# MADUBULA v THE PEOPLE (1994) S.J. 63 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA, JJ.S.
26TH JULY, 1994 AND 19TH AUGUST 1994
S.C.Z. JUDGMENT NO. 11 OF 1994

**Flynote**
**Appeal - Unlawful possession of prescribed trophy - Evidence linking appellant to trophy**

**Headnote**
The appellant, with four others was convicted of being in possession of prescribed trophy namely, nineteen Rhino horns without a certificate of ownership issued in respect thereof. He was sentenced to a fine of K7,000.00 and appealed against conviction.

1994 ZR p64
GARDNER, JS

**Held:**
(i) There was in fact nothing which linked this tank especially with the appellant

**Cases referred to**
1. Monga v The People (1973) Z.R. 188
2. Robson v Impett (1957) 41 CR. APP. R. 138
3. R v Hobson (1954) Deors 400

---

**Judgement**
**GARDNER, J.S.:** delivered the judgement of the court.

The appellant was convicted, together with four others, of unlawful possession of prescribed trophy.

The particulars of the offence were that he, together with four others, on the 1st February, 1987, at Lusaka, jointly and whilst acting together had in their possession prescribed trophy namely, nineteen Rhino horns without a certificate of ownership issued in respect thereof. He was sentenced to a fine of K7,000.00 and now appeal to this court against conviction.

The facts sof the case were that on the 1st February, 1987, PW1, a Sub Inspector in the police, together with PW2, a wildlife Officer, and PW3, a police constable, mounted a road block at Mbuluma. These three witnesses said that the road block consisted of a barrier half way across the road. Before the barrier there was a police notice with the words:

> "Slow down police control ahead"

and at the same place there were resion to slow down at a check point which was placed by the Fisheries Department.

The evidence was that a motor vehicle approached the road block and, despsite the fact that

PW1 signalled to it to stop, it went straight past the road block. PW1 then shouted to PW3 who was some distance ahead to stop the vehicle. PW3 fired five shots at the vehicle until it stopped. The shots hit two tyres, caused other damage to the vehicle and injured two of the passengers. The police evidence was that five people came out of the vehicle, and the appellant, who was the driver, opened the boot of the vehicle. In the boot was a plastic sack generally used for 50kg fo mealie meal and a fuel container. There were too pieces of rhinoceroes horns in the plastic sack and nine pieces of rhinoceroes horns in the fuel container. Some of the other accused persons admitted to being the owners of few of the pieces of rhinocerous horns, but all, on being charged with possession of unlawful trophy, denied the offence. The exhibits were inter examined and were certified to be true pieces of rhinoceros horn.

When the appellant gave evidence he denied having seen any road block or PW1 waving at him to stop, and said that the first he knew was when his car was being shot at. He said that he had been to Luangwa Secondary School to pay a fee for his son and to negotiate for a place at the school for his other child. Before driving to Lusaka there were many people asking for a lift and he picked up six other men. He said that as he approached Mbuluma he saw a man running into the road; he then saw a police man cocking a gun and suddenly he found



that there was blood oozing from his hand. when he came out of the car he saw that his hand was hurt. He was taken to hospital and when he was discharged he was charged with this offence by the police. He said that he had no idea that there were pieces of rhinoceros horn in the vehicle.

Mr Silwya, on behalf of the appellant, argued a number of grounds of appeal. He first argued that it was wrong for the magistrate to have convicted the appellant and the co-accused of count possession of trophy without indicating how much of the trophy was the responsibility of each of the accused. He also argued that the trial court could have found that the appellant was not in control of the trophy because there was no evidence connecting him with any of the pieces of rhinoceros horn. In this connection he referred to the case of Monon v The People (1973) ZR 188, (1) supported in particular by the case of *Hobson v Impett* (1957) 41 CR/ APP R 138 (2) Mr Silweya also argued that the evidence in the court below about the setting up of the road block was suspect and that this court should examine the evidence in the respect and find that it could not be relied upon. He also drew our attention to a passage in the judgement of the lower court which he said unfairly found that the fuel container in which some of the trophy was found must have belonged to the appellant and another passanger which he said improperly shifted the onus onto the appellant. The passages referred to read as follows:

> "I have no doubt that the said tank and I have no doubt that the said exhibit fits 45 (the appellant) so well in that he is the owner of the said Fiat and most likely to have possessed the said container for the sole purpose of carrying exhibit P1
> (the rhiroceros horn); and
>
> "I have no doubt that the accused in this case is trying to take advantage of the situation and they are the only ones who know the truth about the matter."

We will deal with this last argument immediately. It is clear from the evidence that the tank in which the pieces of rhinoceros horn were found was not fixed to the vehicle but was a coperate tank which could have been put into the boot of the vehicle by one of the other accused persons. There was in fact nothing which linked this tank especially with the appellant and to

say so was a misdirection on the part of the learned magistrate. So far as the second passage is concerned the that the magistrate considered that the accused were guilty but this had already been arrived at so far as the appellant was concerned and having reacted to what we will have to say about the question of was not impropriety in these remarks in their relation to the appellant.

So far as the question of unlawful possession is concerned, we have considered the cases referred to by Mr Silweya. In the Hobson case the Divisional Court felt that because the accused person helps to unload from a car a sack which contains stolen goods he is necessarily guilty of receiving stolen goods. We respectfully agree with that decision would distinguish it from this case in which the illegal goods were found in the vehicle owned and driven by the appellants. In the Moonga case the facts were that an unlicenced gun was found in the house of the accussed. There was no dispute that the gun belonged to the brother of the accussed, but it was held that under the Fire Arms Act being "in possession" referred to having control over the gun, and, as the accused had the



gun in his house with his knowledge, it was certainly under his physical custody, control and power. We respectfully agree with that finding and we also respectfully agreee with the finding in the *R v Hobson* (1954) Dears 400, (3) cited in Russell on Crime, Twelth Edition, Vol. II at page 1142 where the note reads "Where property is found in a man's house it is a question of fact for the jury whether it was in the man's possession, that is to say, whether it was there with his knowledge and sanction." We would liken the finding of an illegal object in a car. If the driver of a car carries a passenger who to his knowledge is in possession of illegal trophy, the driver, by virtue of his having the illegal trophy in his car, is jointly in possession of it. As a general rule a driver of a car may choose whether or not to carry passengers or their illegal possessions and if he does so with knowledge of the illegality he is guilty of joint possession. This is also in line with the definition of "possession" in section 4 of the Penal Code which reads as follows:-

> "(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have any thing in his or their custody or possession, it shall be deemed and taken to be in the custody of each and all of them."

With regard to Mr. Silweya's argument that each accused must be found guilty of the quantity of illegal trophy for which he is responsible, this could not apply to the applicant because, if he was aware that he was carrying illegal trophy, he would be jointly liable for the possession of all of it.

In view of our comments on the question of possession it is necessary to consider whether the evidence indicates that the appellant was aware that he was carrying illegal trophy. If he was so aware it matters not whether the trophy belonged to him or to his passengers; his knowledge of its presence in the car would render his guilty of possession of the trophy. Evidence that the appellant knowingly failed to stop at a road block would be evidence from which no reasonable inference could be drawn other than that the appellant was aware of the fact that he was carrying illegal trophy. Mr. Silweya has asked this court to find from the evidence on record that there was no road block as stated by PW1, 2, and 3, and that those witnesses told lies about the existence of the road block because they realise that there was something very wrong in the shooting at the appellant's vehicle and the wounding of the passengers some of whom might have died. In support of his argument that the appellant is innocent Mr. Silweya emphasised the fact that the appellant consistently denied any knowledge of the trophy. Such denial would of course be of no avail if the evidence discloses

that the appellant drove through the road block knowing fully wall that it was there. Mr. Silweya's argument requires us a to assume that PW3 shot at the appellants vehicle for no reason whatsoever. We accept, because we have dealt with such cases, that the police at road blocks have at times improperly shot at vehicles when the driver and passengers thein have been innocent, but that is not the situation in this case. It is not disputed that illegal trophy was found in the appellant's car and we cannot accept on the facts disclosed by the record in this case, that the firing of the car was done for no reason whatsoever.

We have considered the discrepancies in the evidence of the three relevant



witness as to the distance at which PW3 was shead of the road block. PW1 when he first gave evidence said that the distance was 500 metres. When he was recalled he said it was 400-500 feet and explained this by saying :- "It could be from here to the Main Post Office" (It appears that the witness was giving evidence at the Boma Magistrate's Court). PW2 said the distance was about 100 metres and PW3 himself said that he was about 250-300 metres from the barrier. Despite the discrepancies in this evidence all the witnesses agreed that PW3 was some considerable distance ahead of the road block barrier, and the discrepancies suggest only that the witnesses estimated the distance differently, not that the evidence was untruthful in its essential content, namely that there was a road block with a barrier and signs, and that PW3 was some distance beyond the road block. Apart from from the discrepancies to which we have referred and which we find do not go to the root of the evidence, we are satisfied that the learned magistrate did not misdirect herself in any way when accepting the evidence of the prosecution witness that there was a barrier half way across the road, a police sign, a permanent sign erected by the Fisheries Department, and that PW1 was standing in the road, waving his arms to stop the appellant's vehicle.

We are satisfied, therefore, that the evidence indicates that the road block was clearly there and that the appellant drove past the road block by driving on the side of the road which was not occupied by the barrier; and we are further satisfied that such evidence indicates that the appellant had guilty knowledge that he was carrying illegal trophy and thus was guilty of joint possession of such trophy.

In view of the misdirection to which we referred earlier in this judgment we apply the proviso to section 15(1) of the Supreme Court Act and find that the learned magistrate must have convicted in any event on the evidence to which we have referred.

The appeal against conviction is dismissed.

---