

Vannus

D.O.V.
CASE NO: A 568/2001
CAP/01/03
F. Greyser
judg -
27.3.02
gedien
judg -
5.4.02

DIE DIREKTEUR VAN OPREKENDING
VERVOLGINGE
KAAPSTAD
APPEAL
2802-03-26
IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)
THE DIRECTOR OF PUBLIC PROSECUTIONS
In the Appeal of **ANTHONY JACQUES HAMILTON**

Appellant versus THE STATE

Having heard Counsel for the Appellant and Counsel on behalf of the State and having read the record in the Appeal;

THE COURT ORDERS:

That the conviction in respect of the second charge relating to the transporting of Abalone is set aside, but confirm the convictions in respect of the first and third charges, directing however that the sentence imposed in respect of each of those two charges should be served concurrently.


ASSISTANT REGISTRAR
CAPE TOWN
DATE: Wednesday 20 March 2002

REGISTRAR: HIGH COURT
2002-03-22
CAPE TOWN/KAAPSTAD
GRIFFIER: HOOGGEREGSHOF

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(All these particulars appear on the form S.A.P. 69)
Magistrate's Court Case No. C 1238/ 2001

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/Magda

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 568/01

In the matter between:

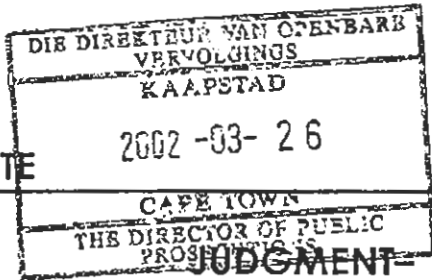
A HAMILTON

Appellant

and

THE STATE

Respondent



JUDGMENT- 20 MARCH 2002

JOSMAN, J

The appellant in this matter was charged with three contraventions of the regulations made in terms of the Marine Living Resources Act, no 18 of 1998. The first charge was in terms of regulation 38 (3) (b) for being in possession of more than twenty Abalone at any one time. The next charge related to transporting Abalone not in a whole state in breach of regulation 38 (1). The third charge relating to possessing Abalone in a closed season in contravention of regulation 9.

The appellant, who was represented at the trial, pleaded guilty to all three charges. He was duly convicted on all three

charges and sentenced to a period of imprisonment of nine months in respect of each charge. The sentences were not to run concurrently.

On appeal Mr van der Merwe who appears for the appellant sought leave to challenge the second conviction on the grounds that it was not competent. The State did not object to this court granting condonation to enable him to do so. In the first place regulation 38 (1) does not deal with the offence of transporting Abalone; it deals with the question of who may obtain a recreational fishing permit. It is regulation 36 (1) which makes it an offence to transport Abalone which is not in a whole state. The record shows that what the appellant admitted was to having carried the perlemoen but not in a vehicle. Mr van der Merwe contended that regulation 36 envisages the transport of shucked Abalone in a vessel or a vehicle, and reaches this conclusion based on the use of the word "*transport*" in section 38 (3) (f) (i) (ii). The State has conceded that the conviction on the second charge was not competent. The appellant explained why he, as a layman,

pleaded guilty to the charge and his explanation was accepted.

Accordingly the conviction on the second charge cannot stand.

Appellant had also appealed against the sentence in respect of the remaining two charges and Mr van der Merwe has contended that the court should have imposed a sentence in terms of section 276 (1) (h) of the Criminal Procedure Act no. 51 of 1977. In the alternative he contended that the two remaining charges, namely possession of more than 20 Abalone and possession of the Abalone out of season, should have been treated as one for the purposes of sentence. Although there is no splitting of charges, there is sufficient correspondence of circumstances relating to the two for the court to have either treated them as one for the purposes of sentence or provided that the sentences should run concurrently.

With regard to correctional supervision Mr van der Merwe suggested that the quantity of Abalone in the appellant's possession, one hundred and seventy four, was such that the court could infer that he was not a smuggler. He contended that the appellant was in possession of the Abalone for his own

consumption. Bearing in mind that the maximum number of Abalone that a person may possess at any one time is twenty, the number of one hundred and seventy four is far in excess of what is permitted. Whereas the appellant was probably not intending to smuggle the one hundred and seventy four Abalone to an overseas destination, he might well have been in a position to sell them locally. Considering how much they are in demand, he might have intended to do that rather than to feed his family with this delicacy. To make matters worse the appellant has a previous conviction, dating from 1996, in which he was sentenced to six months imprisonment, suspended for four years, for being in possession of perlemoen without a permit in breach of the Sea Fisheries Act. The period of suspension has now lapsed but appellant has clearly not learnt his lesson.

The State has referred to an unreported decision in this division of Rose-Innes, J under case no. A88/97, in which the appellant in that matter was charged with being in possession of perlemoen for commercial purposes without the required permit.

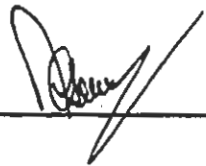
Rose-Innes, J emphasized the need to protect this country's natural resources and particularly those relating to the sea, stressing that the courts regarded these types of offences very seriously. Since 1997 the trafficking in Abalone has if anything increased.

Mr van der Merwe contended that the magistrate had not applied his mind of the question of correctional supervision because of the decision in this division of the *State vs Daniels*, 2000 (1) SACR 256, which held that a sentence of correctional supervision is not competent where there is no express provision made in the enabling statute for such a sentence. He submitted supplementary heads of argument in which he contended that the *Daniels decision* was wrongly decided and in particular referred to a number of decisions in the Appellate Division where correctional supervision was imposed for statutory offences which had not expressly provided for correctional supervision.

In my opinion it is not necessary to decide this thorny issue because I do not think that correctional supervision is the appropriate sentence in the circumstances, given appellant's

previous conviction, the quantity of Abalone found in his possession and also the fact that it was out of season. Mr van der Merwe's argument that the sentence in respect of the two remaining counts should run concurrently carries more weight, for the reasons that he has advanced. In my opinion the sentence of nine months imprisonment in respect of counts one and three should be confirmed but the sentences should be ordered to run concurrently.

In the result I would set aside the conviction in respect of the second charge relating to the transporting of Abalone, but confirm the convictions in respect of the first and third charges, directing however that the sentences imposed in respect of each of those two charges should be served concurrently.



JOSMAN, J

I agree and it is so ordered.



CLEAVER, J