat for the meeting;

3. why he thereafter participated in any manner at all in the "meeting" which was held at his son's flat (which he had conveniently made available to others for the purpose of a "private" meeting);

4. why he remained at this private meeting which, on his version, had nothing to do with him and when he must have realised early on that it related to an illegal transaction;

5. why he participated in the discussion regarding price;

6. why he did not take the opportunity, when he left the flat for a short while, to contact the police.

I should add that many aspects of accused no.1's evidence given under oath were never put in cross-examination of the rangers, and much of what was put was in conflict with the

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testimony he gave at the trial. He was clearly not only untruthful, but I am satisfied that his evidence could not possibly be true, that it was rightly rejected by the court a quo. He was clearly found in possession of the horns in question in accordance with the full legal implications of that term.

I come finally to deal with accused no.6. It will be remembered that Crown counsel conceded:

1. that the High Court had erred in admitting the evidence recorded on the tape carried by the ranger Riley;

2. that the court clearly relied on this evidence when convicting no.6; and

3. that it erred in doing so and that this constituted an irregularity.

It was contended on behalf of no.6 that this admitted irregularity vitiated the proceedings and that his conviction should be set aside on this ground. I proceed to consider this submission.

It is well-known principle that where an irregularity of the kind in casu occurs, a court on appeal can only uphold

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a conviction if a court properly instructed would inevitably have convicted. Differently put, the court can still convict if on the evidence and the findings of credibility, unaffected by the irregularity, there is proof beyond reasonable doubt. See S V TUGE 1966(4) SA 565 (A) at 568 [B];SV HARRIS 1965(2) SA 340 (A) at 362-363.

I have set out some of the evidence led at the trial hereinabove. As in the case of accused no.l the case against this accused also rested on the evidence of the three rangers who trapped him. It appeared that no.6 was targetted by information from those already arrested at Lavumisa. He was contacted telephonically because he was said to be the person with whom the sale had to be concluded.

This information turned out to be correct. As set out above an arrangement was made that the "buyers" would meet accused no.6 at a designated spot at the roadside at Ndzevane. The purpose of the meeting was to conclude a sale of rhino horns. He must clearly have come to that venue for transacting business as a seller of horns.

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If the evidence of the tape is ignored entirely, it is clear that the other testimony against accused no. 6 was nevertheless cogent, consistent and compelling. The witnesses were reliable and corroborated one another in regard to the events that occurred.

By contrast an examination of the evidence of the accused reveals that it is so improbable as to justify rejection. Counsel for the Crown in this regard pointed out the following:

"The version of accused no.6 that he just happened to meet Patrick Mkhaliphi who was parked under a tree near Ndzevane (after Patrick had telephoned him a day or two earlier but had made no specific arrangement to meet) is in itself most unlikely. But having stopped in order to speak to Patrick whom he had co-incidentally recognised, it is beyond reasonable belief that he and accused 5 (who was merely his passenger) should have been approached about rhino horns and then confronted by complete strangers who produced firearms and forced them, at gunpoint, to sign the handwritten agreement which incriminated them in

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unlawful dealing in rhino horns about which accused 6 purported to know nothing. It is also highly improbable that, on that scenario, Riley would gratuitously have "given" accused 6 the surname "Dlamini" which is not his name. It is far more likely that he would himself have furnished a false name as a precaution against detection from having been involved in an illegal transaction".

It is my view that the Crown case that accused no.6 dealt and trafficked in two white rhino horns was an overwhelming one. He was correctly convicted and his conviction and sentence are confirmed. I sum up our verdicts as follows:

1. The appeal of accused no.1 against his conviction is dismissed and his conviction on the charge of contravening Section 8(1) of the Game Act 51 of 1953, as amended, is confirmed.

2. The appeal of accused no.6 against his conviction is dismissed and his conviction on the charge of contravening Section 8(3) of the Game Act 1953, as amended, is confirmed.

3. The sentences imposed are also confirmed, DELIVERED IN OPEN COURT ON THE 22nd NOVEMBER 2002

J.H. STEYN

JUDGE OF APPEAL

I agree

R.N. LEON

JUDGE PRESIDENT

I agree

P.H. TEBBUTT

JUDGE OF APPEAL