R v MAFOHLA AND ANOTHER 1958 (2) SA 373 (SR)

Citation	1958 (2) SA 373 (SR)
Court	Southern Rhodesia, Bulawayo
Judge	Young J
Heard	February 14, 1958
Judgment	February 14, 1958
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Game - Wild animals - Ownership of - Acquisition of. - A Mortal wounding of game - When sufficient to reduce animal into possession for purposes of acquiring ownership.

Headnote : Kopnota

The accused had pleaded guilty to the theft of a carcase of a koodoo. The evidence was that the complainant had mortally wounded it the day B before but, having been unable to find it, had recommenced the search next morning and spoored it down to near a paddock fence on the ranch on which he was an assistant where he found a pool of blood. The accused were thereafter found in possession of the carcase and they had stated that their dog had put up the koodoo and that they had killed it and taken the meat.
Held, as the wounding of the koodoo had not had the effect of reducing the animal into the possession of the complainant, for the purpose of acquiring ownership, that the conviction should be set aside.
The Roman, Roman-Dutch and South African law on the subject of the C acquisition of ownership in wild animals discussed.
Review.

Judgment

YOUNG, J.: The accused were charged in the magistrate's court at D Plumtree with the theft of 'the carcase of one kudu, the property or in the lawful possession of Cedric Mason'. There was a second count, alleging a contravention of the Cedric Mason'. There was a second count, alleging a contravention of the Native Passes Act, Chap. 77, but no point arises as to that. The accused pleaded guilty to the theft and were found guilty, and each was sentenced to a fine of £5, or in default one month's imprisonment with hard labour.

E The facts relating to the charge of theft are as follow. On 10th January, 1958, Mason, an assistant on Commander Cobbold's ranch, Ngwesi, in the Plumtree area, shot at and wounded a koodoo. Mason says:

> 'It ran away and I was unable to find it. The following morning I spoored the animal down to near a paddock fence on the ranch. At that F point I found a lot of blood which indicated to me that the animal had been butchered there. I followed the spoor of donkeys and this led me (to the accused). I asked them where they got the meat and they said that their dog had put it up and they had killed it and taken the meat. . . . I recovered the meat. . . . The koodoo was so mortally wounded that it could not have got away. It was found close to the place where we left off following it. It left a trail of a great deal of blood behind it.'

G This case raises a question which was the subject of controversy among Roman lawyers, but which was settled, as far as Roman law is concerned, by the *Institutes of Justinian*, Book 2, title 1 secs. 13 - 14. The passage reads (Sandars' trans.):

> '13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and H that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.
>
> 14. Bees also are wild by nature. Therefore, bees that swarm upon your tree, until you have hived them, are no more considered to be your property than the birds which build their nests on your tree: so that if any one else hives

---

YOUNG J

> them he becomes their owner. Anyone, too, is at liberty to take the honeycombs the bees may have made. But of course, if, before anything has been taken, you see any one entering on your land, you have a right to prevent his entering. A swarm which has flown from your hive is still considered yours as long as it is in your sight and may easily be pursued; otherwise it becomes the property of the first person that takes it.'

A This passage is based on *Digest*, 41.1.5, where the matter (so far as relevant here) is put thus (de Zulueta's trans.):

> 'Now an animal is considered to recover its natural liberty when either it has escaped from sight or, though still in sight, its pursuit is difficult. It has been asked whether a wild beast, which has been so wounded that it can be captured, at once becomes the property of the wounder. *Trebatius* held that it becomes the property at once, and is considered his so long as he keeps up its pursuit, but that, if he gives B up its pursuit, it ceases to be his, and once more becomes the property of the first taker.'

It appears, therefore, that the rule was as follows: *(a)* where a wild animal had been reduced into possession it does not upon escape regain its natural liberty until it has passed from sight or, though still in C sight, its pursuit has become difficult. (For a modern view of when pursuit becomes difficult, see *Kearry v Pattinson*, 1939 (1) A. E.R. 65, a case concerning bees); *(b)* when it has not previously been reduced into possession the wild animal becomes a man's property only when he actually captures it.

The Roman Dutch law (subject to local statutes) followed the above rule. *Voet* 41.1.7 (Gane's trans.) has this:

> 'Although it is still held nowadays that a wild animal wounded by one person, and taken by another does not become the property of him who wounds. but of him who seizes, still anyone who comes on the scene and seizes a wild animal on the pursuit of which another is still bent ought to be fined, on the ground that he is carrying on a meddlesome form of hunting, such as is often the cause of quarrels and of brawls.'

E See too Hugo Grotius *Introduction to Dutch Jurisprudence* (Maasdorp's trans.) 2.4.31. The legal position was different where the animals *ferae naturae* were kept in an adequate enclosure. By this means the animals could be reduced into possession sufficiently to support a claim to ownership: *Voet* 41.1.5; *Grotius, ibid*. 2.4.9.

The South African law appears to be to the same effect: see *Maasdorp*, F vol. 2, 7th ed., pp. 40 - 42; *Lamont v Heyns and Another*, 1938

T.P.D. 22. The sufficiency of the enclosure is a matter of degree, and therefore of fact. It might be possible to establish a local custom varying the general law, but that is a matter of evidence (*van Breda v Jacobs*, 1921 AD 330), and it does not arise here.

In the present case the claim to ownership is based on the wounding of G the koodoo. But it is clear on the evidence that the wound did not have the effect of reducing the animal into the possession of Mason, for the purpose of acquiring ownership. The koodoo never lost the character of an animal *ferae naturae*, as far as Mason was concerned. On the contrary, it was the accused who *prima facie* acquired ownership in the animal or H its carcase by *occupatio* of a *res nullius*. It is unnecessary to consider the effect of the game laws on the issue of ownership (*cf. Dunn v Bowyer and Another*, 1926 NPD 516), as it was not shown that the accused were not authorised to hunt koodoo. If the question does arise, the correctness of the decision in *Dunn's* case, *supra*, will, I think, require consideration.

The Attorney-General does not support the conviction. The conviction and sentence on the count of theft must be struck out.
