TATENDA MHANGO

and

BRIGHTON NGWENYAMA

and

KUDZAI RUVANGU SHAVA

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J.
MASVINGO, 27 March & 31st July, 2019

Criminal Appeal

C. Ndlovu for the 1st & 2nd appellants
Ms Y Chandata for the 3rd appellant
Ms M. Mutumhe for the state

MAWADZE J: The three appellants were convicted and sentenced by the Provincial Magistrate sitting at Masvingo on 10 April 2018. They were charged and convicted jointly for contravening section 45(1)(b) of the Parks and Wild Life Act [*Cap 20:14*] as read with section 128 of the same Act (*hereinafter The Act*) which relates to keeping, having in possession or selling any live specially protected animal. Each of the appellants after a contested trial was sentenced to 9 years imprisonment.

The 1st and 2nd appellants were and are still represented by *Mr Ndlovu* and they lodged an appeal under CA 23/18. The 3rd appellant who was represented by *Mr Muzenda* (now HON MUZENDA J.) lodged a separate appeal under CA 26/18. On 25 January 2019 my brother

MAFUSIRE J. by consent consolidated the two appeals CA 23/18 and CA 26/18 which were then argued before my brother MAFUSIRE J. and myself on 27 March, 2019. The charge is that on 11 April, 2016 at Buka business centre, Mushandike in Masvingo each of the appellants or all of them was or were in possession of a live pangolin, a specially protected animal which they were selling or disposing without a permit.

The facts giving rise to this appeal are as follows: -

Accused 1 Tatenda Mhango (Mhango) then aged 31 years resides at Plot 21 Grange Farm, Masvingo and was self-employed at Dakota 50 Mine, Mushandike, Masvingo. Accused 2 Brighton Ngwenyama (Ngwenyama) then aged 49 years was residing at House Number 4 Mushandike Secondary School where he was employed as a teacher. Accused 3 Kudzai Ruvangu Shava (Shava) then aged 40 years was residing at No. 97 Dulibadzimu Township, Beitbridge and not employed.

The state case is that on 11 April 2016 police detectives in Masvingo received information to the effect that the accused persons were in possession of a live pangolin at Buka business centre some 20km from Masvingo along the Masvingo – Beitbridge road and that they were selling the pangolin. Acting on this tip off Sgt. Dzire, Cst Mukobwa, two police details from ZRP Support Unit and 2 Officers from the Parks and Wild Life Department proceeded to Buka business centre using two motor vehicles. It is alleged that at Buka business centre Sgt Dzire and Cst Mukobwa posed as buyers and were linked to the accused persons by the informer. It is said the accused persons arranged that Cst Mukobwa and one of the accused proceeded to a certain house where he viewed the live pangolin whose selling price was offered at US$5000. Upon their return Cst Mukobwa confirmed to Sgt Dzire that indeed he had seen the live pangolin after which it is said accused 1 Mhango was tasked to go and bring it to the motor vehicle used by Sgt. Dzire and Cst Mukobwa. The state alleges the pangolin was brought as arranged by accused 1 Mhango contained in a sack and placed in the boot of the motor vehicle being used by Sgt Dzire and Cst Mukobwa. It is alleged the parties continued to negotiate the selling price. Meanwhile Sgt. Dzire using his mobile phone signalled to two details from the Support Unit and other 2 details from Parks and Wild Life Department (Parks Department) who were using another motor vehicle to pounce on the accused persons. As a result, it is alleged that Sgt Dzire apprehended Accused 1 Mhango. Accused 2 Ngwenyama who was seated in Sgt. Dzire's motor vehicle was also apprehended. It is alleged that Accused 3 Shava who was outside the motor vehicle with Sgt Dzire and Accused 1 Mhango took to his

heels despite being ordered by members of the Support Unit to stop. It is alleged that 3 warning shots were fired from an AK rifle but Accused 3 Shava kept on fleeing which resulted in him being hit on the thigh with the 4th shot after which he fell down and was arrested. It is said Accused 3 Shava had to be hospitalised. The live pangolin whose mass is said to be 9.9948 kg and valued at $5000 was recovered and later released by the Parks Department to Gonarezhou National Park.

All the appellants totally disputed the allegations by the state and indicated that they were never in possession of the said pangolin let alone trying to sell it. In fact, they said they were just arrested for no apparent reason.

Accused 1 Mhango said he was enjoying himself at Buka business centre when he went to relieve himself. Upon his return he was shocked to hear gunshots and some police officers just arrested him. Accused 1 Mhango said prior to this day he was well known to Sgt Dzire and it would have been foolhardy for him to sell a pangolin to a police officer.

Accused 2 Ngwenyama said he arrived at his residence from Steven business centre. He said his family members told him that one Simbarashe Mavhengere had left a parcel for him in a sack. Later he said Simbarashe Mavhengere came with another person to collect this sack. Thereafter accused 2 Ngwenyama said he proceeded to nearby Buka business centre to have drinks. Suddenly he said he heard gunshots and was surprised to be arrested in the ensuing melee and that Simbarashe Mavhengere fled leaving the parcel in a sack. Accused 2 Ngwenyama said one Mr Chadzamira was also arrested but later released.

Both accused 1 Mhango and accused 2 Ngwenyama denied ever being in possession of a pangolin.

Accused 3 Shava said he was among the revellers at Buka business centre on 11 April 2016 in the evening when police officers caused some commotion resulting in a pandemonium among the revellers. In that melee accused 3 Shava said he was ordered by the police to lie down and he complied. Accused 3 Shava said he was nonetheless shot in the thigh despite that he had not attempted to flee. Accused 3 Shava blamed the police for callously shooting him.

All the 3 accused persons denied being in possession of the pangolin at any stage, let alone attempting to sell it. They all challenged the state to prove that the animal police said they recovered on the day in question was in fact a pangolin. Lastly the accused person took issue with how the said animal or pangolin was disposed of and allege impropriety on the part of the state.

After hearing evidence from Sgt. Dzire, Cst Mukombwa, Paradzai Masvovere a member of the Parks Department, Progress Mugugu a member of the Support Unit and Chamunogwa Svosvayi an Ecologist for the state on one hand and the three accused persons and a defence witness Munyaradzi Chikumbu on the other the trial court dismissed the accused persons' version as false. All the appellants were thus convicted and sentenced.

Irked by that decision the appellants appealed to this court in respect of both conviction and sentence.

The grounds of appeal can be summarised as follows;

In respect of the conviction the appellants took the following points:-

1.(a) that the court *a quo* made an improper finding of fact that the sack in issue contained a pangolin when the contents of the sack was not shown to the court.

(b) that the state witnesses were not qualified as expert witnesses to say the animal in question was a pangolin

(c) that the sack and its contents were not properly secured and the said animal was improperly disposed contrary to the provisions of Part VI of the Criminal Procedure and Evidence Act, [*Cap 9:07*]

2. that Sgt. Dzire and Cst Mukombwa were incredible witnesses as they gave conflicting evidence on how the appellants were arrested hence the court *a quo* improperly relied on their testimony

3. that there was no rational basis to dismiss the version given by the appellants which version was truthful

4. that there was no legal basis for the court *a quo* to impose the mandatory sentence prescribed in s 128 of the Parks and Wildlife Act, [*Cap 20:14*] in the absence of a statutory Instrument published by the Minister

5. that the facts found proved in this case showed that there was entrapment which entrapment amounts to special circumstances contrary to the court *a quo's* findings

6. that a proper assessment of the personal circumstances of the 3rd appellants Shava cumulatively amounted to special circumstances

7. lastly, that the moral blameworthiness of the appellants warranted either an imposition of a fine, or a fine coupled with a wholly suspended sentence, or a wholly suspended sentence or an option of community service.

I now turn to the grounds of appeal.

1. Whether the animal in issue is a pangolin

It is difficult to appreciate the argument proffered by the appellants in this regard. The thrust of the defence by the appellants is that they have nothing to do with the animal in question and that they were never in possession of any animal nor attempted to sell any animal to anyone. In fact, they said they were just shown a sack containing something by the police after their inexplicable arrest as the police frantically tried to link them to this offence. If that is true one wonders therefore why the appellants are saying the animal "planted" on them as it were was not a pangolin. Equally so it is illogical for the appellants to even argue that the said animal was unprocedurally disposed of. If the police wanted to falsely incriminate them why would the police fail to "plant" a pangolin on the appellants?

Be that as it may Sgt Dzire testified that he heads the Packs and Wildlife Department at the police and is very familiar with a pangolin. After the appellants' arrest he even called members of the Parks and Wildlife Department who also confirmed that the animal in question was a pangolin and police later surrendered it to the Parks and Wildlife Department as it was not feasible to keep the pangolin from 11 April 2016 when it was recovered until 14 February 2018 when the trial commenced.

Cst Mukombwa testified that he is also experienced in Parks and Wildlife matters and is very familiar with a pangolin. He testified that when the 2nd appellant Ngwenyama led him to a toilet to show him the pangolin in a certain house a Buka business centre he saw a live pangolin. Further he said he asked the 2nd appellant Ngwenyama to prove that the pangolin was alive and that 2nd appellant Ngwenyama poked it and it moved rolling into a ball shape.

Paradza Masvovere a member of the Parks and Wildlife Department who was part of the team which arrested the appellants testified that he is very much familiar with pangolins. He explained that he has much experience in that regard and is fully conversant with the appearance, behaviour and characteristics of pangolins. He too confirmed that the animal they recovered at Buka business centre on the day in question was a pangolin.

Lastly, Chamunorwa Svosvayi an ecologist with the Parks and Wildlife Department who has a Bachelor of Science in Animal Science testified that his main brief is to look after

wild life at the Parks and Wildlife Department. He said on 12 April 2016 police called him to identify the animal found with the appellants and he confirmed that it was indeed a pangolin. In his evidence he clearly described a pangolin and distinguished it from a hedge-hodge or "tsoni". Chamunorwa Svosvayi demonstrated clearly that he knows a pangolin and described it as he differentiated it from other animals. In fact, he said the pangolin in issue was stressed and he is the one who recommended its release to its natural habitat.

Given all this evidence there is no basis at all for the appellants to challenge that the animal in question was not a pangolin. Equally so the witnesses explained why the pangolin was released to Gonarezhou National Park its natural habitat. Even assuming the pangolin was unproceduraly released nothing really turns in the appellants' favour. There is no doubt that the animal in issue was a pangolin.

2. Whether the state's evidence is credible

In my view the evidence led by the state is very clear. The police explained why they proceeded to Buka business centre in the day in question and what transpired at Buka business centre leading to the arrest of the appellants. It is incomprehensible to fathom that the state witnesses merely concocted that evidence on what happened at Buka business centre.

I did not find any contradictions between the evidence of Sgt Dzire and Cst Makombwe on the material issues. The witnesses materially corroborated each other on the following aspects;

(i) how they first met the 3rd appellant Shava at Buka business centre

(ii) the initial discussions Sgt Dzire and Cst Mukombwa had with all the appellants as they posed as buyers upon being introduced to the appellants by their informer

(iii) how Cst Mukombwa and the 2nd appellant Ngwenyama went to a house where the 2nd appellant Ngwenyama showed Cst Mukombwa the pangolin and the feedback. Cst Mukombwa gave to Sgt Dzire and the 1st and 2nd appellants who had remained in Sgt Dzire's motor vehicle

(iv) how the 1st appellant Mhango thereafter went to bring the pangolin from the said house contained in a sack to the motor vehicle where Sgt Dzire, Cst Mukombwa, and the 2nd and 3rd appellants were

(v) that the 1st appellant Mhango placed the sack containing the pangolin into the boot of Sgt Dzire's motor vehicle after which Sgt Dzire in the company of 1st

appellant Mhango and 3rd appellant Shava proceeded to the boot of the motor vehicle as Sgt Dzire pretended to check the pangolin

(vi) the price offered by the appellants for the pangolin of US$5000 and how the 3rd appellant Shava took centre stage in the negotiations for the sale

(vii) the position 1st appellant Mhango and 3rd appellant Shava were outside the motor vehicle with Sgt Dzire and the 2nd appellant Ngwenyama inside Sgt Dzire's motor vehicle when the team of details from Support Unit and Parks and Wild Life pounced on the appellants after being stealthy signalled by use of a mobile call by Sgt Dzire

(viii) how and who arrested each of the appellants

(ix) how the 3rd appellant Shava was shot, the number of warning shots fired including the fatal shot

It is therefore incorrect to allege that Sgt Dzire and Cst Mukobwa gave contradictory evidence on material issues. They clearly corroborated each other on how the sequence events unfolded that night. Their evidence together with that of Paradzai Masvovere a member o the Parks and Wild Life Department and Progress Mugugu a detail from the Support Unit who shot at the 3rd appellant as he fled clearly shows that the version of events given by all the appellants was false.

The court *a quo* rightly rejected the evidence of the appellants as it found no motive for state witnesses to falsely incriminate the appellants. Indeed, there was no plausible reason for the police details to simply pick on the appellants amongst all the revellers at Buka business centre that night.

The findings by the court *a quo* on the credibility of state witnesses cannot be faultered. The version given by the appellants was rightly rejected including the red herring that one Chadzamira was arrested. Even the appellants' defence witness Munyaradzi Chikumbu could not support the appellants' version that he too was arrested.

All in all, the evidence against the appellants is simply overwhelming. The grounds of appeal in respect of conviction are clearly ill founded and totally lack merit. The appellants were properly convicted and their appeal against conviction cannot therefore succeed. It is dismissed without much ado.

I now turn to the ground of appeal against the sentence of 9 years imprisonment imposed on each appellant.

In my view the only issue worthy serious consideration is whether it was proper in the circumstances for the court *a quo* to impose the mandatory sentence of 9 years imprisonment prescribed in s 128 of the Parks and Wild Life Act [*Cap 20:14*] (the Act) in the absence of a Statutory Instrument published by the Minister.

During the trial and submissions by counsel the court *a quo* agonised over this well made and articulated submission by counsel for the appellants. Counsel for the state was unable to produce the said Statutory Instrument or vouch for its existence. At the end of the day the trial Magistrate simply imposed the mandatory 9 years sentence on the basis that such sentences have in the past been confirmed on review by the High Court. While this may be correct I believe this is not a bar for me to interrogate this position.

The appellants are charged of contravening s 45(1)(b) as read with s 128 of the Parks and Wild Life Act [*Cap 20:14*].

Section 45 of the Act provides as follows;

> ***45 Control of hunting of specially protected animals and possession or sale of specially protected animals and products thereof***
>
> *(1) No person shall—*
>
> *(a) hunt any specially protected animal; or*
>
> *(b) keep, have in his possession or sell or otherwise dispose of any live specially protected animal or the meat or trophy of any such animal; except in terms of a permit issued in terms of section forty-six.*
>
> *(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment*

In terms of the Sixth Schedule to the Parks and Wild Life Act [*Cap 20:14*] a pangolin or *manis temmincki* is listed as a specially protected animal amongst 24 animals listed thereunder. The pangolin is listed as number 6.

The provisions of s 45(1)(b) and 45(2) of the Parks and Wild Life Act [*Cap 20:14*] pose no problem, at all both in respect of what constitutes the offence and the penalty thereof. In my view what poses problems in interpretation arises when s 45(1) of the Act, [*Cap 20:14*] is read

with s 128 of the same Act [*Cap 20:14*] like in the instant case. Section 128 of the Act [*Cap 20:14*] is couched as follows: -

128 Special penalty for certain offences

Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving ----------

(a) the unlawful killing or hunting of a rhinoceros, or any other specially protected animal specified by the Minister by statutory instrument; or

(b) the unlawful possession of, or trading in, ivory or any other specially protected animal that may be specified by the Minister by statutory instrument; shall be liable

(i) on first conviction to imprisonment for a period of not less than nine years;

(ii) on a second or subsequent conviction, to imprisonment for a period of not less than eleven years;

Provided that where on conviction the convicted person satisfied the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years of both such fine and such imprisonment.

(e) where no special circumstances are found by a court as mentioned in the proviso to subsection (1), no portion of a sentence imposed in terms of subsection (1) shall be suspended by the court if the effect of such suspension is that the convicted person will serve –

(a) in a case of a first conviction, less than nine years imprisonment;

(b) *in the case of a second or subsequent conviction less than eleven years.*" (emphasis is my own)

The problem which arises *in casu* is as follows:-

Where the appellants are charged and convicted of contravening section 45(1) of the Act [*Cap 20:14*] the penalty is a fine not exceeding level eight or imprisonment for a period not exceeding 3 years or both such fine and such imprisonment. The appellants were charged and convicted of not only contravening section 45(1) of the Act [*Cap 20:14*] but also as read with s 128 of the Act [*Cap 20:14*]. This means that where one is charged for contravening

section 45(1) of the Act [*Cap 20:14*] as read with s 128 of the said Act [*Cap 20;14*] the provisions of s 128 of the Act [*Cap 20:14*] become applicable due to how s 128 is couched which is;

"*Notwithstanding any other provision of this Act ------"*

In my view section 128 of the Act [*Cap 20:14*] seems to have been introduced because the legislature had realised that some animals listed as specially protected animals in Sixth schedule of the Act [*Cap 20:14*] are more special than others. This is so because section 128 of the Act [*Cap 20:14*] clearly states that the mandatory minimum 9 years applies to a person convicted of unlawful killing or hunting of a rhinoceros or any other specially protected animal specified by the Minister by statutory instrument.

As already said both rhinoceros and the pangolin are listed in the Sixth Schedule [*Cap 20:14]* as specially protected animals. However, by virtue of s 128 of the Act [*Cap 20;14*] the rhinoceros becomes a more special animal or more protected special animal compared to others in the Sixth Schedule of the of the Act [*Cap 20;14*]. It is specifically mentioned and a mandatory penalty of 9 years imprisonment is prescribed in the absence of special circumstances for killing, hunting or possession of the rhinoceros or its trophy.

The question that arises is whether a pangolin is also made a more specially protected animal like a rhinoceros compared to other animals in the Sixth Schedule [*Cap 20:14]* for it to fall within the ambit of the special penalty provisions of s 128 of the Act [*Cap 20:14]* of the mandatory 9 years imprisonment in the absence of special circumstances?

My view is that the answer would only be in the positive, if the pangolin had been listed by name in s 128 of the Act, [*Cap 20:14]* by the legislature as the rhinoceros or if there is a statutory instrument issued by the Minister specifying or listing the pangolin? This problem in my respectful view would not have arisen if s 128 of the Act [*Cap 20:14*] was couched as follows:-

128 Special penalty for certain offences

Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving –

(a) the unlawful killing or hunting of a rhinoceros, or any other specially protected animal

(b) the unlawful possession of, or trading in, ivory or any trophy of a rhinoceros or of any other specially protected animal shall be liable –

(i) on a first conviction to imprisonment for a period f not less than nine years

(ii) or a second or subsequent conviction to imprisonment for a period not less than eleven years;

Provided ----------"

Further, if the Act was so couched my view is that s 45 of the same Act would be superfluous.

The practical problem is that the state both in the court *a quo* and before this court failed to produce the statutory instrument referred to or covered by s 128 of the Act [*Cap 20:18*] which specifies a pangolin as a more specially protected animal. In fact, the state in this court conceded both in the heads of argument and submissions that such a statutory instrument is non-existent.

It would therefore be a misdirection for the court *a quo* to simply invoke the special penalty provided in s 128 of the Act [*Cap 20:18*] in relations to the pangolin simply because this court has in the past overlooked such an anomaly. The court *a quo* in the circumstances simply took a shot in the dark.

It is therefore my considered view that as the law stands hunting or possession of a pangolin does not warrant the special penalty provided for in s 128 of the Act [*Cap 20:14*] until the Minister specifies the pangolin by or in the statutory instrument. This means therefore that in the absence of such a statutory instrument the sentence of 9 years imprisonment imposed by the court *a quo* is incompetent and should be set aside.

Having made this finding it is therefore not necessary to deal with the question of special circumstances. The appellants should simply have been charged, convicted and sentenced as provided for in s 45(1) as read with s 45(2) of the Act [*Cap 20:18*].

This court is now at large in assessing the appropriate sentence.

It remains a fact that a pangolin is still a specially protected animal as per the Sixth Schedule to the Act [*Cap 20:14*] and is facing extinction. The lacuna in the law which I discussed at length should not distract from that fact. The moral blameworthiness of all the appellants is very high. They were not keen to reveal where and how they got the pangolin. They placed a value of US$5000 on the pangolin. They fully appreciated its value. The

appellants are not unsophisticated illiterate rural people. Their conduct can only be attributed to greed. The 1st appellant Mhango owns a mine at Dakota 50 mine Mushandike. He is not destitute. The 2nd appellant Ngwenyama is gainfully employed as a teacher at Mushandike Secondary School. The 3rd appellant Shava who hails from Beit bridge and is unemployed should have travelled all that far to Buka business centre in pursuit of this illegal enterprise.

The determination shown by the appellants to sell the pangolin is very clear. They all bargained hard. The 3rd appellant even risked being shot upon realising that the long arm of the law had caught up with him. He took a foolish risk instead of simply surrendering like others. The fact that he was shot cannot be a very important mitigatory factor. Above all none of the appellants is contrite. Both the court *a quo* and this court went through a protracted hearing as the appellants did not own up as regards their possession of the pangolin despite such overwhelming evidence.

I am of the firm view that a fine or a wholly suspended prison term or community service is inappropriate in this case. The maximum penalty provided for in s 45(2) of the Act [*Cap 20:14*] is in order in the absence of any special mitigatory factors. All the appellants deserve to be sentenced to a prison terms and there is no objective basis to treat them differently from each other.

In the result it is ordered as follows:-

1. That the appeal by all the appellants in respect of conviction be and is hereby dismissed.
2. That the appeal by all the appellants in respect of sentence be and is hereby partially upheld:
3. That the charge is amended to read as follows:

   "contravening s 45(1)(b) as read with s 45(2) of the Parks and Wildlife Act [*Cap 20:14*]"

   The addition of "as read with s 128 of the Parks and Wildlife Act [*Cap 20:14*] is deleted
4. The sentence imposed by the court a quo is set aside and substituted with the following

   "Each appellant is sentenced to 3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition each appellant does not within that period commit any offence involving unlawful hunting, possession,

selling or disposal of any specially protected animal or the meat or trophy of such a specially protected animal in contravention of the provisions of the Parks and Wildlife Act [*Cap 20:14*] for which each appellant is sentenced to a term of imprisonment without the option of a fine.

Effective term of imprisonment for each appellant is 2 years."

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31 July 2019

MAFUSIRE J

I have had the privilege of reading the judgment of my Brother Mawadze J. It is well written. The facts and the issues are well captured and thoroughly canvassed. I agree entirely with the findings and the conclusion therein. But I cannot resist the temptation to add my own voice.

I will not repeat the facts. They are comprehensively elucidated in my Brother's judgment. I just find it remarkable that in the face of such solid and coherent evidence from the State witnesses, which was so intricately corroborative, the appellants thought it wise to appeal against conviction.

But the grounds of appeal were a long shot. They were a fishing excursion. For example, the posit and argument around the first ground against conviction was that it was wrong for the trial court to have convicted because there was no proof that the animal in question was a pangolin because the court did not itself see it; that no expert had been called to identify it, and that the animal had not been properly disposed of.

But the court *a quo* had competently disposed of such arguments. It did not need to have seen the animal itself in the face of solid testimony from an ecologist, an animal expert in his own right, and his certificate of identification, any more than a court needs to see the corpse in a murder case, in the face of the testimony of a pathologist and his post mortem report.

Furthermore, the police witnesses who first identified the animal as a pangolin were attached to a unit specialising in special minerals and wildlife. So were the other witnesses from the Parks and Wildlife Management Authority ("***Parks and Wildlife***"). Why could they not tell a pangolin if they saw one? At any rate, unless there were other special reasons to

challenge the identification of this particular animal by all those witnesses, which was not the appellants' argument, no expert is ordinarily required to identify a pangolin, any more than one is required to identify a rhinoceros or an elephant or a kudu or any such common game.

The grounds of appeal were multiple but somewhat repetitive. LCT HARMS, then a judge of the Supreme Court of Appeal in South Africa, once wrote an article in the journal, *Advocate*, of December 2001, with a title "***What irritates judges***?" It said in part:

> "Another form of padding is taking too many points. It is indicative of counsel's lack of confidence in the matter. Cases usually turn on one point, occasionally on a few. Too many points tend to obfuscate the good ones. Counsel should be astute enough to make a firm decision of what can and what cannot work."

In the present appeal, counsel for the appellants should have been astute enough to know that the appeal against conviction was doomed. They could have concentrated on the appeal against sentence about which they had made an interesting discovery and had crafted a novel argument.

I agree with the conclusion reached by my Brother Mawadze J that in the absence of a statutory instrument elevating a pangolin to the same level as the rhinoceros, then the special penalty of s 128 of the Parks and Wild Life Act (*Cap 20:14)* does not apply. In terms of the Sixth Schedule to the Act, as read with s 43, a pangolin is one of eight specially protected animals, the hunting, keeping, possession or sale of which is controlled by government, through Parks and Wildlife. So is a rhinoceros. In terms of s 45 of the Act, it is an offence to hunt, keep, possess or sell such an animal without a permit. The maximum penalty for contravening the section is imprisonment of three years or a level eight fine ($500) or both.

Then by s 128 of the Act, Parliament sought to impose a much stiffer penalty for certain offences under the Act. By the use of the *non obstante* clause, "*Notwithstanding any other provision of this Act* …" s 128 ousts any s 45 penalty that may be inconsistent with that set out in s 128 for such offences as are specified. The special penalty in s 128 is a mandatory minimum of nine years imprisonment, which a court can depart from only if there are special circumstances. The specified offences in s 128 attracting this kind of penalty are, in sub-section (1)(*a*), the unlawful **killing or hunting** of rhinoceros, or any other specially protected animal **specified by the Minister** (of Environment and Tourism, or any other to whom the administration of the Act may be assigned), **by statutory instrument** (*my emphasis*).

Section 128(1)(*a*) of the Act did not apply to the appellants for two reasons. The first is that the appellants were not charged with the unlawful **killing or hunting** of any specially protected animal. They were charged with the unlawful **keeping, possession or selling** of a specially protected animal, the pangolin. It was not the State's argument that the keeping, possession or selling of a specially protected animal is the same thing as, or includes, killing or hunting it.

The second reason why s 128(1)(*a*) did not apply to the appellants is as my Brother put it. The State conceded that no statutory instrument by the Minister exists specifying any other specially protected animal for the s 128 penalty. In other words, by s 43 and the Sixth Schedule, Parliament, as the Legislature, specified eight mammals, or twenty four animals (including the python, a reptile, and certain bird species) as specially protected. By s 45 the same Parliament specified that the penalty for hunting, keeping, possessing or selling a specially protected animal is three (3) years imprisonment or a fine of five hundred dollars ($500) or both. But it seems by s 128 the same Parliament sought to over protect the rhinoceros. Perhaps Parliament felt this particular animal was more endangered than the rest. So the penalty for hunting or killing it unlawfully would be nine (9) years. Then Parliament left it to the Minister, through subsidiary legislation, to identify any such other animal as might deserve extra protection as the rhinoceros. Whether by design or dereliction of duty, the Minister, we were told, has not put out such a statutory instrument. So the 9 year penalty of s 128 could not possible apply to the appellants.

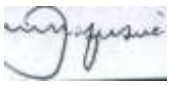
Nor did sub-section (1)(*b*) of s 128 apply to the appellants. The possession or trading referred to therein is not in relation to any live specially protected animal. They refer to the **ivory or trophy** of rhinoceros, or of any other specially protected animal specified by the Minister by statutory instrument. Thus sub-section (1)(*b*) of s 128 of the Act does not apply for the same reason as sub-section (1)(*a*) does not apply. The appellants were not charged with the unlawful possession of ivory or of the trophy of rhinoceros. And there is no statutory instrument to include the pangolin.

In the circumstances, the court *a quo* was wrong to sentence the appellants to the mandatory minimum sentence of nine years imprisonment specified by s 128 of the Act. Therefore, it properly ought to be set aside.

As regards the appropriate penalty, I also consider that the appellants' moral guilt was very high. They knew that what they were doing was very wrong. The deal was being

conducted in the dead of night. The pangolin had been hidden in a toilet under stressful conditions. They were greedy. They drove a hard bargain and were impatient to get paid. When the game was up, the third appellant foolishly tried to flee. At trial they were not contrite. They cobbled an incredible defence that no reasonable court could have given credence to. They persisted with it on appeal. They deserve the maximum penalty under s 45 of the Act. I concur with my Brother Mawadze J.

31ST July 2019



Ndlovu & Hwacha, 1st and 2nd appellants' legal practitioners
Muzenda & Partners, 3rd appellant's legal practitioners]
National Prosecution Authority, respondent's legal practitioners.