REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00110

In the matter between:

OIVA LEVI **FIRST APPELLANT**

VILHO HAFENI **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Levi v S* (HC-MD-CRI-APP-CAL-2023/00110) [2024] NAHCMD 617 (21 October 2024)

Coram: January J et D Usiku J

Heard: **17 July 2024**

Delivered: **21 October 2024**

Flynote: Appeal – Appeal against conviction and sentence – Contravention of s 27(3) of the Nature Conservation Amendment Act 3 of 2017 – Contravention of s 30(1) read with ss 1, 30(1)*(b)*, 30(1)*(c)*, 85, 89 and 89A of Ordinance 4 of 1975 as amended, and further read with ss 90 and 250 of the Criminal Procedure Act 51 of 1977 – Definition of hunt – Possession of suspected stolen meat – Section 51 – Charged and

convicted of the incorrect section under the Ordinance – Irregularity vitiating entire proceedings – Conviction set aside.

Appeal – Appeal against sentence – Previous conviction on similar charge – Nature Conservation Act, as amended – Section 3A – Cumulative effect of sentence imposed, to be considered – Failure thereof amounts to misdirection, warranting interference.

Summary: The appellants were charged in the Otavi Magistrate`s Court, each on 1 count of contravening s 27(3) of the Nature Conservation Amendment Act 3 of 2017, and on count 2, contravening s 30(1) read with ss 1, 30(1)*(b)*, 30(1)*(c)*, 85, 89 and 89A of Ordinance 4 of 1975 as amended, and further read with ss 90 and 250 of the Criminal Procedure Act 51 of 1977. Both appellants were sentenced to 5 years each on count 1 and 5 years each on count 2. These sentences were ordered to be served consecutively. The appellants were consequently sentenced to an effective period of 10 years imprisonment each, in respect of both counts. Aggrieved by the outcome, the 1st appellant noted his appeal against conviction and sentence, whereas the 2nd appellant noted his appeal against sentence only. The 1st appellant is a first time offender, whereas, the 2nd appellant has a previous conviction on a similar charge.

The 1st appellant submitted that, he was charged in terms of the incorrect section under the Nature Conservation Ordinance 4 of 1975 as amended. The 1st appellant was charged with illegal hunting, the State however failed to prove that he hunted. The 1st appellant ought to have been charged with possession of game meat in terms of s 51 of the Nature Conservation Ordinance 4 of 1975 as amended.

The 2nd appellant challenged the sentence imposed by the court a quo on the basis that, the learned magistrate failed to have regard to his mitigating circumstances and overemphasized the seriousness of the case. The 2nd appellant further submitted that the learned magistrate failed to consider the cumulative effect of the sentences imposed.

Held that; hunt is defined as any means whatsoever to kill or attempt to kill, or to shoot or attempt to shoot at, or to pursue, to search for, to lie in wait for or to drive with intent to kill or to shoot at, or wilfully to disturb; search for, trace, lie in wait for or pursue problem animals; set a trap, spring-trap, net, drug, poison or any other means or device approved by the Director to capture or kill problem animals; shoot at, or with dogs to hunt for, problem animals; kill or capture problem animals in any other manner whatsoever.

Held that; s 51 of the Ordinance provides that any person found in possession of any game or wild animal or any game meat or the egg of any game or a wild animal in respect of which a reasonable suspicion exists that it has been hunted or obtained or is possessed contrary to the provisions of this Ordinance, and who is unable to prove that he has hunted or acquired or possesses such game or wild animal or game meat or egg lawfully in accordance with the provisions of this Ordinance, shall be guilty of an offence.

Held further that; it is evident through the witness testimonies that, the 1st appellant was not found hunting, nor was he found setting traps, as alluded to by state counsel. The evidence is clear and so is the 1st appellant`s warning statement for that matter, that he was found in possession of game meat. The state failed to prove that the 1st appellant committed the Act of hunting, as defined in the Ordinance.

Held; the 1st appellant ought to have been charged in terms of s 51 of the Ordinance. Considering the shortcomings and the State`s failure to charge the 1st appellant with the correct section under the Ordinance, this court finds that the convictions on both count 1 and count 2 against the 1st appellant falls to be set aside. In light of this finding, the aspect of sentencing in respect of the 1st appellant need not be considered, as the sentence automatically falls away.

Held; in respect of the 2nd appellant, it is trite that this court’s power to interfere with sentence is limited. A court of appeal will only interfere if the sentence is vitiated by

irregularity and misdirection or if the sentence is one which no reasonable court would have imposed.

Held; when the substantive sentences in relation to the individual convictions are considered, they are appropriate. However, considering the cumulative effect of the sentences, it is found to be harsh and shocking.

Held that; there is no indication in the magistrate's reasons that she considered the cumulative effect of the sentences imposed. She therefore, committed a misdirection in this regard, warranting the interference of this court.

Held that; the sentences in counts 1 and 2 in respect of the 2nd appellant, are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that the sentence in count 2 be served concurrently with the sentence in count 1.

ORDER

(a) The 1st appellant`s appeal against conviction succeeds.

(b) The 1st appellant`s conviction and sentence on count 1 and count 2 are set aside.

(c) The 2nd appellant`s appeal against sentence partially succeeds.

(d) The 2nd appellant`s sentences in counts 1 and 2 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, as amended that the sentence in count 2 is to be served concurrently with the sentence in count 1.

(e) The matter is removed from the roll and considered finalised.

JUDGMENT

January J (D Usiku J concurring):

Introduction

[1] The appellants were charged in the Otavi Magistrate`s Court, each on 1 count of contravening s 27(3) of the Nature Conservation Amendment Act 3 of 2017(the NCAA), and on count 2, contravening s 30(1) read with ss 1, 30(1)*(b)*, 30(1)*(c)*, 85, 89 and 89A of Ordinance 4 of 1975 as amended (the Ordinance), and further read with ss 90 and 250 of the Criminal Procedure Act 51 of 1977 (the CPA). Both appellants were sentenced to 5 years each on count 1 and 5 years each on count 2. These sentences were ordered to be served consecutively. The appellants were consequently sentenced to an effective period of 10 years imprisonment each in respect of both counts.

Explanations of plea in terms of s 115 of the criminal Procedure Act 51 of 1977 (the CPA)

[2] The appellant`s pleaded not guilty on both counts. Both appellants gave statements in terms of s 115 of the CPA. The 1st appellant stated that he is not guilty because he was sent to collect a bag left by workers on a farm. He collected a bag which contained blankets, was given N$200 and instructed to take along two sacks of dried meat that was next to the road. The 1st appellant was then directed to the farm, 30 km out of Otavi. The 1st appellant arrived at the farm in the afternoon. The bag he was sent to collect was not there. He found footprints at the scene and when he arrived at the place where he was directed to, he found 3 bags and fresh meat hanging from a

tree. He did not know what type of meat it was. He took one sack of 50kg and one of 10kg dried meat.

[3] The 1st appellant returned to Otavi. On his way to Otavi, at around 12 midnight, he arrived at Farm Gabus and asked for water. There were charcoal workers sleeping next to the road with their tents. The 1st appellant woke one of the workers and asked for water. He was questioned by the said worker on the contents of the bags that he was carrying. The 1st appellant indicated that it was his belongings in the bag. The worker approached him and saw what was in the bags. The worker asked where he got the meat. The 1st appellant informed him that he collected the meat at an unknown farm, far from where they were. He was asked who gave him the meat, to which he responded that the meat was left by the workers, who worked on that farm. He stated that he knows the workers and they were in the Otavi Location. The charcoal worker told the 1st appellant that he needs confirmation whether the 1st appellant was telling the truth, and requested a number to call to confirm. The 1st appellant indicated that he did not have a phone number. The charcoal worker then told him that he would tie him with ropes and in the morning he would gather information. The charcoal worker indicated further that he would call his employer.

[4] The employer named Gubus, did not take long to arrive at the place where the 1st appellant was. He arrived with two cars. When they arrived, they put the appellant in handcuffs, assaulted him and pointed a firearm at him. He was instructed to tell the truth as to where he got the meat. He gave the same explanation that he gave to the charcoal worker. This explanation was however not acceptable to the employer, who told the 1st appellant to choose between telling the truth and dying. The 1st appellant told the employer to do whatever he pleases. The employer called the police, who indicated that they did not have a vehicle. The employer then took the 1st appellant to the police station where he was arrested.

[5] The 2nd appellant also gave a s 115 statement. He indicated that it was 8 December 2022. One guy from the farm told this appellant that they were released from

duty and that they were on their way. They requested that the 2nd appellant find transport to collect them. The 2nd appellant then called a certain Matheus Johannes also known as Chief. Chief informed him that the car is not available yet and that he needed to return the next morning for them to collect the guy. The next morning, around 5 am, they drove and found the guys standing next to the road. The appellant stated that they never disembarked the motor vehicle. The guys came, loaded their belongings on the car and they then drove to Otavi. Upon arrival in Otavi, the guys dropped their bags at Chief`s house, and Chief dropped them off at their respective houses. Later they came to the 2nd appellant`s house because he was selling traditional drinks which the guys came to drink. The guy who gave the 1st appellant the N$200 was found there. The guys stood up and went to the road, where they gave the 1st appellant directions. From there, the 2nd appellant later saw the 1st appellant together with police and they were instructed to go to the police station.

[6] Dissatisfied with the conviction and sentence, the 1st appellant noted an appeal against both his sentence and conviction. The 2nd appellant noted his appeal against sentence only. The 1st appellant is represented by Ms Pazvakavambwa, the 2nd appellant by Mr Siyomunji and the respondent is represented by Mr Lilungwe.

<u>First Appellant`s grounds of appeal</u>

[7] The 1st appellant filed a notice of appeal dated 4 May 2023, filed on 8 May 2023, which notice was subsequently amended and replaced with a notice of appeal dated 3 June 2024. An application for condonation was filed for the delay. It stands unopposed and consequently, condonation was granted.

[8] The amended notice of appeal reflects as follows:

Ad conviction

1. The court erred in law/fact by convicting the 1st appellant of contravening s 27(3) of the Nature Conservation Amendment Act and contravening ss 1, 30(1)(*b*), 30(1)(*c*), 85, 89 and 89(A) of the Nature Conservation Ordinance 4 of 1975.

2. The court erred in law/fact by convicting the 1st appellant of hunting protected and huntable game when the state`s case relied on the 1st appellant`s warning statement, which showed that other persons were actively involved in snaring and killing the game. The state`s evidence only proved that the 1st appellant was caught in possession of game meat, but there was no evidence to prove that he had hunted the game himself.

3. The state`s evidence failed to prove what kind of dried game meat was in the 1st appellant`s possession and from that dried game meat, how much game was killed.

4. Furthermore, the state`s witnesses contradicted each other on the number of game that were killed.

Ad sentence

1. The court erred in fact and in law by overemphasizing the seriousness of the offence and the public interest, without giving proper weight to the 1st appellant`s personal circumstances.

2. The learned magistrate overly emphasized the seriousness of the offence at the expense of the appellant`s personal circumstances and/or mitigating factors.

3. The learned magistrate did not give weight to the material fact that the 1st appellant spent about 6 months in custody during trial before she handed down her sentence.

4. The learned magistrate erred in law and/or fact as she did not consider the fact that the 1st appellant was a first time offender, he was 30 years old, supporting two minor children and his mother when she handed down the maximum sentence of 5 years on both counts without the option of a fine. The learned magistrate failed to individualise the 1st appellant`s sentencing as he received the same sentences as the 2nd appellant, who had a previous conviction.

5. The learned magistrate was overly hasty in imposing a sentence of direct imprisonment for 10 years, without giving consideration to what the cumulative effect of two 5 year sentences would have for a first time offender. The cumulative effect of the 10 year sentence is harsh and it induces a sense of shock.

6. The learned magistrate erred in fact and/or law by failing to suspend part of the sentence, alternatively, make the 1st appellant`s sentences run concurrently in terms of s 297 of the CPA.

Second Appellant`s grounds of appeal on the sentence

[9] The learned magistrate erred in law and/or fact by imposing a harsh collective sentence of 10 years direct imprisonment, without properly considering the personal circumstances of the appellant and without properly considering the crime, the criminal and the interest of society.

The evidence

State`s case

[10] The state called 6 witnesses to testify in their case. Both the appellants testified in their defence and called no witnesses.

[11] The first state witness, Sigfried Kuhm, testified that the incident started on 8 December 2022 at approximately 08h45. He managed four farms and lives on one. One of the owners of one of the farms he managed, called him. He drove to a spot that they showed him. Upon arrival at the spot, he saw wires, which looked like washing lines, between Tambotie trees. The wires were very long, He stated about 40mm long but from photos handed up, it looks like about 40 meters long. They also found skins, stomach contents, the heads and the wires. The stomach contents were not hanging on the washing line as it was found in the bushes to prevent hyenas from eating them. The witness testified that, because they knew the area very well, they started searching and were assisted by two of his guys, Amon and Petrus.

[12] They observed footprints of at least five people, which separated into two sets of tracks. One set of tracks went to the road and the other went to the farm. When they followed the track to the farm, they found four more carcasses of Elands on washing/hanging lines, and the stomach contents in the bush. They followed the tracks further to two watering holes. It was clear that the people got water from the waterholes.

[13] After finding the five eland and 4 oryx, the next day they found approximately 55 wire snares. On 10 December 2022, the witness received a call from Farm Gabus, the caller describing a spot found on their farm on the road to Guinas. The witness described that it was only on their farm that the road passes on the mountain. The call from the owner of Farm Gabus informed the witness that one of his workers found someone who looked very suspicious, carrying a bag. The owner indicated that it was very suspicious, because they had just loaded their charcoal. The owner informed the witness that the suspicious man so found, was in the holding cells.

[14] The witness went to the police station where he met the owner of Farm Gabus. They went into the charge office where they found, the 1st appellant standing against the wall. The witness testified that for some reason the 1st appellant felt comfortable with him. So much so that the 1st appellant started speaking to him in English. At this point the two had not been introduced. According to the witness, the 1st appellant walked over

to him and told him that he was from the North and that he did not know the area very well. The 1st appellant further told the witness that, he is scared that the people might cut off his head.

[15] The witness asked the 1st appellant how many people there were, to which he responded that the people were many. The police took the witness and the 1st appellant whereafter they drove to Otavi. In Otavi they found a guy, who drove a taxi and who took them to the witness`s farm. When they arrived at the farm they found a guy, peculiar looking and short. The police asked this guy whether he transports people. He responded in the affirmative and stated that he does and he charges N$200. This guy then took the police, the witness and the 1st appellant to another house. While on the way, another guy came down the road. Whilst approaching him, this guy ran between very narrow houses and they could not catch him.

[16] The guy however dropped his cell phone, which Officer Ngambi picked up. The first guy took the police to another street and pointed out a Toyota double cab, with an Oshakati registration number. The guy told the police that the owner of the vehicle was the one collecting the meat. The owner of the vehicle was asked where he got the meat. He then took everyone to the spot where he was dropped off, where he went through a fence, and showed them where he was sitting, to keep a lookout. At this spot, there were old gum boots, and jeans, and the guy told them they were staying in the bush for 4-5 days. From there, the guy showed them a dead oryx bull and then they were taken to another spot. The witness testified that this guy was very familiar with the area, which he found strange. They found camping spots, wine bottles and shoe inserts that were used to disguise their shoe prints. The witness indicates that they found another 4 eland and 11 oryx, a week later. The witness testified that the costs involved would be between 6 and 7 hundred thousand that were simply thrown in the drain. The witness confiscated more than 55 wire snares. The culprits camped on the mountain, where they had cover from the rain. They could easily see the road from that position, which means they could see everyone coming and going, yet nobody could see them.

[17] The next state witness was Herold Kuehl. He testified that, on 12 December 2022, half past 12 midnight, he received a call from one of the employees, indicating that they saw someone walking with meat. The witness was requested to come as soon as possible. He went and took another employee who drove the car with him. They went to the place the first employee indicated and upon arrival, the witness saw the 1st appellant. The 1st appellant was at the charcoal production site. A lot of people surrounded the 1st appellant, waiting for the witness to arrive. They first searched the 1st appellant to see whether he had any weapons on him. They found two okapi knives on him, one in his trouser, the other was in his bag. The 1st appellant had 40kg of dried meat in one bag and the other bag was also relatively full of meat. The witness questioned the 1st appellant on where he got the meat from. The 1st appellant indicated that the meat came from a farm that has two mountains across from each other. The witness asked the 1st appellant whether he had a permit, to which he responded 'no'. The witness told the 1st appellant that he cannot carry meat without a permit, whereafter he called the police. The police indicated that they did not have transport available. The witness then offered to take the 1st appellant to the police station himself. The witness testified that they handcuffed the 1st appellant, got to the police station and they handed him over to the police together with the knife and the bag of meat.

[18] Junias Augustus testified that he only knows the 2nd appellant. He testified that, sometime towards the end of November, he was called by the 2nd appellant from different numbers. He informed the witness that they had a small child who was sick but the white man was not at the farm. They thus needed assistance to transport the child. The witness indicated that he charges N$400. He drove around 8 pm for a distance of about 30km but he could not see the 2nd appellant. The witness decided to call them to enquire where they were. When the witness eventually saw them, one of the parties embarked in front of his car and the rest on the back. They loaded bags onto the back vehicle. The witness indicated that he did not see who climbed onto the back and that none of the appellants climbed in front. The witness at some point questioned them about the child that was supposedly sick. However, they said that there was no child. The witness drove them to their house. One of them went into the house and came out

with the witnesses' money. The witness did not recall whose house it was, only that it was in Titus Street.

[19] The witness testified that, after a week, around 7 December 2022, the same people called him asking whether he could transport them to pick up meat, and that they had N$800 to pay him. The witness refused. They called him from a different number again. He refused once again. The witness was then called three more times, whereafter, he decided to switch off his cell phone.

[20] The following day, the witness encountered the 2nd appellant, who indicated that he had N$70 and he requested that the witness should take him to Chief`s house to pick up his bag. The witness accordingly assisted him. The witness did not see the 1st appellant but only the 2nd appellant and some other accused. At Chief`s house, they found a young lady. The 2nd appellant and the young lady discussed some things, whereafter she came out of the house with around 6 sacks. The witness did not see what was in the sacks. Two days after, the witness was called by a certain Philip, who asked him where they took the sacks that they loaded at Chief`s house. The witness drove to where Philip was. Upon arrival, he saw a white man, the 1st and 2nd appellant. The witness was asked whether he knows the 1st appellant, to which he responded no. He was asked where the meat was dropped off. The witness then took everyone to Titus Street. The witness testified that from there, everyone went their separate ways.

[21] Andries Tsuseb testified that, in December 2022, they received a call from their employer, Siegried, around 9 o' clock. They were picked up and requested to trace tracks, which led them to a scene where an oryx was slaughtered. There was also dry biltong hanged on wire. They proceeded to follow the tracks ahead and came to an eland that was also killed. At the second scene they came across only the head and the skin. They followed the tracks further and found a man, who saw them and ran away. They did not see his face or could not identify who he was. When they arrived at the place where the man was, they found and oryx skinned. They found 4 eland and 3 oryx at different scenes. On 9 December 2022, they followed tracks until they reached the

main road where they found a blue bag. In the blue bag they found two blankets and one pot. They handed the bag with its contents over to their employer, Mr Sigfried.

[22] Philip Buiswalelo is a police officer, attached to the Otavi Criminal Investigation Unit. He testified that, on Saturday 12 December 2022 at 08h35 in the morning at Otavi Police Station, he received a report from the charge office by Warrant Natangwe, that a man was brought, who was found in possession of dry meat. The witness instructed the charge officer to open a case of suspected stolen meat. When the witness arrived at the station, he introduced himself to the 1st appellant and informed him of his legal rights. According to the witness, before he could ask the 1st appellant anything, the latter indicated that he would just tell the truth.

[23] According to the witness, the 1st appellant told him that, he is not from Otavi, that he was simply asked by another person to assist and that he could take the witness to the place they slaughtered the animals. The 1st appellant told him that they were dropped off at a farm approximately 27 km away and the 1st appellant took them to the scene. At the scene, they found bags still sealed with dry meat and the head of an eland as well as the head of the oryx. The witness took pictures thereof. The 1st appellant told the witness that he did not slaughter, he was simply cooking for the group who did the slaughtering. The witness testified that, according to the 1st appellant, after cooking, the 2nd appellant called the vehicle to come and collect the meat. The witness told the 1st appellant to take him to the 2nd appellant, after taking pictures of the scene.

[24] The 1st appellant then took the witness to Otavi to the house of a certain Mr Johannes and indicated that they dropped the meat of at the said house. The witness approached the owner of the house, who indicated that he did load the bags of meat after being called by the 2nd appellant. Mr Johannes indicated that, after loading the bags he left the house. The appellants later came to collect the meat. The witness was later directed to the house of the 2nd appellant, who indicated that he was similarly only called by people to assist. According to the witness, the 2nd appellant indicated that he

accepted to assist because he was struggling. Further, when the 2nd appellant got to the place he saw that the people were slaughtering and he assisted.

[25] John Matias testified that he only knows the 2nd appellant. He only saw the 1st appellant when the latter was in the company of the police when they arrived at his farm. On 9 December 2022, the 2nd appellant informed the witness that he had things on the farm and told the witness to accompany him, to collect these things. The witness and the 2nd appellant went to the farm. On the farm, they found five people, unknown to the witness. These people loaded 6 sacks of dry meat onto the vehicle. Three of the people jumped on the back of the car and three jumped into the front of the car. The witness drove until they reached his house. They then offloaded the bags. The witness asked the 2nd appellant whether there was meat in the bags, he indicated that they are selling and told the witness how much they charge for each bag and that they already have a customer. The witness then left. Upon his return, the guys took their bags.

[26] Esther Garures, is a police officer stationed at the Otavi police station, Criminal Investigation Unit. On 11 December 2022, while charging the appellants with a case of illegal hunting, she informed them of their rights. She spoke to the 1st appellant in English, and used an Oshivambo interpreter to speak to the 2nd appellant. The witness indicates that she filled out a warning statement after informing the appellants of their rights. She testified that, the 1st appellant told her that, he went to a farm, on the gravel road between Guinas and Otavi. The 1st appellant said, his friend told him that they were going to look for jobs. When they arrived at the farm, the friend went in. The 1st appellant saw people catching animals. The 1st appellant however indicated that he was not part of these people and that he never caught any animals. When he refused to assist, the people told him that they were not going to give him any money and that he must find his own way back. The 1st appellant stayed on at the camp, where the other people would kill and slaughter the animals. They spent about a week on that farm. On a particular day, some of the guys came running towards the camp, saying that they were being chased by the boer. The people then called a certain guy named Mafwo to come and load a carcass. The 1st appellant tried to get on the vehicle to go back to

Otavi, but they refused. After all the slaughtering, they managed to return to Otavi, he was not given any money from the sale of the meat.

[27] The 1st appellant went to the boss to ask for money, and he was told to go and collect the meat that was left in the bush and only then would they give him money. The 1st appellant went to collect the meat. He became tired and went to a certain farm where he found charcoal workers. These workers then called the owners of the farm and the 1st appellant was apprehended by the owners of the farm. They pointed a gun at him and took him to the Otavi Police Station. The witness testified that the 1st appellant requested that this information should be included in his warning statement. The statement was then signed by the 1st appellant and the witness. The witness was tasked to read the entire statement into record, which she did. The statement given by the 2nd appellant was similarly read into record by the witness. The 1st appellant disputed the contents of the warning statement at first and a trial-within a trial was scheduled, but later cancelled, because the 1st appellant abandoned his objection. With that, the state closed their case.

Defence case

[28] The 1st appellant testified that, on 9 December 2022, he was invited to the 2nd appellant`s house by a certain Shiweda, for beers. At this house, they found a man named Sacky and another named David. At that house, the 1st appellant asked N$50 from Shiweda to buy meat. Sacky then told the 1st appellant that, if he wanted to make money, he could provide the 1st appellant with N$1500 if the appellant goes to a farm and picks up some things he forgot there. Sacky informed the appellant that there are sacks of meat and a blue bag, containing his blankets near the road at the said farm. Sacky directed the 1st appellant to where the farm was situated and he agreed to go. He was further directed to where the meat was. Sacky specifically told the appellant that the fresh meat was hung in a tree branch, he was told not to touch the meat. When he arrived there, he took one 50kg bag and another 10kg bag. After the 1st appellant picked up the fresh meat bags, he went to the area where Sacky indicated he left his bag. The

1st appellant however never found the bag and observed only foot prints of the security guard. The appellant then started walking back to Otavi.

[29] At 12 midnight, the 1st appellant arrived at Gabus. He woke up the people at the farm to request drinking water. A certain Kavango man approached him, took out a flash light and asked him what he had in the bags. The 1st appellant then indicated that it was his things in the bag. The Kavango man came through the fence to inspect what was in the bags. The man saw the meat and asked the 1st appellant where the meat came from. The 1st appellant indicated that the meat came from the farm. He did not know the name of the farm, as he was merely sent to collect the things.

[30] The man requested a number of the people who sent him, but he did not have a phone. The man then told the appellant that it is very dangerous to be in possession of the meat. The man said he would let the 1st appellant go, but only if the latter paid him N$4000. The 1st appellant indicated that he did not have that kind of money. The man told him to pay N$2000 at least. The man threatened to call his boss whom he indicated would beat the appellant very badly. The 1st appellant did not have any money and the man then called his employer, the white man. When the white man arrived, he was with another man. They handcuffed the 1st appellant and assaulted him. They then questioned him about where he found the meat, he responded that he got it from the farm. The people did not believe him. They called the police, who indicated that there was no transport. The white man then indicated that they would take the appellant to the station. The appellant was then taken into custody.

[31] The following morning, Warrant Philip charged the 1st appellant and questioned him about the meat. The 1st appellant told them about Sacky, but indicated that he did not know where Sacky lived.

[32] The 2nd appellant testified that, on 8 December 2022, Sacky called him to inform him that they were chased from the farm and the 2nd appellant must look for transport to collect them. The 2nd appellant then found Chief, who told him that the vehicle was not

available, however he would inform the appellant once the vehicle is available. The 2nd appellant called Chief again and was informed that the vehicle was now ready. Chief however indicated that he was under the influence of alcohol and that they would only drive the next morning at 4h00.

[33] They drove the next morning. The guys informed the 2nd appellant that they would wait next to the road, which they did. When they found the guys next to the road, Chief and the 2nd appellant remained in the vehicle. The guys simply loaded their bags onto the vehicle and they drove to Chief`s house. The bags were then offloaded at Chief`s house and he dropped the 2nd appellant and the rest of the guys at another house where they met the 1st appellant. The 2nd appellant indicated that he left the guys behind at Shiweda`s house. These guys later came to the 2nd appellant`s house to drink. Among the guys who came to the 2nd appellant`s house was the 1st appellant. Whilst there, the 1st appellant started asking Shiweda for money. Sacky then told the 1st appellant that there were things he left at a certain farm and requested the 1st appellant to collect them and should the 1st appellant collect these things there would be a compensation. The 2nd appellant told the police that he was only called from the farm to arrange transport for the guys there. He was informed that he was being arrested because of the phone call he made to the other accused persons.

Submissions by counsel

[34] In respect of the appeal against conviction, Ms Pazvakawambo, counsel for the 1st appellant, submitted that, the 1st appellant was charged on count 1 with unlawfully and wrongfully hunting protected game, to wit five eland, valued at N$15 000 each, in contravention of s 27(3) of the Nature Conservation Amendment Act and on count 2, the 1st appellant was charged with wrongfully and unlawfully hunting huntable game, to wit, four Oryx, valued at N$4000 each, without a permit or written authority to do so, in contravention of s 30(1)(*c*), 85, 89 and 89A of the Nature Conservation Ordinance 4 of 1975. Counsel contended that, the definition of ‘hunt’, in terms of the Ordinance, is any attempt whatsoever to kill or attempt to kill protected game or huntable game.

[35] Counsel submitted that, the evidence of the state witnesses did not satisfy the definition of 'hunt', since none of them witnessed or testified to the 1st appellant killing or attempted to kill protected game or huntable game. The evidence shows that the 1st appellant was merely found in possession of dried game meat at the time of his arrest.

[36] According to counsel, the warning statement of the 1st appellant did not support the element the state needed to prove, that the 1st appellant hunted or attempted to kill or actually killed the five eland or four oryx as per the charge sheet. Counsel submitted that, the 1st appellant ought to have been charged with contravening s 51 of the Ordinance instead, for being in possession.

[37] In relation to the appeal against sentence, counsel submitted that, the 1st appellant was a first time offender and should have been given the option of a fine. She submitted that the sentence imposed is shocking and harsh. No individualisation was applied to the appellants, as the 1st appellant was sentenced the same as the 2nd appellant, who had a previous conviction. It was further submitted that, to date the 1st appellant has spent 1 year and 4 months in custody.

[38] Mr Siyomunji, on behalf of the 2nd appellant submitted, with regard to the sentence that, the sentence imposed was excessive, s 30 of the Act provides for the option of a fine. Mr Siyomunji implored this court to consider replacing the sentence imposed in the court a quo with a fine of N$20 000, considering that the meat was recovered. It was further submitted that the 2nd appellant has similarly spent 1 year and 4 months in custody, to date.

[39] Mr Lilungwe, for the state, submitted that, the penalty clause of the NCAA provides, under s 5(*a*)(*c*) that, 'any person who contravenes or fails to comply with any provision of paragraph (a) or (bA) or any condition, requirement or restriction of any permit granted in terms of this subsection, shall be guilty of an offence and liable on conviction to a fine not exceeding N$500 000 or to imprisonment for a period not

exceeding five years, or to both such fine and imprisonment'. Counsel submits that it is evident from the record, that the 2nd appellant has a previous conviction for a charge under the Ordinance, as such the above penalty provision does not apply to the 2nd appellant.

[40] Counsel argued further that, the 2nd appellant has a recent and relevant conviction, which shows that he has a propensity to commit the same offence. Further, the fact that the penalty provision of the Act provides for the imposition of a fine coupled with a period of imprisonment does not preclude the magistrate from imposing direct imprisonment, as long as that decision is judiciously made. Counsel stated that, even though the 1st appellant did not have a previous conviction, he too deserved to be punished accordingly, because the seriousness of the offence can be derived from the intention of the legislature, when it increased the penalty provision in the amended Act.

[41] Counsel argued, with regard to the definition of hunting that, the definition is not restricted to the killing or attempted killing, but extends to the setting of a trap or device. Although the evidence do not indicate that the 1st appellant hunted with weapons, the evidence does show that the animals were found dead in traps, traps set by the 1st appellant. Counsel however conceded that, the 1st appellant should not have been sentenced the same as the 2nd appellant, who had a previous conviction.

Applicable Law

[42] For this court to adequately consider whether the 1st appellant`s argument that the latter was wrongly charged and convicted, holds any water, the relevant provisions of the Nature Conservation Ordinance, needs to be revisited. According to the Nature Conservation Ordinance 4 of 1975 (the Ordinance), hunt is defined as:

> '…any means whatsoever to kill or attempt to kill, or to shoot or attempt to shoot at, or to pursue, to search for, to lie in wait for or to drive with intent to kill or to shoot at, or wilfully to disturb;

… (i) search for, trace, lie in wait for or pursue problem animals;
(ii) set a trap, spring-trap, net, drug, poison or any other means or device approved by the Director to capture or kill problem animals;
(iii) shoot at, or with dogs to hunt for, problem animals;
(iv) kill or capture problem animals in any other manner whatsoever…'

[43] Section 30(1)[1] provides that, no person other than the lawful holder of a permit granted by the Minister shall hunt any huntable game.

[44] With regard to a person's inability to give a proper and/or satisfactory account of possession, s 51 of the Ordinance provides:

'Any person found in possession of any game or wild animal or any game meat or the egg of any game or a wild animal in respect of which a reasonable suspicion exists that it has been hunted or obtained or is possessed contrary to the provisions of this Ordinance, and who is unable to prove that he has hunted or acquired or possesses such game or wild animal or game meat or egg lawfully in accordance with the provisions of this Ordinance, shall be guilty of an offence.'

Application of the law to the facts

[45] This court went through the strenuous process of summarising the evidence of the state witnesses, led in the court a quo. It is evident through the witness testimonies that, the 1st appellant was not found hunting, nor was he found setting traps, as alluded to by state counsel. The evidence is clear and so is the 1st appellant`s warning statement in that matter, that he was found in possession of game meat. He adequately explained how he came in possession of the said meat. He further explained that he did not participate in the act of hunting, but merely cooked for the illegal hunters. This was evidenced by their refusal to pay him at the close of this illegal transaction. In this

[1] Nature Conservation Ordinance 4 of 1975.

regard, the state failed to prove that the 1st appellant committed a act of hunting, as defined in the Ordinance.

[46] This court agrees with the submissions made by counsel for the 1st appellant that, the 1st appellant ought to have been charged in terms of s 51 of the Ordinance instead.

[47] In her judgment, the magistrate held that, it is trite that, when an accused disputes the evidence presented to court by a witness, that evidence should be challenged during cross-examination, failure of which will result in the court accepting the version as presented by said witness, as correct. The magistrate went on to state that, the appellants failed to cross-examine the 6th state witness, who presented the most damning evidence against them.

[48] In relation to the duties that arise during cross-examination pertaining to an unrepresented accused, the court held in *S v Haraseb*[2]:

> 'It is settled law that it is no longer sufficient for a presiding officer to merely inform the unrepresented accused of his/her rights, but also to assist the accused when he/she experiences difficulty during cross-examination by clarifying the issues, formulating the questions, and putting his/her defence properly to the witnesses. Furthermore, where the accused fails to cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the risk of a failure of justice.'

[49] Considering the abovementioned principles and the record of proceedings, it is clear that the magistrate failed to adequately assist the unrepresented appellants with cross-examination. She failed dismally in her duty to assist during cross-examination, only to later hold their failure to cross-examine this specific witness, against them. The 6th witness, Elizabeth Garures testified about the purported warning statements. The 1st appellant challenged the contents of the warning statement initially, however, he later

[2] *S v Haraseb* (CR 34 /2021) [2021] NAHCMD 217 (10 May 2021).

abandoned his objection. From a reading of the warning statement, it can similarly not be proven that the 1st appellant engaged in the act of hunting.

[50] Considering the shortcomings and the State`s failure to charge the 1st appellant with the correct section under the Ordinance, this court finds that the convictions on both count 1 and count 2 against the 1st appellant falls to be set aside. In light of this dismissal, the aspect of sentencing in respect of the 1st appellant need not be considered, as the sentence automatically falls away.

[51] We deal with the 2nd appellant`s appeal noted against sentence only. It is trite that this court's power to interfere with sentence is limited. A court of appeal will only interfere if the sentence is vitiated by irregularity and misdirection or if the sentence is one which no reasonable court would have imposed.[3]

[52] In deciding an appeal against sentence, the court hearing the appeal should be guided by the following principles as stated in *S v Ndikwetepo* 1993 NR 319 (SC):

'It is indeed a settled rule that punishment falls within the discretion of the court of trial. As long as that discretion is judicially, properly or reasonable exercised, an appellate court ought not to interfere with the sentence imposed. The discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by irregularity or misdirection.'

The same court cited *R v Lindsay* 1957 (2) SA 235 (N) where it is stated that:

'Another test applied by appellate courts entertaining appeals against sentence which is said to be on the oppressive side is whether such sentence is so manifestly excessive that it induces a sense of shock in the mind of the court. If it does, the inference can be drawn that the discretion had not been properly exercised'. See *S v Ndikwetepo* supra at 323C.

[53] The 2nd appellant in this matter was convicted of contravening s 27(3) of the Nature Conservation Amendment Act 3 of 2017, and contravening s 30(1) read with ss

[3] *S v Tjiho* 1991 NR 361 (HC).

1, 30(1)(*b*), 30(1)(*c*), 85, 89 and 89A of Ordinance 4 of 1975 as amended, and further read with ss 90 and 250 of the Criminal Procedure Act 51 of 1977 (the CPA). Illegal hunting is a serious and prevalent crime for which there is an alarming public outcry. In 2017 the legislature amended the Ordinance by way of the Nature Conservation Amendment Act 3 of 2017 where it is stated –

(a) by the substitution of paragraph (c) of subsection (1) with the following paragraph

'(c) Any person who contravenes or fails to comply with any provision of paragraph (a) or (b) or any condition, requirement or restriction of any permit granted in terms of this subsection, shall be guilty of an offence and liable on conviction to a fine not exceeding N$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.'

[54] The amending Act further amended the same section in respect of a sentence where the convicted person has a previous conviction. In relation to a person with a previous conviction, the amending act provides as follows;

'(3A) If the person referred to in subsection (3) has been previously convicted of an offence referred to in that subsection, he or she is liable to a fine not exceeding N$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment.'

[55] The record of proceedings clearly reflects that the 2nd appellant does in fact have a previous conviction on a similar charge. This notwithstanding, it is found that the sentence imposed is excessive and harsh in the circumstances, warranting the interference of this court.

[56] When the substantive sentences in relation to the individual convictions are considered, they are appropriate. However, considering the cumulative effect of the sentences, it is found to be harsh and shocking. There is no indication in the magistrate's reasons that she considered the cumulative effect thereof. She therefore, committed a misdirection in this regard. In addition, she overemphasised the

seriousness of the offence at the peril of the personal circumstances of the appellant and paid lip service to the consideration of mercy or leniency.[4]

[57] These crimes are indeed serious and prevalent. We agree with the magistrate that they deserve heavy and deterrent sentences. The cumulative effect of the sentences, however, need to be ameliorated in the circumstances. It can be ameliorated for instance by suspending all or a portion of the custodial sentences or ordering a portion or part of it to be served concurrently in terms of s 280(2) of the CPA and taking offences together for purposes of sentence. In relation to the last-mentioned option the guidelines in *S v Tjikotoke* [5] should be considered. In that case it was stated as follows:

> 'Special care should be taken when dealing with statutory offences. Although the procedure was neither sanctioned nor prohibited by the Criminal Procedure Act 51 of 1977, it was undesirable and should only be adopted by lower courts in exceptional circumstances. These exceptional circumstances could for instance be present where the charges were closely connected or where the charges followed from one and the same act or where the charges were closely connected or similar in point of time, place or circumstance. (Paragraphs [6] – [8] at 39H – 40D.)'

[58] This court further considers the fact that the 2nd appellant has spent a total of 1 year and 4 months in custody, pre-trial as well as post-conviction.

[59] In the result, the following order is made:

(f) The 1st appellant`s appeal against conviction succeeds.

(g) The 1st appellant`s conviction and sentence on count 1 and count 2 are set aside.

(h) The 2nd appellant`s appeal against sentence partially succeeds.

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[4] *Babi v S* (HC-MD-CRI-APP-CAL-2023/00046) [2023] NAHCMD 810 (8 December 2023).
[5] *S v Tjikotoke* 2014 (1) NR 38 (HC).

(i) The 2nd appellant`s sentences in counts 1 and 2 are confirmed but it is ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977, as amended that the sentence in count 2 is to be served concurrently with the sentence in count 1.

(j) The matter is removed from the roll and considered finalised.

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H C JANUARY
JUDGE

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D USIKU
JUDGE

APPEARANCES:

FIRST APPELLANT:	R Pazvakavambwa Of Pack and Company Incorporated Windhoek
SECOND APPELLANT:	M Siyomunji Of Siyomunji Law Chambers Windhoek
RESPONDENT:	B Lilungwe Of Office of the Prosecutor-General Windhoek