

SOUTH AFRICA / JUDGMENT

Chu v S (A407/11) [2012]

ZAGPJHC 204 (13 March 2012)

[2012] ZAGPJHC 204

COURT

South Gauteng High Court, Johannesburg

BEFORE

Willis, Heaton-Nicholls

CASE / FILE NUMBER

A407/11

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REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: A407/11

DATE: 13/03/2012

In the matter between

CHU, DUC MANH.....APPELLANT

and

STATE

J U D G M E N T

WILLIS J:

- [1] This is an appeal against sentence. The appellant was charged with one count of the contravention of section 15 (15) (b) read with sections 1, 81, 87 (1) and 95 of the Customs and Exice Act, No. 91 of 1964 in that he failed to declare the possession of 12 rhinoceros horns weighing 60,607 kilograms valued at R913 385.00. He was, in addition, charged with a contravention of section 57 (1) read with sections 1, 56, 57 (1), 101
- (a) and 102 of the National Environmental Management – Bio-Diversity Act No. 10 of 2004 read with Government Gazette 31899 Volume 524 in that he was in possession of the relevant rhinoceros horns without being in possession of a permit.

- [2] On 6 July 2011 the appellant pleaded guilty to the charges proffered. He had the benefit of legal representation and he was duly convicted on the same day. The state called three impressive witnesses: Fredrik Willem Rossouw, Richard Hemmington Amsley and Warrant Officer Steyn in aggravation of sentence. These were all experts who testified as to the seriousness of the problem of hunting of rhinoceros for their horns, how the resources of the State are stretched to the limit in trying to combat this and how, at the moment, it looks as though the State is fighting a losing battle. Moreover, I believe that the Court may fairly take judicial notice of the fact that the whole issue of hunting of rhinoceros in South Africa has received much attention and the scale of the problem is most disturbing.
- [3] The appellant, who as I have already indicated, had the benefit of legal representation placed before the Court information that he was 30 years old; that he is married and he has two children and that he had been in custody for approximately 13 months and that he was looking after his elderly parents. He is an expatriate.
- [4] On 4 August 2011, the learned Regional Magistrate, Mr Manyate sentenced the appellant to 2 years imprisonment on count 1 and 10 years imprisonment on count 2. The appellant was thus sentenced to an effective 12 years imprisonment. On 13 August 2011 the appellant brought an application for leave to appeal against the sentence in accordance with section 309B of the Criminal Procedure Act. On the same day, the appellant was granted leave to appeal against his sentence.
- [5] Sentence has to fulfil various functions. Obviously, a Court must always have regard to the possibility of rehabilitation and correction. Sentence must also serve the function of specific deterrence. In other words, it must deter this particular individual from committing the crime again. It must also protect society: society must be protected from those who can do it harm, the most obvious examples of whom would be murderers and rapists. Sentence must satisfy society's desire for retribution and it must also act as a general deterrence.
- [6] If one has regard to the questions of rehabilitation, specific deterrence (in other words, the deterrence of this particular individual) or the need to protect society from this particular individual, I do not think that one needs to impose a sentence of this magnitude. It is a different matter, however, if one has regard to the questions of general deterrence and society's desire for retribution.
- [7] As I have already said, cogent evidence was given by experts before the learned Magistrate as to the seriousness of the problem of rhinoceros poaching. Society's sense of outrage regarding rhinoceros hunting of the kind in question is particularly acute. There are various different views around the world as to why hunting of endangered species such as rhinoceros should be viewed so seriously. There is course the secular humanists argument that rhinoceros are part of evolution, that they are here and have been around roaming the earth for many millions of years before human beings arrived here and that human beings have no right to remove such creatures from the earth and that the world benefits from species diversity.

- [8] There is also the religious argument that rhinoceroses were put on this earth as part of God's creation, like human beings, and that even if human beings exercise sovereignty over the earth, it is not their right to eliminate from God's creation creatures such as rhinoceros. There is also the argument closely related to the religious one: that of stewardship. It is an argument for example that often received support of organisations such as the World Wildlife Trust. The Prince of Wales, when he has addressed international conferences on conservation, has used the argument that we, as human beings, are stewards of the earth and that part of our responsibility is to ensure that magnificent creatures such as rhinoceros that have been around for millions of years should not be eliminated.
- [9] There are various different theses. In my view, one of the reasons why poaching such as this is viewed so seriously is that we get a glimpse, through the threat to the survival of rhinoceros, of our own precariousness on this earth through greed. More particularly, this is underlined when the ultimate reason for poaching of rhino and taking of their horns is utterly irrational. The horns have no medicinal value whatsoever. The substance of which rhino horn consists is remarkably similar to human hair and the hair of other animals.
- [10] It is utterly irrational that rhino' should be hunted in the way that they are and, if rhinoceroses are eliminated from the face of the earth, how long will it be before whales and dolphins are eliminated? How long is it before all that moves within the sea is eliminated and upon which we rely so much for our survival? How long is it before the habitats that sustain our being on the earth that provide us with the food from the earth are also lost? There is a deep sense within society that this kind of action, rhino' poaching, poses a threat to ourselves in the end.
- [11] I accept that there are a host of different arguments, none of which necessarily is wholly correct, but I believe that there are glimpses of the truth in all of them. I cannot help but remember the famous words of Pastor Martin Niemöller who had to endure the scourge of Nazi's in Germany who had said: "They came for the Jews, and I did nothing because I was not a Jew. They came for the Gypsies, and I did nothing because I was not Gypsy. They came for the Communists, and I did nothing because I was not a Communist and then they came for me and then it was too late."
- [12] If we do not as a society, as a world-wide community, stand united to protect species such as rhinoceros, I believe that there is a huge risk that systematically so much that is precious will be lost and ultimately our own existence as human beings on the earth will be placed in danger. Be that as it may, as I have said, there are different views. I have no doubt that the community feels very strongly that there should be stiff sentences in matters such as this in order to act firstly as a general deterrent and also to placate society's own sense of outrage that this is going on.

- [13] Having said that, I think it has to be accepted that the learned Magistrate did commit two misdirections. The one is that he failed to take into account the long period that the appellant had been awaiting trial: some 13 months. He also referred to the fact that the appellant was part of a syndicate. Although I believe the Magistrate was correct, on a balance of probabilities, in concluding that the appellant was indeed part of syndicate, on the criminal standard the Magistrate was not entitled to make this inference.
- [14] These misdirections, minor though they may be, call for interference. Furthermore, the fact that the two offences are so closely linked to one another provides a compelling argument for ordering their concurrency. I am narrowly persuaded, having had the benefit of argument from counsel for the State, that the concurrent running the sentence is appropriate. Accordingly I propose that the following order be made: the appeal is upheld to the limited extent that it is ordered that the sentence of imprisonment on count 1 is to run concurrently with the sentence on count 2. In other words, the effective sentence is 10 years imprisonment.

JUDGE HEATON-NICHOLLS: I agree.

JUDGE WILLIS: It is so ordered.

Counsel for the Appellant: Adv A Gissling

Counsel for the State: Adv M Ncosini

Attorney for the Appellant: Karien Nel

Date of hearing: 13 March 2012.

Date of judgment: 13 March 2012.

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