

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case No.: CA 11/2017

In the matter between:

SAMUEL GIDEON

1ST APPELLANT

NDUME CASH SASON J K NAKAKUWA

2ND APPELLANT

v

THE STATE

RESPONDENT

and

THE STATE

APPELLANT

v

SAMUEL GIDEON

1ST RESPONDENT

NDUME CASH SASON J K NAKAKUWA

2ND RESPONDENT

Neutral citation: *Gideon v S; S v Gideon* (CA 11-2017) [2017] NAHCNLD
122 (8 December 2017)

Coram: TOMMASI J and JANUARY J

Heard: 24 October 2017

Delivered: 8 December 2017

Flynote: Appeal – Hunting in contravention of s 26(1) of the Nature Conservation Ordinance 4 of 1975 – Sentence – Appellants sentenced to 6

years' imprisonment for the killing of two rhinos a calf and a cow – striking disparity between the sentence imposed and that which this Court considers appropriate in view of more stringent penalty provisions.

ORDER

1. The appeals of both appellants are dismissed;
2. The appeal of the Respondent (The State) is upheld;
3. The sentence of six years' imprisonment imposed in respect of count 1 of both appellants (accused 2 and accused 3) are confirmed and in addition hereto the appellants are sentenced to pay a fine of N\$60 000 or in default of payment four years' imprisonment;
4. The sentence is ante-dated to 9 September 2016;
5. The conviction of both appellants in respect of count 2 is hereby set aside;
6. Both appellants are declared unfit to possess a fire-arm for a period of two years.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an appeal and cross-appeal in respect of the sentence imposed by the Magistrate sitting at Opuwo Magistrate's Court. I shall refer to the accused as the appellants and the State as the Respondent.

[2] The appellants were arrested on 15 June 2015. First appellant was accused 2 and second appellant was accused 3 in the proceedings in the district court. They were charged with 3 other co-accused. Both appellants were convicted of the following four offences: unlawfully hunting of specially protected game to wit 2 black rhinos, a cow and a calf¹; unlawful possession of controlled wildlife

¹ Count 1 - contravention of s 26 (1) of the Nature Conservation Ordinance 4 of 1975, as amended,

products to whit 2 rhino horns²; unlawful possession of a fire-arm and ammunition³. Second appellant was convicted of an additional charge of driving without a driver's licence.⁴ They pleaded guilty and their trial was separated from the trial of their co-accused.

[3] Both appellants were sentenced on 9 September 2016 to 6 years' imprisonment in respect of count 1 and were given fines in respect of all other counts. Both appellants and the Respondent (the State) appealed against the sentence of 6 years' imprisonment. The court granted the appellants condonation for the late noting of the appeal and the matter was thus heard on the merits. The court deemed it expedient to deal with both appeals simultaneously.

[4] Both appellants had similar grounds which can be summarised as follows:

- (i) the learned magistrate failed to take into consideration the following:
 - (a) their personal circumstances;
 - (b) the fact that they have been in custody for a year and two months awaiting trial;
 - (c) they are first offenders at their age;
 - (d) they tendered a guilty plea and did not waste the court's time; and
- (ii) The learned magistrate overemphasised the seriousness of the crime and treated the retributive aspect of the sentence as the major component;
- (iii) The learned magistrate lost sight of the role which the appellant played in the offence.

[5] The State appealed on the grounds that the learned magistrate misdirected herself, alternatively erred in law and/or fact in the following respects:

² Count 2 - Contravention of s 4(1)(a) of the controlled Wildlife Products and Trade Act 9 of 2009

³ Count 3 and 4 - Contravention of s 2 and 33 of the Arms and Ammunition Act, 7 of 1996

⁴Count 5 - Contravention of s 31(1)(a) of the Road Traffic and Transportation Act, 1999 (Act 22 of 1999)

- (a) by imposing a lenient sentence which induces a sense of shock if regard is had to the fact that two rhinos were killed and the provisions of section 26(3)(a) of Ordinance 4 of 1975, as amended and/or
- (b) by attaching little weight to the seriousness of the offence of rhinoceros poaching and or interest of society's desire for retribution and deterrence.

[6] The dispute herein is whether the sentence of 6 years' imprisonment is too harsh or too lenient. This court may also conclude that is an appropriate sentence. It is trite that an appeal court only interfere with the sentence of a lower court if there was a material misdirection or if the sentence imposed by the trial court was so inappropriate that the appeal court, if it had sat as court of first instance, would have imposed a sentence which would markedly have differed from that imposed by the trial court, so that it could be said that the sentence imposed in the first place was 'shocking', 'startling' or 'disturbingly inappropriate'.⁵

[7] Both appellants pleaded guilty to the charge of unlawful hunting of specially protected game and the penalty clause applicable makes provision for a fine not exceeding N\$200 000 or to imprisonment for a period not exceeding 20 years or to both such fine and imprisonment.

[8] The first appellant was 31 years old, not married and has two children. One is living with him whilst the other is staying with her maternal grandmother. The children are not attending school. He repaired jack-pot machines and did some construction work. He indicated that, if given a fine, he would obtain help from his family members and his boss. Second appellant was 29 years old and single. He has two children and they are living with their mother. He is a self-employed bar owner and he indicated that he would also be in a position to pay a fine.

⁵ S v LK 2016 (1) NR 90 (SC), page 106, paragraph 44

[9] The State led the testimony of Bernd Brell, a Director of Save the Rhino Trust and a Police Reservist, in aggravation. He informed the court that he assists the police with investigation of crime involving specially protected species like the desert black rhino and southern white rhino. According to him there are currently only 60 black rhinos left in the 'southern northwest part of Namibia' (sic) and they experienced an increase in the illegal hunting activities of the black and white rhino species. He indicated that during 2011 they lost 1 rhino due to illegal activities. According to their statistics this increased over the years and there has been a loss of 72 rhinos in Etosha for the year 2016 by September 2016.

[10] He testified that the black rhino has become a flag ship in Namibia, which tourists are coming to see. It was his view that if Namibia can protect the rhino successfully, Namibia will also be able to protect the rest of the environment. The black rhino, according to him has been trans re-located and re-introduced to communal conservancies in an attempt to increase the population and to enable the community to earn money from the conservancies. He held the view that the current sentences are not deterring would be offenders as the illegal poaching of rhino is on the increase.

[11] The magistrate in her reasons for sentence took into consideration that both appellants pleaded guilty and both are first offenders. She considered their personal circumstances and the fact that they indicated that they are in a position to pay a fine. She considered the number of rhinos killed and the negative impact poaching has on the economy of Namibia. She took to heart the call for more deterrent sentence and emphasised the need for deterrence.

[12] Mr Nsundano, Counsel for first appellant submitted in argument that the magistrate, in over-emphasising the need for deterrence, failed to warn herself of the danger of underestimation or even totally disregarding one or more of the other factors. He submitted that she ignored or paid scant attention to the offender before her and she made the appellant pay the price of the increase in number of rhinos killed in Namibia. His further argument was that the penalty clause makes provision for a fine and that a fine would have been an

appropriate sentence in view of the fact that the appellant was a first offender and given the fact that the rhino horns were recovered. He submitted that a fine would be advantageous as this would contribute to the resources available to the State for the protection of the natural resources.

[13] Mr Bondai, Counsel for second appellant, submitted in argument that the court was constrained to consider imposing a fine first and proposed that a custodial sentence is a punishment of last resort to be imposed where there are compelling grounds to depart from the imposition of a fine. He cited *S v Mali* 1981 (2) SA 478 (E); *S v Mynhardt* ; *S v Kuinab* 1991 NR 336 (HC) and other case law in support for his argument.

[14] Mr Mudamburi argued that there was no misdirection or error on the part of the learned magistrate when imposing the custodial sentence and if anything she erred on the side of leniency. He submitted that the seriousness of the offence is evidenced by the penalty provided for. He submitted that, in less serious cases a first offender may be spared from receiving direct imprisonment but argued that this offence is a serious offence and other considerations apply.

[15] Counsel for both appellants argued that a custodial sentence was not called for in the circumstances of this case whereas counsel for the respondent insisted that it was justified given the nature of the offence.

[16] It is trite that there is nothing that precludes a court from imposing custodial sentences on first offenders particularly when convicted of serious offences. The learned magistrate specifically however mentioned that the appellants are first offenders who deserve leniency. This is a clear indication that the learned magistrate considered this factor.

[17] It is furthermore trite that the period which the appellants were detained in custody awaiting the finalisation of their case is a factor which the court ought to take into consideration. This factor was not specifically mentioned but the learned magistrate stated the following: 'The court however when passing a sentence should not disregard accused 1-2's personal circumstances as stated.' First

appellant during his submissions in mitigation stated that he has been in custody for a year and two months as he was not granted bail. I am satisfied that the learned magistrate did not disregard this factor.

[18] Counsel for first appellant raised the issue in argument that the learned magistrate failed to consider the fact that the rhino horns were recovered. This is not a factor which deserves much consideration. The fact of the matter is that two rhino's had been killed for the horns and the circumstances of the recovery is not known. The appellants certainly did not hand it over of their own free will. The only consideration is that they did not benefit from the offence.

[19] The fact that they pleaded guilty was specifically mentioned by the learned magistrate and there is no merit in the ground that the learned magistrate failed to consider same.

[20] Mr Bondai argued that imprisonment could only be imposed as an alternative to a fine. The Namibian authorities cited in support of this argument do not support it. *S v Skrywer* 2005 NR 288 (HC) deals with consistency in sentencing and in *S v Mynhardt; S v Kuinab, supra*, this court sets out the general guidelines for the imposition of fines. These guidelines are important when a sentencing court considers the imposition of a fine but it does not prescribe that imprisonment could only be imposed as an alternative to a fine. In *S v Brand and Various Other Cases* 1991 NR 356 (HC) the court indeed indicated that a first offender should not be sent to gaol if there is some other adequate punishment but the court at the same time cautioned that sentences which are too low do not achieve any of the purposes i.e. retribution and reform; and that accused scoffs at it and it may lead to the community taking the law into their own hands.

[21] The penalty clause makes provision for three distinct types of penalties i.e. a fine, imprisonment or both a fine and imprisonment and there is therefore nothing which precludes the sentencing court from imposing a custodial sentence only. The sentencing court however ought to consider all the types of penalties which the legislature avails to the court including the option to impose

a fine. The fact that the learned magistrate did not stipulate that he/she considered the option to impose a fine, does not mean that it was not considered. The learned magistrate clearly did not think that a fine was an appropriate sentence. It is useful to a court of appeal if the sentencing court give reasons why a fine is not imposed but it is evident that the learned magistrate intended to impose a sentence which would serve as a general deterrent and that she held the view that a custodial sentence would serve this purpose.

[22] The next question for determination is whether the learned magistrate erred in overemphasising the need for deterrence. It is important to consider the peculiar nature of this offence. The statute makes provisions for a higher fine and a longer term of imprisonment for the hunting of elephants and rhinoceros. The reason for this is not hard to fathom. The commercial value of the tusks of the elephants and the horns of the rhinoceros is the drive behind hunting these animals. It is therefore the intention of the legislature to discourage the hunting of these animals without a valid permit by enacting more stringent penal provisions for the hunting of these species.

[23] The importance of protecting particular species has been highlighted in *Nel v The State* (CA 38/2014) [2014] NAHCMD 233 (30 July 2014) an unreported case of this court. Smuts J, as he then was,⁶ made the following comment:

‘The court in *S v Vorster* also stressed the importance to the national economy of the Etosha National Park in whose vicinity the illegal hunting had occurred in that case.⁷ Tourism, in many instances dependent upon the abundance and diversification of game, particularly protected and specially protected species, has become increasingly important to the national economy since then. This phenomenon has spread since then (1996) and is evident across the length and breadth of the country and no longer the preserve of larger national parks. The burgeoning tourism sector of the economy and the compelling need to preserve game and protected species may no doubt become increasingly compromised if more stringent penal provisions are not urgently enacted and

⁶ at page 8, paragraph 20

⁷ *Supra* at 181C-D.

imposed to address the rapidly increasing prevalence of offences under the Ordinance.'

[24] In *S v Khumalo & another* 1994 NR 3 (HC) Frank J at page 4 made the following remarks:

'One cannot however encourage the situation where a person involved in illicit trading of rhino horns will only face a financial penalty. While this may act as a deterrent for an individual this will not act as a deterrent in the general sense and will not assist in preventing the poaching of rhinoceros'.

[25] The oft cited case of *S v Van Wyk* 1993 NR 426 (SC) at 448D – E makes it clear there are situations which arise 'where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other.' I am of the considered view that the learned magistrate did not err when she emphasised the need for general deterrence given the current clamour of society for protection of wildlife and game.

[26] The final ground of appeal of the appellants is that the court failed to take into consideration the role they played in the commission of the offence. The role which the appellants played in the commission of this offence was not placed before the learned magistrate. They were legally represented when they tendered their plea in terms of section 112 (2) which provided the court with no information as to what their roles were in the commission of the crime. From the various pleas recorded however it may be inferred that the appellants were not involved in the actual hunting but they all acted with common purpose.

[27] The final consideration is whether the sentence imposed by the learned magistrate was such that it can be termed as 'shockingly or inappropriately lenient or harsh.

[28] It is well known that there are several reasons for the protection of endangered species and that in recent times there has been an increase in the number of rhino killings simply for purposes of obtaining the horn which is sought after. Society's sense of outrage regarding rhinoceros poaching is well

documented by regular publications in the print and social media. The legislature responded to the concerns of society by increasing the maximum fine and maximum period of imprisonment with effect from 31 December 1990.

[29] In *S v Ngombe* 1990 NR 165 (HC) this court dealt with a similar matter. The appellant was convicted in a magistrate's court of two contraventions of s 26(1) read with ss 26(3), 85, 90 and Annexure 3 of the Nature Conservation Ordinance 4 of 1975 in that he had shot two rhinoceros in the Etosha Game Reserve. In respect of the first count the appellant was sentenced to five years' imprisonment, two years of which were suspended on certain conditions. In respect of the second count the appellant was sentenced to three years' imprisonment. On appeal the Court was of the opinion, taking into account that the maximum sentence which could be imposed was six years' imprisonment that the sentences imposed were disturbingly inappropriate and induced a sense of shock. In the circumstances the Court set aside the sentences and replaced them with sentences of two years' imprisonment on each count. It must be borne in mind that this case was decided before the maximum sentence was increased to 20 years' imprisonment. The amendments came into effect soon after this judgment was delivered.

[30] In *S v Khumalo & another* 1994 NR 3 (HC) the appellants were convicted in a magistrate's court of contravening s 2(1)(a) of Proc AG 42 of 1980, namely possession or dealing in controlled game products i. e. two rhino horns, and were each sentenced to five years' imprisonment of which two years were conditionally suspended. In this case it was held that the threat under which rhinoceros as a species existed was well-known: the species as a whole faced extinction and this meant that deterrence was necessary to prevent this from happening; and the fact that deterrence had to be accorded great weight in offences such as the present to attempt to save the rhinoceros population and that this would also justify severe sentences did not, however, mean that one had to close one's eyes to the other factors and negate them completely. In this case the court found that one year imprisonment would be appropriate for first appellant and a period of three years for second appellant.

[31] What is evident is that, although sentences were reduced on appeal, custodial sentences for hunting rhinos and possession of rhino horns were sanctioned by this court. The sentence of 6 years is consistent with the sentence imposed in *S v Ngombe, supra* which was decided 27 years ago. This simply means that the sentence imposed does not reflect the more stringent penal provisions which were enacted, which called on the court to impose harsher sentences nor does it adequately take into consideration the current carnage in the national parks which continues unabated.

[32] The legislature has done its part by ensuring that more stringent penal provisions are in place and it is now incumbent on the courts to do its part to preserve game and protected species. If the courts do not impose deterrent sentences, poachers would reason that the risk may be worthwhile and the community may take matters into their own hands. Namibia would become the playground for illegal hunters and syndicates would find fertile ground to plunder the natural resources of this country.

[33] I am of the considered view that the learned magistrate failed to adequately take into consideration the more stringent penal provisions which properly reflects the interest of society and consequently imposed a sentence which is too lenient. There is a striking disparity between the sentence imposed and that which this court considers appropriate. I must hasten to add however that the State ought to consider the charges more carefully and it should place evidence of how the offence was committed before the court in order for the court to be placed in a position to determine and appropriate sentence. This does not mean the Court advocates that other factors should be disregarded. The offender as an individual matters and his/her circumstances should always be considered and each case should be determined on its own peculiar facts.

[34] The appellants were also charged and convicted of hunting and having been in possession of rhino horns. The appellants did not appeal against this conviction and in fact pleaded guilty to both counts. It appeared to the court that there may have been a duplication of convictions. The court invited counsel to

address it on whether the conviction of both hunting of the two rhinos and possession of their horns amounted to an improper duplication of convictions.

[35] Mr Mudamburi submitted additional heads of argument and Mr Bondai made oral submissions on behalf of both appellants at very short notice. The court is indebted to counsel for their submissions. Mr Mudamburi submitted that it was not a duplication of conviction and referred this court to *S v Gaseb & others* 2000 NR 139 (SC); *S v Seibeb & another*; *S v Eixab* 1997 NR 254 (HC); *S v Vincent Jazperson* CR 34/2013 in support of his argument.

[36] In *S v Eizab*, supra Hanah J, at page 256 stated as follow:

‘The two most commonly used tests are the single evidence test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Lansdown and Campbell South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test.’

[37] What is apparent in this matter is that both offences may constitute separate offences but they were committed with the single intent to obtain the rhino horns. In order to obtain the rhino horn the appellants had to hunt the rhino. I am of the considered view that both these acts are one transaction for the purpose of a criminal transaction and that it consequently amounts to a duplication of convictions.

[38] Mr Mudamburi furthermore brought it to the court’s attention that the learned magistrate failed to declare the appellants unfit to possess a fire-arm.

Section 10(7) of the Arms and Ammunition Act 7 of 1996 which provides as follows:

'The court shall upon convicting any person referred to in paragraph (a) of subsection (6) of where the court exercises a discretion as referred to in paragraph (b) of that subsection, bring the provisions of the paragraph concerned to the notice of such person and afford him or her an opportunity to advance reasons and present evidence why he or she should not be declared or deemed to be declared unfit to possess an arm.'

[39] Mr Bondai submitted that this court has inherent jurisdiction to hold such an enquiry and to make such an order and urged the court to do so in order to avoid a further delay of the matter. He informed this court that the appellants have no objections if such order is made. This court is empowered to review matters in terms of section 304(4) and this omission has been brought to the notice of this court. The court therefore, in view of the fact that the appellants do not have any objection to such an order being made, herewith make the order which the learned magistrate ought to have made.

[40] In the premises the following order is made:

1. The appeals of both appellants are dismissed;
2. The appeal of the Respondent (The State) is upheld;
3. The sentence of six years' imprisonment imposed in respect of count 1 of both appellants (accused 2 and accused 3) are confirmed and in addition hereto the appellants are sentenced to pay a fine of N\$60 000 or in default of payment four years' imprisonment;
4. The sentence is ante-dated to 9 September 2016;
5. The conviction of both appellants in respect of count 2 is hereby set aside;
6. Both appellants are declared unfit to possess a fire-arm for a period of two years.

M A TOMMASI
JUDGE

I agree

H C JANUARY
JUDGE

Appearances:

For the 1st Appellant: Mr Nsundano
Of Legal Aid – Oshakati

For the 2nd Appellant: Mr Bondai
Of Legal Aid – Ondangwa

For the Respondent: Adv Mudamburi
Of Office of the Prosecutor-General

and

For the Appellant: Adv Mudamburi
Of Office of the Prosecutor-General

For the 1st Respondent: Mr Nsundano
Of Legal Aid – Oshakati

For the 2nd Respondent: Mr Bondai
Of Legal Aid – Ondangwa