THE STATE
Versus
NDUMISO HADEBE
And
MTHANDAZO MOYO
And
CLEOPAS SIBANDA
And
KHOLWANI MPOFU

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 3 SEPTEMBER 2021

Criminal Review

KABASA J: The four accused appeared before the court *a quo* charged with contravening section 38(1) as read with s 38(2) of the Parks and Wildlife Act, Chapter 20:14. They pleaded guilty and were duly convicted.

The facts are that on 8th August 2021 the four went to Dollar Block Ranch Safaris Inyathi where, with the aid of dogs and spears, they hunted and killed 3 impala, one female and 2 male. Investigations led to their arrest and subsequent appearance in court.

Upon their conviction a sentence of 20 months imprisonment with 3 months suspended for 5 years on the usual condition of good behaviour and a further 7 months on condition of payment of restitution was imposed on each one of them. Each one was left with an effective 10 months imprisonment.

Nothing turns on the conviction. However the following issues arise from these proceedings.

1. The citation of the charge is wrong. Section 38(1) simply says:-

"No person shall …" Citing the charge as contravening s38(1) is therefore meaningless.

The proper citation should be contravening section 38 (1) (a) as read with section 38(2) of the Parks and Wildlife Act.

There will be no prejudice occasioned to the accused if the charge is amended and it is so amended.

2. There is no provision of the suspension of a term of imprisonment on condition of compensation. It is actually compensation that is ordered in favour of the relevant authority and this is in terms of s 104(1)(b) of the Act. It is therefore incompetent to suspend a portion of a prison term on condition of payment of compensation. The compensation is in essence a civil judgment. (*S* v *Tarwirei Mataga and 4 Others* HH 148-94).

In ordering compensation the court simply states:-

"Compensation is awarded to – in the sum of -."

3. In cases of this nature a fine suffices unless the offence is particularly bad that only a term of imprisonment will meet the justice of the case. (*Moyo and Another* v *S* HB 16-90, *Rinke* v *S* HH 125-90). See also *S* v *Manyara & Others* 1984 (1) ZLR 155, *S* v *Luke Chauke and Others* HB 76-81. Where a statute provides for the option of a fine, the court must look to a fine first unless there are valid reasons to opt for imprisonment. Such can be that the offence is particularly bad that a fine would not meet the justice of the case.

The penalty for hunting is a fine not exceeding level 7 or imprisonment not exceeding 2 years or both such and such imprisonment. By imposing 20 months, the court *a quo* was shy of only 4 months of the maximum permissible penalty.

> "It is now settled law that the maximum penalty should be reserved for the most serious offence" (per GARWE J (as he then was) in *S* v *Joseph Mabhurongo* HH 36-94).

In casu, the accused are all first offenders who pleaded guilty. Besides the fact that 3 impala were killed, their circumstances were such that a fine would meet the justice of the case.

I am not persuaded to accept that this was the worst possible contravention of the Act justifying a sentence of 20 months, just 4 months shy of the maximum penalty.

> "Punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy." (*S* v *Sparks and Anor* 1972 (3) SA 396).

The sentence imposed *in casu* was excessive and disturbingly so.

The learned Magistrate justified the imposition of a term of imprisonment by alluding to the prevalence of the offence. However the prevalence of a particular type of offence is no bar to imposing a fine where appropriate, coupled with a suspended sentence of imprisonment. (*S* v *Zindoga* HH 124-88).

The court should not permit the aspect of prevalence to shackle its discretion to impose an appropriate and constructive penalty. (*R* v *Makaza* 1969 (1) RLR 100).

As B*EADLE CJ* put it in R v Makaza (supra)

> "If the prevalence of an offence warranted a continual increase in sentence, bicycle theft would by now merit life imprisonment."

The need to protect wildlife and to preserve flora and fauna is accepted but the emphasis of one aspect over all others resulted in the imposition of an inappropriate sentence.

The learned Magistrate also stated that he discounted 4 months in recognition of the fact that the accused pleaded guilty and are first offenders. In other words he would have imposed the maximum permissible penalty.

I find nothing so reprehensible about the accused's conduct to warrant the remarks made by the learned Magistrate to the effect that the 4 accused jumped at the deep end and must therefore expect to be treated severely.

The manner in which the learned Magistrate went at length to justify the sentence suggests that he was aware that the sentence was unduly harsh. No matter how much one tries to justify it, an unduly harsh sentence remains so, unduly harsh and calling for interference.

With that said, the conviction stands but the sentence is set aside and substituted with the following:-

> "Each accused is fined $30 000 or in default of payment 3 months imprisonment. In addition, 6 months imprisonment is suspended for 5 years on condition … (the usual condition of good behaviour)
>
> Compensation is awarded to Dollar Block Ranch Safaris in the sum of USD 3 000. Each accused to pay his portion of USD750."

Dube-Banda J……I agree