

THE STATE

versus

PHILIP DZOKURASA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 12 September 2023

Criminal Review - Sentence

ZISENGWE J: The accused was convicted in the Magistrates court of the offence of unlawful possession of the trophy of a specially protected animal in contravention of s45 (1) as read with s 128 (1)(b) of the Parks and Wildlife Act [*Chapter 20:14*] (“the Act”). The specially protected animal in question being a python. He candidly admitted to having been found by some game rangers in possession of a python skin and some python “fat” which he kept stored in a sack in his bedroom. The conviction is proper and stands to be confirmed.

Upon his conviction the accused was sentenced to 9 years’ imprisonment ostensibly on the basis of that sentence being the mandatory minimum sentence provided under the Act.

When the record of proceedings was submitted for review in the ordinary course, I directed a query to the learned magistrate in the following terms:

“Does the possession of a python (or any trophy thereof) attract the mandatory minimum sentence of 9 years’ imprisonment (without the option of a fine). In other words, does a python appear in the statutory instrument listing those specially protected animals whose possession (or the possession of a trophy thereof) attracts the said mandatory minimum sentence? (see Statutory Instrument 71 of 2020).”

In response the trial magistrate while conceding that a python is not included in SI 71/2020 indicated that he had been influenced *inter alia* by a previous review matter he had dealt

with earlier over the same subject matter the import of which review was to suggest that the mandatory minimum sentence of 9 years' imprisonment was applicable for the possession of a python or its trophy. He even attached a copy of the said review matter.

Be that as it may, s45 of the Act provides for the protection of specially protected animals and criminalises the hunting of such animals, it reads:

45 Control of hunting of specially protected animals and possession or sale of specially protected animals and products thereof

(1) No person shall—

(a) hunt any specially protected animal; or

(b) keep, have in his possession or sell or otherwise dispose of any live specially protected animal or the meat or trophy of any such animal;

except in terms of a permit issued in terms of section forty-six.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment

The 6th Schedule of the Act lists several animal species all designated as specially protected animals, of which the python (*Python sebae*) is one.

Section 128 however provides for stiffer penalties for the hunting or possession (or the possession of products or trophies thereof) of an identified group of specially protected animals from among their number. Although the legislation does not employ such terminology, one might say that that this latter category of animals comprises “extra-specially” protected animals. These animals are identified by means of a statutory instrument and it is those the animals whose hunting or possession (or the possession of their products or trophies) attracts the mandatory minimum sentence of 9 years' imprisonment upon a first conviction. This much is clear from a plain reading of s128 of the Act which provides as follows:

128 Special penalty for certain offences

(1) Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving—

(a) the unlawful killing or hunting of rhinoceros, or any other specially protected animal specified by the Minister by statutory instrument; or

(b) 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:

Provided that where on conviction the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(2) Where no special circumstances are found by a court as mentioned in the proviso to subsection (1), no portion of a sentence imposed in terms of subsection (1) shall be suspended by the court if the effect of such suspension is that the convicted person will serve—

(a) in the case of a first conviction, less than nine years imprisonment;

(b) in the case of a second or subsequent conviction, less than eleven years.

The singling out of some of these specially protected animals as deserving greater protection than the rest may be due to a variety of reasons; for example, they may be at greater risk of extinction due to certain human practices such as poaching which targets them or due to some environmental or ecological factors or considerations. These are the animals that find their way into the Statutory Instrument referred to earlier.

The Statutory Instrument route provides a convenient, useful and flexible mechanism by which the Minister responsible for the Administration of the Act can "upgrade" or "relegate" some of the specially protected animals to or from that list as the situation may require without having to amend the parent Act. The remaining animals on the list attract a sentence of provided

in section 45 of the Act (i.e., to a fine not exceeding level eight or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment”

The current Statutory Instrument in this regard is SI 71 /2020 and lists the following animals as these which attract the mandatory minimum sentence of 9 years’ imprisonment.

Mammalia

1. Aardwolf—*Proteles cristatus*
2. Bat-eared Fox—*Otocyon megalotis*
3. Cheetah—*Acinonyx jubatus*
4. Gemsbok—*Oryx gazelle*
5. Lichtenstein’s Hartebeest—*Alcelaphus Lichtensteini*
6. Pangolin—*Manis temmincki*
7. Rhinoceros— (a) Black—*Diceros bicornis* (b) Square-lipped—*Ceratotherium simum*
8. Roan—*Hippotragus equines*
9. Wild or Hunting Dog—*Lycaon pictus*

The python is conspicuous by its absence from that list and the latin maxim *expressio unius, est exclusio alterius* finds particular application here. Reference in the charge, therefore to s128 of the Act was erroneous and stands to be expunged therefrom.

The situation in the present matter is not unprecedented. It arose in the case of *Tatenda Mhango and others v The State* HMA 33-19. In that case the court was confronted with the same issue *albeit* relating to the pangolin. The court similarly concluded that the pangolin (at that particular moment in time) not being one of the animals listed in the relevant Statutory Instrument in operation at that stage, was not one whose hunting or possession (or the possession of its products or trophies) attracted the mandatory minimum sentence of 9 years’ imprisonment. That position with regard to pangolins has since been amended by the inclusion of the pangolin in SI71/2020.

Ultimately therefore, as things presently stand, the mandatory minimum sentence provided for in s128 of the Act does not apply to the hunting or possession of pythons or the possession of any trophy thereof. Consequently, the sentence imposed in the present matter was

based on a wrong interpretation of the Act and cannot stand. The accused should have been sentenced in terms of s45 of the Act.

This court, subject to the limitations imposed under s45 of the Act, is at liberty to substitute the sentence imposed by the trial court with an appropriate one, suffice it to say that the offence for which the accused was convicted cannot be trivialised. It remains a serious offence given the incessant killing of pythons, not infrequently under the guise of that reptile's purported supernatural powers. I hold the view that a sentence which meets the justice of the case is one of 2 years' imprisonment.

Accordingly, following order is hereby made

1. The conviction is hereby confirmed, subject to the deletion of any reference to s128 of the Parks and Wildlife Act, [*Chapter 20:14*] in the charge.
2. The sentence imposed is here by set aside and substituted with the following;
"2 years' imprisonment"
3. The accused to be brought before the court without any undue delay to be informed of the alteration of his sentence on review.

ZISENGWE J

MAWADZE J agrees.....