

THE STATE
versus
MOLO MWEEMBE
and
MARKSON MULEYA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 APRIL 2018

Criminal Review

MATHONSI J: This matter was placed before me for automatic review in terms of section 57 (1) of the Magistrates Court Act [Chapter 7:10] following the conviction and sentence of the two accused persons to an effective 15 years imprisonment by the magistrates court sitting at Binga on 29 January 2018. The two had pleaded guilty to one count of contravening section 82 (1) of the Parks and Wildlife (General) Regulations, 1990 as read with section 128 of the Parks and Wildlife Act [Chapter 20:14] as amended by section 5 of the General Laws Amendment Act No 11 of 2011.

When the court found no special circumstances as would entitle it to refrain from the imposition of the mandatory minimum sentence of 9 years imprisonment, it sentenced each accused person to 20 years imprisonment of which 5 years imprisonment was suspended on condition of future good behaviour leaving them with an effective 15 years imprisonment. In arriving at what was clearly a very harsh sentence the trial magistrate made the interesting observation:

“The two accused persons had three pairs of horns (ivory) meaning three elephants were killed. They had an intention of selling meaning they were or they wanted to make a living out of trading in ivory.”

I was unable to appreciate what may have informed the imposition of a sentence which was more than double the mandatory minimum sentence provided for in the penal section and desired to know from the trial magistrate how that eventuated. By letter of 21 March 2018 the trial magistrate makes the concession that she erred:

“I concede I erred, in fact I realised it soon after I had sentenced the accused persons, hence I hastened to have the record placed before you as a matter of urgency. I admit I grossly misinterpreted the section. I agree that I had no sound reason to run away from the minimum mandatory sentence of 9 years.”

The facts are that on the night of 27 January 2018 the 41 years and 42 years old accused persons respectively, who hail from Chief Sinankoma area of Binga were lured by game rangers to an ambush in which they attempted to sell 12kgs of ivory valued at \$2 057.00 which they possessed. They were promptly arrested and charged with the crime of unlawful possession of unmarked ivory in contravention of section 82 of Statutory Instrument 362/1990 as read with section 128 of the Act. Upon being arraigned before a magistrate they pleaded guilty and were convicted as aforesaid.

In terms of section 128 (1) (b):

“Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving the unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by statutory instrument shall be liable—

- (i) on a first conviction, to imprisonment for a period of not less than nine years;
- (ii) on a second or subsequent conviction, to imprisonment for a period of not less than eleven years--.”

The trial magistrate is right that there was no sound reason to depart from the mandatory minimum sentence provided for in the Act. The two accused persons were convicted of only one count of unlawful possession of ivory. It mattered not that they had three pairs of horns, it is the single count which carries the mandatory minimum sentence of 9 years and not a single or pair of horns. The accused persons are first offenders and not repeat offenders who would still be liable to a minimum of 11 years imprisonment. There was a misdirection on the part of the trial court which calls for interference with the sentence.

I must say that courts of law must always be slow to impose sentences far above the one prescribed by a statute where a mandatory minimum sentence is imposed by a statute. This is because the mandatory minimum sentences, by their very nature, constitute an invasion of the usual sentencing discretion of the court, which it exercises having regard to the various relevant factors of the case which should inform the assessment of an appropriate sentence. With

mandatory sentences the legislature intervenes and prescribes the sentence to be imposed usually in respect of prevalent crimes which are causing serious economic or social harm. One would want to believe that when prescribing a mandatory sentence the legislature would have already taken into account the mischief that is intended to be addressed by it and fixed stern deterrent punishment that fits the offence.

As stated by the learned author G. Feltoe, *Criminal Defender's Handbook* (2009) at page 164:

“By prescribing mandatory minimum sentences, the legislature is interfering with the normal sentencing discretion of judicial officers to decide upon an appropriate level of sentence based upon the particular circumstances of the offence and the offender and the various mitigating and aggravating factors in the case. With mandatory sentences, the sentence is no longer individualized. At least the mandatory minimum sentence must be imposed. Research has shown that where a minimum term of imprisonment is made mandatory, sentences imposed are considerably longer than would normally be imposed for the crime in question.”

To the extent that the mandatory minimum sentence is already rigorous and invariably heavy, there is no need for the sentencing court to make the situation worse by going beyond that which is prescribed for a single count. As already stated it matters not, in my view, that the accused persons possessed more than one horn. The fact remains that it is for one count that they are being punished. If the legislature intended to take into account the number of horns involved it would have said so.

The discretion of the court to sentence a convicted person taking into account the heat of the moment as the sentencer is closest to the circumstances of the offence having taken the evidence and at times assessed the complainant, is the most hallowed of judicial discretions. Without attempting to disturb the spirit of legislative minimum mandatory sentences in those selected cases, it must be said that there can be no doubt that such sentences have led to rigidity which brings unease to the courts. What the courts should do is to simply comply with the sentence and not exacerbate the situation by adding more. In the words of CAMERON J in *Centre for Justice Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) paragraph 16-21:

“First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent ‘truly convincing reasons’ for departure, the scheduled offences are ‘required to elicit a severe, standardized and consistent response from our courts through imposition of ordained sentences. Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences.”

The 9 year mandatory sentence is severe enough. It should have been imposed. Happily even the trial magistrate has realized the undesirability of the sentence that was preferred.

In the result, it is ordered that:

1. The conviction of the two accused persons is hereby confirmed.
2. The sentence is set aside and substituted with the sentence of 9 years imprisonment for each accused person.

Bere J agrees.....