

**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**

**CASE NO A82/2013**

In the matter between

**CHUMLONG, LEMTONGTHAI**

**APPELLANT**

versus

**THE STATE**

**RESPONDENT**

**Coram:** Tsoka J and Levenberg AJ

**Heard:** 29 August 2013

**Delivered:** 30 August 2013

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**J U D G M E N T**

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**TSOKA J:**

- [1] The appellant, a 44 year old Thai Citizen, Chumlong Lemtongthai, was charged in the Regional Court of Kempton Park with 26 counts being

counts 1 to 26 for contravention of section 80 (1) (i) of the Customs and Excise Act, 91 of 1964 in that he unlawfully and intentionally made improper use of documents issued as per column 1 and column 3 of schedule A, in respect of goods to which the Customs and Excise Act relates, to wit export of rhino horn.

- [2] He was charged with 26 counts for contravention of the Provisions of Section 57 (1) read with Sections 1;56 (1) 57 (2) 97 (1) 98 (2) 101 (2) of The National Environmental Management: Biodiversity Act 10 of 2004 and Chapter 7 of the same Act read with Regulations 150, 151 and 152 published in Government Gazette 29657 on 23 February 2007 and also Regulation 148 Published in Government Gazette 31899 on 13 February 2009, and also read with schedule 1 of the Prevention of Organized Crime Act 121 of 1998 read with section 250 of the Criminal Procedure Act 51 of 1977, in that he unlawfully and intentionally traded in rhino horn, a listed threatened or protected species without the necessary TOPS permits to either trade in such horns or hunt and / or kill or export the rhino horns, counts 27-52
  
- [3] Counts 53 to 79, ie. Money Laundering in contravention of 54 of Act 121 of 1998 were withdrawn against him.
  
- [4] The appellant, who enjoyed legal representation, on 5 November 2012 tendered a plea of guilty in terms of Section 112 (2) of the Criminal Procedure Act 51 of 1977 to the 52 counts. He was duly convicted on the basis of his plea.
  
- [5] On 9 November 2012 he was sentenced as follows:
  - 5.1 Counts 1 to 26: 10 years imprisonment
  - 5.2 Counts 27 to 36: 12 years imprisonment
  - 5.3 Counts 37 to 46: 12 years imprisonment
  - 5.4. Counts 47 to 52: 6 years imprisonment
 The effective term of imprisonment was therefore 40 years.

- [6] On 16 November 2012 the trial court granted him leave to appeal his sentences.
- [7] The imposition of sentence falls squarely within the discretion of the trial court and a court of appeal such, as this court, can only interfere with the trial court's discretion when such discretion was not properly exercised, or the sentence imposed is as a result of an irregularity or misdirection or such sentence so imposed, having regard to the nature and circumstances of the offence, is disturbingly inappropriate or induces a sense of shock. See *S v Blank 1995 (1) SACR 62 (A)*.
- [8] The issue in this appeal is whether the trial court exercised its discretion properly in imposing the effective sentence of 40 years imprisonment.
- [9] Briefly, the facts in this matter are as follows. The appellant is a Thai Citizen. He validly entered the Republic of South Africa at OR Tambo International Airport. He is a director of a Thai company known as Xaysanang Trading Export-Import. The company deals in rhino horns, lion bones, teeth and claws. He was involved in the shooting of 26 rhinos. Every one of the 26 rhinos shot was legally shot after the necessary legal hunting permit was issued to him. The rhinos were shot, according to the appellant, for trophies for trade in Asia, yet the appellant knowingly misrepresented this fact to the South African authorities that the rhinos were shot and killed for trophies. After the permits were thoroughly checked and cleared by the Customs and Nature Conservation, the appellant changed the address of the consignees as appeared on the CITES (Conservation International Trade in Endangered species of Wild Fauna and Flora) permits so that the rhino horns ended up in Laos, Thailand. The people reflected on the permits as professional hunters were in fact prostitutes hired by the appellant to mislead the authorities into believing that indeed professional hunters, shot the rhinos, while in fact this was not true.

- [10] In considering an appropriate sentence the trial court took counts 1 to 26 for purposes of sentence, as one count, and sentenced the appellant to 10 years imprisonment. Counts 27 to 36 were also taken together for purposes of sentence, as one count, and sentenced the appellant to 12 years imprisonment. Similarly, counts 37 to 46 were also taken together for purposes of sentence as one count and he was sentenced to 12 years imprisonment. Lastly, with regard to counts 47 to 52, which were also taken together as one count, the appellant was sentenced to 6 years imprisonment. The effective sentence of the appellant was therefore 40 years direct imprisonment.
- [11] In terms of section 80 (1) (i) of the Customs and Excise Act, Act 91 of 1964 any person who makes improper use of a permit, such as the appellant, is liable for a fine not exceeding R20 000.00 or treble the value of the goods, whichever is greater or to imprisonment for a period not exceeding five (5) years or to both such fine and such imprisonment.
- [12] In terms of Section 101 (1) of the National Environmental Management; Biodiversity Act 10 of 2004, any person who contravenes the provisions of Section 57 (1) of the same Act, as is the case with the appellant, is liable to a fine of R10 million or to imprisonment for a period not exceeding 10 years imprisonment or to both such fine and imprisonment.
- [13] That the maximum imprisonment for contravention of the provisions of 80 (1) (i) of Act 91 of 1994 in respect of each count, is 5 years imprisonment and 10 years imprisonment in respect of the other counts is quite clear. The trial court, having taken counts 1 to 26 for the purposes of sentence as one, was therefore not entitled to impose the sentence of 10 years imprisonment. This is a misdirection that entitles this court to interfere with the sentence so imposed. The same reasoning applies to counts 27 to 36 and 37 to 46. Again this court finds that the trial court misdirected itself with the result that this court is

at liberty to interfere with the discretion that the trial court had in imposing the sentences. With regard to counts 47 to 52, the trial court exercised its discretion properly in imposing a 6 years imprisonment instead of the maximum 10 years imprisonment. However, as the sentencing process was tainted by misdirection, this court is at liberty to assess the question of sentence *de novo*.

- [14] Counsel for the state conceded that the learned magistrate had indeed misdirected himself in the manner set forth above. She submitted both in her written and oral argument that a sentence of 31 years would be appropriate in the circumstances of this matter.
  
- [15] What then is an appropriate, just and fair sentence having regard to the personal circumstances of the appellant, the nature and circumstances of the offences and the interest of society?
  
- [16] First, the personal circumstances of the appellant at the time of sentence were as follows: He was 44 years old; he is married with two children who are at university in Thailand; he is a first offender; he pleaded guilty to the charges levelled against him; he was in custody for a period of 16 months awaiting the finalization of the trial. He tendered his apologies to the people of South Africa for the offences and the damage caused to them.
  
- [17] On the other hand the aggravating factors must, however, be considered. They are the following. Although the appellant was issued with legal permits to shoot the rhinos, the permits were issued to him on the basis of the fraud he perpetrated on the authorities. He lied to the authorities that the rhinos were shot for trophies while knowing that this was untrue and that the rhinos were shot for their horns to be traded in Thailand. The offences were premeditated. His actions are as a result of greed because at the time he was employed as an agent for Xaysavang Trade and Export / Import. Rhino related crimes are prevalent in this country. A day does not pass without reading in the

print media about the killing of these poor animals. The appellant appears to be a member of a syndicate that operates from Thailand and specializes in dealing in rhino horn. Instead of disclosing the identities of the syndicate to the authorities to enable them to smash the syndicate, the appellant failed to disclose this information to the South African Authorities. At the time of his arrest, he had already placed an order for the hunt of another 50 rhinos. Of the 26 sets of horns that were fraudulently exported, only 3 sets of horns were recovered. His actions, but for the fraudulent permits, are akin to that of poachers. The exploitation of the permit system was over a period of 6 months.

[18] The rhino population, since 2010 to date, has been in a decline as a result of poaching. There is a public outcry for harsher sentences to be imposed by the courts for accused persons convicted of rhino related crimes.

[19] In the unreported judgment of Willis J, with whom Nicholls J agreed in this division, in the matter of *Chu, Puc Manh v The State, Case No A407/2011 (GSJ) (29/08/2012)*, the learned judge in paragraph (8) of the judgment, arguing for preservation of rhinos, said the following:

***(8).....'It is an argument for example that often received support of organizations 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 rhinos that have been around for millions of years should not be eliminated.'***

[20] The sentiments expressed by Willis J above resonate not only with the people of the world but with the population of South Africa. If we do not take measures such as imposing appropriate sentences for people such as the appellant, these magnificent creatures would be decimated from earth. Our Flora and Fauna would be poorer for it. South Africa

would no longer be the safe home of one of the "Big Five", as it is known all over the world.

- [21] In argument the appellant referred us to the matter of ***S v Engelbrecht 2011 (2) SACR 540 (SCA)*** wherein the appellant had falsified documents to defraud the fiscus with regard to VAT. In that matter the appellant was convicted of 157 counts of fraud and one of corruption. He was sentenced to 6 years imprisonment, of which 2 years were suspended. This sentence was confirmed on appeal.
- [22] The facts of ***Engelbrecht*** differ significantly to the facts in this matter. In the present matter the appellant pleaded guilty to and was convicted of 52 counts for contravention of two different statutes. His crime is not simply one of fraud. It involves the destruction of a national treasure, the rhino population of this country. The killing of the 26 rhinos involves an action which accounts for a significant percentage of the total number of rhinos illegally killed in this country.
- [23] The appellant also submitted that he was not involved in poaching *per se*, but only in the illegal trading of the rhino horns. However, the appellant's counsel conceded in argument that there were 26 rhinos killed as a result of the appellant's illegal actions. The practical effect of the appellant's actions is therefore the same as if he had pulled the trigger himself.
- [24] In any event, the Legislature has deemed it fit to treat the crime of dealing in rhino horns in the same manner as the actual killing. Consequently, reliance on ***S v Engelbrecht***, in my view, is misplaced.
- [25] In the ***Chu*** matter, wherein the appellant was convicted of 1 count of possession of 12 rhino horns and in contravention of The National Environmental Management: Biodiversity Act, the appellant was sentenced to 10 years imprisonment. In that matter 6 rhinos would

have had to be killed in order for the appellant to have come into possession of the 12 rhino horns as each rhino has 2 horns.

- [26] In the present matter 52 rhino horns were involved as a result of the killing of 26 rhinos. More than 4 times the number of rhinos was killed in this matter than in *Chu*. If *Chu* was applied in this particular case, it could have produced a sentence of over 40 years imprisonment. When this proposition was put to the appellant's counsel, he was unable to explain why the appellant in this matter should not at least receive a proportionally similar sentence to that which was imposed in *Chu*.
- [27] In his written submissions the appellant in the main, submits that as he pleaded guilty and has tendered his apologies to the people of South Africa, he is remorseful, which fact should count in his favour in passing sentence. His further main submission is the fact that he has been in custody for a period of 16 months awaiting the finalization of the trial.
- [28] From the evidence on record it appears that the appellant tendered a plea of guilty in order to bargain for a non-custodial sentence. This explains the reason why when he realized that the state was not prepared to sanction a non-custodial sentence, he changed his plea to that of not guilty plea in terms of section 113 of the Criminal Procedure Act 51 of 1977. Realizing that the evidence against him was overwhelming, he then changed his not guilty plea to a guilty plea in terms of section 112 (2) of the same Act. This, in my view, is not a sign of remorse. It is a sign of being realistic. I therefore find no basis for concluding that the plea of guilty and the apology are a sign of remorse.
- [29] With regard to the period of 16 months spent in custody as an awaiting trial prisoner, it is unhelpful to artificially calculate this period as double the period spent in jail as was done in the full court in the matter of *S v*



***Brophy 2007 (2) 56 SACR (W)***. In my view the period the appellant spent in custody awaiting trial, should like all other mitigating factors, be taken into consideration in determining what an appropriate sentence, in the particular case, should be. In ***Radebe v S (726/12) [2013] ZASCA 31 (27 March 2013)***, the court in para [14] of the judgment said:

***“(14) A better approach in my view is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified.....”***

- [30] The killing of rhinos, solely to trade in their horns, is a serious crime. The evidence on record reveals that 26 rhinos were shot and killed for their horns. The arrest and prosecution of the appellant prevented the potential loss of further 50 rhinos, solely for their horns. In the present matter the appellant was issued with permits to legitimize his unlawful and criminal activities. I have no doubt in my mind that, had the authorities known the truth, the permits would not have been issued to the appellant.
  
- [31] In as much as the object of sentencing is not to satisfy public opinion but to serve the public interest, public opinion and indignation to the killing of rhinos must be taken into account in passing an appropriate sentence. The personal interests of the accused must not prevail above those of the public. The two must, as far as humanly possible, weigh against each other and then a determination should be made as to what a fit and appropriate sentence, in a particular case, should be.
  
- [32] In my view, deterrence cries out in this matter. The sentence to be imposed must not only act as a deterrent to the appellant but must also serve as a deterrent to all those who intend to embark on the illegal activity of dealing in rhino horn. Potential poachers must know that in the event that they are caught, they will be prosecuted and a proper and fitting sentence would be imposed on them. Courts should not shirk their responsibilities in meting out the appropriate sentence in

appropriate cases. They must protect these ancient and magnificent animals.

[33] Having regard to the personal circumstances of the appellant, the nature and circumstances of the offences that the appellant was convicted of and the interests of justice, the just and appropriate sentence would be 5 years imprisonment in respect of counts 1 to 26; 10 years imprisonment in terms of counts 27 to 36; 10 years imprisonment in respect of counts 37 to 46 and 10 years imprisonment in respect of counts 47 to 52, totalling 35 years imprisonment. It is ordered that the 5 years imprisonment in respect of counts 1 to 26 run concurrently with the 30 years imprisonment in respect of counts 27 to 52.

[34] In the result the appeal against sentence imposed on the appellant succeeds. It is ordered that the sentence imposed on the appellant is set aside and replaced with a direct imprisonment of 30 years.

It is so ordered.

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**M.TSOKA J**  
**JUDGE OF THE HIGH COURT**

I agree.

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**P.N. LEVENBERG A J**  
**JUDGE OF THE HIGH COURT**



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**Summary**

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**TSOKA J; LEVENBERG AJ**

This is an application for leave to appeal against the sentence. The appellant was charged in the Regional Court of Kempton Park with 26 counts for contravening section 80 (1) (i) of Customs and Excise Act 91 of 1994, in that he unlawfully and intentionally made improper use of documents issued as per

column 1 and 3 of schedule A, in respect of goods to which the Customs and Excise Act relates, to wit, export of rhino horns.

The appellant is a Thai citizen, and a director of a Thai company known as Xaysanang Trading Export-Import. The Company deals with rhino horns, lion bones, teeth and claws. He was involved in the shooting of rhinos after legal hunting permits were issued to him for trophies.

This was a misrepresentation to the South African Authorities by the appellant. After the permits were thoroughly checked and cleared by the Customs and Nature Conservation, the appellant changed the addresses as they appeared on the CITES (Conservation International Trade in Endangered species of Fauna and Flora) permits, with the result that the rhino horns ended up in Laos and Thailand. The people reflected on the permits as professional hunters were in fact prostitutes hired by the appellant to mislead the South African Authorities. It also emerged that the appellant was a member of a syndicate that operates from Thailand and specialises in dealing in rhino horns.

The Court had to determine whether the trial court exercised its discretion properly in imposing the sentence of 40 years imprisonment. Although the appellant had legal permits to shoot the rhinos, he intentionally lied to the authorities. The permits were issued to him fraudulently to legitimize his unlawful and criminal activities. The offences were premeditated. The appellant knew that the killing of rhinos for trading is a serious crime.

The sentence must not only serve as warning to the appellant but must also serve as deterrent to all those who intent to

embark on illegal activities of dealing in rhino horns. Poachers must know that in the event they are caught, they would be prosecuted, and a proper and fitting sentence would be imposed on them. Courts should not shirk their responsibilities in meting out the appropriate sentences in appropriate cases. These ancient and magnificent animals must be protected.

Having regard to the serious nature of the offences, the personal interest of the appellant and the interest of justice, a just and appropriate sentence, in the circumstances, would be 30 years imprisonment.

The sentence imposed by the trial court is therefore set aside and substituted with a sentence of 30 years imprisonment.