IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, DIVISION, PIETERMARITZBURG

CASE NO: AR393/2018

In the matter between:

JABULANI MATHONSI Appellant

and

THE STATE Respondent

ORDER

(a) The appeal succeeds to the extent that the conviction and sentence on count three are set aside.

(b) In all other respects the appeal is dismissed.

(c) The effective sentence is therefore three years' imprisonment, effective from 9 February 2017.

JUDGMENT

Delivered on: 20 May 2020

PLOOS VAN AMSTEL J (MASIPA J concurring)

[1] The appellant in this matter was found guilty in a regional court on three charges, namely a contravention of section 57 (1) of the National Environmental Management: Biodiversity Act 10 of 2004 (the carrying out of a restricted activity involving an attempt to hunt a rhinoceros); a contravention of section 1 (1) (a) of the Trespass Act 6 of 1959 (entering the Zulu Nyala Game Reserve unlawfully and without permission); and a contravention of section 4 (1) (f) (iv) of the Firearms

Control Act 60 of 2000 (the unlawful possession of a prohibited firearm, namely a rifle of which the serial number had been removed). He was sentenced to an effective period of 18 years' imprisonment. The appeal before us is in respect of the convictions and the sentence, leave having been granted by this court on petition to it. With the consent of the parties we dealt with the appeal without the hearing of oral argument, in the light of the current restrictions regarding the Covid19 pandemic, as we are empowered to do in terms of section 19(a) of the Superior Courts Act 10 of 2013. Counsel for both parties delivered heads of argument, in which their respective submissions were fully set out.

[2] The events in question occurred during the night of 19 July 2015. Late that night a report was received by Innocent Mhlongo, who worked for the Nyathi Anti-Poaching Unit, that a colleague had noticed footprints leading into the game reserve. A team was assembled. They followed the footprints in the reserve and at about 6 am they noticed from the footprints that the intruders had left the reserve.

[3] They continued to follow the footprints outside the reserve. It seemed to them that they were following four persons. Three of them crossed the N2 highway and the team followed their footprints. The fourth one remained on the road, where he was apparently arrested by other members of the Unit.

[4] The footprints led them up a hill, known as Mtekweni. As they approached a cave, a person emerged from it and ran away. The appellant then came out of the cave, raised his hands and asked the members of the Unit not to shoot. A second person came of the cave. He and the appellant both lay down on the ground and they were handcuffed. Mhlongo testified that the appellant was barefoot. The second person was wearing Adidas shoes, which he said were similar to the prints that they had been following. This person was later tried together with the appellant, and convicted of the same offences.

[5] In the cave Mhlongo found a rifle with a silencer, together with a bag and a knife. He asked the two men who they were and what they were doing there. They identified themselves and the appellant said they had been to the Zulu Nyala Game Reserve to hunt rhinos.

[6] The appellant claimed in his evidence that he had not been near the cave and that he and his co-accused were arrested while they were innocently walking along a pathway, on their way to meet with a friend who lived in the vicinity of the Mtekweni hill. They both denied that they had entered the reserve.

[7] The state called an expert witness who had compared casts of the footprints which were found in the reserve with the Adidas shoes which had been taken from the appellant's co-accused at the cave. He described the similarities and made particular reference to a thorn which was embedded in one of the shoes. He said there was a high probability that the prints in the reserve were made by these shoes, but scientifically he could not say that this was definitely the case as there were not enough points to rely on. This evidence must be seen in the context of the case, and not in isolation.

[8] The members of the anti-poaching unit followed the footprints from where they entered the reserve to the point where they left the reserve again. They continued to follow the prints until they got to the cave on the hill. One suspect ran away, and the appellant and his co-accused, who was wearing the Adidas shoes, surrendered. In the cave they found a rifle with a silencer, a bag and a knife. When Mhlongo asked what they were doing there the appellant admitted that they had been to the reserve in order to hunt rhinos. In the light of this evidence it can safely be accepted that the shoes worn by the co-accused, which had been examined by the expert witness, made some of the prints that were found in the reserve.

[9] I am unpersuaded that the magistrate erred in rejecting the appellant's evidence as false beyond a reasonable doubt and convicting him on counts one and two. This brings me to the conviction on count three.

[10] There was no evidence that the rifle found in the cave belonged to the appellant or that it was ever in his possession. It may have belonged to his co-accused, or to the third person who made his escape. In her judgment the magistrate said: 'With regards to this, I have considered that indeed the accused were found in possession of a firearm. This firearm was found in a cave inside the cave (sic) from where the accused came out, and therefore the only reasonable inference that can be drawn is that indeed the accused was in possession of the said firearm inside that cave'. It appears that the magistrate found that both the accused were in possession of the rifle, which is confirmed by the fact that she convicted them both on that charge.

[11] Although this is not entirely clear, it seems that the magistrate's reasoning was that the men entered the reserve with a common purpose to hunt a rhino and that therefore the possession of the rifle by one of them constituted possession by all of them. This is an incorrect approach. In *S v Mbuli* 2003 (1) SACR 97 (SCA) para 71 Nugent JA said a mere intention on the part of the group to use the weapons for

the benefit of them all will not suffice for a conviction. He referred with approval to *S v Nkosi* 1998 (1) SACR 284 (W), where it was held that the State has to prove that the group had the intention to exercise possession of the guns through the actual *detentor*, and the actual *detentors* had the intention to hold the guns on behalf of the group. There was no evidence in the present matter to support such a conclusion and the conviction on this count cannot stand.

[12] With regard to sentence the setting aside of the conviction and sentence on count three changes the picture altogether. The effective sentence is thereby reduced from 18 years to 3 years. It seems to me that the sentence of two years' imprisonment on count one was on the light side, while the sentence of one year imprisonment on count two seems entirely appropriate.

[13] The order that we make is as follows:

(a) The appeal succeeds to the extent that the conviction and sentence on count three are set aside.

(b) In all other respects the appeal is dismissed.

(c) The effective sentence is therefore three years' imprisonment, effective from 9 February 2017.

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Ploos van Amstel J

Appearances:

For the Appellant	:	A. Hulley
Instructed by	:	Durban Justice Centre
	:	Durban

For the Respondent	:	A Harrison
Instructed by	:	Office of the Director of Public Prosecutions
	:	Durban

Date Judgment Reserved	:	15 May 2020
Date of Judgment	:	20 May 2020