INTHE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, THOHOYANDOU

CASE NUMBER: CC14/2019

In the matter between:

MFANA IGNITUS KUBAI **First Appellant**

OBED SAMIN CHAUKE **Second Appellant**

V

STATE

JUDGEMENT

AML PHATUDI J

[1] The State arraigned the appellant, Obet Chauke, as accused number 2 and, one Mr Thabalani Kubai as accused number 3, in the Regional Court, (per P.V. Mudau), held at Louis Trichardt (Makhado). The appellant faced, among other charges, hunting of a specially protected wild animal, in contravention of section 31(1) (a) read with the

provisions of s 31(3); 31(4); 112 and 117 read with schedule 2 of Limpopo Environmental Management Act, Act 7 of 2003[1].

[2] The State withdrew all charges against Thabalani Kubai, who was the other person arraigned as accused number 1. The appellant and Chauke remained charged as accused 1 and 2 respectively. A guilty verdict followed on 3 May 2016. On 10 August 2016, the trial court sentenced the appellant and Chauke in terms of s 276 (1) (b) of Criminal procedure Act, Act 51 of 1977, as amended, to 11 years direct imprisonment.

[3] Saddened by the conviction and 11 years direct imprisonment, both the appellant and Chauke approached the trial court with their application for leave to appeal both, the conviction and sentence. The trial court upheld their application for leave to appeal only the sentence imposed.

[4] On 02 December 2016, the appellant and Chauke enjoyed the trial court's indulgence by granting bail, pending the outcome of the appeal against the sentence.

[5] The dissatisfaction of the appellant and Chauke relating to the trial court's refusal to grant leave in respect of the conviction, prompted them

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[1] "Count 1. Hunting of a specially protected wild animal in contravention of Section 31(3),31(4),112 and 117 as well as Schedule 2 of the Limpopo Environmental Management Act 7 of 2003 and also read with Section 256 of Act 51 of 1077 in that upon or between 5 June 2014 and at or near Chakaronga farm accused wrongfully and unlawfully without a valid permit hunt a specially protected wild animal to wit one rhinoceros to the value of approximately R450 000.00 by shooting and or killing it on land on which any wild animal or alien animal is found or likely to be found.

to petition the Judge President of this Division. This court dismissed their petition with which they sought leave against conviction.[2]

[6] Let me digress before dealing with sentence and indicate that this appeal court, caused issue of a directive, through the Registrar of this court, directing the appellants to show cause, why this appeal court should not increase the sentence imposed by the trial court. Further, the directive directed parties to file heads of argument to that effect.

[7] On the first hearing day of this appeal, this appeal court enquired as to the trial court's reasons for granting bail pending the appeal on sentence. The reason for the said enquiry is that there was no transcribed record of proceedings and, or, an order filed with the appeal record. The submissions made led to this court ordering reconstruction of bail pending appeal application and the judgement thereof if indeed the proceedings took place. This caused a postponement.

[8] Counsel for the appellants placed on record that the second appellant, Mr Chauke, has since abandoned his appeal against sentence. He served his sentence and, as things stand, he is released[3]. It is not clear on how, and, under what circumstances he was released. As a result, Mr Kubayi is the only appellant before this appeal court.

[9] The appellant filed the recorded record of proceedings relating to his application to be admitted to bail pending sentence. The record is, however riddled with "[inaudible]". I, nonetheless, find that this appeal

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[2] Ms Campbell, counsel for the appellant, submits that the appellant has already approached the Supreme Court of Appeal, with a view of petitioning it in relation to the refusal of his petition by this court, even before this court could finalise this appeal against sentence..

[3] Probably on parole

court can proceed with the hearing and adjudication of this appeal[4] because one finds what was required, being, the *ratio decidendi*[5].

[10] The grounds for the appeal stipulated, are – (a) the trial court erred in not considering the penalty clause enunciated in s 117 (1) (a) of the Limpopo Environmental Management Act, Act 7 of 2003 (LEMA). (b) 11 years direct imprisonment induces a sense of shock because, the appellant (i) is a first offender, (ii) has 2(two) minor children, (iii) he is a bread winner and (iv) he spent almost 2(two) years in custody awaiting trial. He lastly indicates that the trial court erred in finding that no other sentencing option was appropriate.

[11] I outright indicated to the parties that this appeal court has a prima facie view that the trial court erred in not sentencing the appellant in accordance with the penalty clause stipulated in schedule 2 of s117(1)(a) of the Limpopo Environmental Management Act, Act 7 of 2003. It is further not clear as to why the trial court sentenced the appellant in terms of the provision of s 276 (1) (b) of Criminal Procedure Act 51 of 1977, whilst in his judgement, he indicated:

"The penalty clause in the present case is provided for in section 117(1)(a) of Act 7 of 2003 and the maximum fine is a fine of R250,000 and the term of imprisonment the maximum thereof is 15 years imprisonment".

[12] The parties' positive response left us with no other option but to indicate that, on that leg alone, we are duty bound to interfere with the trial courts sentence.

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[4] The requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. See *S v Chabedi* [2005] ZASCA 5; 2005 (1) SACR 415 (SCA) para [5]; Phakane v S (CCT61/16) [2017] ZACC 44; 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC) (5 December 2017) para [39]

[5] A reason for the decision

[13] Now that this appeal court is bound to interfere with the sentence, we are obliged to consider sentence afresh. We, in doing so, are to consider the evidence led within the four walls of the record.

Factual background.

[14] I find it apposite to first set out a brief factual background that led to the conviction and with more emphasis, evidence on aggravation of sentence imposed respectively.

[15] On 5 June 2014, the appellant was arrested at Chataronga after a carcass of a recently killed Rhino was found with 2 (two) horns missing. The appellant was found in possession of a rifle, two horns which were in a black refuse bag lying where he and Chauke were found hiding under a fallen tree. When Nkopa (one of the main witnesses in the main trial leading to conviction) testified, the appellant, through his counsel, admitted, which admission was formally recorded in terms of section 220 of Criminal Procedure Act, Act 51 of 1977 (CPA), that, he was in possession of a licence firearm at Hunter's Rock when arrested. The appellant with hindsight of the evidence led in the main trial opted not to testify in rebuttal.

[16] The State led the evidence of two witnesses and a probation officer who prepared a pre-sentence report, in aggravation of sentence as envisaged in terms of section 274 (1) of CPA. The appellant, once more, opted not to rebut the State's case neither to lead any evidence in mitigation of sentence notwithstanding an opportunity granted to him.

[17] The evidence led, in short, brought to the fore that Chataronga and Hunters-Rock are game farms adjacent to each other. They are located in far North Western part of Limpopo Province, close to the borders of Botswana and Zimbabwe respectively.

[18] Isak Cornelius Prinsloo, the first witnesses to take a stand, is the manager at Chataronga game farm. He set out the challenges the game farm had, more especially relating to Rhino poaching. He testified that the farm lost 11 (eleven) Rhinos between 2010 -2014, due to illegal hunting by poachers. Of the said 11, only 3 case were successfully prosecuted. In 2014, the farm had 51 Rhinos that were kept, and conserved, as a project. It costs R200 000 monthly to deploy security force with vehicles. Rife poaching at the farm left Kruger, the owner, with no option, but to sell all 30 remain Rhino at half their market value.

[19] Mario Scholtz, an Environmental Management Inspector (EMI), employed by South African Parks and attached to Environmental Crime Investigation Unit (SAN Parks) explained the Rhino poaching challenges San Parks encounter. San Parks' immense interest in these matters is demonstrated by its instruction to an attorney at law to "watch a brief". Mr RJ Pretorius placed on record that he has been instructed by Green Law Foundation to watch a brief and to report to the organization on what transpired at this appeal court.

[20] Mr Nephale, the probation officer, placed his report on record wherein he brought to the fore the appellants personal circumstances, the impact of Rhino poaching and opined on what an appropriate sentence would be.

The Law

[21] As a point of departure, s24 (b) (ii) of the Constitution of Republic of South Africa, provides that 'everyone has the right- (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures, to (ii) promote conservation and (iii) secure ecologically sustainable development and

use of natural resources, while promoting justifiable economic and social development'.

[22] The legislative, in its quest to protect the environment for the benefit of present and future generations, enacted- LEMA. LEMA makes provision for the protection and conservation of the environment in the Limpopo Province. It makes provision for preservation and regulation of environment, including hunting of wild and exotic animal.

[23] In regulating hunting of wild and exotic animals, LEMA provides, 'no person may without a permit hunt specially protected wild animal'. It further provides that no person may hunt a wild or exotic animal on land of which that person is not the owner, except with the written permission of the owner of the land.

[24] The penalty clause stipulates that 'any person who is convicted of an offence in terms of the Act, is liable, in case of an offence referred to in section 31(1)(a), 31(3), to a fine, not exceeding R250,000, or, to imprisonment for a period not exceeding 15 years, or, to both such fine and such imprisonment, and, to a fine not exceeding 4 times the commercial value of the fauna, flora, or cave formation in respect of which the offence was committed.

[25] The appellant's counsel submits that, considering the appellants personal circumstances, being, (i) a first offender, (ii) a bread winner for 4 children coupled with (iii) no element of mercy on a 35 year old, who has already spent two years in custody awaiting finalisation of the main trial, an eleven (11) years direct imprisonment is harsh, disproportionate and induces a sense of shock. She, in her submission addressing this appeal court's directive, states, firstly, that the State did not bring any cross-appeal nor did they apply for an increase in sentence. Secondly,

relying on Komobumbi and Liang cases, submits that an appropriate sentence would be 24 months imprisonment, of which 12 months is suspended 5 years subject to certain condition.

[26] In rebuttal, counsel for the State submits that the appellant has an experience in poaching, especially Rhino horns, in that, he was once involved in 11 cases of Rhino poaching. He was not prosecuted. He co-operated with the police to a successful arrest and prosecution of certain Chinese. He submits that the experience he had, coupled with greed, prompted him to commit the offence himself. Unfortunately, he was caught with his hand in the cookie jar-the two Rhino horns in a black refuse bag. A classical principle set in S v Zinn[6] is a key to the determination of an appropriate sentence.

Personal Circumstances

[27] It is common cause that the appellant is, prima facie, a first offender because of non-existence of previous conviction. He was 35 years at the time of the commission of the offence and had 2 (two) children. Nephale describes the appellant, as penned in his report and his testimony in aggravation, as a person who lived a lavish lifestyle and drove luxurious cars. Members of his community wondered where he got the money from to sustain such lifestyle. He opined that the appellant committed the offence out of greed, for he had sufficient income to sustain his family.

[28] I indicated earlier that the appellant did not lead any evidence in mitigation. In S v Martin[7], the court stated that 'an accused assumes some risk by not testifying in mitigation of his /her sentence, in that,

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[6] 1969 (2) SA 537 (A)
[7] 1996 (1) SACR 172 (W)

there is no answer to "why did you do it"[8], is brought to the fore.' Perhaps to put it differently, there is no evidence on whether [the accused] is remorseful or not, whether he/she will be in a position to afford any fine if the court finds imposition of a fine appropriate in the circumstances. The trial court and this appeal court is not privy to such evidence.

[29] In order for an accused to benefit from the notion "first offender", a subjective test applies. He/she must lead evidence on how it came about that he/she committed his/her first offence. A first offender is either a "fallen angel", or, "an incorrigible rogue", in the criminal career of every person.

[30] The evidence on record, more specifically the appellant's testimony during his bail application pending main trial, which is evident from the said record handed in as Exhibit L, his involvement in the commission of poaching offences. For ease of reference, this is how it unfolded:

Prosecutor: Were you ever taken to court for that case?

Appellant: Ja, I once assisted the police to arrest a Chinese National for having bought.

...

Prosecutor: This incident happened in 2008, not so

Appellant: That is so

Prosecutor: How many rhino horns were involved in that case?

Appellant; I cannot recall Your Worship

Prosecutor: I put it to you, you were arrested for eleven incidents of rhino horns; and I further put it to you that on that occasion you assisted the police to show the police who you were going to sell these rhino horns to, and those are the Chinese that you are talking about, not so sir?

Appellant: That is the case

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[8] Martin-Ibid

Prosecutor: That is the case, ja. So now you want this court to believe you know nothing about hunting, you know nothing about rhinos, nothing. Whereas in 2008 you [were] involved in eleven rhino horn cases

Appellant: I am learning to hunt now. In 2008 when that person was arrested, I told the police that "I will show you whom he does supply".'

[31] It is clear from the record that he "assisted" the State in succeeding in its prosecution of a Chinese convict involving 11 Rhino horns poached. Counsel for the appellant was left wanting in her submission in avoidance of the appellants encounter with the law and the knowledge relating to "rhino poaching". She was reluctant to concede that the appellant is not a "fallen angel" relating to hunting and poaching of Rhino horns.

[32] The appellant, in my respective view, is knowledgeable on how to poach wild animals. It is further my view that the appellant felt he found his niche in rhino poaching. He went to Chataronga and or Hunter's Rock game farms with full intent to hunt. He had with him a rifle and silencer, which he, as inferred, used it to put down a cow rhino, which was found, dehorned. I further find him knowledgeable and experienced on how to navigate the operation of hunting, the governing laws and how to avoid prosecution. He admitted the rifle is his. He carried the rifle all the way from his home at Phalaborwa –over 200 km to Chataronga/Hunter's Rock game farms in the far Northwestern side of South Africa, almost by the borders of Botswana and Zimbabwe.

[33] I am afraid; I am not persuaded to consider the appellant as a "fallen angel". In any event, in Matyityi[9], the Supreme Court of Appeal put it clear that where the sentence is to be a lengthy period, it is immaterial whether the accused is a first offender or not.

[9] 2011 (1) SACR 40 (SCA)

[34] In Di Blasi[10], the appellate court indicated that a heartless criminal, should not be punished leniently, lest the administration of justice is brought into disrepute.

The offence committed:

[35] Rhinoceros (Black or White) are, in terms of Schedule 2 of LEMA, declared 'specially protected wild animal'. It is a criminal offence to "hunt" without a permit, specially protected wild animals.

[36] The appellant, a convict for having contravened the provision of section 31(1) (a) read with 31(3) of LEMA as indicated earlier, stands to be sentenced in accordance with the provided penalty clause. The said penalty clause is, well articulated in section 117.

[37] The 'decimation of the rhino population in South Africa is a matter of national and international concern, which has enjoyed such media attention over the years as to thrust it into the public eye: (see *Bilankulu and Another(*188/2020)[2020]ZASCA 114).

[38] Scholtz, an EMI level 2, testified in aggravation of sentence and brought to the fore, rhino poaching from a national statistics in South Africa. He indicates that since 1973, there is an international ban on the trade with rhino horn, as the two rhino species in Africa, the black and white, have been classified under Appendix 1. In South Africa, they are classified under schedule 2. He indicated that South Africa is fortunate, in that, it is the country with the largest population of Rhino in the world. Poaching rhinos for their horns wiped out rhinos in other countries in Africa.

[10] 1996 (1) SACR (1) (A)

[39] He demonstrated how, in 2014 alone, Limpopo had the highest rhino poaching incidents. He opined that the rate in which the rhinos are poached, they are on the verge of extinction. I agree.

[40] The appellant committed an offence that infringes the rights of all citizen of South Africa, to have the environment protected for the benefit of present and future generation.[11]Extinction of this specially protected animal will leave the present and future generation with no exposure to real Rhinos. The present generation include the appellant's own 2 children. This pandemic, rhino poaching, is committed out of greed –get rich quick-by selling them to those who trade with for whatever reason.

Interest of the society

[41] The offence committed is so serious and the society has a vast interest in, firstly, preserving the specially protected wild animals to survive. People demonstrate this, not only of this country, the money they donate to stop this pandemic. Secondly, the interest of the society is demonstrated by the "watching brief" by Mr RJ Pretorius who has been instructed by Green Law Foundation. The Foundation and San Parks incurred insurmountable amount of money in paying for an attorney from Kwa Zulu-Natal to Limpopo, not once but each time the matter is before all courts –the Regional and High Courts. Thirdly, the society watch the type of sentences our courts impose on convicts relating to these offences.

[42] The court in Di Blasi[12], stated that the 'requirements of society demand that premeditated, "well planned"[13] and heartless criminals, [such as in the present case] should not be punished too leniently lest

[11] Section 24(b)(ii) of the Constitution of the Republic of South Africa
[12] Op Cit fn10
[13] My insertion

the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indigestion of interested persons and of the community at large and, as severe as a just retribution for the crime but should also deter others from committing similar offence'.

The sentence

[44] Sentencing a convict is not an easy task. It is trite law that in determining an appropriate sentence, courts should be mindful of the fundamental principle that punishment should fit the criminal as well as the crime, be fair to the society.

[45] Counsel for the appellant relied on *Mberirua v State* (HC-MD-CRI-APP-CAL-2018/00077) [2019] NAHCMD 166 (24 May 2019) when she opined that 24 months imprisonment would be appropriate a sentence.

[46] The appellant, charged with possession of pangolin in contravention of Controlled Wildlife Act, pleaded guilty to the offence. The trial court sentenced the appellant to 24 months imprisonment and suspended 12 months for a period of 5 years subject to certain conditions. On appeal, the Namibian High Court found no reason to interfere with the sentence. The offence committed in the said case differs materially with what the appellant is charged with in this case.

[47] Spilg J, sitting as a court of first instance, convicted Bilankulu and another for contravention of section 31(3) of LEMA. The trial court sentenced Bilankulu and another to 15 years direct imprisonment. On appeal, the Supreme Court of Appeal (188/2020) [2020] ZASCA 114, confirmed the sentence. In doing so, the court had this to say:

'In respect of count 2, s 117 of the Limpopo Environmental Management Act provides for a fine not exceeding R250 000 or imprisonment for a

period not exceeding 15 years, or both such fine and such imprisonment and a fine not exceeding four times the commercial value of the fauna in respect of which the offence was committed. The penalty on count 2 represents the maximum period of imprisonment prescribed under the said Act. As I have noted, the high court heard evidence relating to the prevalence of rhino poaching and the consequences thereof in South Africa and in Limpopo. The danger posed to the rhino population generally weighed heavily with it. It was submitted that the sentence imposed was unduly harsh as neither of the appellants benefited from the criminal deed by virtue of the swift action of the game reserve management and the evidence did not establish that either of the rhinos died. On a conspectus of all the evidence, I do not consider that these considerations can redound to their benefit. It was not of their doing. I am unable to find that the sentence imposed is startlingly inappropriate'.

[48] On my perusal of the record and considering the sentence imposed in this case, I had a prima facie view, of which I now confirm that there was an element of error in sentencing the appellant to 11 years imprisonment in terms of section 276 of CPA.

[49] The directive issued, as to why this appeal court should not increase the sentence, intends to rectify a too lenient sentence, *Vis a Vis*, the offence committed. The importance of issuance of the notice is, set out by Khampepe J in S v Bogaards[14] as follows:

'Elevating the notice practice to a requirement merely sets out the correct procedure according to which the court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the appellate court's exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition

[14] 2013 (1) SACR 1 (CC)

of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires'.

[50] The lenient sentence imposed is, in my view, shockingly inappropriate. I find it necessary to increase the sentence in order to bring to equilibrium, the scales of justice relating to the offence committed, the interest of the society, as opposed to the appellant's personal circumstances.

[51] I, after considering the appellant's involvement in rhino poaching cases in 2008; the evidence that he left Phalaborwa armed with a rifle and silencer; carried lunch in a lunch box; wore camouflaged clothes and entered the game farms mentioned; a cow rhino been killed and dehorned; am of the view that the appellant regards poaching of rhino horns as his niche and lucrative business opportunity.

[52] It is indeed that the appellant spent 2 years in custody awaiting trial. In *Radebe and Another v S* (726/12) [2013] ZASCA 31; 2013 (2) SACR 165 (SCA) (27 March 2013) it was stated that:

'[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced.

[14] A better approach..., is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. ... [A]ccordingly, ... the test is not whether on its own, that period of detention

constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one. (Emphasis added)[15]

[53] A sentence less than the prescribed maximum, as envisaged in terms of section 117 of LEMA is, in my view, disproportionate to the offence the appellant committed and convicted of. There is no evidence led before the trial court and, or, this appeal court, on the circumstances the appellant was subjected to in custody, or, to take into account the conditions that affected the accused in detention that warrant determination of such period.

[54] In Bilankulu, the Supreme Court of Appeal confirmed 15 years imprisonment as appropriate a sentence for transgression of the provisions of section 31(3) of LEMA.

[55] I, in the result, make the following order.

ORDER

55.1 The appeal is upheld.

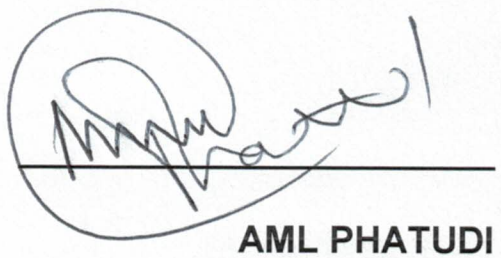
55.2 The sentence imposed by Regional Court- Makhado is set aside and replaced with the following:

"The accused is sentence to 15 years direct imprisonment" as envisaged in terms of section 117 of LEMA"

55.3 The appellant must report at **Alldays Police Station**, Limpopo Province, within 72 hours from 27 January 2023

[15] Footnotes omitted.

55.4 The registrar of this court is ordered to send a copy of this judgement to SAN Parks and Green Law Foundation Attorneys



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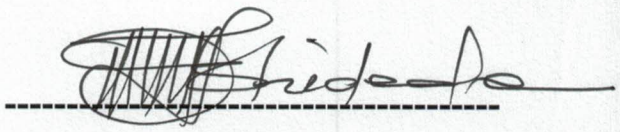
JUDGE OF THE LIMPOPO HIGH COURT

I agree



TC TSHIDADA

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT	:	**Ms ANITA CAMPBELL**
INSTRUCTED BY	:	**Anita Campbell Attorneys**
		TZANEEN
WATCHING BRIEF		
GREEN LAW FOUNDATION	:	**Mr. KJ PRETORIUS**
FOR THE STATE	:	**Adv. ZE MABODI**
INSTRUCTED BY	:	**DPP. Thohoyandou**
HEARD	:	**18 November 2022**
JUDGMENT	:	**27 January 2023**

JUDGEMENT DATE : Judgment handed down electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 27 January 2023.