

THE STATE
versus
NAISON CHIDHOBERA
and
EMMANUEL NGORIMA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 October 2020

Criminal Review

CHITAPI J: The proceedings in this matter were referred for review by the learned regional magistrate following scrutiny. The accused persons were jointly charged with contravening s 59 (2) (a) of the Parks and Wildlife Act, [*Chapter 20:14*] which creates the offence of “hunting any animal on any land.” The accused persons not being permit holders in terms of the Act, hunted for and killed two porcupines within Virginia Farm, Chegutu. They pleaded guilty to the charge and were duly convicted.

Following their conviction, the learned magistrate sentenced them to each pay a fine of \$150.00 in default thereof to serve 2 months imprisonment. An additional 6 months imprisonment wholly suspended for 3 years on condition that they do not commit an offence involving contravention of the Parks and Wildlife Act was further imposed.

The learned regional magistrate queried the fact that the learned trial magistrate did not order compensation in terms of s 104 of the Parks and Wildlife Act. The learned trial magistrate submitted that although she took note of the query by the learned regional magistrate, she laboured under the belief that s 104 was permissive or directory and that ordering compensation was in the discretion of the court. She reasoned that the word “may” in the heading to s 104 meant that the court has a discretion to either order compensation or refrain from doing so. Section 104 is couched as follows—

“104 Court may order payment for hunting of animal

The quoted text is just a subheading. Subsection (1) to (4) of the Parks and Wildlife Act provides as follows—

(1) Where a person is convicted of an offence in terms of this Act involving the hunting of any animal, the picking of any plant or the catching of any fish and—

(a) the person convicted has appropriated or disposed of any animal, plant or fish which forms the subject of the charge and which has not been restored to the land on which it was hunted or picked or the water in which it was caught, as the case may be; or

(b) the commission of the offence has caused the death of an animal or fish or the destruction of a plant or has made it necessary or expedient for an animal or fish to be killed or a plant to be destroyed; the court shall, in addition to any penalty which it may impose on the person convicted, order him to pay—

(i) in the case of an animal, plant or fish which was hunted, picked or caught in a national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park, or of any specially protected animal, to the Authority;

(ii) in any other case, to the appropriate authority for the land on which the animal was hunted or the plant was picked, or for the water in which the fish was caught;

such amount as may be specified in respect of the animal, plant or fish concerned in terms of subsection (2).

[Subsection amended by Act 19 of 2001]

(2) The Minister may on the recommendation of, or after consultation with, the Authority, by notice in a statutory instrument, specify, in respect of different species of animals or plants and in respect of fish, the amount

to be imposed in terms of an order made in terms of subsection (1) and may in like manner amend or revoke any such notice.

[Subsection amended by Act 19 of 2001]

(3) The provisions of sections 348 and 349 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

shall apply, *mutatis mutandis*, in relation to the amount specified in an order made in terms of subsection (1) as if such amount were a fine referred to in those sections and any amount so recovered shall, in accordance with the order, be paid to the Authority or to the appropriate authority for the land on which the animal was hunted or the plant was picked or for the water in which the fish was caught, as the case may be:

Provided that, except in the case of the Authority, the appropriate authority shall give security *de restituendo* in case the judgment of the court which made the order is reversed on appeal or review.

[Subsection amended by Act 19 of 2001]

(4) Where an order is made in terms of subsection (1) on two or more persons, the liability thereunder shall be joint and several unless the court, in its order, apportions the amount which each such person shall be required to pay.”

The provisions of subs (1) of s 104 are clear that the court shall order payment of compensation where the circumstances described therein are proved or established. The amount of compensation is determined by reference to the Statutory Instrument referred to in subs (5) (*supra*).

The learned trial magistrate mistakenly considered the word “may” in the subheading to s 104 as giving her discretion to order or not order compensation. Section 7 of the Interpretation Act, [*Chapter 1:01*] provides as follows-

“In an enactment—

(a) Headings and marginal notes and other marginal reference therein to other enactments; and

(b) Notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision ... shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only.”

Had the learned trial magistrate applied her mind to the whole of s 104 aforesaid as opposed to the subheading, she would have noted that it is compulsory or peremptory to order compensation in circumstances set out in subs 1 of s 104. I must caution that statutory offences are not so easy to determine. A lot goes into it and the judicial officer dealing with statutory offenses should always be mindful of the basic rules of statutory interpretation.

The last issue is to determine what should be done about the learned trial magistrate's omission. It does not appear from the surrounding facts that the accused persons are easily locatable so that the compensation order may be imposed. The learned trial magistrate must however be properly guided for the future when dealing with s 104 of the Parks & Wildlife Act. The appropriate course to adopt in this matter is to find that the proceedings are not in accordance with real and substantial justice owing to the impugned sentence. I accordingly withhold my certificate.