

THE STATE
versus
SHAKE MAFUKA

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 4 March 2020

Criminal Review

CHIKOWERO J: This review is pursuant to accused's conviction and sentence on two counts.

The first was on a charge of unlawful possession or sale of raw ivory as defined in s 82 (1) of Statutory Instrument 362 of 1990 as read with s 128 (1) (b) of the Parks and Wild Life Act [*Chapter 20:14*].

The allegation was that on 12 September 2018 and at Nyadzomba Village, Chief Chitsungo, Mushumbi Pools the accused unlawfully possessed an ivory without a permit or licence issued in terms of the Act.

The second was unlawful possession of pangolin scales as defined in s 45 (1) (b) of Statutory Instrument 362 of 1990 as read with s 128 (1) (b) of the Parks and Wild Life Act [*Chapter 20:14*].

The State's allegation was that on 12 December 2018 and at Nyadzomba village, Chief Chitsungo, Mushumbi Pools the accused unlawfully possessed six scales of a pangolin without a licence or permit issued in terms of the Act.

KWENDA J and myself confirmed the convictions, on 11 June 2019, when this record initially came before us for review.

Accused pleaded guilty to both counts.

No circumstances have arisen necessitating a departure from our stance *vis a vis* the propriety of the convictions.

The Magistrates Court at Guruve sentenced the accused to 9 years imprisonment on each count.

This the court *a quo* did because it found no special circumstances.

Accused was thus sentenced to undergo a total 18 years imprisonment.

When the matter initially came up for review we altered the sentence to a total 9 years imprisonment, having treated the two counts as one for purposes of sentence.

But the record has again been placed before us for further review.

This no doubt was on the back of the appeal judgment in *Tatenda Mhango, Brighton Ngwenyama and Kudzai Ruvangu Shava* HMA 33/19.

It is s 128 of the Act which provides for the mandatory minimum sentence of 9 years imprisonment in the absence of a finding of special circumstances.

But that section applies to one of the counts with which I grapple with.

The pangolin is not mentioned as a specially protected animal in section 128 of the Act.

No Ministerial certificate exists in terms whereof the pangolin is specified as a specially protected animal the unlawful possession of which would attract the mandatory minimum sentence of 9 years imprisonment in the absence of a finding of special circumstances.

The sentence of 9 years imprisonment imposed *a quo* on this count is not in accordance with real and substantial justice.

But the forfeiture order, relating to the scales of the pangolin, is certified as being in accordance with real and substantial justice.

As for the count relating to unlawful possession of ivory, that is covered under s 128 (1) (b).

There is nothing wrong with the finding of no special circumstances relating to this particular count.

It necessarily follows that the sentence of 9 years imprisonment imposed on the accused on this count is confirmed as being in accordance with real and substantial justice. So is the order forfeiting the ivory to the state.

In the result I order as follows:

1. Charge 2 count 2: the sentence of 9 years imprisonment imposed on the accused for possessing pangolin scales without a licence or permit be and is set aside.
2. Instead, the accused is sentenced to pay a fine of RTGS\$100 in default of which the accused shall undergo 6 months imprisonment
3. The 6 pangolin scales remain forfeited to the state

Finally, I record that this review has turned out to be an academic exercise.

The accused died of pneumonia on 20 May 2019 at Chikurubi Maximum Prison.

CHIKOWERO J

KWENDA J agrees