

SWAZILAND HIGH COURT

REX

Vs

PETER MCINTYRE

1st Respondent

PATRICK MKHALIPHI

2nd Respondent

AARON VILANE

3rd Respondent

NKOSINATHI MPANDZA

4th Respondent

AZARIUS MATSIMBE

5th Respondent

JABULANI MHLABANE

6th Respondent

Cr. Trial no. 43/2001

Coram

SAPIRE, CJ

For the Crown

Mr. M. Maseko

For Defence

Mr. Ntiwane

Mr. B.G. Simelane

Mr. M. Mamba

JUDGMENT

(on replacement)

(11/03/2002)

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Accused No. 1 has been found guilty of contravening Section 8(1) of the Game Act of 1953 as amended and has been sentenced to the minimum period of imprisonment prescribed by the Section. Accused 5 & 6 have been found guilty of contravening Section 8(3) of the same Act and sentenced to the minimum period of imprisonment prescribed under the relevant section. Section 8(6) of the Act provides:-

"(6) Any person found guilty of an offence under subsection (1), (3) or (4) shall be required by the

court in addition to any penalty imposed under that subsection to either replace that game or to compensate fully for the replacement value specified in the First, Second or Third Schedule in relation to that game, failing which such person shall be liable to a further period of imprisonment of not less than two years but not exceeding six years.

(7) any such replacement or compensation shall be made to the owner of the game or, if ownership of the game cannot be established, to the owner of the property where the game was hunted, and where the owner of such game or property cannot be determined, such replacement or compensation shall be made to the Government. "

The first schedule provides for the identification of specially protected game and includes the Rhinoceros of all species in respect of which no replacement value is mentioned. It also includes the white Rhinoceros and the black Rhinoceros specifically. In the former case the replacement value is E40 000 and in the second case the replacement value is E200 000.00.

The res delictae in this case are two Rhino Horn that in terms of the definition of game is the item which being a part of the animal with which we have to deal.

Having found the accused guilty of contravening sub-sections 1 and 3 the court is required to make an order under sub-sections 6.

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The order envisaged is either to replace "that game" or to compensate fully for its replacement value specified in the schedule.

"that game " means the game which is the res delictae of the offences. Game includes any part of such game. In this case as we have seen the res delictae are parts of the animal namely its horns. No specific compensation amount is referred to in the schedule relating to the horns alone. The order I must make therefore is that the horns must be replaced. Only if this cannot be done does the question of compensation arise.

The use of the words "replace" and "compensate" seem inappropriate in the circumstances such as the present where

(a) the owner of the horns cannot be established (in fact it is probably one of the accused persons who is owner of the horns.).

(b) There is no evidence as to the property where "the game" may have been hunted and in fact there is no evidence that it was in fact hunted. The accused are not charged with having hunted the game

(c) The owner of the game or property cannot be determined.

(d) No evidence of any loss which as to be made good by replacement or compensation has been demonstrated.

The provisions of the section in such circumstances require that the replacement or compensation shall be made to the Government. There is nothing to suggest that the Government has lost anything which can be replaced or for which it has to be compensated.

Counsel for the accused argue that the section cannot be properly applied in these circumstances. The basis of the argument that there has been no loss to anyone and the question of compensation or replacement cannot arise. The wording of Section 7 however does not permit of such an interpretation. It clearly contemplates that an order must be made even where the person who has suffered a loss cannot be identified.

Crown counsel proposed that in order to comply with the Section and to avoid obvious inequities which would follow I should order that each of the accused would be obliged to replace or compensate at the value of one white rhino in terms of Section but that such be paid jointly. That means you divide the compensation by 3. He suggested that each of the accused would contribute one third. There is no provision of the Act that would permit me to do so. Moreover if the game is to be replaced the question of compensation does not arise.

A further suggestion was submitted to me by defence counsel that seems to make some sense and I will make an order in those terms. The conclusion to which I have come makes it unnecessary for me to have to consider some of the ticklish problems that may otherwise arise. The three accused are ordered to replace the game which is the corpus delicti namely 2 Rhino Horns. Their obligation so to do is however discharged by the forfeiture of exhibits "A1" and "A2" and their delivery to the Government as represented by the Chief Ranger.

SAPIRE, CJ