THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 199/2004

In the matter between

IAN CAMERON **Appellant**

and

THE STATE **Respondent**

CORAM: ZULMAN, CLOETE JJA
et MAYA AJA

HEARD: 7 MARCH 2005

DELIVERED: 11 MAY 2005

Summary: Statutory interpretation – 'possession' (of lobsters) – meaning, in Regulation 52 (a), Marine Living Resources Act 18 of 1998.

JUDGMENT

ZULMAN & CLOETE JJA

[1] The court *a quo* upheld the conviction of the appellant in the magistrate's court, Durban, of contravening regulation 52 (a) of the Regulations promulgated in terms of the Marine Living Resources Act[1] in that he possessed four east coast rock lobsters (commonly referred to as 'crayfish'), the carapaces of which measured less than 65mm. The magistrate sentenced the appellant to pay a fine of R2 400,00 and failing payment to imprisonment for 90 days. The court *a quo* reduced the sentence to a fine of R600,00 and failing payment to imprisonment for 30 days. The entire sentence was suspended for three years on condition that the appellant was not convicted of a contravention of the regulation committed during the period of suspension. The court *a quo* granted leave to appeal to this court.

[2] Regulation 52 appears in part 10 of the regulations which deals specifically with east coast rock lobsters. The material portion of Regulation 52 (a) provides:

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[1] 18 of 1998.

'No person shall engage in fishing, collect, disturb, or be in possession of any east coast rock lobster of which-

(a) the carapace is less than 65 mm in length measured along its mid-dorsal line from the centre of the edge which connects the two enlarged anterior spines to the middle of its posterior edge; ...'

[3] It is not in dispute that the appellant was diving in the sea off the Salt Rock beach on a reef called Tiffanys. Photographs depicting relevant areas of the Salt Rock Beach were introduced in evidence. In addition to the photographs certain measurements which were taken by an official of the KZN Nature Conservation Service were also placed before the magistrate. The photographs and measurements reveal the following:

3.1 A person wishing to reach the road above the beach where vehicles are parked, after leaving the sea and crossing the beach, reaches a grass area where there are steps set into a grass embankment. The steps lead to a grass path.

3.2 At the other end of the path and before one reaches the road there is a second set of steps. These steps are of concrete.

3.3 The approximate distance from the shoreline to the steps at the beginning of the grass area is 14 paces and it is approximately 56 paces from those steps to the concrete steps. This makes a total of approximately 70 paces from the shoreline to the concrete steps.

[4] The appellant was in a wetsuit and had other diving gear with him including a dive bag, a spear gun and a measuring device suitable for measuring lobsters. After diving from approximately 15h00 to 17h30 he left the water with a catch of seven east coast rock lobsters in his bag. He walked off the beach and up the grass embankment to the end of the path and according to him proceeded to lay his kit down on the first concrete step leading up to the road where his vehicle was parked. When he got to the foot of the concrete steps one Nxumalo, an inspector in the employ of the KZN Nature Conservation Service, who had been watching him

diving, appeared at the top of the steps. Nxumalo took possession of the lobsters. Their carapaces were later scientifically measured. It turned out that four of them were undersized, their carapaces measuring 62.6, 62.8, 63.7 and 63.7mm.

[5] At the time of the incident and again before the magistrate the appellant stated that he intended measuring the lobsters' carapaces and that he had put everything down at the bottom concrete step in order to do just that. This was denied by Inspector Nxumalo. He said that the appellant had not stopped to put anything down. On the contrary, according to Nxumalo, he believed that the appellant had obviously been intending to go up to his vehicle and to drive off. It was only when the appellant looked up from the bottom of the concrete steps and saw Nxumalo that he then put his things down and claimed that he was about to measure his catch.

[6] The court *a quo* stated that a great deal of time had been spent in

argument before it and indeed before the magistrate, on the question as to when and where a person in the appellant's position might measure his catch before he could be said to have fallen foul of regulation 52 (a). For reasons set forth in the judgment of the court *a quo*, it considered that this question was irrelevant. In its view the vital question on appeal, which did not enjoy attention either before the magistrate or in the heads of argument presented to the court *a quo* by counsel on both sides, was what exactly, on a proper interpretation, regulation 52 (a) in fact prohibited.

[7] The court *a quo* held that as far as 'possession' in the regulation is concerned 'the offence, which is perfectly clearly defined, consists solely of being in possession of an undersized lobster' (the emphasis is ours) and that 'the regulation says nothing whatsoever about a fisherman being given the opportunity to measure his catch.' The court went on to state that if it is apparent to a person catching a rock lobster upon looking at it 'that the lobster concerned might well be undersized, [he] is guilty of the offence if he nevertheless assumes the

risk and retains possession of it.' The court *a quo* stated further that:

'... if at the moment the diver takes hold of the lobster he sees that it is undersized, or if he recognises that possibility, not even measuring in the water will excuse him from criminal liability because between the time of looking at it and measuring it he will already have had possession with the necessary *dolus directus* or *dolus eventualis.* If, however, he can genuinely say that when taking hold of the lobster it did not look to him to be undersized, he will not have had the necessary *dolus eventualis* even if the measuring discloses that it is in fact undersized.'(Again the emphasis is ours.)

Furthermore in the view of the court *a quo* 'the offence will be complete once the diver takes or retains possession recognising the catch to be undersized, or assuming that risk in the actual realisation that it might well be undersized.'

[8] We believe that this overly literal construction of the regulation by the court *a quo* is, with respect, erroneous. Taken to its logical conclusion such an interpretation would mean that any person who merely engages in fishing or merely collects, or disturbs, or (to use the word of the court *a quo*) 'solely' has possession of, any undersized rock lobster, would

commit an offence. regulation 53(1) (b) (also in Part 10 of the Regulations) provides that:-

'No person shall –

(a)...

(b) engage in fishing or collecting east coast rock lobster with a trap other than –

(i) a flat circular trap with no sides and of which the diameter does not exceed 30cm;

or

(ii) by means of baited hooks.'

A person engaging in either method of fishing rock lobsters sanctioned by the regulations should realize the reasonable possibility that in so doing he or she might 'collect' or 'disturb' undersized rock lobsters. And on the literal interpretation of the court *a quo* , such a person would be guilty of contravening regulation 52 (a). The regulation requires a sensible and realistic interpretation so as to remove such a manifest absurdity and so as to give effect to the true intention of the legislature (cf *Venter v Rex*[2]).

Furthermore regulation 44(1)(a) which appears in Part 8 of the

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[2] 1907 TS 910 at 914-5.

regulations (which deals with both west and east coast lobsters) is in wider terms than regulation 52 (a) in that it provides that 'No person shall –

(a) engage in fishing, collecting, keeping, controlling, storing or transporting of, or be in possession of, any rock lobster, except on the authority of a permit.' The wide wording of this latter regulation and the prohibition against 'keeping' suggests that regulation 52 (a), with which we are here concerned, requires a narrower interpretation.

[9] 'Possession' is not defined in the regulations. Its meaning in regulation 52(a) must accordingly be sought by analyzing that regulation in the context of the regulations as a whole and the purpose sought to be achieved by the Marine Living Resources Act, 18 of 1998 pursuant to which they were made[3].

[10] The key to interpreting regulation 52(a) lies in our view in the mental element of possession which the State has to prove to secure a

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[3] 'Possession Offences' in the title on 'Criminal Law' 6 Lawsa (Reissue) paras 384-393 pp 376-390.

conviction for its contravention. The physical element required is control[4]. The mental element is not merely knowledge of control[5] but, in addition, the intention to exercise such control for personal gain or benefit.[6] *Mens rea*, a separate and additional requirement,[7] was conceded by the representative of the State on appeal to be limited to *dolus*.[8]

[11] In the present matter the appellant intentionally took control of the rock lobsters. He said his purpose was to measure them and to return those which were undersized. If this version is reasonably possibly true, the mental element of possession required for a contravention of the regulation would be lacking: the physical control assumed by the appellant would have been for the limited purpose of ascertaining whether continuing to hold them would be an offence, and his avowed

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4 *S v Adams* 1986 (4) SA 882 (A) 890G-H.

5 Which the majority of this court held in *S v Brick* 1973 (2) SA 571 (A) 580C-D was sufficient for a contravention under s 2(1) of Act 37 of 1967 for possession of indecent or obscene photographic matter ─ so the appellant was held correctly convicted even were it to be assumed that he held the matter with the intention of informing the police about it.

6 The two concepts are contrasted in *S v Adams* n 4 above at 890J-891G.

7 *S v Adams* n 4 above at 891H-I.

8 It is not necessary to examine the correctness of this concession.

intention was not to continue to hold them if this were the case. The question of *mens rea* would arise once the appellant knew the rock lobsters were undersized, or subjectively appreciated the reasonable possibility that they might be, and in either case decided to continue to exercise control over them for personal gain or benefit anyway. On the facts of the case, the enquiry resolved itself into the question whether it is reasonably possible that the appellant still intended to measure the rock lobsters when he was stopped by Inspector Nxumalo. If it is not, it is an obvious inference that the appellant had control of them with the intention of exercising such control for personal gain or benefit; and that he had *mens rea* (at least in the form of *dolus eventualis*) to contravene the regulation, because he obviously knew that to retain such control would constitute an offence. The magistrate correctly held that –

'The issue for the Court to determine is ... the accused's version that he still intended to measure the crayfish.' [9]

[12] The magistrate rejected the accused's version that he intended to measure the rock lobsters essentially upon the basis of the probabilities, as he saw them. More particularly he said the following in this regard:

'In relation to count 1, the Court specifically rejects the accused's version that he intended to measure the crayfish and to return them to the water, if it were necessary. The Court finds that on an objective appraisal of all the evidence and indeed of the accused's performance and his willingness to change his version to suit the State's case, which was particularly evident from the issues relating to the possession of ammunition[10], that his version that he intended to measure the crayfish might be possibly true, but I certainly do not consider it to be reasonably possibly true and I reject it.'

As pointed out in an able argument by Mr Howse who appeared for the

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9 To the extent that the decision in *S v Bailey* 1968 (3) SA 267 (N) is at variance with what has been said above, we consider that it was wrongly decided. The appellant was there convicted of an offence, the essence of which was that he was wrongfully and unlawfully in possession of one crayfish in berry in contravention of s 25(f) of Ordinance19 of 1958 (N).

10 i.e. count 4 on which the appellant was convicted; the conviction was set aside by the court *a quo* and is not here directly relevant.

appellant, this passage, upon a proper construction and regard being had to the relevant evidence relating to the possession of ammunition count, amounts to a favourable finding of credibility. In essence the magistrate, on a fair reading of the passage in the light of the evidence given by the appellant, is complimenting the appellant for conceding the State's version that a licence to possess ammunition was indeed necessary.

[13] The magistrate's judgment being based essentially upon his assessment of the probabilities, this court is free, on its own analysis of all of the relevant facts, to come to a different conclusion. Although a court of appeal will naturally pay respect to a trial court's findings of fact it will not be inhibited from substituting its own inferences from them. (See for example, *Rex v Dhlumayo and Another*[11]).

[14] In order to properly appreciate whether the probabilities as a whole favour the appellant's version or are destructive of it, it is necessary to

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[11] 1948 (2) SA 677 (A) 705 – 6 para 7.

have regard to the following:

The appellant had approximately 26 years of experience as a fisherman. Whilst fishing on the day in question he had thrown back a number of rock lobsters which he considered to be undersized. The four rock lobsters in question were minimally undersized. These small differences lend considerable credence to the probability that although the appellant was not sure whether the four lobsters might be undersized, he thought this unlikely but nevertheless intended to ascertain whether this was or was not so by measuring them. The appellant's evidence that on previous occasions there had been no objection to him measuring his catch at his car was not contradicted and cannot be simply rejected as being fanciful. Indeed Inspector Van Schoor, of the KZN Nature Conservation Services, Nxumalo's superior, confirmed that fishermen frequently measured their catch at their vehicles and this is corroborative of the appellant's version.

[15] As regards the probabilities which the magistrate considered to be

destructive of the appellant's version, the following remarks are apposite:

The distance between the first concrete step where the appellant said that he wished to measure his catch and the shoreline was, as previously stated, approximately 70 paces. The magistrate held, in effect, that it was improbable that the appellant would, on his own version, have been prepared to walk the relatively long distance back to the sea to discard undersized lobsters whereas he could quite easily have measured the lobsters on the beach or at the first set of steps which were nearer to the beach.[12] Mr Howse correctly pointed out that on the probabilities and regard being had to the minimal amount by which the four lobsters in question were undersized, the appellant might well have subjectively believed that he ran no real risk of having to go back to discard them since in all probability all four of them would not upon measurement be undersized. This belief would have been based upon his experience as a

[12] Whether a fisherman is obliged to return an undersized rock lobster to the sea was not argued. We accordingly prefer to leave the question open. It can be assumed for the purposes of argument in favour of the State that this is the case.

fisherman which would enable him fairly accurately to estimate whether a lobster was undersized or not, without having to measure same. Furthermore the appellant in his evidence explained that he did not wish to measure the lobsters on the beach or at the first set of steps cut into the grass embankment as he did not wish to get sand or grass on his equipment, and for this reason preferred to measure the lobsters on the first concrete step. We find nothing improbable in this explanation and certainly no basis for rejecting it as not being reasonably possibly true. Another probability which the magistrate considered to be destructive of the appellant's version was that it was unlikely that the appellant would have left his expensive diving equipment on the concrete steps and then return to the sea to discard undersized lobsters, thereby running the risk that the equipment might be stolen whilst he was away. The appellant explained this by stating that at the particular time of the day the area was deserted and he did not consider that there was any risk of theft. Again

we have no reason to believe that this explanation is not reasonably possibly true.

[16] Accordingly in our view there is no good reason on the probabilities as a whole to reject the appellant's version as not being reasonably possibly true (cf *Rex v Difford*[13]). The appellant gave a reasonable explanation for the fact that he had four undersized lobsters and of his intention to measure them and to discard any undersized lobsters. In all the circumstances the appeal is allowed and the appellant's conviction and sentence are set aside.

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R H ZULMAN & T D CLOETE
JUDGES OF APPEAL

MAYA AJA)CONCUR

[13] 1937 AD 370 at 373