REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 763 OF 1975

SAHAL MOHAMED HUSSEIN…… APPELLANT

VERSUS

REPUBLIC……..……..RESPONENT

JUDGMENT

The appellant and a man called Ali were charged with the unlawful possession of eleven leopard skins contrary to section 33 and 47 of the Wild Animals Protection Act. Both were convicted and sentenced. Ali did not appeal. The appellant appealed against conviction, but not his sentence. The charge first related to eleven cheetah skins, but was amended. An ambush was laid and, at about 6.00 am, a car was stopped. In it were three people, the appellant who was driving, Ali who was sitting next to him and a third man who was in the back, but was not, it seems, charged. In the boot of the car were the skins. No one had, or produced, a permit to have them.

The main point in this appeal is whether, upon the facts and in law, possession in the appellant was, or was not, established. The prosecution called nine witnesses. We shall particularly refer to the evidence of the three game scouts, James Heshan, Jackson Mbi and Harrison Nzeki. James Heshan spoke of the laying of the ambush and the finding of the skins in the boot, but his evidence, standing alone, lacks some of the value otherwise to be accorded to it because he only used the plural. He said that a permit was requested "but they said they did not have one" and "I asked accused where they got skins from and they said they had bought them". But we do not know who answered. Perhaps one can, in view of the second quotation, rule out that the third man said anything; it does not matter. The witness also said: "I enquired as to the owner of car and they said [the appellant] was the owner". But other evidence proved that he was not. At all events, the appellant was not the one who said it was his car for "they said" he was.

Jackson Mbi gave evidence in line with that given by his colleague albeit with some variation, for James Heshan said that no one said where they had got the skins from, and he said "they said that they got the skins from Tanzania". But he went further than his co-scout saying that "[Ali] said skins were his" which is for bearing in mind in favour of the appellant. Counsel for the appellant was well satisfied with this evidence and asked Jackson Mbi no questions (having asked James Heshan only one which we need not here consider). But counsel for Ali asked a number of questions as a result of which we have:

… I spoke to the driver on his side. [The appellant] opened the boot. Other two were outside the car. [Ali] was on left hand side in the middle. When I saw cheetah skins I spoke to [the appellant] first. I asked who was owner of skins and he said [Ali] … I asked for permit from [Ali] ... He said he did not have permit.

Counsel for the appellant did not thereafter seek to question the witness through the Court, again no doubt

being content enough, but the question to be asked is how he knew who the owner of the skins was. That did not emerge. But what he said in his statutory statement must be read with what Jackson Mbi said, and we shall see what it was in a moment. Harrison Nzeki also gave evidence in line with what the other two game scouts said, but he arrived at the car after they did for he told the Court: I saw people in second shift stop a motor vehicle … I ran to where they were at the car and I asked [James Heshan] what he had found and he said he had found eleven leopard skins. and "I was not present when [Jackson Mbi] spoke to accused". He told the Court that the appellant opened the boot for him, and he went on: "I asked for permit and [the appellant] said he did not have one". He also said that, "the accused said skins were theirs", which in regard to him must be read with out last quotation. Counsel for the appellant asked him but three questions, nothing in challenge of what we have set out. But counsel for Ali again asked a number of questions as a result of which we have, "I asked [the appellant] for permit. [The appellant] answered regarding ownership of skins. [Ali] asked me to forgive him". Counsel having received those answers was, no doubt, prudent enough to ask no more questions and the prosecutor should have, but did not, enquire into these answers. But we do not, as we are asked, read them as supporting that on this occasion, too, the appellant said that the skins were the property of the co-accused. "I asked [the appellant] for permit" reinforces what the witness said in evidence-in-chief, "[The appellant] answered regarding ownership of skins" must be read with, "I asked him where he had come from and he said Tanzania. Informed him he was under arrest for transporting skins without a permit" and, "[Ali] asked me to forgive him", cannot be read separately from, "I also told the others. Accused then taken to police".

To be read with this is a statement which the appellant made in answer to the charge (albeit the skins were referred to as those of a cheetah) that he was in possession of the skins contrary to the Act. He said, "All that has been written is true. That's all". Let us deal with this right away.

The statement was objected to on the ground that the appellant was threatened before he made it, and a trial within a trial was held. There is not a word of a threat to be found anywhere in the cross-examination of the witness who took it. The nearest one can get to any suggestion of impropriety is to be found in a question refuted in this answer, "I did not say to[the appellant] 'sign this statement. Don't waste my time'." Nor did the appellant go on his defence to substantiate his counsel's allegation. It has been geld that there is no distinction in principle between repudiated and retracted confessions: *Tuwamoi v Uganda* [1967] EA 84 and that whilst a conviction may be justified if based on a confession alone, if it is retracted it should only be accepted with corroboration: *Sharifa Binti Ali v R* (1955) 22 EACA 378. But, as was said in *Toyi s/o Kalihose v R* [1960] EA 760, there is no rule of law or practice requiring corroboration of a retracted confession before it can be acted upon; but it is dangerous to act upon it unless it is corroborated in material particulars or unless the court after a full consideration of the circumstances is satisfied of its truth.

Wanja Kanyoro Kamau v The Republic [1965] EA 501, whilst pointing to the danger of relying on a retracted confession in the absence of corroboration, makes it clear that a Court may do so if fully satisfied that the confession must be true. Of course in *Girisomu Bakaye v Uganda* [1965] 621 the Court of Appeal said that it will not normally give effect to an uncorroborated retracted statement where there has been no direction as to caution; but we ask, fairly as we believe, why an accused person making a wholly unjustifiable allegation in the sense of putting up a suggestion of wickedness on the part of the police without trying in the least to prove it, should be in a better position than a man not prepared to be specious? It has been laid down, in *Hassan s/o Waliseme v R* [1959] EACA 800 that the procedure of a trial within a trial is to be followed in trials before a magistrate, and, with respect, there is good reason for so holding. But one must remember that the orignal reason why trials within a trial are held is to conduct a part of a trial which it is better for a jury not to hear in their absence. (We understand, however, that in Hong Kong, defence counsel is given the choice of asking for the jury to remain, for it can be to his advantage to have them there). At all events once the trial within a trial is held, and on the basis that if there is to be a challenge on the facts, it should be made before the jury, the challenge should be renewed. This is made clear in *Kinyori s/o Karuditu v R* (1956) 23 EACA 480. We do not intend to set out the procedure to be adopted in full, but the Court of Appeal has said that after a decision on a trial within a trial has been made known it is advisable for the trial judge (which includes, of course a trial magistrate) to ascertain from defending counsel whether he proposes to exercise his right to impugn the now admitted statement as regards the weight to be given to it. The trial magistrate seems to have been unaware of this,

but defence counsel is a most experienced practitioner, and he made no challenge at all in that regard. Nor did the appellant say a word about it in his statutory statement towards the end of the case. What he did say, to be read with what we set out of the evidence of Jackson Mbi, ie "I asked [the appellant] who was the owner of skins and he [Ali]" was this:

…. I was driving a lorry and it was broken down .. At about 11.00 p.m. I was looking for a lift to Nairobi. The car in this case approached and wanted petrol …. I asked for a lift and he agreed .. We left … and went to Kibo Bar and bought four bottles of cognac and two bottles of Coca Cola. He drank the brandy while driving until we reached Robo near Kenya boundary. We stopped there and found [Ali] there. He asked for a lift and this was agreed….. They asked me for a permit and I told them to ask the owner who I pointed out.

That is for rejection, surely. Late at night, the appellant was driving a lorry in Tanzania, but it broke down. He, seemingly, made no effort to notify anyone or to make any arrangements for it. When, by good fortune, a car happened to come along, the appellant simply left his vehicle because he wanted to get to Nairobi. Then a good deal of liquor was bought and drank by the car driver only as we read the statement, apparently on the Tanzanian side of the border. And then nearer to the border some time after 11.00 pm for "he drank the brandy while driving" there, also wanting a lift was Ali. But the portion we relate to the previous quotation is that if Ali was waiting for a lift and, as the scout said, he was pointed out as the skins' owner (sole owner is the suggestion) there he was, in the dead of night with his eleven skins waiting for a lift. It cannot be. And it is not so.

Jackson Mbi's evidence was not challenged. The trial magistrate believed it. However the magistrate worded his judgment, he certainly believed the evidence of the three scouts and he did not believe the evidence given by the two accused. It is also clear that he not only believed the impugned statement to have voluntarily been made but he believed it to be true. So do we. Evaluating the evidence in its form of the recorded word, we do not for a moment doubt the truth of the prosecution evidence whilst we reject the defence evidence and the story which was put up by the appellant. But then it is said that the conviction must yet be quashed because of the magistrate's alleged massive misdirection. Let us consider them.

The appellant and Ali were charged (under section 3) with being in possession of the skins without such possession being obtained by them in accordance with the Act. The burden of proof was, of course, on the prosecution to prove its case, but section 3 (6) provides that once proof of possession is given, the onus is on the accused to prove that his possession was lawfully obtained. It was no part of the appellant's case that the possession of the skins was obtained in accordance with the Act, only that possession in him was not proved. This was, in essence, a question of fact and little enough needed to have been said about the law. But the magistrate felt the need to say something about it. He began by asking what, if anything, the two men had that morning and to what extent the prosecution had to prove knowledge of that possession. On that confused approach, he analysed the law. What, of course, was for proof by the prosecution in respect of each accused was simply whether, at common law, possession in each of them was proved. That is all. Knowledge was just one factor in helping to determine the issue. The magistrate then found, and there is respectable authority for his having so found, that the necessary ingredients of possession in the context of the case were custody, physical control and knowledge, the latter being usually a matter of inference. So be it.

Applying this to the facts of the case, he said that both accused had control of the car in which they were travelling, an odd-sounding statement, but one which, following as it did the statements of fact which he set out and anticipating his findings that "I have weighed the evidence of the accused carefully and I reject it as untrue based on the test I have stated", meant that he believed that both the accused knew that the skins were in the boot, that they were there unlawfully and that both of them were knowingly transporting them. This is clear from his paragraph beginning "Turning now to the facts of this case ….", for he goes on:

I find that both accused had control of the car in which they were traveling. On the authorities, to be found guilty the prosecution must prove that they were knowingly in control of the leopard skins.

He had, therefore, in the forefront of his mind that not only must the prosecution prove that the leopard skins were in the boot, but that both the accused knew that those skins were there and that they had control over them. There is no non sequitur here as is suggested. The expression, "both accused had control of the car" relates as we have said. Nor is there a misdirection in the paragraph going on to speak of the request for a permit. That has no relation to section 3(6). It was another factor in the determining of the issue of possession, ie that when a permit was sought, someone or other said the skins were bought. The magistrate's further reference to a witness saying that the appellant said that the skins belonged to Ali was no more than another factor, ie that the appellant did not throw up his hands in horror at the thought of the skins being where they were, but put forward a reason why their presence in the boot did not compromise. Which the magistrate rejected.

The paragraph, the start of which we now reproduce, was unfortunate in its phraseology, ie:

I am required in my capacity as jury to decide whether on the balance of probabilities a reasonable person would accept the explanation proffered by the accused as true.

It is a misdirection. But what the magistrate meant was that he was looking at the facts, having stated his understanding of the law, to see whether possession had been proved. He was quite wrong to put any onus at all on the appellant and his co-accused. But he came to the conclusion, having set out what the two men had to say about what they were doing on the night concerned than what they told him was false. The last quotation is followed by this:

Their versions of events differ. [Ali] made a statement to the police referring to a friend but he did not know the [appellant] ..[The appellant], the driver of the car, makes no mention of a fourth man though his statement regarding the journey is comprehensive. Both say that the third man was drunk and the [appellant] took over the driving at the Kenya/Tanzania border.... And they both rely on the condition of the third man for being in control of the vehicle. It is to be observed that no question was put to any prosecution witnesses on this point. Finally there is the alleged conversation with the game scouts. The [appellant] infers and [Ali] states categorically but without any reason that those witnesses were lying. Observing these witnesses, ie [James Heshan] and [Jackson Mbi], I was not given the impression that they were lying nor were they crossexamined on this aspect....

It is undoubted, as we think for all that, the language and approach of the magistrate does not commend itself to us, that what he was saying was that the defence cases were untrue. He follows on by saying so in the passage we have quoted, ie that he had weighed the evidence of the appellant and his co-accused, Ali, and he rejected it as untrue.

Unfortunately, he went on to say, "based on the test I have stated" and that test was very wrong. But if it can be said that the defence was rejected, not only on the magistrate's test, but also as the law requires, to fail to sustain the conviction would lead to injustice in the circumstances of the case. What then follows the misdirection? It is this:

The prosecution have proved that the accused were in control of a vehicle in which leopard skins were found. They have proved that the accused were knowingly in control of these skins by virtue of the evidence which I accept as true of [James Heshan, Jacson Mbi and Harrison Nzeki]. Thus they have proved possession as required by the Act.

The finding comes at the end of the analysis of the evidence. As we read the magistrate's judgment what he was doing was to see whether the reasonable man would accept the defence cases, notwithstanding the very strong acceptable evidence of the prosecution, evidence which once accepted concluded the case against the defence. His misdirections resulted, as we think, in his concern to make sure that he was not being unfair to the accused. He was wrong in at least two ways, for all evidence in a case must be considered together: *Okethi Okale v The Republic*, [1965] EA 555; and there was no burden on the accused so far as possession (as apart from lawful possession under section 3(6)) is concerned.

We do not think that the magistrate anywhere dealt, in terms, with the matter of demeanour but it is

beyond contest that he believed the prosecution evidence and that he disbelieved that given by the defence. That, as it seems to us, distinguishes this case from the cases quoted to us for it enables us to say that, for all the misdirections contained in the magistrate's judgment, a conviction on the accepted facts was inevitable.

But that would not be enough were we, upon our own independent assessment on the written word not also satisfied that the guilt of the appellant was established by the prosecution as the law requires. We have gone through the record very carefully and, in our view, the magistrate was demonstrably right to reject the defence case, a case outstandingly calling for rejection, a case involving one man looking for a lift from

Tanzania to Nairobi at almost midnight because his lorry broke down and a second man also wanting a lift from there or thereabouts to Nairobi a little while later, a man perhaps encumbered with eleven leopard skins. And a driver who, in quite a short space of time managed to consume, while driving, four bottles of brandy. Upon the recorded word, the three game scouts (who did not, it appears, know the appellant and Ali) spoke the truth. They had no reason to be untruthful and they were not untruthful.

We think we are not being unfair in pointing out that a frontal attack on their veracity was mounted by counsel for neither accused. Their evidence was for acceptance. Just as clearly to us was the defence case for rejection; we are tempted to say out of hand. We entertain no doubt that it was not only far-fetched but false. We do not doubt that the appellant not only had eleven leopard skins in the boot of his car but that he knew they were there and was knowingly transporting them in a joint venture, at least with Ali. We need not consider whether, in all cases of possession, custody, physical control and knowledge of presence are needed to constitute the ingredients of possession, but where they are present in circumstances such as concern us, possession may properly be said to have been established from them. In our view the appellant undoubtedly at least had the joint custody and physical control of the skins and he knew what and where they were. We have not, we could say, omitted to observe that Ali appears to have accepted blame. Upon evidence (including the appellant's statement to the police or without it) appellant's guilt is to us, quite manifest and the appeal is dismissed.

Appeal dismissed.

Dated at Nairobi this 9th day of February 1976

E.TREVELYAN

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JUDGE

S.K. SACHDEVA

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JUDGE