NOTES FROM THE AFRICAN RHINO SPECIALIST GROUP

The Crown vs. Peter McIntyre and five others

with particular reference to the species argument and the importance of preventive rather than remedial legislation

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Background

On 28 April 2001, seven men were arrested in a trap while trafficking in two white rhino horns at Lavumisa and Ndzevane in the Lubombo region of Swaziland. The seven comprised a Mozambican, a South African and five Swazi nationals. One of the Swazis was made an accomplice witness.

Notable among the arrests was Peter McIntyre, a South African businessman who had served as a policeman for 15 years and was an experienced Bantu administration commissioner (a type of magistrate). McIntyre owns properties on both sides of the Lavumisa border post between Swaziland and the Republic of South Africa (RSA), including houses, a hotel, a bottle store, a garage and a fast food outlet. McIntyre was well known to the border post officials as he regularly travelled between Swaziland and South Africa.

Significantly, McIntyre was represented in court by defence lawyer Louis Benn, who himself had been arrested in South Africa for illegal possession of a rhino horn by the Endangered Species Protection Unit of the South African police and had paid 5000 South African rand (approximately USD 500) to WWF in an out-of-court plea bargain with the attorney general.

All six accused pleaded not guilty to the charges of 1) possession of two white rhino horns and 2) trafficking in two white rhino horns. As rhino horns are categorized trophies of Specially Protected Game, they were charged under Sections 8(1) and 8(3) of the Game Act, which prescribes minimum mandatory imprisonment terms of five years for possession and seven years for trafficking, without the option of a fine. Furthermore, Section 8 of the Game Act, together with rape, murder, armed robbery, vehicle theft and certain other serious crimes, falls under the Non-Bailable Offences Order, and the accused were thus refused bail until their trial was completed. Additionally, the court does not have the discretion to suspend any part of the sentence.

The case was heard by the chief justice in the High Court of Swaziland. Four Big Game Parks rangers, four police officers and three expert witnesses from RSA gave evidence.

Species argument

The defence tried a variety of arguments, the most significant—and likely to be damaging to the prosecution—being the species argument.

Defence counsel initially argued that as the Game Act defined 'animal' as 'any vertebrate animal indigenous to Swaziland' the possibility existed that the horns before court could have originated from a white rhino beyond the boundaries of Swaziland; that the individual animal (specimen) itself would then not have been indigenous to Swaziland; and therefore the accused had no case to answer. This was a ludicrous argument and it was soon modified when defence learned of the existence of the northern white rhino (*C. s. cottoni*). They then argued that the possibility existed that the horns before the court were from a

northern white rhino and as this subspecies existed only in the Democratic Republic of Congo, it was not indigenous to Swaziland, and therefore if this possibility reasonably existed, the accused could not be found guilty on the grounds of reasonable doubt.

The Crown's response was formed around the following points:

The Game Act is specific in that it lists under *Specially Protected Game* in the First Schedule:

- rhinoceros—all species
- white rhinoceros—*Ceratotherium simum*
- black rhinoceros—*Diceros bicornis*

as well as other animals including elephant and lion.

In listing 'rhinoceros—all species' the intention of the legislation is abundantly clear, especially in view of the fact that this was introduced as an amendment to the Game Act in 1993, after a defence lawyer in a previous rhino horn case had 'invented' a 'brown rhino' and had thus created 'reasonable doubt' that the horn before the court was that of a white rhino. In that case, the accused (a bishop of the Zionist Church of Swaziland, Reverend Zitha) was acquitted, in spite of the Crown arguing that no such thing as a brown rhino existed.

In addition to the 'rhinoceros—all species' position, the act lists rhinoceros by genus and species. Rhino subspecies are not listed. The Crown thus argued that protection was offered to *C. simum* as a species, which automatically covered subspecies *C. s. simum* and *C. s. cottoni*, and thus the defence argument was flawed. Contention around this argument remained around the use of the word 'indigenous'.

Dr Richard Emslie, the scientific officer of IUCN SSC's African Rhino Specialist Group, gave evidence on this issue as an expert witness. He confirmed the Crown's arguments and went further to point out that international conventions such as CITES Resolution Conf. 9.14 (revised) deal with rhino protection at the taxon level, not at the genus or species level. He explained that reducing illegal trade in rhino horn was a problem of global concern as spelt out in the CITES resolution.

Dr Emslie used Bayesian statistics to establish that the probability of horns recovered in Swaziland being those of a northern white rhino was so small that the horns were almost certainly those of a southern white rhino. Dr Emslie also mentioned that trade experts Dr Esmond Bradley Martin and TRAFFIC's Simon Milledge had indicated to him that the known trade routes for northern white rhino horn did not include Swaziland. This evidence served to establish the overwhelming probability of the horns before court being those of a southern white rhino, in the event that the species argument was upheld by the chief justice in favour of the defence counsel.

The weight of evidence given by the Crown witnesses was consistent and impressive against all accused persons. Before the close of the Crown's case, the chief justice made a ruling that the defence's species argument was flawed in view of the fact that the Schedule of the Game Act listed 'rhinoceros—all species' and thus the issue of subspecies was irrelevant.

At the close of the Crown's case, three of the accused were acquitted on the grounds that the Crown had not proved its case against them beyond reasonable doubt. The remaining three accused were put to their defence and gave versions of the events, which were flawed. During submissions, the defence appealed to the judge to revisit the species argument and reconsider the ruling that had been made earlier in the case.

JudgementEffective legislation

This case has highlighted the most important aspect of no-nonsense legislation that is designed to be preventive rather than curative. As long as it is implemented as intended, it will serve to deter any potential poaching and trafficking. It is better to make an example of a few people, thereby creating awareness and preventing the extinction of a species, than to have a lot of people in and out of jail and not achieve the objective of stopping a species from becoming extinct.

The significance of the chief justice's ruling on the species argument is notable in that had the defence's argument been upheld, then this case heard by the chief justice of Swaziland would have served as an authority in all countries practising similar law and would in most cases have meant that those countries would have had to amend their laws preemptively in order to avoid manipulation of technicalities in favour of the quest for the truth and what is right. Invariably most countries would have been slow to amend their laws—if they had even become aware of such a precedent—and a large, serious loophole would have existed in the efforts for effective control of rhino poaching and trafficking.

Acknowledgements

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Effective legislation

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Black rhino crisis in Zimbabwe

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Zimbabwe's white rhino (*Ceratotherium simum*) population was gradually re-established through translocations from South Africa after this species had been eradicated in Zimbabwe during the colonial era. Translocations included a number of white rhinos that were purchased and imported by wildlife ranchers at considerable expense to themselves. White rhinos have been under sound management in South Africa and have been steadily increasing to a present continental total of about 10,500, while the continental total of black rhinos (*Diceros bicornis*) in Africa has declined drastically, bottoming out at only 2450 by the early 1990s. Continentally, black rhino numbers have increased slightly since 1995, reaching 2700 by 1999. The Zimbabwean focus of international conservation concern, therefore, has been the country's black rhino population. During the early 1980s, the Zambezi Valley within Zimbabwe held the largest remaining black rhino population in Africa (over 1000), but cross-border poaching by Zambian poachers began to cut down this population drastically in the late 1980s, and an urgent conservation strategy was implemented, with considerable international interest and support.

This national strategy for black rhino conservation was based upon the following two main rhino breeding initiatives.

- Intensive Protection Zones (IPZs) were set up in stateland areas, to concentrate available government anti-poaching resources on the few relatively high-density rhino populations that survived the waves of poaching in the late 1980s and early 1990s. These four IPZs received significant donor