DENNY MTETWA

WITNESS SAIZE

ISAAC MLAMBO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J and WAMAMBO J
MASVINGO, 17 JULY, 2019 AND 13 MAY 2020

Criminal Appeal

L. Mhungu with him *A. Nkumbula*, for the appellants
T. Chikwati for the respondent

WAMAMBO J: The appellants appeared before a Magistrate sitting at Chipinge facing a charge of contravening section 82 of the Parks and Wildlife General Regulations Statutory Instrument 362 of 1990 as read with section 128(1)(b) of the Parks and Wildlife Act [*Chapter 20:14*]. The appellants were sentenced to the mandatory 9 year imprisonment term each. They now appeal against both conviction and sentence.

The grounds of appeal are raised against conviction are: -

"1. *The appellants aver that the trial Magistrate erred and misdirected himself in convicting the appellants o the charge when infact there was no evidence pointing to their guilty. (sic)*

2. The trial Magistrate misdirected himself in failing to consider that the appellants were infact not in possession of the ivory and as such did not deal in the said ivory. There was no evidence showing that the appellant dealt in ivory.

3. *The court a quo misdirected itself in relying on the evidence of "trap" witnesses who had a clear motive to secure the conviction of the appellants at the expense of the truth. Thus the court wrongly accepted unreliable evidence from "trap" witnesses thereby convicting the appellants who were clearly innocent*."

The sole ground against sentence reads as follows:-

"*4. The appellants aver that the Magistrate erred and misdirected himself in holding that there were no special circumstances when in fact they existed. Thus due to the existence of special circumstances, the court a quo out to have sentenced the appellants to a fine or even community service regard being had to the factors in mitigation when considered against the factors in aggravation and the circumstances of the case".*

The appellants pray for the sentence of 9 years imprisonment to be substituted with an option of a fine or alternatively an order to perform community service.

The respondent firmly opposes the application.

The State case shred to its broken bones is as follows:-

On 12 October, 2018 the complainant Jeremiah Mhlanga, an investigator employed by the Ministry of Environment and Tourism received information about five persons selling elephant tusks and soliciting for buyers. Jeremiah contacted the third accused who confirmed that they had two elephant tusks for sale. The next day Jeremiah contacted the third appellant again. It was agreed that a meeting would take place at Charuma Primary School, Chief Mutema, Chipinge. Jeremiah along with his team proceeded to Charuma Primary School.

The recovered 2 elephant tusks weighed a total of 13.5 kilograms.

In oral submissions *Mr Mhungu*, for the appellant stated that by standing by his heads of argument. He then proceeded to attack the findings by the trial court that the appellants dealt in ivory. *Mr Mhungu* was of the view that the State case contains improbabilities to the extent that the trial Court must have misdirected itself for believing the State's version. A lot was made by *Mr Mhungu* of what he termed entrapment. He also developed an argument that appellants were never in possession of the ivory.

On sentence it was averred for the appellants that the trial Court made findings of fact that appellants were not in possession of the ivory and that there was entrapment. Entrapment is a special circumstance according to the case of *State* v *Kam* 1983 ZLR 302, so it was argued.

On the State side *Mr Chikwati* was of the view that most of the facts are not in dispute. He averred that the definition of sale includes expose for sale. He averred that the appellants made arrangements for the sale of the ivory and led officials to the ivory tusks.

On sentence the respondent was of the view that there were no special circumstances. The State averred that according to Section 260 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] entrapment is not a defence but is relevant in mitigation. *Mr Chikwati* when quizzed by the Court on whether he agreed that there was entrapment argued that the manner in which 2nd and 3rd appellants were overzealous to offer other items like the lion's head reflects that it was not entrapment.

Mr Chikwati proceeded to submit that the appellants not only acted in common purpose but are the ones who made arrangements with the buyers of the ivory. Why else would the appellants labour to link the buyers with the ivory, he retorted. Perhaps a close examination of the provisions of the Parks and Wildlife Act [*Chapter 20:14*] and the related Regulations may be of assistance.

Section 82 of the Parks and Wild Life (General) Regulations S.I. 362 of 1990 reads as follows:-

> *82(1) Subject to section 85 no person shall acquire, have in his possession, sell or transfer any raw ivory that has not been registered unless the raw ivory –*
>
> *(a) was lawfully taken from an animal that was lawfully hunted in terms of the Act, or*
> *(b) was lawfully taken from an animal that died on any land for which that person is the appropriate authority or*
> *(c) has been lawfully imported into Zimbabwe and the period within which that person is required to produce the raw ivory for registration in terms of section 77 has not elapsed.*
>
> *(2) Subject to subsection (5) of section 80 and to section 85 no person shall acquire have in his possession, sell or transfer any piece of manufactured ivory which exceeds two hundred grams in mass unless such ivory is marked ivory.*

(3) In any prosecution arising out of a contravention of subsection (1) the burden of proving –

(a) any fact referred to in paragraph (a)(b) or (c) of that subsection and

(b) that the period referred to in that subsection has not elapsed shall rest on the accused.

Section 128 of the Parks and Wildlife Act [*Chapter 20:14*] reads as follows:-

"128 Special penalty for certain offences
(1) Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving:

(a) ----------

(b) the unlawful possession of or trading in ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by Statutory instrument shall be liable: -

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

(ii) ----------
Provided that where on conviction the convicted person satisfies 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 or to both such fine and such imprisonment
(`2) ……."

When regard is had to the grounds of appeal against conviction two grounds remain. The first ground of appeal is a general and broad ground that is not clear and specific. To allege that there was no evidence pointing to appellants guilt is clearly not a ground of appeal. The remaining grounds are basically attacking the findings by the trial Magistrate that the appellants possessed the ivory while the last ground attacks the "trap" evidence. To better understand the evidence relating to the possession or otherwise of the ivory it is instructive to consider the evidence in more detail. The star state witness was Jeremiah Mhlanga. The other state witness corroborated Jeremiah's evidence in all material respects. Where there were disagreements they did not go to the material aspects of the case. Jeremiah's evidence was not seriously challenged in cross examination. Jeremiah Mhlanga testified that after receiving a tip off about people selling ivory he

met 2nd and 3rd appellants. The 2 appellants introduced themselves "with joy"; and spoke of the "item" being available. The two were transported to Heleni's bar after promising to meet the following morning. Second appellant volunteered information that he and others also had a lion's head. Contact between Jeremiah Mhlanga and the 2 appellants were live resulting in the appellants coming over to Jeremiah and his team. The appellants were the ones who directed the witnesses through a dust road from Bichenough bridge to Mutema and then to Charuma Primary School.

What transpired after the car was parked is that the three appellants left and took some time before they returned. Upon their return they were now five in numbers. The 3 appellants were walking behind two men one of whom was carrying a sack. The three appellants boarded the car where the purported buyer was. The sack was loaded in the car boot. The sack contained two ivory tusks. The trial court found that technically there was a trap. Nothing turns on this finding.

The evidence reveals that the appellants volunteered information to the state witnesses. The appellants led the way, located the ivory and returned in the company of two others. One of the two accomplices was carrying the sack containing the ivory.

We are convinced that the appellants not only knew where to find the ivory but actually proceeded to bring the ivory *albeit* through their accomplices.

It did not end there. Negotiations supposed to take place for the sale of ivory attracted the appellants into the buyer's car. The bag was also placed in the car.

The appellants were clearly not trapped into committing the offence. They already were in possession of the elephant tusks before the authorities got wind of such information. The appellants volunteered information, directions and led the authorities to the tusks in question.

The Trial Court found that the appellant dealt in ivory. The case of *S v Solomon Mtisi HMA 28-H* was cited as authority.

Possession has been often described as a nebulous concept. In this case although not having what has been described in argument as direct physical possession the appellants not only led the authorities to the place where the tusks were. They disappeared and returned in the company of the two other persons with one of them carrying the tusks.

It is not a technical issue of who was physically carrying the tusk. Surely five men would not necessarily carry two tusks if one man could. The appellants did not only have knowledge of

the presence of tusks but returned with them *albet* in the company of their accomplices. The evidence established that they were keenly aware that there were tusks at Charuma area and that they were for sale.

The tusks were being bought to the physical attention of the buyers for them to buy. From the start the negotiations between the state witnesses and, the appellants revolved around buying the tusks.

The Magistrate found the appellants guilty of the offence charged. The offence as preferred by the State is for either possession or dealing in ivory. Having found that the appellants dealt in the ivory in question the conviction is thus proper on the circumstances. When it comes to the sentence the ground of appeal is already not clear and specific as is required by the Rules.

To aver that the trial Court should have found special circumstances without attacking or alleging the said special circumstances is very broad and not specific. To further aver that a sentence of a fine or community service was the proper sentence is not sufficient.

The penalty clause clearly provides that where there are no special circumstances a fine four times the value of the trophy or imprisonment of 5 years imprisonment or both is the proper sentence. There clearly is no room for community service.

To aver in heads of argument and in oral argument that entrapment is a special circumstance is not entirely correct.

The matter of *S v Kamtande* 1983(1) ZLR 302 was cited as authority for this proposition.

The facts in the Kamtande matter (supra) are captured in the headnote as follows:

> "*In providing in Act 1 of 1982 the amendment to the Precious Stones Trade Act, 1978 which laid down minimum prison sentences for certain offences under the Act unless the convicted person can show that there "are special reasons" why such a sentence should not be imposed, the legislature must have been aware that most convictions for the offences of unlawfully dealing in or possessing precious stones result from traps set by the Police. This means that entrapment cannot per se be regarded as a " special reason " for a sentence less severe than the specified minimum, but in certain cases it can be so regarded.*
> *The Courts have long distinguished between trapping which is acceptable and trapping which is not and it can be assumed that this is a recognised basis for distinction as far as the legislature is concerned. For example, if the trapping was such that it promoted the commission of the offence by someone who would not otherwise have committed it, that may be regarded as a special reason.*
> *Whether in any particular case it is to be regarded as a special reason is left by the lawmaker to the opinion of the trial court."*

Clearly the Kamtande case (supra) does not say if an offender is trapped that entrapment automatically avails the offender as a special reason or special circumstance. In fact, it is authority for the proposition that there are special cases such as under Precious Stones Trade Act, 1978 wherein police entrapments is expected because of the nature of the offence.

The learned Trial Magistrate when dealing with the issue of special circumstances had this to say at page 22 of the record.

> "*The question now, is it that the accused persons in case were trapped into committing the offonce as they allege. I do not agree to this motion for the offonce had already been committed whereby at Chauma Village there were elephant tusks in the possession of Lovemore and Clemence for which the accused persons dealt in by soliciting and scouring for buyers. This explains why the three of them were present at Charuma Village on the day and time of the commission of the offence. The trap was therefore for purposes of facilitating their arrest for an offence they all had already and were committing……*

We agree with these findings in the circumstances of this case. We thus find that there are no special circumstances in this case. It follows that the mandatory minimum sentence is the correct sentence.

We therefore uphold both the conviction and sentence and order as follows:

The appeal by the appellants against conviction and sentence is hereby dismissed.

MAWADZE J AGREES……...

Mhunga and Associates, appellants legal practitioner

National Prosecuting authority, respondent's legal practitioner's