THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 42/09

HERMAN ZüRICH Appellant

and

THE STATE Respondent

Neutral citation: *Zürich v The State* (42/09) [2009] ZASCA 108 (22 September 2009)

Coram: Streicher JA, Hurt *et* Bosielo AJJA

Heard: 31 August 2009

Delivered: 22 September 2009

Summary: Criminal law – Appeal against conviction of unlawful trade in ivory – Admissibility of evidence obtained as a result of improper conduct not involving the accused.

ORDER

On appeal from: Northern Cape High Court (Williams J and Mokgohloa AJ) on appeal from the Regional Court, Upington.

1 The appeal is dismissed.

JUDGMENT

BOSIELO AJA (Streicher JA et Hurt AJA concurring).

[1] The appellant, an attorney practising in Upington was charged, together with a co-accused Jacques Andrew Esterhuizen (Esterhuizen) in the Regional Court, Upington on various counts relating to the contravention of the Northern Cape Nature and Environmental Conservation Ordinance 19 of 1974 (the Ordinance). On 22 November 2005 the appellant was convicted on counts one and two on the basis that he had been an accomplice in the unlawful importation and subsequent sale of elephant tusks by Esterhuizen to one Jaco Oberholzer (Oberholzer) in contravention of ss 44(1)(b)(i)[1] and 46[2] of the Ordinance.

' s 44(1)(b)(i) Subject to the provisions of this ordinance, no person shall without a permit authorising him to do so-
(a) . . . .
(b)(i) import into the Province from any place outside the Republic the carcass of any wild animal, or . . .'

[2] 's 46 No carcass of any wild animal shall be sold by any person other than-
(a) the owner of any land on which the animal concerned was hunted in accordance with the provisions of this ordinance;
(b) a market master at a public or municipal market; or
(c) a person authorised by a permit issued under this ordinance or a licence issued under the Licences Ordinance, 1981(Ordinance 17 of 1981), to sell such carcass.'

[2] On appeal to the Northern Cape High Court, the conviction and sentence on count 1 were set aside. The conviction on count 2 was confirmed but the sentence was set aside and replaced with a fine of R5 000,00 (five-thousand rand) or imprisonment for nine months with a further imprisonment for nine months suspended for 3 years on prescribed conditions. The appellant is appealing against that judgment with the leave of the court below.

[3] The facts of this case are common cause. During or about December 1998, the South African Police Services (SAPS) launched a special covert operation dubbed 'Operation Rhino' in Upington. This was in direct response to reports of some widespread criminal activities in Upington involving unlawful dealing in uncut diamonds and unlawful dealing in protected species. In the course of their initial investigations, some twenty-six suspects, including the appellant were identified.

[4] The required authority to undertake the covert operation in terms of s 252A of the Criminal Procedure Act 51 of 1977 (the CPA) was obtained from the office of the Director of Public Prosecutions (DPP) in Kimberley. Jaco Oberholzer (Oberholzer), a member of the Gold and Diamond Unit, Bloemfontein was to be used as the undercover agent. In order to facilitate this covert operation Oberholzer was employed by one Nickey Celliers, also one of the police informers involved in 'Operation Rhino', at Celliers' business called North Western Transport in Upington. The authority thus conferred included the interception and recording of communications between the police, the undercover agent and the suspects.

[5] It appears that, during the period between December 1998 and January 1999, Oberholzer's credibility in the role he was playing began to be questioned. This posed a serious threat to the entire covert operation. In order to save the project the police decided to clothe Oberholzer with more convincing credibility. They decided to stage a bogus arrest of Oberholzer for unlawful dealing in uncut diamonds. The necessary authority for this bogus arrest was granted by the office of the DPP in Kimberley.

[6] Pursuant to this ploy, Oberholzer was duly arrested on 25 February 1999 for unlawful dealing in uncut diamonds. It was part of the scheme that Oberholzer would contact the appellant for legal representation. This Oberholzer did but, as the appellant had a prior engagement on the date set for Oberholzer's court appearance the appellant instructed one, Mr de Beer, his professional assistant to attend to the bail application, which de Beer did successfully. It was an essential part of the plot that Oberholzer should use this arrest to establish and maintain a relationship with the appellant. It was in the course of the relationship which ensued that the appellant told Oberholzer that he knew of someone from Rietfontein who had elephant tusks to sell. He offered to introduce Oberholzer to that person. In pursuance of this offer the appellant called Oberholzer to his offices on 29 March 1999 to meet the man from Rietfontein who turned out to be Esterhuizen (who later became accused two). The appellant introduced Esterhuizen to Oberholzer at his offices. As a direct consequence of this introduction, Esterhuizen sold and delivered two elephant tusks to Oberholzer. In a recorded conversation on 1 April 1999, the

transcript whereof was handed in as 'Exh K,' Oberholzer reported to appellant that a sale was successfully concluded for R20 500,00.

[7] In terms of s 252A of the Criminal Procedure Act 51 of 1977 any law enforcement officer, official of the State or any other person authorised thereto for such purpose may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence. The appellant conceded that the conduct of the police in this case did not go beyond providing an opportunity to commit an offence. It follows that the evidence against the appellant was not rendered inadmissible by virtue of the fact that it was obtained by way of a trap. Before us the appellant accepted that to be the case.

[8] In the court below the appellant contended that the evidence against him was rendered inadmissible by s 35(5) of the Constitution. The section provides:

‘Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.’

The court below held that the section did not render the evidence against the appellant inadmissible as the admission of such evidence would not have rendered the trial unfair. Before us the appellant conceded that the section did not apply as no right in the Bill of Rights was violated. The appellant did however submit that the evidence against him should not have been admitted

in that it was obtained in an improper manner in that the magistrates and the prosecutor concerned were misled and the judicial process was abused by police officers in cooperation with senior officials of the National Prosecuting Authority in order to create an opportunity for Oberholzer to make contact with the appellant so as to uncover the commission of an offence.

[9] The respondent conceded that the investigative methods employed by the police were unacceptable and that a court had a discretion to disallow evidence improperly obtained but submitted that the facts relied upon by the appellant did not justify the exclusion of the evidence.

[10] In *S v M* 2002 (2) SACR 411 (SCA) at 431g-i Heher JA said that there is no doubt that a court at common law has a discretion to exclude evidence improperly obtained on the basis of 'a proper balancing of the competing interests so clearly identified' in *S v Hammer and Others* 1994 (2) SACR 496 (C). In that case Farlam J said at 499a-e:

'The following factors may be useful in deciding whether to exercise the discretion: (a) society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired; (b) whether the unlawful act was a mistaken act and whether in the case of mistake, the cogency of evidence is affected; (c) the ease with which the law might have been complied with in procuring the evidence in question (a deliberate "cutting of corners" would tend towards the inadmissibility of the evidence illegally obtained); (d) the nature of the offence charged and the policy decision behind the enactment of the offence are also considerations; (e) unfairness to the accused should not be the only basis for the exercise of the discretion; (f) whether the administration of justice would be brought into disrepute if the evidence was admitted; (g) there should be no presumption in favour of or

against the reception of the evidence, the question of an onus should not be introduced; (h) it should not be a direct intention to discipline the law enforcement officials; (i) an untrammelled search for the truth should be balanced by discretionary measures, for in the words of Knight Bruce VC, "Truth, like other good things, may be loved unwisely – it may be pursued too keenly – may cost too much".'

[11] In the present case the police or prosecuting authorities did not perform an unlawful act as against the appellant. Insofar as their conduct was improper it was improper as against the court, the magistrates and the prosecutors involved. Counsel for the appellant correctly conceded that the appellant's rights had not been violated by such improper conduct. In so far as the appellant was concerned, a misrepresentation was made to him that Oberholzer had been dealing in uncut diamonds and that misrepresentation eventually led to him introducing Oberholzer to Esterhuizen as a person who had elephant tusks for sale. Traps, by their very nature always involve misrepresentations specifically intended to deceive the suspect. In terms of s 252A the uncovering of an offence by way of such a misrepresentation is not improper and if it goes no further than to create an opportunity to commit an offence does not affect the admissibility of the evidence obtained as a result. Save for the limited purpose of persuading the appellant that Oberholzer might be inclined to unlawful acts, the misleading of the court, the magistrates and the prosecutors had no effect on the trial. The appellant can therefore not complain that he did not have a fair trial. In these circumstances the admission of the evidence could not have brought the administration of justice into disrepute. To the contrary the exclusion of the evidence could have done so. The appellant is an attorney who was suspected of criminal

activities which the police had great difficulty in exposing. In these circumstances the evidence against the appellant obtained as aforesaid was in my view correctly admitted against the appellant.

[12] The appellant did not advance any other basis for upholding the appeal. The appeal is therefore dismissed.

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L O BOSIELO
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	F VAN ZYL SC Instructed by ENGELSMAN, MAGABANE INC KIMBERLEY LOVIUS BLOCK ATTORNEYS BLOEMFONTEIN
FOR RESPONDENT:	J J CLOETE Instructed by NATIONAL PROSECUTION AUTHORITY KIMBERLEY DIRECTOR PUBLIC PROSECUTIONS BLOEMFONTEIN