

S v KUDAVARANDA 1988 (2) ZLR 367 (HC)

Court

High Court, Harare B

Greenland J

Criminal review C

23 November 1988

[zFNz]Flynote

Criminal procedure (sentence) - mandatory minimum sentence - whether D may be suspended - "special circumstances" justifying a lesser sentence - two offences carrying similar mandatory sentences arising out of same course of conduct with same motive and intent - killing a rhinoceros and possessing its horns, in contravention of Parks and Wild Life Act 1975 - special circumstances found in relation to second offence. E

[zHNz]Headnote

The accused had been convicted, inter alia, of two charges under the Parks and Wild Life Act No. 14 of 1975. The first was one of killing a specially protected animal, namely a rhinoceros, in contravention of s 36(1)(a) of the Act. The second was one of possessing the horns of the same rhinoceros, in contravention of s 37(b) of the Act. Both offences carry F a mandatory penalty of a fine of \$15 000 or five years' imprisonment, unless there are special circumstances in the particular case justifying the imposition of a lesser penalty. The magistrate imposed the mandatory penalty on each count, but suspended half the total for five years on appropriate conditions. On review,

Held, that under s 337(1)(b) as read with the Sixth Schedule of the Criminal G Procedure and Evidence Act [Chapter 59], the trial court had no power to suspend any portion of the minimum sentence.

Held, further, that in enacting the severe minimum penalties provided by the Act, the legislature intended to prevent or deter the hunting of the endangered animals themselves. In respect of the rhinoceros, the killing H of the animal was motivated by a desire to acquire the horn but nothing

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else. In this case, the killing of the rhinoceros and the possession of its A horns were completely interlinked. Consequently, special circumstances existed in relation to the offence of possession, justifying the imposition of a sentence less than the mandatory minimum sentence.

Cases cited:

S v Boid HH-128-82 (unreported) B

S v de Montille 1979 RLR 105

S v Moyo 1988 (2) ZLR 79 (HC)

S v Ndebele HB-71-82 (unreported)

S v Chisiwa 1981 ZLR 666 (SC)

S v Dracos S-100-82 (unreported) C

[zJDz]Judgment

Greenland J: In this case the relevant facts emerge from the very helpful submissions of the Acting Attorney-General, which are quoted in full:

"The accused was charged with one offence against the Firearms Act, [Chapter 308] and three offences against the Parks and Wildlife Act No. D 14 of 1975. He pleaded guilty and was, eventually, sentenced on all four counts. His Lordship has asked the Acting Attorney-General to 'advise shortly whether or not he is satisfied with the propriety of the proceedings. In particular, is the suspension of the mandatory sentence incompetent?

Count one alleged an offence against s 5(2)(b) of the Firearms Act. The charge itself is badly drawn as it does not specify which of the alternatives in the section was alleged against the accused. See S v Boid HH-128-82. But it seems that the accused was sentenced on the basis of possessing a rifle without being a holder of a certificate. The magistrate found that special reasons existed and fined the accused \$200 or, in default of payment, 2 months' imprisonment with labour. The certificate of the firearms examiner falls short of proving beyond reasonable doubt that the rifle was manufactured after 1900. All the examiner is able to say is that he suspects 'that it was most likely made after the year 1900'.

Count 3 alleged a contravention of s 36(1)(a) of the Parks and Wildlife Act. The particulars read: 'In that on the 29th day of July 1987 and at or near Nyawude village, Chief Chitsungo, in the said Province, the accused did wrongfully and unlawfully hurt a specially protected animal, that is to say the accused killed one rhinoceros'. On this count, the accused was fined \$15 000 or in default of payment 5 years imprisonment

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with labour. A That is to say, the magistrate imposed the mandatory penalty.

Count 4 alleged a contravention of s 37(b) as read with s 84(1)(a) of the Parks and Wildlife Act. The particulars read 'In that on the 6th August 1987 and at Nyawude Village, Chief Chitsungo, Guruve, in the said B province the accused did wrongfully and unlawfully purchase, acquire or have in his possession two rhinoceros horns.' Again, the charge is badly drafted. On this count, the accused was also fined \$15 000 or in default of payment 5 years imprisonment with labour - the mandatory penalty.

Having C announced his penalties on counts 3 and 4, the magistrate continued:

'Total on counts 3 and 4 is \$30 000 or in default of payment 10 years imprisonment with labour, of which \$15 000 or in default of payment 5 years imprisonment with labour is suspended for 5 years on condition D accused does not within this period commit any offence involving the contravention of s 36(1)(a), s 37(b) as read with s 84(1)(a) of the Parks and Wildlife Act, 14/75.'

In my submission the order purporting to suspend part of the sentence was incompetent. The magistrate's power to suspend a sentence is E contained in s 337(1)(b) of the Criminal Procedure and Evidence Act [Chapter 59]. But that power does not extend to offences specified in the Sixth Schedule which specifies, inter alia, 'offences in respect of which any enactment imposes minimum sentence. . .'. The penalties laid down for the offences alleged against the accused are set out in subs(4a) of s 115 of the Parks and Wildlife Act and are clearly minimum penalties. F Accordingly, there was no power to suspend. See S v de Montille 1979 RLR 105.

The fact that the accused was charged with 2 offences in respect of the one rhinoceros killed is disquieting, although technically in order. But the sentences imposed in respect of those offences, in so far as they G involve sentences of imprisonment, should have been concurrent. As to the fines, it may be that, given the circumstances of the offences, the obligation to pay a fine in respect of the one offence constitutes special circumstances in respect of the other."

As regards the first count of contravening s 5(2) of the Firearms Act, it is clear H from the record that it was "possession" of the firearm that the State was

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concerned with. As there is no prejudice to the accused the charge is amended A to properly reflect that allegation.

"Possession" is also the gravamen of the charge in Count 4 and as there is no possible prejudice that count is also amended accordingly.

The Acting Attorney-General is, for the reasons given, correct in submitting B that the court had no power to suspend the mandatory sentences or any portion thereof. This aspect therefore requires rectification.

The first step is to accept that it is clearly the intention of the legislature that the rhinoceros is a particularly endangered species and deserving of unique protection. Hence the bringing into force of the severe sanctions of mandatory C sentences prescribed in the Parks and Wildlife Amendment Act No. 35 of 1985. This court can take judicial notice of the appalling situation that now pertains to the rhinoceros, where the State's resources are being stretched beyond limits in an attempt to contain internationally organised, inspired and financed decimation of a greatly depleted species.

Secondly, D it is clear that it is the horn of the rhinoceros which poachers, such as the accused, require. The rest of the animal is neither prized nor utilised.

It follows that, as in the present case, the killing of the animal is in consequence of the desire to possess the horn thereof. The two separate E offences of 'Hunting a specially protected animal' and of 'possession of a rhino horn' are completely interlinked on the facts. Had the accused not removed the horns from the carcass it is unlikely that two separate charges would have been levelled.

It is clear that the intention of the legislature, in prescribing the exemplary F sanction of a mandatory minimum sentence for mere possession of a rhino horn, is to prevent or deter the hunting of the trophy animal itself.

To my mind the above stated aspects constitute "special circumstances in the particular case justifying the imposition of a lesser penalty. . . ", as stipulated and envisaged by the proviso to s 115(4a) of the Act. G

To quote from S v Moyo HH-346-88:

"The expressions "special reasons" and "special circumstances", which mean the same thing (see R v da Costa Silva 1956 R & N 369 at 372C H

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per BEADLE J, as A he then was) have been considered in a number of cases, most recently in S v Mbewe HH-27-88. A concise statement of their meaning is found in S v Makaurire HB-134-84.

'Special reasons are factors arising out of the commission of the offence or peculiar to the offender, which are out of the ordinary, either in their degree or their nature'."

This B dictum is a crystallisation of what has been clearly set out in precedents such as S v Ndebele HB-71-82; S v Chisiwa 1981 ZLR 666 (SC) and S v Dracos S-100-82.

To C my mind, the accused's criminal responsibility reposed in the fact of killing the animal. That fact rendered him the immediate possessor of the horns. Possession thereof was in instant consequence of the killing. Special circumstances exist in relation to the offence of possession of rhino horn.

In the result therefore the sentence in respect of Count 4, "possession of rhino D horn", is set aside. So, too, is the order that the sentences on counts 3 and 4 be suspended.

The sentence on Count 3, 'illegal hunting' is restated as:

"fined \$15 000 or, in default of payment, 5 years' imprisonment with E labour."

The sentence on Count 4 is substituted as follows:

"fined \$2 000 or, in default of payment, one years' imprisonment with labour, suspended for 5 years on condition the accused is not convicted F of committing within that period any offence involving the hunting or trapping of any animal or the possession of the meat, skin or trophy thereof for which he is sentenced to prison without option.

The special circumstances is that the accused's possession was in consequence of his personal hunting of the trophy animal, which illegal G act is being appropriately punished in Count 3. The two illegal acts arise out of the same course of conduct with a common motive and intent."

The accused is to be taken before the trial court and the sentence explained to him.

Reynolds J agrees. H