



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**REPORTABLE**

Review Case No. 42/13

In the matter between

**REX**

and

**DUMSANI SOFELA NHLABATSI**

**Neutral citation:** *Rex v Dumsani Sofela Nhlabatsi* (42/13) [2014] SZHC 03  
(3 February 2014)

**Coram:** Mamba J

**Considered:** **03 February 2014**

**Delivered:** **03 February 2014**

- [1] Criminal law and Procedure – on a conviction on a charge of being found in unlawful possession of a trophy of Royal Game in contravention of section 8 (4) of the Game Act 51 of 1953 – court enjoined to order accused to replace game or compensate for it per section 8(6) of the Act. This is in addition to sentence.
- [2] Criminal Procedure – contravention of section 8(4) of the Game Act – compensation only required where accused fails to replace game for which he has been convicted.
- [3] Criminal law – definition of game under the Game Act 51 of 1953 includes part thereof.

- [1] The accused who was at some stages of the trial represented by Counsel appeared before the late Senior Magistrate at Pigg's Peak facing two charges. On the first count he was charged with the crime of rape and on the second count he was charged with a contravention of section 8 (4) of the Game Act 51 of 1953 (as amended), in that he was found in possession of a horn of a bushbuck, being a trophy of a Royal Game as defined in the Act.
- [2] He pleaded not guilty on the first count and guilty on the second one. He was, however, found guilty on both counts and sentenced accordingly.
- [3] On the first count he was sentenced to a term of imprisonment for nine (9) years whilst on the second count he was sentenced to pay a fine of E4000.00 failing which to undergo a custodial term of two years. These sentences appear to me to be in accordance with the applicable law. However, the sentencing exercise in respect of the second count was not completed as set out in the said Game Act.
- [4] It is common cause that a bushbuck is listed in the second schedule to the Act. That schedule contains game that is classified or defined as Royal Game. That schedule also stipulates the value of a bushbuck as E800.00.

- [5] Section 8 (4) of the Act prohibits and criminalises being in possession of a trophy or Game without a permit to do so or otherwise than in accordance with the conditions set out in such permit. Section 8 (6) of the Act on the other hand provides that ‘any person found guilty of an offence under subsection (1), (3) or (4) [of this section] shall be required by the court in addition to any penalty imposed under that subsection, to either replace that game or to compensate fully for the replacement value specified in the first, second or third schedule in relation to that Game, failing which such person shall be liable to a further period of imprisonment of not less than two years but not exceeding six years’. (Underlining and emphasis added by me).
- [6] From the above, it is clear that after sentencing a convict for a contravention of section 8(4) of the Act, the court is enjoined to go further and consider the issue of replacement or compensation for the value of the game for which the accused or convict has been convicted. In the instant case, this was never done and this must be corrected. (See the judgment of this court in *Rex v Dumsane Gamedze and two others*, Review Case No. 148/05 (unreported), delivered on 6<sup>th</sup> February 2006).

[7] The issue of replacement or compensation was considered by Sapire CJ in *R v Peter McIntyre and others*, case number 43/2001 (yet unreported) judgment delivered on 11<sup>th</sup> March 2002. There the learned Chief Justice stated as follows:

“The order envisaged is either to replace “that game or to compensate fully for its replacement value specified in the schedule.

“that game” means the game which is the *res delictae* of the offences. Game includes any part of such Game. In this case as we have seen the *res delictae* are parts of the animal namely its horns. No specific compensation amount is referred to in the schedule relating to the horns alone. The order I must make therefore is that the horns must be replaced. Only if this cannot be done does the question of compensation arise.

The use of the words “replace” and “compensate” seem inappropriate in the circumstances such as the present where

(a) the owner of the horns cannot be established (in fact it is probably one of the accused persons who is the owner of the horns).

(b) There is no evidence as to the property where “the game” may have been hunted and in fact there is no evidence that it

was in fact hunted. The accused are not charged with having hunted the game.

(c) The owner of the game or property cannot be determined.

(d) No evidence of any loss which has to be made good by replacement or compensation has been demonstrated.

The provisions of the section in such circumstances require that the replacement or compensation shall be made to the Government. There is nothing to suggest that the Government has lost anything which can be replaced or for which it has to be compensated.”

That pronouncement constitutes the law on the issue in this jurisdiction.

[8] In the present case, there was no evidence that the accused had hunted and killed a bushbuck or that anyone had lost a bushbuck or its horn-the trophy for which the accused was convicted. However, there was evidence that the accused had no permit to possess that trophy or horn. So, perhaps notionally, someone unknown to the crown has lost that horn. The loss of a horn of a bushbuck is of course not, at least on the available evidence, the same as a loss of a bushbuck.

[9] I have already stated that the learned senior Magistrate who dealt with the matter in the court a quo is now deceased and thus cannot have any further say in this matter. I see no useful purpose to be served by referring this matter to the incumbent learned senior Magistrate to deal with it in terms of section 291 (bis) of our Criminal Procedure and Evidence Act 67 of 1938. This court is, in the circumstances of this case, at large to make the correction or requisite order herein. The accused is hereby ordered to replace the trophy which is the *corpus delicti* herein. As in the *Peter McIntyre case (supra)*, I order that the horn in question be and is hereby forfeited to the Government as the required replacement. In the result, the issue of compensation does not arise.

**MAMBA J**