

TRAINING MODULE

WILDLIFE AND CRIMINAL LAW

STRENGTHENING LEGAL MECHANISMS TO COMBAT ILLICIT WILDLIFE TRADE

EXERCISE 2

Charging and Sentencing

OBJECTIVES AND INSTRUCTIONS

- **Nature of the Exercise**

- This exercise is ideal for students and legal practitioners, including prosecutors and magistrates or judges.
- Participants are provided with extracts from the Lemthongthai case (educators can also choose a case from their own jurisdiction).
- Participants will be required to critically discuss aspects of the case with respect to charging and sentencing.

- **Purpose of the Exercise**

- To promote awareness of the seriousness of wildlife crimes.
- To enhance an understanding of the connection between wildlife offences and other offences, and to apply domestic legislation in this context.
- To enhance an understanding of factors to be considered in aggravation in wildlife offences.

- **Methodology/ Procedure**

- Educators are encouraged to choose a case from their own jurisdiction to use instead of the case study below.
- The participants should be divided up in smaller working groups. Each group should be allocated a breakaway room to conduct the exercise.
- The whole exercise should not take more than 2 hours in total - an hour for the exercise itself, and an hour for the feedback session.
- Each group will be handed a summary of the Lemthongthai case with certain issues highlighted to be discussed. After each working group has

concluded the exercise, the participants join and each group provides feedback on their discussions and conclusions to the whole group (discussion to be facilitated by one of the facilitators).

- Different working groups may be assigned different parts of the case to analyze, depending on time.
- The extract and instructions to the participants are attached as Annex A.

ANNEX A - PARTICIPANTS

NOTE TO PARTICIPANTS:

- Please read carefully through the summary and extracts from the Lemthongthai case below.
- Discuss the questions and issues raised and come to a conclusion on each.
- Appoint one person in the working group to report back your conclusions to the full group of participants.

Summary and some extracts from *Lemthongthai v S (849/2013) [2014] ZASCA 131 (25 September 2014)*, judgment delivered by Acting Deputy President, MS Nvasa in the South African Supreme Court of Appeal

Summary:

Mr Chumlong Lemthongthai (hereafter referred to as "Lemthongthai" or "the accused"), a 43 year old Thai national, successfully applied in terms of Chapter 7 of the National Environmental Management: Biodiversity Act 10 of 2004 (which requires a permit for the hunting of rhino, as well as for the possession and export of rhino horns) to the Department of Environmental Affairs for 26 permits to shoot and kill rhino, representing to them that professional hunters would hunt and kill the rhino for trophy purposes. A total of 26 rhino were shot and killed. It however emerged that the object of the hunt was not to hunt rhino for trophy purposes but rather to engage unlawfully in trade in rhino horn. Most of their horns were exported.

Lemthongthai was arrested and charged and the following additional facts emerged:

- Lemthongthai was a director of a Thai company with the name Xaysavang Trading Export-Import, Bolikhamxay Provincie Thailand;
- The company deals in the trade of rhino horn and lion bones, teeth and claws;
- Permits were obtained for these rhino horns under the pretence that it was meant for trophy purposes, whilst the purpose was for trade, and the conditions of these permits were not complied with;
- The persons on whose behalf the applications were made were not bona fide hunters and their passports were merely used to fraudulently obtain hunting permits in their names.
- Lemthongthai paid the shipper Air and Sea Trophy Exports in cash with accompanied instructions in order to export the horns;
- Lemthongthai unlawfully and intentionally made improper use of airway bills and custom declaration forms to enable the rhino horn to be exported;

- The name of the consignee and country of destination was changed, contrary to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), in the permits issued in relation to the rhino hunt.

Based on the facts provided above, and based on the legislation applicable to your country:

- What charges under wildlife and customs legislation will you bring against the accused?
- Which elements will need to be proven by the prosecution?
- Is there sufficient evidence to prove the elements of these offences? What additional evidence, if any, would you require?
- Would it be possible to charge the accused with committing the offences of committing organised crime ("racketeering"), fraud and forgery ("document fraud")? What additional evidence, if any, would you require to prove such offences?
- On the above set of facts, what other challenges does the case raise?

Lemtongthai pleaded guilty to 52 counts in terms of Section 80(1)(i) of the Customs and Excise Act, Act 91 of 1964 (making improper use of a licence, permit or other document issued in respect of goods in terms of the Act) and Section 57(1) of the National Environmental Management Biodiversity Act, Act 10 of 2004 (carrying out a restricted activity involving a specimen of a listed threatened or protected species without/contrary to the conditions of a permit issued in terms of the Act)

Note: Keep in mind that there were 26 rhinos involved, and therefore one count for each under the customs legislation, and another for each under the biodiversity legislation.

Discuss the following:

- Why do you think Lemtongthai pled guilty?
- What sentence might be appropriate in this case?
- Are there aggravating factors?
- Are there mitigating factors?

In the Regional Court:

The appellant was convicted by the Regional Magistrate on the strength of his plea of guilty. The following is a version of the sentencing proceedings in the Regional Court as was later summarised by the Supreme Court of Appeal:

The Magistrate took into account the seriousness of the offence and was particularly concerned about the appellant's manipulation of the permit system. He held it against the appellant that he used the identification particulars of other persons in order to procure the permits. The Magistrate considered, in favour of the appellant, the fact that he had been in custody for a period of approximately 16 months. He was concerned about preservation of South Africa's biodiversity. The Magistrate considered the appellant to be 'almost the same as a poacher' because the ultimate aim was to obtain the rhino horn..... The effective sentence was 40 years' imprisonment.....

Discuss the following:

- Do you agree with the sentence? Is 40 years imprisonment appropriate?
- Do you agree with the motivation for the sentence provided by the magistrate?

In the High Court, on appeal:

The accused appealed the sentence to the High Court. The following extract and summary of the appeal proceedings in the High Court as was later rendered by the Supreme Court of Appeal:

*The judge correctly took into consideration that the rhino population since 2010 has been in decline due to illegal rhino poaching. He referred to the decision in *Chu v The State* [2012] ZAGP JHC 204 (13 March 2012) in which the South Gauteng High Court, sitting as a court of appeal, was emphatic in its concern about our diversity heritage and the protection of endangered species such as the rhino.*

The High Court took the view that the present case called out for a sentence that would act as a deterrent, but after having had 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, decided to reduce the sentence. The appeal therefore succeeded and it was ordered that the sentence imposed on the appellant is set aside and the court replaced the effective sentence of 40 years' direct imprisonment

with a total of 30 years direct imprisonment.

In the Supreme Court of Appeal

The accused appealed the sentence to the Supreme Court of Appeal. The following extract and summary of the outcome in the Supreme Court of Appeal:

Before us it was contended on behalf of the State that the offences before us were more serious than if the appellant had been a poacher proper. It was submitted that the manipulation of the permit system was such that it called for a harsh sentence and that a long period of imprisonment was warranted. When it was put to counsel for the State that the sentence imposed (30 years' imprisonment) should not be disproportionate in relation to sentences imposed in respect of other offences universally regarded as odious, her response, understandably, in the glare of public scrutiny, was that she could take her submission on the necessity for a harsh sentence no further.

The witness called on behalf of the State in aggravation of sentence did not dispute, when it was put to her by the appellant's legal representative in cross-examination, that the rhinos that were shot and killed, had been surplus bulls that were destined to be shot by trophy hunters. That concession alone distinguishes this case from those of the conventional type of poacher, namely, a person who kills indiscriminately without any pretence at legality.

On behalf of the appellant it was contended that, in the circumstances of the case, a non-custodial sentence was called for. I disagree. The manipulation of the permit system by the appellant is to be decried...

The Constitution recognises that citizens have the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that, inter alia, promote conservation...

The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general. Allowing the kind of behaviour that resulted in the convictions in the present case to be dealt with too leniently will have the opposite effect to what was intended by the [Biodiversity Act]. A non-custodial sentence will send out the wrong message. Furthermore, illegal activities such as those engaged in by the appellant are fuel to the fire of the illicit international trade in rhino horn.

That being said, the High court wrongly had regard to the existence of a rhino

trading syndicate, of which there was no evidence. ... In addition to these misdirections, the sentence of 30 years' imprisonment is too severe and induces a sense of shock. It is disproportionate when compared to the minimum sentences statutorily prescribed for other serious offences. Thus, we are at large to interfere in the sentence. ... a sentence of imprisonment of six months in respect of each of counts 27 to 52 is an appropriate sentence. This amounts to a total of 13 years' imprisonment. In arriving at this conclusion, I have borne in mind that the appellant was in custody for 16 months awaiting the finalisation of his trial.

In my view, in addition to the sentence of imprisonment referred to in the preceding paragraph, a hefty fine is called for in respect of the contraventions of the [customs legislation]. It is clear that such a fine will impact not only on the appellant, but also on the directing minds behind the offences in question. In this regard the penal provisions under s 80(1) of the [customs legislation], particularly in relation to the imposition of a fine, fall to be considered alongside the facts of the case. In the latter regard, consideration should be given to the tender made in the trial court on behalf of the appellant, of a fine of R1 million, in lieu of a sentence of imprisonment...

The appeal was therefore upheld to the extent reflected in a substituted order that resulted in an effective sentence of a fine of R1 million plus a period of imprisonment of thirteen years, and failing payment of the fine an effective period of imprisonment of 18 years.

Consider the following:

- Do you agree with the decision of the High Court? Was 30 years disproportionate in relation to other offences?
- Are there any arguments that could be made that this crime warranted a stronger penalty than imposed for other “odious” offences?
- What is your opinion on the sentence imposed by the Supreme Court of Appeal? Does it matter that the rhinos were surplus bulls destined to be shot by trophy hunters?
- Would it make a difference if the accused hired a group of poachers to illegally shoot the rhinos in a protected area under the cover of darkness, deliver them to him, and then falsified documentation to export the horns? In that case, what do you think would have been an appropriate sentence?