

THE STATE
versus
SHAMISO MUNKULI

CRB HWNP467/16

THE STATE
versus
MOSES MASUKU

CRB DT53/17

THE STATE
versus
MOSES MWINDE

CRB BNG25/16

THE STATE
versus
FRANCIS SHOKO

CRB HWNP428/17

THE STATE
versus
TAMA MULEYA
and
ERNEST SIYACHITEMA KOMONDE
and
CLIVE SIBUKANDE KOMONDE

CRB BNG396-8/18

THE STATE
versus
SMART MUNKULI
and
THEMBA TSHUMA

CRB BNG 495-6/18

THE STATE
versus
DAMASON MUTALE

CRB BNG 497/18

THE STATE
versus
MTHABISI SIVAKO
and
MEHLELI NDLOVU

CRB BYO R426 & 428/18

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 29 January 2020

Criminal Review

CHIKOWERO J: A common point of law arises in these 8 records.

In all the matters, accused persons were charged with the offence of contravening s 45 (1) (b) of the Parks & Wildlife Act [*Chapter 20:14*] as read with s 128 of the same Act.

Shamiso Munkuli, on his own plea of guilty, was sentenced to 9 years imprisonment for possessing 145 pangolin shells without a permit.

In sentencing him on 28 February 2017, the Magistrates Court sitting at Hwange ordered that the 145 pangolin shells, valued at US\$1450.00, be forfeited to the State.

The same court, on 19 April 2016, sentenced Moses Masuku to 9 years imprisonment for possessing a live pangolin without a permit. He was convicted on his plea of guilty.

That animal, valued at \$5000.00, was likewise forfeited to the State.

On 14 January 2016 the Magistrates Court sitting at Binga sentenced Moses Mwinde to 9 years imprisonment for possessing a python skin without a permit. Forfeiture was ordered. Moses was convicted on his plea of guilty.

On 3 November 2017 the Hwange Magistrates Court sentenced Francis Shoko to 9 years imprisonment for possessing a live pangolin without a permit.

He also had pleaded guilty. This particular pangolin was also forfeited to the State. Its given value was \$5000.00.

Despite their protestations of innocence, the same court, this time on 17 October 2018, convicted Tama Muleya, Ernest Siyachitema Komonde and Clive Sibukande Komonde for unlawful possession of 2 pangolin trophy skins.

Each was sentenced to 9 years imprisonment.

The skins, whose value was \$10 000, were forfeited to the State.

20 November 2018 was the day that Smart Munkuli and Themba Tshuma were each incarcerated for 9 years imprisonment.

The Magistrates Court, sitting at Binga, convicted them for unlawful possession of 120 pangolin trophy scales. They pleaded guilty.

Those US\$5000 scales did not escape forfeiture.

The same fate befell 71 pangolin scales, also valued at US\$5000.

The offender was Damason Mutale.

He too, before the same magistrate and on the same date, pleaded guilty to unlawful possession of these.

Upon conviction, he was sent to prison for 9 years.

Finally, after a protracted trial, Mthabisi Sivako and Mehleli Ndlovu were, on 22 January 2019, convicted for possessing or keeping a pangolin without a permit.

The regional court at Bulawayo sentenced each to 9 years imprisonment.

Although the US\$5 000 pangolin was recovered, no forfeiture order was sought or made. The reason for this does not appear from the record.

In each of these cases, the trial court canvassed the issue of special circumstances. It found none. It took the view that section 128 of the Act was applicable for the purposes of sentence.

However, in *Tatenda Mhango, Brighton Ngwenyama and Kudzai Ruvangu Shava* HMA 33/19, after a close analysis of the relevant provisions of the Act, this court came to the conclusion that, because there was no statutory provision by the relevant Minister specifying a

pangolin as a specially protected animal, the mandatory minimum sentences of 9 years (for a first offender) and 11 years imprisonment (for a second or repeat offender), were not triggered by a conviction.

Accordingly, the existence or otherwise of special circumstances did not even arise for consideration since an offender, on conviction, was not in jeopardy of being sentenced to one or other of these lengthy mandatory jail terms.

The same position holds true for unlawful possession of a python or its trophy.

There still is no statutory instrument in place. The *Mhango* judgment was handed down on 31 July 2019.

This means section 45 (2) is the applicable penal provision.

Section 45 of the Act reads as follows:

“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 not exceeding three years or to both such fine and such imprisonment.”

The convictions in all the matters were confirmed as being in accordance with real and substantial justice.

There was total recovery in all the cases. None of the accused persons benefitted from their criminal escapades.

However, one cannot ignore the fact that these crimes are commercial.

The intention of the legislature is to protect these endangered animals from extinction.

In doing so, however, the option of a fine has been made available.

Even the maximum custodial sentence is not stiff.

What this all means is that an effective custodial sentence is to be reserved for bad cases.

The then 28-year-old Shamiso Munkuli, a first offender, pleaded guilty to possessing 145 pangolin shells. The value was US\$1 450. Shamiso is male. The number of shells shows that he possessed them for commercial purposes.

But the mitigating factors outweighed the aggravation. He did not deserve to be sent to jail.

In any event, he has been serving since 28 January 2017. He must be released immediately.

In my view, Moses Masuku ought to have been sentenced to a short prison sentence. Had that been done, he would have finished serving and released by now. He is serving the 9 years imposed on 19 April 2016. Moses must be released immediately.

Unlike his namesake, Moses Mwinde, a poor unemployed then 35-year-old widower, ought not to have been jailed at all. He pleaded guilty. He was a first offender. His misdemeanor was possessing a python skin whose value was not stated. Nobody disputed his evidence that he did not know that his act was a crime. He ought to have been kept out of prison to look after his large brood of 6 children. The jail term virtually “orphaned” those children. He will be released immediately. He has been languishing in prison since 14 January 2016.

Although a short prison sentence was merited, Francis Shoko, in my view, has seen enough of the inside of the prison walls. Having been incarcerated since 3 November 2017, he too should now go home.

Tama Muleya and his two co-accused persons, incarcerated since 17 October 2018, were convicted for unlawful possession of two pangolin skins. Although the reason for the possession was commercial, it was neither alleged nor proved that they had hunted or killed the pangolins whose skins they were found in possession of. It seems to me that they ought to have been spared the rigours of a jail term.

Much the same observations apply to Smart Munkuli and Themba Tshuma. To their credit, these two were contrite. Both pleaded guilty. Both were sentenced to 9 years imprisonment on 20 October 2018.

The situation of Damason Mutale is on all fours with that of Smart Munkuli and Themba Tshuma.

As for Mthabisi Sivako and Mehleli Ndlovu, these were motorized organized criminals. The pangolin was found in the boot of their car, in Luveve. The animal was said to have been brought all the way from Shangani. Effective custodial sentences merit the justice of this particular case.

At the end of it all, therefore, the sentences passed in all these matters are not in accordance with real and substantial justice. The court *a quo* misdirected itself in applying the incorrect penalty provisions.

In the result, the following order shall issue:

1. The convictions in all the cases are in accordance with real and substantial justice. The proceedings are, to that extent, confirmed.
2. The forfeiture orders, in respect of such matters where the same were granted, are confirmed.
3. The sentence of 9 years imprisonment imposed on each accused be and is set aside.
4. The accused persons be and are sentenced as follows:
 - (a) in respect of:
 - (i) CRB HWNP 467/16, the accused is sentenced to pay a fine of \$100.00 in default of payment 6 months imprisonment.
 - (ii) CRB DT 53/16, the accused is sentenced to 12 months imprisonment.
 - (iii) CRB BNG 25/26, the accused is sentenced to pay a fine of \$100.00 in default of payment 6 months imprisonment
 - (iv) CRB HWNP 428/17, the accused is sentenced to 12 months imprisonment.
 - (v) CRB BNG 396-8/18, each accused is sentenced to pay a fine of \$100.00 in default of payment 6 months imprisonment.
 - (vi) CRB BNG 495-6/18, each accused is sentenced to pay a fine of \$100.00 in default of payment 6 months imprisonment.
 - (vii) CRB BNG 497/18, the accused is sentenced to pay a fine of \$100.00 in default of payment 6 months imprisonment.

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CRB HWNP 467/16
CRB DT 53/16
CRB BNG 25/16
CRB HWNP 428/17
CRB BNG 396-8/18
CRB BNG 497/18
CRB BYO R 426 & 428/18

- (viii) CRB BYO R 426 and 428/18, each accused is sentenced to 3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition each accused does not within that period commit any offence involving unlawful hunting, possession, selling or disposal of any specially protected animal in contravention of the provisions of the Parks and Wildlife Act [*Chapter 20:14*] for which upon conviction each accused is sentenced to a term of imprisonment without the option of a fine. Effective term of imprisonment for each accused is 2 years.”

Save for CRB BYO R426 and 428/18, the Registrar of the High Court be and is directed to immediately issue warrants liberating all the accused persons.

CHIKOWERO J:

KWENDA J: agrees