

IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON SENTENCE

HELD AT MBABANE

Case No. 184/2017

In the matter between:

REX

And

**CHEN BEIHSUN
HSIAO CHEN HAO**

**1st Accused
2nd Accused**

Neutral citation: **Rex vs Chen Beihsun and another (184/17) [2017]
SZHC 234 (2nd November, 2017)**

CORAM **J.S MAGAGULA J**

HEARD: **18/5/17 and 23/5/17**

DELIVERED: **2/11/2017**

Summary: Criminal law – sentencing for possession of trophies of four rhinos – aggravation and mitigation factors on sentence – replacement or compensation for poached game – sentence on failure to replace or compensate for poached game – guiding principles on sentencing.

JUDGMENT

[1] The accused persons are charged with six (6) counts of contravening different sections of the Game Act No. 51 of 1953 as amended. The charges preferred against the accused persons read as follows:

“COUNT ONE

Accused 1 is guilty of the crime of Contravening Section 8 (1) of the Game Act 51 of 1953 as amended by Act 4/1991 and the kings Order in Council 12/1993.

In that upon or about the 25th February 2017 and at or near KM III International Airport, in the Lubombo Region, the said Accused person did wrongfully and unlawfully possess trophies to wit, sixteen (16) pieces of Rhino horns without a valid permit and did thereby contravene the said Act.

COUNT 2

Accused 1 is guilty of the crime of Contravening Section 8 (3) of the Game Act 51 of 1953 as amended by Act 4/1991 and the Kings Order in Council 12/1993.

In that upon or about 25th February 2017 and at or near KMIII International Airport, in the Lubombo Region, the said accused person did wrongfully and unlawfully trade or traffic in the raw product, to wit, sixteen (16) pieces being trophies of Rhino horns without a valid permit or licence and did thereby contravene the said Act.

COUNT 3

Accused 1 is guilty of the crime of Contravening Section 19 (1) of the Game Act 51 of 1953 as amended by Act 4/1991 and the Kings Order in Council 12/1993.

In that upon or about 25th February 2017 and at or near KM III International Airport, in the Lubombo Region, the said accused person did wrongfully and unlawfully export from Swaziland sixteen (16) pieces of specially protected game being trophies of Rhino horns without a valid permit or licence and did thereby contravene the said Act.

COUNT 4

Accused 2 is guilty of the crime of Contravening Section 8 (1) of the Game Act 51 of 1953 as amended by Act No. 4/1991 and Kings Order in Council 12/1993.

In that upon or about the 25th February 2017 and at or near KM III International Airport in the Lubombo Region, the said accused person did wrongfully and unlawfully possess trophies, to wit, eight (8) pieces of Rhino horns without a permit and licence and did thereby Contravene the said Act.

COUNT 5

Accused 2 is guilty of the crime Contravening Section 8 (3) of the Game Act 51 of 1953 as amended by Act 4/1991 and the Kings Order in Council 12/1993.

In that upon or about 25th February 2017 and at or near KMII International Airport, in the Lubombo Region, the said accused person did wrongfully and unlawfully trade or traffic in the raw product, to wit, eight (8) pieces being trophies of Rhino horns without a valid permit and did thereby contravene the said Act.

COUNT 6

Accused 2 is guilty of the crime Contravening Section 19 (1) of the Game Act of 1953 as amended by Act 4/1991 and the Kings Order in Council 12/1993.

In that upon or about 25th February 2017 and at or near KMIII International Airport, in the Lubombo Region, the said accused person did wrongfully and unlawfully export from Swaziland eight (8) pieces of specially protected game being trophies of Rhino horns without a valid permit or licence and did thereby contravene the said Act”.

[2] Upon arraignment both accused persons pleaded guilty to the charges preferred against them. The crown accepted their plea and a statement of agreed facts was handed into court.

[3] STATEMENT OF AGREED FACTS:

The statement of agreed facts reads as follows:

“ 2. The accused persons plead guilty on all the above charges and the Crown accepts their plea. It is agreed between the parties that the following

events occurred before, during and after the commission of the offences:

2.1 The accused persons were apprehended at the King Mswati III International Airport on the 25th February 2017 en – route to Hong Kong via the Republic of South Africa. The Accused persons arrived in the country on the 20th February 2017 from the Republic of South Africa. On their arrival in this country both accused persons were booked at the Happy Valley Hotel situated at Ezulwini where they stayed from the 21st February until 25TH February 2017.

2.3 Accused persons arrived at the KM III International Airport on the 25th February 2017 during the day. They had with them their luggage which was checked in by air link officials, wherein after their luggage was checked in by air link officials, wherein after their luggage was checked they were issued with the following name tags;

1. Chen Bei – hsun was given tag number SA 463068 and SA 463069.

2. HSIAO Chen Hao was issued tag number SA 462956 and SA 462957

2.4 After the issuance of the tag numbers, the luggage was taken to the screening Section where there is a screening machine operated by the Aviation Section Officials. This is where the aviation Security Officials made the suspicious finding in the luggage of the accused persons and it was then that police officers were called in to do an investigation on this finding.

2.5 After the police were called an investigation led by 3222 D/A/SUPT Dlamini resumed. They introduced themselves and asked for permission to search the accused persons who were by then at the departure lounge and were called back by the security personnel. Their luggage was brought back and was searched in the presence of the accused persons. In the luggage there were three (3) suitcases and were marked as follows:

(i) SA 463068 which belonged to the Chen Bei – hsun had 9 pieces of Rhino horns.

(ii) SA 463068 which belonged to Chen Bei – hsun had 7 pieces of Rhino horns.

(iii) SA 462957 which belonged to Hsiao Chen Hao had 8 pieces of Rhino horns.

By then accused persons together with their luggage were in an office at the screening Section.

2.6 After the luggage had been searched, a body search was also conducted on both accused persons;

On the body of Chen Bei – hsun the following currency was found;

2x HONG KONG DOLLARS

2X 100 HONG KONG DOLLARS

6 HONG KONG COINS

1X5 YEN NOTES

2X 10 YEN NOTES

1X 30 YEN NOTES

13X 100 YEN NOTES

2X 100 CHINESE NOTES

8X 1000 CHINESE NOTES

10X 200 RANDS

9X 100 RANDS

5X 100 US DOLLARS

TOTAL VALUE E19,897.98. On the body of Hsiao Chen Hao the following currency was found;

6x 1000 Chinese Notes

23x100 Rands

1x50 Rands

2x 5 Rands

4x1 Yen

2x5 Yen

1x50 Yen

100X100 Yen

31x100 Yen

3 coins

1x 10 Hong Kong Dollars

4x 20 Hong Kong Dollars

2x 100 Hong Kong Dollars

1x 20 Macav notes

2X 10 US Dollars

5x100 US Dollars

1x 11 Coins Hong Kong

1X 5 Jiao Coins

5 Chinese coins

TOTAL VALUE E47, 355.91

The Accused persons were then charged with the offences of Contravening the Game Act after Game Experts confirmed the Rhino horn pieces.

3. ACCUSED 1 SPECIALLY ADMITS THAT;

a) He unlawfully possessed Sixteen (16) pieces of Rhino horns without a permit or licence as per Count 1.

b) He unlawfully trade or traffic trophies of Rhino horns being 16 pieces without a permit or licence as per Count 2.

c) He was unlawfully exporting 16 pieces of the trophies of the Rhino horns out of Swaziland without a permit or licence as per Count 3.

ACCUSED 2 SPECIFICALLY ADMITS THAT;

(a) He unlawfully possessed Eight (8) pieces of Rhino horns without a permit or licence as per Count 4.

(b) He unlawfully trade or traffic trophies of Rhino horns being 8 pieces without permit or licence as per Count 5.

(c) He was unlawfully exporting 8 pieces of the trophies of the Rhino horns out of Swaziland without a permit or licence as per Count 6.

4.1 *Further, Accused two does not dispute that initially he had two suite cases, however, the other suite case was flown to the Republic of South Africa and was intercepted by the security*

at OR Tambo International Airport. The suitcase contained 7 pieces of Rhino horns.

5. It is further agreed between the parties that the following be handed in as part of the Crown's evidence:

1. The 24 pieces of Rhino horns found in possession of both Accused persons.

2. The DNA Report compiled by Dr Cindy Harper of the Veterinary Genetics Laboratories in South Africa.

3. Photographs taken at the scene by 4419 D/Const Nkosinathi Thusi who is a scene of crime officer based at Siteki Police Station.

4. Three suite – cases where five litre containers/boxes were found.

5. Five litre containers/boxes of wine where the 24 pieces of Rhino horns were neatly concealed”.

Additions by Consent:

1. Accused alleged that they were carrying luggages on behalf of Chen Deji.

This appears on RSP 218 i.e statement recorded before Police upon arrest.

Court – “ *statement added as paragraph 6*”

[4] It is worth mentioning that the last clause of the statement of agreed facts was not in the statement when it was handed in. Counsel applied that this paragraph be added by the court by consent. I duly added the paragraph.

This statement however did not appear to me to be consistent with accused's plea of guilty and had they not been represented I would have recorded a plea of not guilty. However since the accused persons were represented and counsel were in agreement that the statement would be relevant in mitigation of sentence, I recorded the plea of guilty as tendered by the accused and confirmed by their legal representative. Nothing was said on this statement in mitigation.

[5] The accused persons having pleaded guilty to the charges preferred against them, which plea was confirmed by their legal representative Mr. Nzima, and on the basis of the statement of agreed facts handed into court I duly convicted the accused persons on all the charges preferred against them. I now proceed to hand down my judgment on sentence.

[6] The accused persons are charged with statutory offences the minimum and maximum sentences of which are prescribed by such statute. Both accused persons are charged with contravening section 8 (1) of the Game Act 1953 as amended. Section 8 (2) prescribes a minimum sentence of not less than five (5) years and a maximum sentence not exceeding fifteen (15) years without the option of a fine.

- [7] Both accused persons are also charged with contravening section 8 (3) of the same Act. The said subsection prescribes a minimum sentence of not less than seven (7) years and a maximum sentence not exceeding fifteen (15) years without the option of a fine.
- [8] The accused persons are also charged with contravening section 19 (1) of the same Act. That section prescribes a minimum sentence of not less than five (5) years and a maximum sentence not exceeding fifteen (15) years.
- [9] In summary therefore the court cannot impose a sentence of less than (5) years for contravention of section 8 (1) and for the contravention of section 19 (1) of the Game Act. For the contravention of section 8 (3) the court cannot impose a sentence of less than seven (7) years. The accused persons have been found guilty of contravening all these sections.
- [10] The court can therefore impose any sentence ranging from five (5) years to fifteen (15) years for the contravention of sections 8 (1) and for the contravention of section 19 (1) of the Act. The court can also impose any sentence ranging from seven (7) to fifteen (15) years for the contravention of section 8 (3) of the Act.
- [11] In my view any sentence between the minimum and maximum prescribed by the Act should be informed by the existence or non- existence of aggravation and mitigation factors in the commission of the offence. The conduct of the accused persons

from the time of arrest up to the time of finalisation of the trial should also be taken into account. Submissions in mitigation which relate to the personal circumstances of the accused should also be taken into account.

- [12] In the case of possession of trophies of protected game, as in *casu*, I think the number or amount of trophies found in the possession of the accused person should be taken into account in deciding whether or not there are aggravation factors. In my view a person found in possession of one rhino horn extracted from one rhinoceros cannot be given the same sentence as a person in possession of four horns or numerous pieces of horns from four rhinos. A stiffer sentence ought to be imposed on the latter accused person.

For instance in the South African case of *CHUMLONG LEMTONGTHAI v THE STATE* (A82/2013) [2013] SGHC (30 August 2013) Justice Tsoka J stated at pages 7-8:

“ In the Chu matter, wherein the appellant was convicted of 1 count of possession of 12 rhino horns.....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 12 rhino horns as each rhino has 2 horns.

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".

The learned judge was referring to the case of CHU, PUC MANH v THE STATE (A407/2011) (GST) (29/08/2012). From his reasoning it is clear that the number of horns or rhinos involved is a factor to be taken into account in determining the sentence to be imposed.

[13] In *casu*, the crown led Mr. James Jubela Reilly, head of the Swaziland Big Game Parks conservation and security who, apart from giving evidence demonstrating how seriously the crime was viewed by the international community, also told the court that the rhino horns in question were actually extracted from four (4) rhinos. In my view this fact alone should take the sentence several strides in the aggravation direction.

[14] Mr Reilly also testified that the rhino horns in the possession of the accused persons were extracted from three rhinos poached in neighbouring South Africa as per the DNA report compiled by Dr Cindy Harper. The 4th rhino was suspected to have been killed in Swaziland in the not too distant past. Again in my

view the fact that most of the rhinos were poached in South Africa with one of them having been poached some 718 kilometres from KMIII International Airport. Per exhibit “F” suggests that Swaziland is considered an easy exit point for the game trophies. Our country is therefore considered a convenient route for the perpetration of this transnational illicit trade. Our courts are therefore challenged to impose stiffer sentences to deter offenders who view our country in this light. This is therefore another factor which should take the sentence some further strides in the aggravation direction.

[15] Although fewer pieces of rhino horns were found in accused No.2’s luggage, the evidence adduced by Mr. Reilly revealed that some of the pieces found in the different luggage of the two accused persons were from the same rhinos. This indicates that the accused persons were acting in concert and the fact that fewer pieces of rhino horn were found in the possession of accused No. 2 does not make him any less guilty. In any event he agreed that seven(7) other pieces had already been exported and intercepted in South Africa

[16] In considering the sentence to be imposed upon the accused persons I am guided by the principle laid down in the South African case of S.V. ZINN 1969 (2) SA 537 where the Appellate Division of the Supreme Court laid down the triad that constitutes a guideline for sentencing. Delivering the unanimous decision of the court Rumpff JA stated at page 540 – G:

“ It then becomes the task of this court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society.”

(See also Chumlong, Lemtonghai v The State *Supra* at paragraph 15).

[17] The crime is transnational and it is viewed by the international community as well as our own society in a very serious light.

That is why it has high minimum and maximum sentences. In other jurisdictions the prescribed sentences are even higher.

Also as Mr. Reilly pointed out, this offence leads to loss of lots lives as rangers and poachers are in constant armed conflict.

In the Chumlong matter Justice Tsoka J stated at page 9:

“ The killing of rhinos, solely to trade in their horns, is a serious crime.....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 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”.

I fully associate myself with the sentiments expressed by the learned judge.

[18] In imposing the sentences I impose upon the accused persons I do take into account that the accused persons have pleaded guilty which is a sign of remorse, and that they are first offenders. I also take into account the now trite principle of our law that courts ought to visit offenders with mercy.

[19] For the foregoing reasons the following sentences are imposed upon the accused persons:

Accused No. 1 - Chen Bei – Hsun

Count No. 1 – Nine (9) years imprisonment

Count No. 2 – Eleven (11) years imprisonment

Count No. 3 – Nine (9) years imprisonment

All the sentences are to run concurrently and back – dated to date of arrest of the accused person.

Accused No. 2 – Hsiao Chen Hao –

Count No. 1 – 9 years imprisonment

Count No. 2 – 11 years imprisonment

Count No. 3 – 9 years imprisonment

All sentences to run concurrently and back – dated to the date of arrest of the accused person.

[20] Over and above the sentences imposed above, the accused persons are hereby ordered in accordance with Section 8 (6) of the Act to either replace the rhinos poached in the Republic Of South Africa or compensate the owners thereof or the owners of the property in which the rhinos were hunted for their full value thereof as provided for in the first schedule to the Game Act. This means that the accused persons shall pay jointly and severally, the one paying the other to be absolved R40,000-00 (Fourty Thousand Rand) in respect of each of the three rhinos.

The accused persons shall further, in respect of the fourth rhino, make replacement or pay compensation for the value thereof in the sum of E40,000-00 (Fourty Thousand Emalangeni) to the Government of Swaziland.

[21] Should the accused persons fail to replace the rhinos or pay the stipulated compensation they shall over and above the penalties imposed in paragraph 18 hereof, serve further periods of imprisonment as follows:


Accused No. 1 Chen Bei – hsun –

Four (4) years imprisonment

Accused No. 2 Hsiao Chen Hao –

Four (4) years imprisonment

The exhibits (rhino horns) are forfeited to the state.



J.S MAGAGULA J

For the Crown: Mr M. Nxumalo and Ms L. Dlamini

For the Accused Person: Mr O. Nzima