IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

8/11/2016

Case Number: ~~20064/201~~
A334/15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED. ✓
DATE 8/11/16 SIGNATURE

In the matter between:

ARMANDO PETRUS MKHABELA	**1st Appellant**
DAVID MAPIKWA MABASO	**2nd Appellant**
JACOB JULIUS NTULI	**3rd Appellant**
And	
THE STATE	**Respondent**

JUDGMENT

Sardiwalla AJ

[1] The three Appellants were charged on a count of contravening the Riotous Assemblies Act, No 17 of 1956, in that they conspired to commit the offence of illegal hunting of a rhinoceros within a National Park, prohibited by section 46 (1) of the National Environmental Management: Protected Areas Act, No 57 of

2003. Furthermore the Appellants were charged with the unlawful possession of a firearm and ammunition in contravention of respectively section 3 and 90 of the Fire Arms Control Act, No 60 of 2000. The Appellants were represented during the plea and sentence proceedings. All three pleaded guilty to the three counts against them. The court *a quo* convicted them as charged on the basis of the admissions contained in their signed statements in terms of section 112 of the Criminal Procedure Act, No 51 of 1977.

[2] The Appellants were sentenced as follows:

Count 1: 5 years Imprisonment each

Count 2: 1st Appellant – 5 years imprisonment, 2nd Appellant- 3 years imprisonment and 3rd Appellant- 4 years imprisonment

Count 3: 4 years imprisonment each.

The sentence on Count 3 was to run concurrently with the sentence on Count 2 in respect of each Appellant.

[3] The Appellants successfully applied for leave to appeal in respect of the sentence.

[4] The Appellants were charged for conspiring to commit the crime of illegal hunting of rhino within a Kruger National Park, which is prohibited in section 46(1) of the National Environmental Management: Protected Areas Act, No 57 of 2003. Section 46(1) of Act 57 of 2003 provides as follows:

> *"Despite any other legislation, no person may without the written permission of the management authority of a nature reserve or world heritage site enter or reside in the reserve or site"*

It was conceded that section 46(1) of the National Environmental Management: Protected Areas Act, No 57 of 2003 deals with trespassing in a protected area and that section 57(1) of the National Environmental Management: Biodiversity Act, No 10 of 2004, should have been used for illegal hunting of rhinoceros.

Section 57(1) of Act 10 of 2004 provides as follows;

"A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7"

Restricted activity is defined in section 1(a) of the Act 10 of 2004 as follows:

"(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen"

[5] In spite of the charge referring to the wrong section and Act, it was submitted a quo on behalf of the Appellants, that it was clear that the Appellants meant to plead guilty on a charge of conspiracy to hunt and kill rhino, a protected species, while not being in possession of a valid permit to do so. It was further submitted on behalf of the Appellants that it was their intention to plead guilty to conspiring to illegally hunt rhinoceros in the Kruger National Park and that they would not suffer injustice if this Court rules that the defect in the charge sheet was cured by admissions that the Appellants made in their statements in terms of section 112 of Act 51 of 1977.

[6] Section 88 was introduced to overcome technical errors made by persons drawing up the charges. Section 88 provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. This means that the accused can now be found guilty, even though the indictment does not disclose an offence provided that the evidence proves the offence. In this matter the deficiencies in respect of count 1 as contained in the charge sheet was cured in terms of section 88 of the Act 51 of 1977 by the admissions made respectively by the Appellants in their section 112 statements.

[7] This court will only interfere with the sentencing discretion if the trial court misdirected itself, or had not exercised its discretion judicially and properly, nor had the sentence been startlingly inappropriate, or that the interest of justice require it. In ***S v Pieters 1987 (3) SA 717 (A) at 734D-F,*** Botha AJA stated that the decisive question facing the Court of appeal on sentence was whether it was

convinced that the court which had imposed the sentence being adjudicated upon, had exercised its discretion to do so unreasonably. If so, the Court of appeal was entitled to interfere.

[8] The Appellants submitted that the Magistrate misdirected himself by referring to and relying on submissions made by the prosecutor from the bar on a disputed confession by one of the Appellants. It is trite that a party wishing to rely on a particular mitigating or aggravating factor must provide a sufficient factual basis for that factor through the production of evidence. The content of the confession was placed in dispute, and the Magistrate misdirected himself in relying on the confession that was disputed as there was no factual basis to do so. The Magistrate only relied on the submissions relating to the confession where he imposed the respective sentences pertaining to count 2 when he differentiated between the involvement of each Appellant and the level of participation.

The court in ***S v Kekane 2013 (1) SACR 101(SCA)*** stated that:

> *"It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock. It has been submitted on behalf of the appellant that the sentence is out of proportion to the gravity of the offence and that, in the circumstances of this case, a non-custodial sentence was appropriate. It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced."*

[9] It was also submitted on behalf of the Appellants that the sentence is not proportionate to the circumstances of the case and induces a sense of shock based on the following three aspects: the Appellants did not execute their plan to hunt and kill rhinoceros; the Magistrate overemphasized the interest of society while placing little value on the personal circumstances of the Appellants; and the cumulative effect of the three sentences is shocking disproportionate under circumstances.

[10] Section 18(2) of the Riotous Assemblies Act 17 of 1956, states that the conspirator is liable to the same punishment as the person convicted of committing the crime and the sentence imposed by the Magistrate in respect of count 1 is indeed one that he could have imposed. The fact that the Appellants did not execute their plan is not mitigating because if it was not for the preventive action of the police they would have executed their conspiracy, and it was in the interest of justice to arrest would-be perpetrators of serious crimes before they commit it, and charge them for conspiracy to commit the crime rather than to wait for them to carry out their plan and charge them for the completed offence.

Dealing with remorse as a mitigating factor, Ponnan JA made the following dictum in ***S v Matyityi 201 1(1) SACR 40(SCA) at 47 a-d***.

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse .Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart: and whether he or she does indeed have a true appreciation of the consequences of those actions."

[11] The Appellants further argued that they were enticed by the police agent to commit the crimes and that they were just randomly chosen by the police agent.

Section 252A (1) states that traps are admissible *"if that conduct does not go beyond providing an opportunity to commit an offence"*. Accordingly, this court admits the evidence of a trap. In ***S v Sellem 1992(2) SACR 19 (A) at 28f-29c*** the Court found that if a crime was committed as result of enducement it would be significant during sentencing stage. The court further found that the influence of persuasion is a question of fact that must be established through evidence. The Appellants failed to give evidence regarding the influence that the persuasion of the police agent had on them.

[12] The fact that the crime was carefully planned is an aggravating factor and it was not an impulsive act; and the Appellants had the opportunity to change their minds and withdraw from conspiracy. This Court takes judicial notice of the alarming proportions that rhino poaching has reached South Africa and there is a general outcry for strong action to curb offences linked to rhino poaching.

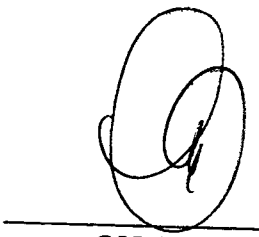
[13] I am of the view that the Magistrate did not overemphasise the interest of society in this matter if the following factors are taken into consideration: the endemic proportions that rhino poaching has reached and the interest of the community therein; that the Appellants were in unlawful possession of a firearm which they wanted to use to commit a crime; the court did take into consideration the personal circumstances of the Appellants as well as the fact that he regarded them as first offenders; the fact that they did plead guilty to the offences; the court did take into consideration that they were arrested as a result of a police trap; that the Appellants did not complete the offence and kill rhinoceros; the court considered alternative sentencing options. The cumulative effect of the sentence and; similar matters that it dealt with were also taken into account.

[14] This appeal previously served before this Court on 10 March 2016. On that occasion the question was raised whether the provisions of Section 113 of the Criminal Procedure Act should not have been applied by the Court a quo. Counsel for the State provided additional Heads of Argument and referred us to ***Mokonoto v Reynolds 2009 (1) SACR 311 T***, amongst others. Standing alone, that decision would indeed provide support for an argument that the learned Magistrate should have entered a plea of not guilty, and that the fairness of the

enticement be investigated. On the facts of this case however, there is no justification for such. The topic was only raised in argument on sentence. It also appeared that the particular police official had only on one occasion mentioned that money could be made in this manner. Thereafter eight calls were made to him to arrange the intended crime. There can be no question that the Appellants were unfairly or unlawfully enduced into this course of conduct.

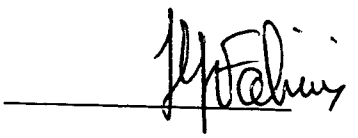
[16] Accordingly it is ordered that:

[17] The appeal against the sentences is dismissed.



CM SARDIWALLA
ACTING JUDGE OF THE HIGH COURT

I agree



HJ FABRICIUS
JUDGE OF THE HIGH COURT

HEARD ON	: 11 OCTOBER 2016
FOR THE APPELLANT	: ADV L AUGUSTYN
INSTRUCTED BY	: LEGAL AID BOARD
FOR THE RESPONDENT	: ADV JH VAN DER MERWE
INSTRUCTED BY	: DIRECTOR OF PUPBIL PROSECUTIONS
DATE OF JUDGMENT	: 8 NOVEMBER 2016