IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A596/13

In the matter between:

JUAN ROODMAN Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 23 OCTOBER 2014

BOQWANA, J

Introduction

[1] The appellant appeared before the Regional Court in Blue Downs having been charged with one count of contravention of Regulation 36(1) (b) alternatively Regulation 36(1) (a) of the Regulations in terms of the Marine Living Resources Act No. 18 of 1998, together with one Raymond Puma ('Raymond'), who passed away during the course of the trial. The appellant was accused 2. He was convicted and sentenced to:

1.1 a fine of R20 000.00 or 12 months imprisonment; and

1.2 to 18 months imprisonment suspended for 5 years on the following conditions:

1.1.2 Correctional supervision for 18 months with the following:

(a) House arrest;

(b) Community Service;

(c) Attending treatment programmes;

(d) Submission to monitoring by the Commissioner of Correctional Services.

[2] The appellant was granted leave to appeal against his conviction by the magistrate.

Background facts

[3] The charge against appellant concerned an incident that occurred on or about 26 February 2006 at or near Joostenbergvlakte where the appellant was accused of being involved, as part of a syndicate, in transportation and/or possession of abalone that had been shucked and not in a whole state to the total of 190.6 kg, without an appropriate valid permit.

[4] During November 2005, the Directorate of Special Operations ('DSO') conducted an undercover operation in terms of section 252A of the Criminal Procedure Act, 51 of 1977('CPA'), at premises in Betty's Bay pursuant to the receipt of information from an unnamed source about illegal abalone activities

that were conducted at a smallholding in San Souci in Sir Lowry Pass Village in Somerset West.

[5] On 2 December 2005, Harry Evans ('Evans'), who later became a state witness, and his son, Brendan, were caught whilst attempting to collect the abalone stored on the premises. It became apparent from the questioning of Evans by the DSO that Evans and Brendan, were merely middlemen and the bigger role players involved in the syndicate were two Chinese men by the names of Zimming Yuan (known as David) and Long Cai Wu (known as Jason). Another big role player, who was an 'associate' of the two Chinese men, was one Denver Langenhoven ('Langenhoven'), who had a cooling facility, in Woodstock and handled all the export administration, packaging and freezing of the abalone. The abalone would after processing and packaging be exported to Hong Kong.

[6] Evans and his son offered to assist the DSO in their investigations. Evans agreed to be used as an agent. One Paul Rossouw ('Rossouw') also agreed to be used as a DSO agent to accompany Evans in all the deals in order to corroborate Evans as a witness at the later stage. The purpose of Evans and Rossouw acting as agents was to identify the providers of the abalone as well as anybody else who might be involved in the illegal activities of the syndicate. They had to also identity the *modus operandi* of the syndicate.

[7] Evans testified that he worked as an employee of David. His job was to obtain abalone from the suppliers and process it. These suppliers were all introduced to him by Jason. The abalone received from the suppliers was illegal. The abalone processing involved washing, cooking, drying, sorting and packing it according to sizes. The dried abalone was then transported to Johannesburg.

[8] Rossouw testified that during the six months period that he and Evans worked undercover he observed four different scenarios on how the syndicate operated. The first scenario was that on instructions of David they would rent premises to receive shucked abalone from the supplier. They had premises in Betty Bay for a couple of months and thereafter in Okavango Industrial area in Brackenfell. Suppliers would buy abalone at the premises. In the second scenario the abalone would be collected from the suppliers. They would meet the suppliers at the predetermined location to fetch abalone loaded in a vehicle. On the third scenario they would transfer the abalone from the supplier's vehicle to their own vehicle. With regard to the fourth scenario he and Evans would hand over the vehicle to the suppliers and wait for the supplier, who would collect the abalone and bring it back to them. They would then take the abalone to Langenhoven's factory in Woodstock for processing, packaging and exportation.

[9] Evans testified that, on 23 February 2006, whilst he was in his office at the workshop, he received a telephone call from David just after 10:00 in the morning. David gave him a name and number of a person who would contact him. Shortly thereafter he received a telephone call from the person and number that David informed him about. The person identified himself as Raymond. Raymond informed him that they needed to make arrangements for Evans to fetch the abalone from him (Raymond). The person told him to meet him at Southern Lodge in Victoria Street in Plumstead at approximately 12:00 midday. After the conversation with Raymond, Evans telephoned the Investigating Officer, Johannes Jacobus Strydom ('Strydom'), informing him about his arrangements with Raymond. He then left with Rossouw, his co-agent, to meet Raymond in

Plumstead. They were driving in a Toyota Hilux Bakkie which belonged to the DSO. The Bakkie did not have a canopy. At the back of the bakkie was a blue plastic canvas. When they arrived at their destination they met a person who introduced himself as Raymond. Evans explained to Raymond that they had to place the abalone in the middle of the canvas and he must fold the sides over the abalone like an envelope so that there would be no liquid leakages from the bakkie. At that stage he did not know whether the abalone was frozen or fresh. Rossouw who was driving gave the keys of the bakkie to Raymond. Raymond drove off with the bakkie, whilst Evans and Rossouw waited. He then saw Strydom. At that moment, Raymond came back and parked the bakkie behind Strydom, i.e. where he had picked it up in the first instance. Evans could see that there was something underneath the canvas. Raymond gave the keys back to Rossouw and left. They opened the blue canvass they could see that it was shucked abalone. Evans never had contact with Raymond again. This background is important, although it did not involve the appellant but his employer, the late Raymond. The incident that directly involves the appellant is the one I deal with below.

[10] On 26 February 2006, on his way from the factory to his house, Evans received a telephone call from Raymond again from the same cell number as before. Raymond wanted arrangements to be made for Evans to fetch abalone from him. Evans told Raymond to phone David, his employer, first so that David could be made aware of the deal and make arrangements for payment for the abalone. Evans phoned Strydom to inform him about the transaction that was to take place. He then phoned Rossouw his co-agent and arranged to meet him.

David then phoned Evans after which Raymond phoned Evans again. Raymond told Evans that his employees would meet Evans at the Joostenbergvlakte turn-off at 18:00. He told him that they would be driving a BMW. In the meanwhile Evans met Rossouw at Engen Garage in Okavango. Raymond called again to enquire if they were near the meeting place. Rossouw drove the bakkie to Joostenbergvlakte whilst Evans followed with the Mercedes Sprinter bus that he was driving.

[11] They saw the BMW. Rossouw parked the bakkie in front of the BMW with the cars facing each other. Evans parked behind Rossouw. Evans phoned Raymond again to inform him that they had arrived at the meeting place. Evans could see that there were two white people sitting in the front seats of the BMW. Evans got out of the bakkie, went to the BMW, by the driver's window, and introduced himself. The driver of the BMW confirmed that he was working for Raymond. Evans bent down to look at the person's face. At the time of the conversation he was standing next to driver's door and was about 30cm from that person. While they were talking, the person was looking at him. The driver of the BMW then told Evans to follow him to a safe place where they could swop vehicles. Evans then advised the driver that Rossouw would follow and he would remain behind to keep watch. He did not look at the passenger's face, but noticed that both gentlemen in the BMW were quite tall and were sitting quite high in the car. He noted the colour of the BMW as metallic and the registration number as CF 42444. The vehicle had MAG wheels on. He also noticed the vehicle parked outside the court building during the trial, with the same colour and registration number. Rossouw followed the BMW with the bakkie and Evans got left behind. The BMW and the bakkie went out of his sight and Evans waited next to the road

at the Joostenbergvlakte turn-off. At this point the bakkie came back driven by the two people who were in the BMW. He observed that the same person who drove the BMW also drove the bakkie. The two people drove away. A while later, he saw in his rear view mirror the bakkie coming towards his direction. The bakkie turned left into the road where the bakkie and BMW had been driven to swop vehicles. A little while later, the bakkie came back being driven by Rossouw. He could see folded blue canvass at the back of the bakkie and he could see that there was something beneath.

[12] Raymond phoned again to say that one of his employees left their cell phone in the bakkie. He took the phone to Joostenbergvlakte turn-off, where they had met with Raymond's employees. He saw the BMW again and the same people that he had seen earlier were seated in the BMW in front. He went to the driver's side again and then bent down to give him the cell phone. The driver thanked him. At that stage he made sure that he made the right observations of the person. The driver had a scar on his forehead. The scar was not very noticeable if one was far away. One had to be near to see it. It was a small mark. He was glad for the second opportunity because his job was to identify people. The bakkie had plastic bags containing fresh Abalone weighing 190.6 kg. Samples were taken and placed into forensic bags. The abalone was then processed. Meanwhile Langehoven advised Evans not to bring abalone to the processing plant in Woodstock because the police were busy in the street. It was however later processed at Woodstock.

Rossouw corroborated Evans in material respects. There is no need to repeat all his evidence except where material, such as in the aspect of identification, which I deal with below.

[13] When Rossouw followed the BMW with the bakkie for the purposes of swopping cars, he parked opposite the Cape Garden Centre. No other people were present except him and the two occupants of the BMW vehicle. The men in the BMW got out of the vehicle. Rossouw got out of the bakkie also and the three stood behind the bakkie. That is when Rossouw gave the driver of the BMW a first clear look. He concentrated on the driver because he was the more active of the two men. The driver was only a metre away from him when he made these observations and it was still light. He observed that the driver was a tall white male with dark curlish hair. He observed the driver for about a minute and a half to two minutes because they were in close proximity. The suspects left with the bakkie and he remained with the BMW. Whilst in the BMW he began to look for evidence. He found a driver's licence containing the name, initials and ID number of the driver and made a note of the licence disc. He learnt that the driver's name was F J Roodman. He saw the face of the white man in the photograph in the driver's licence whom he identified as the same man who was the driver and to whom had just spoken. He gave the picture in the driver's licence a good look during the five to ten minutes he spent in the BMW waiting for the two men to return just to confirm his observations a second time. Upon the return of the two gentlemen with the bakkie, Rossouw double-checked the identity of the driver with the photo he had just seen. The same person who drove the BMW also drove the bakkie. When he got out of the bakkie, Rossouw looked at his face and

walked close alongside the bakkie right up to the driver. He observed the driver on their return for at least two minutes and was sure that the person who drove the BMW was the same as the one on the driver's licence. He also confirmed the registration numbers and colour of the BMW. He further confirmed that the two men came back with the load of abalone at the back of the bakkie.

[14] The magistrate concluded that Evans and Rossouw were very impressive witnesses who gave a clear and coherent account of the events they observed. He found that each of them had the opportunity to view the faces of the appellant and his co-accused, Raymond. He found that both witnesses were not shaken under cross-examination and their evidence accorded with the probabilities and their version was the one to be preferred.

[15] The appellant primarily raises three main grounds of appeal, being that: the state failed to present evidence that the principal parties, i.e. David and Raymond, were not in possession of a permit; that the appellant was not properly identified and the magistrate erred in failing to appreciate the wide ranging material differences between the evidence of Evans and Rossouw; and finally, that the magistrate did not properly consider the appellant's *alibi* and other relevant evidence.

Evaluation

Identification

[16] The appellant put his identity in issue. It is trite that evidence of identification should be treated with caution. In **S v Mthetwa 1972(3) SA 766 (A) at 768A** the Court said the following:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..'

[17] In the present matter, the witnesses testified that when they made observations it was still light. They both identified the driver of the BMW as a tall white man and saw him at close proximity. Evidence is clear that they both had sufficient opportunity to look at his face on two occasions. Evans, whilst talking to the driver, bent down to observe him and noticed a scar the second time around. Rossouw not only saw the face but he compared the person he had just seen with the person in the photograph of the driver's licence. He had enough time to study the driver's licence and to have a second look in order to make sure that the person in the picture and the driver were one and the same person. This is not a case where the perpetrator quickly vanished from the scene without his face being noticed. The witnesses had plenty of time to look at the appellant.

[18] It could not simply be coincidental that the BMW that belonged to the appellant's family was identified in the incident, his driver's licence was found in the vehicle, with the person in the photograph looking like the driver of the BMW on that day, the very same vehicle was spotted outside the court building during the trial and Raymond happened to be known by the appellant as a friend. The appellant lived in Joostenbergvlakte, his house is approximately five minutes

from where the driver of the BMW was identified on 26 February 2006 by Evans and Rossouw. The cell phone records also strengthened the state' version, albeit recording contact between Raymond and Evans.

[19] The fact that Evans and Rossouw had no dealings with the appellant prior to the incident does not weaken the state's case. The features observed on the scene such as the scar were also observed in Court. The witnesses also had sufficient time to observe the identity of the driver. The appellant also confirmed that he had a scar. The magistrate was correct in his finding that dock identification is not inadmissible, but that it should be considered together with other evidence. In the totality of all the evidence the identification of the appellant by Rossouw and Evans was reliable.

[20] The magistrate did not give elaborate reasons as to why he found that Evans and Rossouw were the most impressive witnesses, save to mention that they gave clear and coherent account of what they observed. This however does not give rise to a misdirection. The approach to be adopted by the court of appeal on the appeals based on fact is well known. In **R v Dhlumayo and another 1948 (2) SA 677 (A) at 706,** Davis AJA stated:

> '8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
>
> 9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.
>
> 10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

> 11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.
>
> 12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

[21] Evans and Rossouw were clear and consistent. They were not overly shaken in cross-examination. They were extensively cross-examined but stuck to their testimonies. Rossouw and Evans dealt with over 30 consignments and identified a fair amount of suspects. The explanation that the statements to the police only included what they thought important at the time is reasonable. The magistrate was therefore correct by accepting Evans and Rossouw's evidence.

Permit

[22] Having found the appellant to have been on the scene on the day in question, the magistrate did not deal with the issue of the permit. Counsel for the appellant submitted that the magistrate erred in failing to do so. Whilst, it could have been seen to render the judgment more complete for the magistrate to give his views on the permit issue, his failure to do so does not amount to a misdirection in my view. **See R v Dhlumayo supra.** Not only did the appellant deny that he was at the scene, he conceded that on that day in question he did not have a valid abalone permit which was registered in his name. It was therefore not necessarily crucial for the magistrate to determine the issue of the permit. Be that as it may, this Court has had an opportunity of considering the record independently and its views on the permit aspect follow hereunder.

[23] Regulation 36(1) (a) and (b) read as follows:

'(1) No person shall –

(a) engage in fishing, collecting, disturbing, keeping, controlling, storing, transporting or be in possession of any abalone, except on the authority of a permit; or

(b) transport or be in possession of any abalone that is not in the whole state, except on the authority of a permit; or...'

[24] Section 250 (1) of the CPA stipulates that: "If a person would commit an offence if he –

(a) Carried on any occupation or business;

(b) Performed any act;

(c) Owned or had in his possession or custody or used any article, or

(d) Was present at or entered any place,

without being the holder of a licence, permit, permission or other authority or qualification (in this section referred to as the "necessary authority") an accused shall at criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved."

[25] The submission raised on behalf of the appellant on the issue of the permit is that once a principal or a company is in possession of a permit, the authority should extend to the agents. It is argued that both Evans and the appellant were employees and agents of David and Raymond respectively; David was a partner at Big Cedar, an entity alleged to have been in possession of a licence; and that David and Raymond had permits to purchase, process and legally export abalone.

[26] Evans testified clearly that the activities that he was involved in were illegal. He testified that the abalone they received from the suppliers was shucked and was illegal. The law is quite clear that in order to be in lawful possession of or to legally transport abalone that is shucked, authority of a permit is required. Evans, Rossouw and the appellant's activities on 26 February 2006 fell within those activities prohibited by the Regulations. To argue that they did not need a permit by virtue of their principals holding a permit is nonsensical. Furthermore there was no evidence presented to the effect that the permit allegedly held by Big Cedar covered transportation or the possession of shucked abalone *nor* was it stated that Raymond had a permit covering transportation and possession of abalone.

[27] Evans testified that the permit Big Cedar held did not cover their activities because certain regulations were applicable before a person could transport abalone. The actions of all the parties involved on the day of the incident, i.e. 26 February 2006, were indicative of the fact that they were aware that what they were doing was illegal. There was no evidence to contradict that of Evans in this regard. In addition to that the driver of the BMW in particular wanted vehicles to be swopped in the secluded area where no one could see.

[28] It is also important to mention that none of the abalone was processed through Big Cedar from the evidence presented. To the contrary, it was processed in Langenhoven's premises in Woodstock and packed in cardboard boxes together with the fish from Viking Fishing. Viking Fishing had permits to export fish but not abalone. There were no abalone permits. The abalone was mixed with the fish from Viking Fishing so as to disguise it from those inspecting the product

at the harbour. All these actions, in my view, suggest that those involved knew that what they were doing was illegal.

[29] Lastly, nowhere in his evidence did the appellant state that he was employed by Raymond or Big Cedar as matter of fact, and therefore covered by Raymond's or Big Cedar's alleged permit *nor* did he state that he in fact had a permit on the day in question. He excluded himself from agency. He can therefore not rely on it as it would not be applicable to him. He placed his identity in issue and conceded that he did not have a valid abalone permit.

[30] In the absence of evidence proving that the appellant had the authority of the permit to possess or transport abalone that had been shucked, it must be deemed that he did not have the authority in terms of Regulation 36(1) (b).

Appellant's case

[31] The appellant denied any involvement in the incident of 26 February 2006. He raised an *alibi* that on that particular day he was watching rugby with his father, Frederick Roodman ('F Roodman') and his vehicle, a bakkie, had gone for repairs. The BMW belonged to his father and it was not driven by him on that day. In fact his father's testimony was that he had given the vehicle to Nicholas, the appellant's younger brother. The *alibi* was not raised in the appellant's plea explanation nor was it put to any of the state's witnesses except for when Strydom was re-called for cross examination to deal with the statement made by F Roodman. Surely, the appellant would have known where he was on the day of the incident and would have put this defence upfront to the witnesses of the state

i.e. Evans and Rossouw who identified him as being one of the two white men identified on 26 February 2006.

[32] It is accepted that the appellant has no onus to establish the *alibi* and that if it might reasonably be possibly be true he must be acquitted. The alibi must however be tested together with other evidence and not in isolation. See **R v Hlongwane 1959 (3) 337 (AD) at paragraphs 340 H to 341 B.**

[33] The appellant criticizes the state for failing to disclose the affidavit of F Roodman, from the defence and the court, which showed that the appellant's brother was the driver of the vehicle on the day in question, until very late. The statement was apparently taken one year after the trial had commenced and after Strydom was cross examined. This was cured by the recall of Strydom. Criticism of the magistrate on this issue is without merit.

[34] Furthermore, the statement did not deal with the whereabouts of the appellant on that day. It simply referred to Nicholas. F Roodman testified that he informed the investigating officer that the appellant was with him watching rugby on that day. This crucial information, was however not included in the statement. There were inconsistencies between the appellant and his father as to what teams or games were watched that Sunday. All this leaves an impression that the *alibi* was a belated fabrication. The totality of evidence provides strong support for a finding that the appellant's *alibi* is false.

[35] It must also be stated that the appellant did not make a good impression as a witness. He contradicted himself on many instances and even changed his version on numerous occasions. For example, he initially testified in cross

examination that the game he watched was a Super 14 game between the Stormers and a team he could not recall. When pressed on this issue, the second time under cross examination, he changed his version and stated that he had checked on the internet after first cross examination and had discovered that the game was between Wales and Ireland. He however could not remember whether he watched any rugby the previous day or two. The appellant was not a truthful and a credible witness. I am in agreement with the magistrate's remarks that the record speaks for itself in so far as the appellant's inconsistencies are concerned.

[36] In the circumstances, the appeal has no merit and should be dismissed.

[37] I therefore propose the following order:

1. The appeal is dismissed and the conviction and sentence are confirmed.

_____

BOQWANA J

Judge of the High Court

I agree, it is so ordered

_____

SALDANHA J

Judge of the High Court