

REPUBLIC OF NAMIBIA

REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 18/2017

In the matter between:

**LI XIAOLING
LI ZHIBING
PU XUEXIN
WANG HUI
v
THE STATE**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

RESPONDENT

Neutral citation: *Xiaoling v S* (CA 18/2017) [2019] NAHCMD 94 (12 April 2019)

Coram: USIKU J et SIBOLEKA AJ

Heard on: 03 December 2018

Delivered on: 12 April 2019

Flynote: Criminal law: Appeal against conviction and sentence – test – is there a material misdirection in law or on the facts. Is there an emphasis of one factor at the expense of the other that has resulted in a material misdirection during the

sentencing process. None of the above appears to have taken place.

Summary: The four appellants, as a group booked in at the Country Club for one day. The finer substantial details of their ins and outs movements between the two rooms in which they were booked shows that they were jointly and severally in association with each other. They were in possession and in full control of all their luggage that includes the two suitcases in which the 14 rhino horns and the leopard skin were found. The group's joint and full control over their luggage continued to manifest itself even up to the time when the officer informed them about the detection and removal from the conveyor belt of the two suitcases at the departure luggage point.

Held: The prosecution has proved its case against appellants beyond reasonable doubt on all three main counts.

Held: The conviction and sentence of the trial Court will accordingly be altered in terms of section 304 (iv) of the Criminal Procedure Act 51 of 1977.

ORDER

In the result we make the following order:

1. The first appellant's appeal against conviction on counts 1 and 2 is dismissed.
2. The appeal of the second, third and fourth appellants against conviction on count 2 is dismissed.
3. The appeal against the discharge of all four appellants on the main 3 counts is upheld, and all the appellants are accordingly found guilty as charged on the said main counts.
4. The appeal against sentence is dismissed.
5. All three main counts are taken together for purposes of sentence.

6. The four appellants are each sentenced to twenty (20) years imprisonment of which five (5) years is suspended for a period of five (5) years on condition that the appellants are not convicted of the offences referred to in section 4, 5 and 6 of the Prevention of Organized Crime Act 29 of 2004, committed during the period of suspension.
7. The sentence is antedated 30 September 2016.

APPEAL JUDGMENT

SIBOLEKA AJ (USIKU J concurring):

[1] The four appellants were charged in the Regional Court, Windhoek on three counts related to the following: Unlawful exportation of Controlled Wildlife Products: 14 rhino horns on the first count and a leopard skin on the second count. These offences were in contravention of section 4(1)(e) read with schedule 1 and with sections 1, 4(2)(b) of the Controlled Wildlife Products and Trade Act 9 of 2008 and as read with section 18 of The Riotous Assemblies Act No. 15 of 1956.

On count 3 the appellants were charged on money laundering: acquisition of Proceeds of unlawful activities in contravention of section 6(a) read with sections 1, 8 and 11 of the Prevention of Organized Crime Act No. 29 of 2004. They were all discharged on count 3 and convicted on counts 1 and 2 and sentenced to fourteen (14) years of which thirty (30) and twenty eight (28) months respectively were suspended for five (5) years on condition the appellant is not convicted on the above and relevant competent alternative sections. Aggrieved by the above results the first appellant is unhappy of his conviction on counts 1 and 2; the second and third appellant on count 2 and finally this Court is requested to uphold the discharge of the fourth appellant on all three counts. The respondent appealed the discharge of the four appellants on all three main counts.

[2] The grounds of appeal against conviction are that:

[3] Although the grounds of appeal on this matter are not fully clear and specific what comes out of them is that the trial Court did not assess all the evidence placed before it appropriately. Secondly it is suggested that the convictions were based on suspicions.

[4] On sentence, the ground is that: The fourteen (14) years imprisonment imposed is inappropriate and startlingly shocking. The seriousness of the offence and the aggravating circumstances were overemphasized over the personal circumstances of the appellants. The time the appellants spent in custody up to the date of their sentencing was not properly accounted for.

[5] I will now look at the evidence that led to the arrest, conviction, and sentence of the appellants on this matter. A brief discussion will then follow.

[6] Wilhelmina Shatunenga, a sergeant in the police, was stationed at Hosea Kutako International Airport at the time of the incident. On 24 March 2014 at 06h30 in the morning she was on duty at the departure luggage point. She was operating the X-ray conveyor belt machine scanning/screening all the luggage of passengers leaving the country. The machine detected some objects in two suitcases which she offloaded from the conveyor belt. She took the name tags bearing the names of the first and second appellants on the suitcases. She went to the departure hall and called the owners. When she asked them to open so that she can search inside, they told her their boss who was still at the parking area had the keys. Const. Hauseb went to the parking with the first appellant, but there was no such a boss. When they came back, this witness told Const. Hauseb to break the locks in her presence which, he and the first appellant agreed to. In one suitcase they found ten rhino horns and in the other four rhino horns and a leopard skin. When asked to whom the products belonged they kept on saying 'the boss' 'the boss'. Hauseb went back to the departure hall but there was nobody because all the passengers bound for Johannesburg were already boarding the aircraft. He went

to the restaurant, he did not find him. At the male toilets, he found one of them locked. He knocked at the door, but there was no answer. He peeped underneath the locked door but did not see the feet of a person inside. He went and climbed on the toilet pot of the nearby toilet and looked inside the locked toilet. There he saw the third appellant sitting on the closed toilet pot body and legs on top of it, hiding. He told him to come out which he did, and he took him to Shatunenga.

[7] Batholomuis De Klerk, a Unit Commander, Protected Resources Unit, testified that on 24 March 2014 Sergeant Mihangu from the Aviation Police at Hosea Kutako Airport called and informed him about the discovery of 14 rhino horns and one leopard skin during the screening process at the departure luggage point in the suitcases of Chinese Nationals who were about to depart out of the country by air. De Klerk sent two Inspectors Katau and Nandjebo to bring the appellants one, two and three to his office. According to the report of the two Inspectors to De Klerk, the products were found inside their luggage. The third appellant who was also travelling with them, was found in the toilet cubical and arrested as well. Insp. Nandjebo explained their legal rights to them. It was thereafter that the second appellant told the officer that he received the two suitcases just outside the airport terminal.

[8] Looking uneasy the second appellant said he was unable to identify the Chinese person from whom he received the two bags (suitcases) and neither does he know him by name nor where he is; but they are from the same region in China. Suddenly the third appellant interjected in a loud, sort of commanding voice. He spoke to the second appellant in Chinese language. Hereafter the second appellant depicted a sign of fear and subordination to the third appellant. According to the interpreter, the third appellant told second appellant that he was also in trouble because of the latter's receipt of the two suitcases outside the airport terminal.

[9] On being questioned about his knowledge of the two suitcases, the third

appellant said he only saw the luggage with the second appellant inside the terminal. The first appellant did not say anything. The officer opened and checked the contents of the two suitcases, in one bag there were four (4) rhino horns; a leopard skin and clothes while in the other bag there were ten (10) rhino horns and some clothes. Apart from the fact that the second appellant had a relatively new passport, the officer found that the three appellants left China to Zambia and then to Namibia together. They all had tourism visa endorsements for Zambia and Namibia in their passports. The officer noticed clearly that the appellants were travelling together as a group.

[10] According to investigations the staying arrangement at the hotel was that the first and second appellants were housed in room 242 while the third and fourth appellants were in room 243 under the name of P. I. Ghang. The officer obtained a CCTV video footage, which he viewed together with other officers during the investigation of this matter. This footage was also viewed by the trial Court during the hearing of this matter. The footage clearly showed the movements of all the four appellants during their stay at the Country Club.

[11] When the officer and others viewed the video footage he credibly identified appellants one, two and three. The fourth appellant who was not yet identified but was also visibly seen on the video footage together with the other three appellants was Wang Hui. Also viewed were the two suitcases in which fourteen (14) rhino horns and a leopard skin were detected on the conveyor belt at Hosea Kutako International Airport. The video footage clearly showed that these two suitcases were also part of the four appellants' luggage. All four handled the two suitcases (luggage). The video viewing left no doubt on this aspect.

[12] The argument that the two suitcases did not belong to the four appellants is credibly displaced by this credible evidence. The unassailable evidence that was placed on record before the trial Court is therefore; that among the luggage the four appellant possessed were also two suitcases containing fourteen (14) rhino

horns and a leopard skin.

[13] De Klerk followed some intelligence trails and found that the fourth appellant was residing in Otjiwarongo. On 18 May 2014 he was in Windhoek. They searched further and eventually found him at his hotel room. A search of his car yielded nothing. They searched his hotel room and belongings and found his Chinese driver's licence with recent coloured photos of the third appellant which he said he got from a friend. On further search of his photo gallery, the officer found photos of the passports of the first, second and third appellants which he said he also got from a friend. This showed that the appellants were together in one group. All these items were confiscated.

[14] Clip one of the video footage showed the entrance of the four appellants into the Windhoek Country Club on Sunday, 23 March 2014 at 15h00. The fourth appellant was in front, followed by the first appellant carrying a sling bag, then came the third appellant also carrying a sling bag, pulling a suitcase and a jacket. The last was the second appellant who was also pulling a suitcase with a sling bag on. On the movements of the four appellants to and from the hotel the following features are of interest. Some of the clips showed the first appellant leaving the hotel through the main entrance with an object looking like a sling of a vehicle key in his right hand which the fourth appellant was also carrying at that stage. The time lapse between when the first appellant left the hotel and came back was almost two minutes. On his return to the hotel he was carrying a large bag over his left shoulder. On another clip the first appellant is seen returning to the hotel pulling a trolley whereon there was an image of one of the suitcases wherein the rhino horns were found.

[15] A hanging vehicle key sling looking object was numerously seen changing hands and pockets between the first and fourth appellants respectively. The same also surfaced regarding a shoulder sling bag which repeatedly changed hands between the same first and fourth appellants. The above was accompanied by

numerous entry and exits by all the four appellants into and out of the hotel rooms 242 and 243. Suddenly the first appellant was seen returning, entering the room – pulling a brown golden coloured bag similar to the one wherein rhino horns were detected during the routine screening exercise at the airport. De Klerk exhaustively gave a credible detailed description of similarities between the suitcase viewed on the footage while in the first appellant's hand and one of the two bags wherein rhino horns were detected at the conveyor belt.

[16] The evidence of the CCTV video footage showing all the finer details of the in and outs of all the four appellants at the two rooms 242 and 243 during their stay at the Windhoek Country Club credibly and beyond reasonable doubt proves the following – that the four appellants were in one group; they knew each other; they were all travelling together and were all aware of how the fourteen (14) rhino horns and a leopard skin came to be found inside two of their suitcases.

[17] The above highly abnormal in and out movements of the four appellants between their two hotel rooms are not in accord with the mindset of innocent visiting hotel residents. It credibly, and without doubt falls in line with an uneasy/unsettled wrongdoing mindset brought about by the premeditated arrangements in which they were all involved, relating to the acquiring packaging and taking of the said products out the country.

[18] The conduct of all the appellants during their one day stay at the two rooms of the Country Club alluded to above clearly shows that they were jointly in possession and in full; control of the two suitcases containing the products. It also shows the none existence of any kind of interruption in their said possession and control of these products. Their one day stay at the Country Club was uninterrupted followed by their arrest at the Airport the next day. A very clear and credible unbroken chain of custody of the suitcases was proved beyond reasonable doubt.

[19] There has been a continuous possession and full control of the said items. The fact that it was only the first, second and third appellants who were physically at the Airport ready to board the plane and leave the country with the items had it not been for their swift arrest does not; and cannot extricate the fourth appellant from the blame and the resultant conviction. They possessed the parts on behalf of the group. It is on the basis of these observations that I am of the considered view that the trial Court materially erred in not convicting the four appellants on all three main counts. The two appellants who were arrested with the products were merely executing what the whole group had agreed should be done. In this case it is very clear from the body of the whole evidence and the conduct of the group that they had agreed to take the products out of the country.

[20] Ms. Davids, a resident of Windhoek at Chief/Insp. De Klerk's office interpreted for the appellants from English into Mandarin and vice versa. This is the language spoken by all Chinese Nationals including the appellants. There were no difficulties noticed during that process. The first and second appellants said they were working for the third appellant to whom they referred to as, "boss".

[21] The meaning of the word 'deal in' in the Definitions and interpretation under section one of the Controlled Wildlife Products and Trade Act 9 of 2008 is as follows: "... 'deal in, means sell, buy, offer or expose for sale or purchase, barter or offer as valuable consideration. It is credible from the whole body of evidence placed before the trial Court that the appellants had either bought or bartered the fourteen (14) rhino horns and the leopard skin in order to acquire possession thereof. It means they dealt in the products in view of the wide definition of the words "deal in" for purposes of this act. It is clear from the wording of section 4 (1)(a) and (b) that the products were illegally acquired and possessed as contemplated in schedule one.

[22] Section one of Schedule one of the Controlled Wildlife Products states the following:

'1. Subject to paragraph 2 and 3 no person may possess ... any object from, deal in, import into, or export from Namibia any tusks, horn, head, ear, trunk, skin, tail or foot or any part thereof, of any elephant, or rhinoceros or any part of any species or other specimen mentioned in appendix one unless the action in question is authorized by a permit'. This definition expressly includes the leopard skin which the appellants possessed without a permit or any authorization whatsoever.

[23] In the reasons for judgment the trial Court Magistrate found that appellants one, two and three's air tickets back to China were paid by the fourth appellant. They booked in at the Country Club as a group, and so did they book their flight back to China as a group. The flight bookings were made on 22 March 2014 while their arrests took place on 24 March 2014.

[24] The Magistrate took the whole body of evidence into account and considered it in its totality. Reference was made to the matter of *S v Shabalala* 1966 (2) SA 297 where the Court held that "the doctrine of common purpose has been held to mean that where two or more people associate in a joint unlawful venture, each will be responsible for any acts of his co-accused which fall within a common design".

[25] According to Ms. Davids who interpreted for the appellants at the offices of the Protected Resources Unit the appellants talked amongst themselves agreeing that the first appellant must accept the whole blame and exonerate the rest. This is in fact what he did, he pleaded guilty to the charges, taking all the weight on his shoulders thereby exonerating his co-appellants. This conduct is a proof beyond reasonable doubt that indeed the appellants were jointly and severally operating in common purpose as a group. This is an unassailable, credible acknowledgment that they all were aware of the presence of the fourteen (14) rhino horns and the leopard skin in the two suitcases. I hold this view because if the second and third appellants were not aware of rhino horns, they could simply have pleaded not guilty instead of reaching an agreement with the first appellant over the items which they

did not have knowledge off.

[26] The other aspect relates to the fact that the first and second appellants told the police officer that the third appellant was their boss (employer). This evidence was corroborated by the police officer Shatunenga who was operating the detecting machine. This evidence solidifies the presence of common purpose and the appellants' awareness that they were in fact exporting the fourteen rhino horns and the leopard skin out of the country.

[27] It is at this juncture that the trial Court materially misdirected itself in handing down a not guilty verdict on all the four appellants on the three main counts, holding that the prosecution has not proved the said counts beyond reasonable doubt.

[28] The above is a material misdirection given the fact that the same trial Court had as I have discussed above, already pronounced its satisfaction on record to say that all the appellants had carefully planned these offences. This is a legally well reasoned acknowledgment by the said trial Court that all the four appellants were in fact guilty on all three main counts in that they have acquired; possessed; were busy exporting the products. The appellants used the proceeds of unlawful activities which is what money laundering crafted in count 3 is materially all about. All the elements related to the three main counts such as, acquire; use; possession of or brings into or takes out of the country have been proved by the prosecution beyond reasonable doubt. The fact that these products were detected at the departure luggage conveyor belt at Hosea Kutako International Airport destined to be flown out of the country shows that all preparations required had gone past consummation, in that they have been finalized.

[29] The word "... exports ..." in section 4(1)(e) of the Controlled Wildlife Product and Trade Act 9 of 2008 does not require the receipt of the wildlife products at the desired/intended destination not at all. In this matter the products were acquired, carefully packed in two suitcases, culminating in the registration of the luggage at

the department point at Hosea Kutako for the flight out of the country. The transgression of exportation of wildlife products has therefore been completed and its requirements satisfied.

[30] From the above it is credibly clear that the following assertions of the appellants counsel:

That the prosecution had failed to prove its case beyond reasonable doubt; that the convictions of the appellants were based on suspicions and; That the trial Court has not properly evaluated all the evidence placed before it, have been credibly displaced. The requisites for the existence of common purpose as stated authoritatively: *S v Mgedezi*,¹ the authority relied on by the appellants counsel have been fully satisfied. This is credibly apparent in the whole evidence I have alluded to and discussed above.

[31] As regards sentence it is very clear from the trial Court's reasoning that all the relevant factors such the appellants being first offenders, their personal circumstances, the period they had already spent in custody on this matter, the seriousness of the crime, in particular the number of fourteen (14) rhino horns and a leopard skin that were in two of their suitcases were all considered. The trial Court also considered the impact these offences have on the wellbeing of our tourism industry. These were all appropriately taken care of during the sentencing process.

[32] It is, in my considered view, and common knowledge that: Rhinos are not a migratory or a troublesome specie such as elephants and sometimes buffaloes moving and crossing borders from one country to the other, thereby destroying the fields of the communities along their path and adjacent to their routes not at all.

[33] Rhinos are peaceful animals that one will have no reason whatsoever to

¹ *S v Mgedezi and Others* 1989 (1) SA 687.

shoot at on this earth, or to possess their horns products apart from wanting to export and thereby trade therein. Their carcasses are left out to rot. They are confined to National Parks and private farms. They appear by and large to be satisfied with the grazing and water within their habitats. Locals, visitors and tourists alike have to go and view them inside parks and private farms which is not always the case with buffalo and elephants. From all the above, it is my considered view that the only ultimate purpose of being found in possession of or dealing in rhino horns is to launder and to bring the tourism industry which is the engine of our economy and wellbeing, to its knees. In my view, being found in possession of these products is the worst kind of economic setback a foreign, or local national can commit on Namibian soil. If this subtle onslaught is not tackled with an iron fist, an irreparable damage to our wildlife is inevitable and certain.

[34] This Court is alive to the well-reasoned consideration the trial Court has placed on each appellants' personal circumstances; the period they had already spent in custody as well as the seriousness of the offences, in particular the substantial number of rhino horns they had on them to wit fourteen (14). The impact thereof on the wellbeing of our country's overall economy to wit the lucrative tourism industry.

[35] The conviction and sentence of the trial Court will accordingly be altered in terms of section 304(iv) of the Criminal Procedure Act 51 of 1977.

[36] In the result we make the following order:

1. The first appellant's appeal against conviction on counts 1 and 2 is dismissed.
2. The appeal of the second, third and fourth appellant against conviction on count 2 is dismissed.
3. The appeal against the discharge of all four appellants on the main 3 counts is upheld and they are accordingly found guilty as charged on the said 3 main counts.

4. The appeal against sentence is dismissed.
5. All three main counts are taken together for purposes of sentence.
6. The four appellants are each sentenced to twenty (20) years imprisonment of which five (5) years is suspended for a period of five (5) years on condition that the appellants are not convicted of the offences referred to in section 4, 5 and 6 of the Prevention of Organized Crime Act 29 of 2004, committed during the period of suspension.
7. The sentence is antedated 30 September 2016.

A. M. SIBOLEKA
Acting Judge

D. USIKU
Judge

APPEARANCES:

APPELLANTS: Mr. S. Namandje
Sisa Namandje & Co. Inc. Windhoek

RESPONDENT: Mr. S. Nduna
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