

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A. And SEHEL, J.A.)

CONSOLIDATED CRIMINAL APPEAL NOS.16'A' OF 2016 & 16 OF 2017

SONG LEI.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

**1. XIAO SHAODAN }
2. CHEN JIANLIN }RESPONDENTS
3. HU LIANG }**

**(Appeal from the decision of the High Court of Tanzania
at Mbeya)**

(Levira, J.)

dated the 08th day of November, 2016

in

Economic Crimes Appeal No. 16 of 2016

JUDGMENT OF THE COURT

16th & 30th August, 2019

MUGASHA, J.A.:

In the Resident Magistrate's Court of Mbeya, Song Lei, Xiao Shaodan, Chen Jianlin and Hu Liang were jointly and together charged with three counts: In the first count, all accused persons were charged with the offence of leading organized crime contrary to sections 57(1), 60(2) and

paragraph 4(1) (a) of the First Schedule to the Economic and Organized Crime Control Act Cap 200 RE: 2002 (the EOCCA). It was alleged by the prosecution that, on 5/11/2015, at Kasumulu area within Kyela District in Mbeya Region, jointly and together organized and furthered the objectives of a criminal racket by importing to the United Republic of Tanzania Trophies to wit: eleven (11) pieces of Rhinoceros valued at USD 418,000 equivalent to TZS. 902,888,000,000/= without Trophy's dealer licence or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the CITES) permit.

In the second count, all accused persons were charged with the offence of unlawful dealing with Trophies contrary to sections 83 (1), 84(1) of the Wildlife Conservation Act No. 5 of 2009 (WCA) read together with paragraph section 57 (1) and 60 (2) and Paragraph 14 (b) of the First Schedule of the EOCCA. The prosecution alleged that, on 6/11/2015 at Kasumulu area within Kyela District in Mbeya Region, the accused persons jointly and together imported eleven (11) pieces of Rhinoceros horns valued at USD 418,000 equivalent to TZS. 902,888,000,000/= without trophy import certificate or a CITES permit previously sought and obtained from the Director of Wildlife.

In the third count, all accused persons were charged with the offence of unlawful possession of Government Trophy Contrary to section 86 (1) and (2) (c) (ii) of the WCA read together with section 57 (i) and paragraph 14 (d) of the First Schedule of the EOCCA. It was the prosecution case that, on 6/11/2015 at Kasumulu area within Kyela District in Mbeya Region, jointly and together were found with eleven (11) pieces of Rhinoceros horns valued at USD 418,000 equivalent to TZS. 902,888,000/= without a permit from the Director of Wildlife.

They all pleaded not guilty and totally denied the charges. The trial court held that, the prosecution proved all counts and convicted the accused persons for all counts and were sentenced to imprisonment for fifteen (15) years in respect of the first count; ordered to pay a fine amounting to USD 836,000 twice the value of the trophies for the second count and a jail term of twenty (20) years and in addition, to pay a fine of USD 4,180,000 for the third count.

Aggrieved, they appealed to the High Court whereby they were all acquitted on the first count. For the remaining counts, the conviction of the Song Lei was upheld whereas Xiao Shaodan, Chen Jianlin and Hu Liang

(the trio) were acquitted. Song Lei was not amused and as such, he preferred an appeal to the Court with the following grounds of appeal:

*"1. That the first appellate High Court erred in law and fact in not holding that **chain of custody** of the disputed 11 rhinoceros horns was broken between the customs office at the Kasumulu Malawi border and Kyela Town (a distance of more than 10 kilometers) as there is no evidence on record establishing that there was any chronological documentation and / or paper transfer showing the seizure, custody, control, transfer, analysis and disposition of evidence between the said Customs Office and Kyela Town where PW6 allegedly conducted his analysis of the horns.*

2. That the first appellate High Court erred in law and fact in sustaining the convictions of the appellant in the 2nd and 3rd counts when:

a) There is no evidence that the appellant was the one who had modified the car to store the rhino horns.

*b) On 26/9/2015 i.e three months earlier, another person **ZHANG PENG**, had been seen driving the same car and was seen with the modified tank and there is no evidence on*

record that this person was not the one who had planted the said horns in the car without the knowledge of the appellant.

*c) The said **ZHANG PENG** did not testify and thereby raising the possibilities that he was the one who was behind the rhino horns.*

1. That the first appellate High Court erred in law and fact in relying on the expert evidence of PW6 MUSA MMBANGA, when:

a) PW6 did not establish any chain of custody about documentation as to how, from whom, and at what time and date, he received the disputed 11 Rhino horns.

*b) PW6 himself stated (at from page 101 (line 22) to page 23, (line 1 and 2) that he **could use a chemical to test if there could be a dispute of a horn**" and that he **"could send samples to Nairobi**) for analysis.*

2. That the first appellate High Court erred in law and fact in sustaining the convictions of the appellant in Counts 2 and 3 when the prosecution itself through PW1 Godliving Daniel Mollel stated in the first three lines of page 41 of the record that it was

"impossible for me to understand who kept in the hidden tank those Rhino horns in the motor vehicle between Zhanga Peng and Song Lei. Zhang Peng is not among the accused."

The DPP also appealed against the decision of the High in a two ground Memorandum of Appeal.

- "1. That the Trial Judge erred both in law and in facts for acquitting the 1st, 2nd and 3rd Respondents on ground that they had no knowledge that the motor vehicle they boarded had carried government trophy namely, Rhinoceros horns.*
- 2. That the Trial Judge erred both in law and in facts fir acquitting the 1st, 2nd and 3rd Respondents on ground that the case against them was not proved beyond reasonable doubts."*

The two appeals (Criminal Appeal No. 16'A' of 2016 and Criminal Appeal No. 16 of 2017) were consolidated as they emanate from same proceedings. To bolster the arguments in support of Song Lei's appeal on his behalf, Mr. Mkumbe, learned counsel filed written submissions which he

adopted at the hearing of the appeal. The Respondent Republic did not file any submissions.

At the hearing, Messrs Mulisa and Simon Wankyo, learned Senior State Attorneys represented the Director of Public Prosecutions whereas Mr. Victor Mkumbe and Ms. Irene Mwakyusa represented Song Lei, Messrs Shimbwe Shitambala, Ladislaus Rwekaza and Dominicus Nkwera represented the Xiao Shaodan, Chen Jianlin and Hu Liang (the trio)

Before dealing with the appeal we have deemed it crucial to narrate briefly what culminated to the apprehension, arraignment and conviction of all accused persons before the trial court, which constitutes the background from which the consolidated appeal arises.

The prosecution case was built along nine (9) witnesses and several documentary and physical exhibits. It was the prosecution account that, on 26/9/2015 Zhang Peng; a Chinese National driving in motor vehicle with Registration. No. T103 DER make Toyota Hilux (Exhibit P4) was travelling to Malawi from Tanzania vide Kasulumu border. On arrival at Kasumulu border post, a customs official Godliving Daniel Mollel (PW1) having scrutinized the documents of the motor vehicle, gathered that it belonged to Song Lei. He thus, requested Zhang Peng to produce an authorization

letter from the owner which permitted him use the respective motor vehicle to travel to Malawi. Zhang Peng communicated on phone with Song Lei and availed him with PW1's email address and Song Lei obliged having sent the email to PW1 with the respective authorization. Thereafter, PW1 inspected the motor vehicle and found that, it had a welded tank which looked like a fuel tank but it had no fuel. Thus, PW1 cleared Zhang Peng who was given a permit of three (3) months.

More than a month later, that is, on 6/11/2015, Song Lei came from Malawi driving the same motor vehicle accompanied by Xiao Shaodan, Chen Jianlin and Hu Liang (the trio) who claimed to have come as tourists in Tanzania. After they had cleared with the Immigration Department, PW1 demanded from Song Lei the documentation of the motor vehicle which was sought to be cleared before entering Tanzania. On seeing the documents, PW1 remembered that it was the motor vehicle which he had cleared on 29/9/2015 and found in it a secret chamber. As such, PW1 notified Song Lei that, the motor vehicle had to be inspected. As Song Lei became worried, PW1 reported the matter to the Officer Commanding Station at Kasumulu who assigned Vicent Gervas Buyoya (PW5) to handle the matter. PW5 directed the car to be taken to yard by Song Lei. By then

Xiao Shaodan, Chen Jianlin and Hu Liang (the trio) had departed for Kyela after hiring a taxi owned by Mussa Hamisi Mwangoke (PW7) who told the trial court that the trio seemed to be in a hurry to go to Kyela. Ultimately, the trio were found at Kyela and returned to Kasumulu and each was required to identify his personal bag and all were identified by their respective passports. Thereafter, PW5 called a mechanic Primin Komba (PW3) to unscrew the tank and eleven (11) horns suspected to be of Rhinoceros were found in the secret chamber and retrieved in the presence of all accused persons. Song Lei was ordered and obliged to open the car using the ignition switch. The search by PW5 was in the presence of Song Lei, Xiao Shaodan, Chen Jianlin, Hu Liang, PW1, Chacha Magige (PW4) and (PW3). Thereafter, a seizure certificate was prepared and the horns and the mobile phones are among the items which were documented to have been seized and all accused persons signed it. The seizure certificate was tendered as exhibit P13. On the same day, all accused persons and the horns were taken to Kyela accompanied by PW5, PW1 and Mchome and Mwambete. At Kyela Police station, the horns were placed in three trunks, stored and were kept under control and supervision of PW5. On the following day, Mussa Mmbaga, an ecologist who testified as PW6 went at

the Police Station, examined the horns and confirmed that they were actually Rhino horns. In his account, he gave a respective description of the shape and size of each horn and prepared the valuation report (Exhibit P14). PW6 tendered the Rhino horns as Exhibit P5.

H. 5259 D Mtakula (PW9) the Electronic expert from the Police Force, recounted as to how he conducted the examination of the mobile phones and an Ipad which were seized from the accused persons. He testified on what he was able to gather from those gadgets and prepared a report which was tendered as Exhibit P23. However, since he was not conversant with Chinese language, PW9 could not understand the content of text messages inscribed in Chinese language and the trial court had to seek the services of an interpreter in order to understand the contents of the messages in the mobile phones. However, it could not be established as to which phone belonged to which accused person in the absence of any evidence from the mobile companies and from Exhibit P13 the certificate of seizure the owners could not be discerned which was a shortfall on the manner in which the seizure was conducted.

As earlier pointed out, the accused denied the charges. However, Song Lei all along admitted to be the owner of the motor vehicle but

claimed not to have knowledge of the secret chamber of the motor vehicle where the horns were found. He contended to have met the trio in Malawi and that they had agreed to share the costs of fuel and use his car to travel to Tanzania. This was echoed by the trio who apart from denying the charges, they claimed not to have been aware if the motor vehicle in question had a secret chamber which was found with Rhino horns.

In addressing the first and third grounds of complaint, Mr. Mkumbe faulted the first appellate court in not taking cognizance that, the chain of custody was broken when the Rhino horns alleged to have been retrieved from the Song Lei were ferried from Kasumulu border post to Kyela Town. He attributed this to the failure by the prosecution to tender documentary evidence in respect of the seizure of the eleven (11) horns which was contrary to the provisions of section 38 (3) of the Criminal Procedure Act Cap 20 RE: 2002 (the CPA). To support this proposition he relied on the case of **PAULO MADUKA AND 4 OTHERS VS THE REPUBLIC**, Criminal Appeal No. 110 of 2007 (unreported) and the first appellate court's finding that, there had been a cut of chain of custody in the absence of the chronological documentation showing the transfer of exhibit, its storage and packaging before being returned to the source. Moreover, Mr. Mkumbe

faulted the fixing of the seal on the trunks that carried the horns at Kyela instead of Kasumulu border Post. He as well questioned the expertise of PW6 as he had recounted that, the laboratory for examining the trophies in Dar es Salaam was not yet operational.

In arguing the 2nd and 4th grounds, Mr. Mkumbe submitted that the since Song Lei had denied to have knowledge that his car had a secret chamber, it was incumbent on PW1 to have taken action being the person who initially discovered the secret chamber when the car was being driven by Zhang Peng failure of which he argued, the prosecution fell short of proving the actual person who packed the Rhino horns in the motor vehicle. In other words, it was Mr. Mkumbe's argument that Zhang Peng was a material witness to establish the charges beyond any doubt against Song Lei. To cement his submission on the absence of knowledge on the part of Song Lei about the secret chamber found with the horns, Mr. Mkumbe referred us to the case of **MOSES CHARLES DEO VS REPUBLIC** [1987] TLR. 134.

It was thus submitted by Mr. Mkumbe that, in the absence of knowledge on the part of Song Lei, his conviction was purely based on suspicion which was not proper because in a criminal trial, suspicion

however grave is not a basis for a conviction. To back up this proposition he cited to us the cases of **MT 60330 PTE NASSORO MOHAMED ALLY VS REPUBLIC**, Criminal Appeal No. 73 of 2002 and **NATHANIEL ALPHONCE MAPUNDA AND ANOTHER VS THE REPUBLIC** [2000] TLR 395.

Mr. Mkumbe urged us to allow the appeal and set Song Lei free as the charges were not proved against him beyond reasonable doubt.

On the other hand, the DPP opposed the appeal whereby, Mr. Mulissa faulted the basis of the appeal and urged the Court to dismiss it in entirety. He pointed out that, what was searched and seized from Song Lei and the trio (co-accused's) was documented in the search and seizure certificate which was signed by all the accused persons and at the trial it was tendered by PW5 as Exhibit P13. As such, the complaint on non tendering it is unfounded.

It was submitted that, the chain of custody was not broken because from the point of seizure up to the tendering at the trial, the horns remained under the control of PW5 which is supported by PW6 who testified to have examined the horns at the Police Station as confirmed by Amini Makamba the OC CID Kyela (PW8). Mr. Mulissa argued that, since

Rhino horns are items which cannot easily change hands; it is not every time when the chain of custody is broken the exhibit cannot be produced in court. To back up this proposition he cited to us the cases of **JOSEPH LEONARD MANYOTA VS REPUBLIC**, Criminal Appeal No. 485 of 2015 and **KADIRIA SAIDI KIMARO VS REPUBLIC**, Criminal Appeal No. 301 of 2017 (both unreported).

He defended the stance on fixing of the seal on the trunks carrying Rhino horns at Kyela arguing that the expert PW6 was based there. In addition, he argued that, the horns could not be tampered without missing the eye of Song Lei and co-accused persons who were in the same vehicle which carried Rhino horns from Kasumulu to Kyela. Regarding, the contest on the expertise of PW6, Mr. Mulisa argued the same to be baseless, because the witness demonstrated his professional expertise being an ecologist which was basically not disputed by the defence advocates.

In opposing the 2nd and 4th grounds of appeal regarding the actual possession of the Rhino horns, Mr. Mulisa contended that Song lei and Zhang Peng were basically principal and agent respectively, because according to PW1, it is the former who authorized the latter which made

the Customs department to issue Zhang Peng permission to cross the border to Malawi using Song Lei's motor vehicle.

The learned State Attorney attributed the worries of Song Lei to have corroborated the prosecution's account that he had knowledge about the secret chamber in his motor vehicle where the horns were found. He as well, challenged the argument that, the prosecution ought to have summoned Mr. Zhang Peng to be without basis because when he initially drove the car in question, the Rhino horns were not found therein. As such at that particular moment, it was unnecessary for PW1 to inquire about the secret chamber as it is not an offence under the law. The learned State Attorney concluded by reiterating that Song Lei's appeal be dismissed because it is not merited as the charges were proved beyond reasonable doubt.

In rejoinder, Ms. Mwakyusa challenged the practicability of gauging the worries of Song Lei being in connection with the Rhino horns because he had no knowledge about the secret chamber. She argued that it was probable for some other person to modify the chamber without the knowledge of Song Lei. Besides, she was of the view that, Song Lei's

signing of the certificate of seizure is not full proof that he had knowledge about the presence of Rhino horns in the secret chamber. On his part, Mr. Dominicus Nkwera came with a view that, since the prosecution did not summon the hotel manager from Malawi where Song Lei resided before travelling to Tanzania, the prosecution failed to prove charges against Song Lei and in particular, the knowledge about the secret chamber in the motor vehicle found with Rhino horns. As for Mr. Shitambala, apart from challenging the expertise of PW6, he contended that exhibit P13 was not a certificate of seizure and instead, a mere search warrant.

As for the DPP's appeal, Mr. Simon Wankyo faulted the first appellate court to have acquitted Xiao Shaodan, Chen Jianlin and Hu Liang (the trio) while the prosecution had established their involvement in the unlawful dealing in trophies because they were found in possession of the Rhino horns as acknowledged in Exhibit P13 which was signed by the trio. He added that, their conduct having rushed to Kyela and telling lies that they went to exchange money points to their guilt because according to DW3 the discussion as to who had money or otherwise was conclusively sorted out in Malawi. It was Mr. Wankyo's view that, the questionable conduct of the trio is cemented by the evidence of the taxi driver who was hired by

the trio to take them to Kyela and they had confided with him to be in a hurry. To support his proposition, he cited case of **MICHAEL STEPHENE NYANGINYWA VS REPUBLIC**, Criminal Appeal No. 87 of 2017 (unreported). When asked if the bags of the trio were searched, Mr. Wankyo declined but maintained that, having signed Exhibit P13, the trio had acknowledged to have been found in possession of the Rhino horns. He asked the Court to allow the DPP's appeal.

On the other hand, in opposing the DPP's appeal, it was argued that, the worries and running away of the trio did not prove their connection with Rhino horns found in the motor vehicle considering that, their bags were not searched. It was pointed out that, after the trio was through with the immigration formalities, they were justified to move from Kasumulu to Kyela leaving behind Song Lei who was processing the clearance of the motor vehicle. In addition, it is contended that the trio was under no duty to disclose about their money which does not connote that, they were found in possession with Rhino horns. Besides, having stayed at Kasumulu for 30 minutes, this is indicative that they had not attempted to run away as suggested by the prosecution. Finally, advocates for the trio urged the Court to dismiss the appeal.

In rejoinder, Mr. Wankyo reiterated what he had earlier on submitted in chief and urged the Court to allow the appeal because the charge against the trio was sufficiently proved.

Having carefully considered the submission of counsel and the grounds of complaint by the parties, we have gathered that, it is not in dispute that, the secret chamber of the motor vehicle in question which belongs to Song Lei was found with Rhino horns. It is also not disputed that, the secret chamber of the said car was discovered by PW1 on 29/9/2015 when it was being driven by Zhang Peng while going to Malawi. What is in dispute is whether Song Lei and the trio had knowledge about the existence of the secret chamber and the horns found therein.

It was repeatedly submitted on behalf of Song Lei that, the Rhino horns found in the secret chamber of Song Lei's motor vehicle were probably hidden therein by Zhang Peng. It was also argued that, since Song Lei's car while in Malawi was parked at a Hotel, it is inappropriate to impute knowledge on Song Lei about the existence of the Rhino horns in his motor vehicle. In a criminal trial, in order to establish knowledge on

the part of the accused person in respect of possession of unlawful items the Court in the case of **MOSES CHARLES DEO VS REPUBLIC**, (supra) which was cited to us by Mr. Mkumbe the Court categorically stated that:

" for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came albeit in his presence, at his invitation and arrangement."

Similarly, in the case of **NURDIN AKASHA alias HABAB VS REPUBLIC**, 1995 TLR, 227 the appellant was charged with among others, unlawful possession of dangerous drugs which were stuffed in two motor vehicle tyres kept in a room used as a store in the appellant's premises. The Court among other things held:

"Whether the drugs were hidden in the store by the appellant himself or by another person with the appellant's approval, the appellant was in possession of those drugs."

We fully subscribe to the said decisions which are valid in the matter before us. It is our considered view that, Song Lei was a person in charge

and control of his motor vehicle regardless of having authorized Zhang Peng to drive it when the latter was travelling to Malawi from Tanzania. Also, our view is that, even if the horns were packed in the secret chamber be it by Zhang Peng or the unnamed Hotel Manager, this must have been with the knowledge and approval of Song Lei the owner to the motor vehicle in question. It is highly unlikely that, Zhang Peng and the hotel manager would have risked leaving the valuable Rhino horns in the motor vehicle which they had no control over it.

Therefore whether the Rhino horns were packed in the secret chamber by Song Lei himself or Zhang Peng or the unnamed Hotel manager, he had knowledge of them did approve and as such, Song Lei was in possession of the Rhino horns as rightly found by the courts below. Moreover, having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle. We found the argument that search and seizure was not conducted to lack merit. This is because, according to the evidence of PW1 and PW5 the search was conducted and the seized items were documented in Exhibit P13 including the Rhino horns as reflected at page 327 of the record. Moreover, Exhibit P.13 clearly shows that those

searched included Song Lei and the trio and it was witnessed by PW1, PW3 and PW4 whereas the searching officer was PW5. Therefore, having concluded that, that Song Lei had knowledge on the Rhino horns found in his car, in our considered view, neither Zhang Peng nor the hotel Manager was a material witness for the prosecution considering that Song Lei was arrested on 5/11/2015 at Kasumulu border in possession with Rhino horns. In this regard, the suggestion that PW1 ought to have taken action on 29/9/2015 having seen the secret chamber holds no ground because on that day the Rhino horns which are a subject of the charges were not found in the respective motor vehicle.

We now proceed to consider the propriety or otherwise of the chain of custody. The complaint basically hinged on the finding by the trial judge as reflected at page 269 of this record that:

"In the present case, with due respect to the Senior State Attorney, there had been a cut of chain of custody specifically chronological documentation showing the transfer of the Exhibit either to or from PW9 the Electronics' expert. There should have been a clear linkage as to how the exhibit was

transferred, admitted, dealt with and finally how it was stored and packed before being returned to the source. I suppose there happened a slight failure on the part of the prosecution”

The 1st appellate Court relied on the case of **PAULO MADUKA AND 4 OTHERS VS REPUBLIC** (supra) in evaluating the evidence of PW9 the Electronic expert who examined the mobile phones and Ipad alleged to belong to the accused persons which had the text messages and it was in respect of how the mobile phones were stored, examined and returned to the source for tendering in court. Therefore, the finding was not in respect of the chain of custody of the Rhino horns as suggested by Mr. Mkumbe who with respect, missed the boat having interpreted the 1st appellate court finding to have been in respect of the broken chain custody of the horns which was not the case.

The above notwithstanding, it is on record that, following the alert by PW1 that Song Lei’s motor vehicle had to be inspected, PW5 who was assigned the task, searched the motor vehicle and retrieved 11 Rhino horns which were enlisted in Exhibit P13. Subsequently, in the presence of all accused persons, horns were taken to Kyela Police Station for safe

custody. As correctly argued by the learned Senior State Attorney, this is flanked by PW6 who recounted to have examined the horns at Kyela Police Station which was confirmed by PW5 who was in custody of the horns and PW8 the OC CID of Kyela. As to the fixing of the seal on the trunks at Kyela instead of Kasumulu, this was explained by the prosecution that, it was because the expert PW6 was in Kyela and not Kasumulu. We are contented with the prosecution's account because when the accused were apprehended on 5/11/2015, it was not yet confirmed that the horns were of Rhinoceros. The confirmation came after the examination conducted by PW6, the expert. In this regard, it was justified to have the seal fixed after the confirmation and not before that and we are satisfied that, the seal was thereafter not tampered. In our considered view, since Rhino horns are items which cannot easily change hands and in the absence of any evidence that Exhibit P13 was mishandled or handled by any other unidentified person, we are satisfied that it was at all time, from seizure to its tendering at the trial under the control and supervision of PW5 and the chain of custody was not broken. See- **VUYO JACK VS DIRECTOR OF PUBLIC PROSECUTIONS**, Criminal Appeal 334 of 2016.

As to the complaint on the expertise of PW6 who examined the horns, because he had testified that the laboratory for examining government at Dar es Salaam was not operational is indeed without basis. In the first place, PW6's competence was not contested by it by Song Lei or his advocate because the cross-examination basically hinged on the description of the horns which was well addressed by PW6. There was no question as to PW6's his expertise or competence to examine Rhino horns. It is trite law that failure to cross-examine a witness on a crucial aspect safely vouches the acceptance of truthfulness of a witness. See- **NIYONZIMA AUGUSTINE VS REPUBLIC**, Criminal Appeal No 483 of 2015 (unreported). In this regard, raising the complaint at this stage is purely an afterthought.

We therefore agree with the learned Senior State Attorney that, on the basis of cumulative evidence of the prosecution, it was proved beyond a speck of doubt that, Song Lei was actually found in possession of the Rhino horns, which were seized by PW5, examined by PW6 and then throughout placed under control of PW5 who tendered them at the trial. As such the Song Lei's appeal is not merited.

We have now to consider the appeal by the DPP against Xiao Shaodan, Chen Jianlin and Hu Liang.

It was contended by Mr. Wankyo that the conduct of the trio after Song Lei was apprehended indicates that they had knowledge about the presence of the horns in the motor vehicle which is owned by Song Lei. Mr. Wankyo attributed such knowledge to their disappearance at Kasumulu until when they were apprehended at Kyela and telling lies about seeking to exchange currency corroborated the prosecution case. On the other hand, in opposition of the DPP's appeal, basically, all the learned counsel for the trio argued that, the trio had no knowledge about the secret chamber and the presence of the Rhino horns therein.

In convicting the trio trial the court, at page 177 of the record the trial magistrate acknowledged as follows:

"Evidentially, it is very difficult for the prosecution to bring witnesses who witnessed and confirmed the collusion of the accused persons in arranging how and when the commission of offence could take place, what the court is doing, assessing and evaluating

the evidence the court will come to the conclusion that, the accused persons had organized and arranged the crime... If you consider the evidence of the prosecution you will come to the finding that the accused persons arranged and further committed 1st and 2nd counts ... in the final analysis ... the prosecution has proved all its 3 counts beyond reasonable doubt all four accused persons are guilty."

[Emphasis ours]

It will be recalled that, the third court for which the trio were convicted was in relation to the offence of unlawful possession of Rhino horns. Before the first appellate court which overturned the verdict of the trial court, at page 266 it concluded as follows:

"However, the 2nd, 3^d and 4th appellants were not owners of the said motor vehicle as stated earlier; therefore, unlike PW1 who inspected that motor vehicle on 26/9/2015 and discovered the modified part; proof of their knowledge about the modified part of the vehicle, presence of rhinoceros horns in

that part the control of the same was necessary to prove knowledge and hence possession”.

Regarding the conducts (sic) of 2nd, 3rd and 4th appellants, it is a common ground that, they rushed to Kyela Town leaving the 1st appellant at Kasumulu border. I am mindful with (sic) the fact that sudden rush had to do with something unusual. The issue is did that movement (escape) guarantees (sic) that the 2nd, 3rd and 4th appellant were escaping from being apprehended. That goes in the same in the same manner that such escape of the appellants connotes suspicion that they were in possession or had something uncommon but, there is less evidence to believe that they were in possession of the said trophies. In the event, the trial magistrate ought to have been minded with the principles guarding the admission of suspicious evidence... that suspicion however grave is not a basis for a conviction in criminal trial.

It is settled law that, for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of the presence of such items or that he exercised control over them, or that those items came albeit in his presence, at his invitation

and arrangement. See- **MOSES CHARLES DEO VS REPUBLIC**, (supra). We are satisfied that the prosecution did not sufficiently discharge the burden of proof that the trio had knowledge of the horns which were packed in the motor vehicle which belonged to Song Lei. Moreover, the trio 's account which is to the effect that they were mere passenger as tourists on the way to see Mount Kilimanjaro did cloud the prosecution's case with a shadow of doubt. The movement of the trio from Kasumulu to Kyela did not sufficiently establish the trio's knowledge of existence of the Rhino horns in the car which they had no control. On that account, it is highly unsafe to ground a conviction on suspicion however grave. See - **MT 60330 PTE NASSORO MOHAMED ALLY VS REPUBLIC** (supra) and **NATHANIEL ALPHONCE MAPUNDA VS REPUBLIC** (supra). On this accord, we found no cogent reasons to vary the verdict of the first appellate court in respect of the trio.

In view of what we have endeavoured to demonstrate, as for Song Lei's appeal we do not find cogent reasons to vary the concurrent findings of the courts below because the charges were proved beyond reasonable doubt and as such his appeal is without merit and it is dismissed. Similarly,

we are satisfied that, the prosecution did not prove charges against the trio and as such, the DPP's appeal is not merited and it is hereby dismissed.

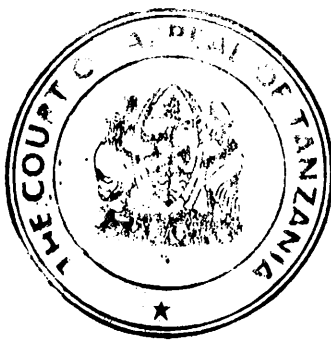
DATED at MBEYA this 30th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2019 in the presence of Ms. Xaveria Makombe and Zena James, learned State Attorneys for the respondent in Song Lei's appeal and for the appellant in DPP's appeal and Mr. Gerald Msegeya holding brief for Mr. Victor Mkumbe, learned advocate for the appellant in Song Lei's appeal and for the respondents in DPP's appeal is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL