THABANI ZONDO

Versus

MRS R. DUBE N.O.

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO3 APRIL & 7 AUGUST 2014

G. Nyoni for applicant

Court Application for Review

KAMOCHA J: This matter was enrolled on the unopposed roll. The applicant was seeking for an order in the following terms in his amended draft order:-

"It is ordered that:-

(1) The proceedings before 1st respondent and in respect of count 1 thereof, sitting at Hwange Magistrates' Court on 25 September 2013 and under case number CRB W 511/13, wherein applicant was convicted and sentenced to 16 years imprisonment of which 1 year was suspended, be and are hereby set aside in their entirety.
(2) The applicant will be tried afresh in respect of count 1 thereof, before the same magistrate."

The applicant's complaints relate to the two alleged irregularities. The first one related to the provisions of the particular statute he was alleged to have contravened. The charge read as follows:-

"Charged with contravening section 82 (1) of the Statutory Instrument 362/1999 as read with section 128 (b) of the Parks and Wild Life Act [Chapter 20:4] "Unlawful Possession of elephant tusks without a Permit or Licence."

In that on the date unknown to the prosecutor but during the period between September 2012 to February 2013 and at Phelandaba Line, Tsholotsho, Thabani Zondo unlawfully possessed eight elephant tusks without a permit or licence, circumstances contrary (*sic*) to the provisions of the Act.

The applicant correctly pointed out that there was no section 128 (b) in the Parks and Wild Life Act [Chapter 20:14]. Further the applicant was wrongly charged with contravening

section 82 (1) of Statutory Instrument 362/1999 which in fact pertains to Manpower Planning and Development (Printing Packaging and Newspaper Industry). The correct charge should have read as follows:-

Charged with contravening section 82 (1) of the Parks and Wild Life (General) Regulations SI 362 of 1990 as read with section 128 (1) (b) of the Parks and Wild Life Act [Chapter 20:14] "Unlawful Possession of elephant tusks without a Permit or Licence".

Apart from the wrong citation of the provisions of Act contravened the body of the indictment adequately informed the applicant that between the months of September 2012 and at Phelandaba Line in Tsholotsho he possessed 8 elephant tusks when he was not a holder of a licence or permit.

The applicant clearly understood the charge that he was facing and pleaded guilty to it. He confirmed to the court when it was canvassing the essential elements with him that he was found in possession of 8 elephant tusks. When asked where he got the 8 elephant tusks from his answer was: "We removed them from dead elephants"

The accused and one Mphilisi Vundla went into Hwange National Park and put cyanide into a watering hole where elephants and other wild animals drink water. As a result, 8 elephants drank the water and died. The 8 tusks the accused and is friend possessed were from some of those elephants. These facts were common cause.

When canvassing the essential elements it was wrongly stated that the accused had no authority or permission from the Environmental and Management Authority. The appropriate authority should have been Parks and Wild Life. But no prejudice would be occasioned by naming a wrong authority. There will be no prejudice to be suffered by the accused in any way.

The accused understood and appreciated that he did wrongfully and unlawfully poison 8 elephants and removed some tusks from some of the elephants. The naming of a wrong authority does not warrant the setting aside of the proceedings in the circumstances.

The applicant's legal practitioner Mr Nyoni who deposed to the founding affidavit attempted to raise a distinction without a difference on the issue of "unlawfully possessed" and "found in possession without a permit or authority." The submission is clearly untenable and does not need any serious consideration.

Similarly the applicant's complaint about the explanation given to the accused by the trial court in respect of special reasons is without any basis. One has to look and compare what the accused said in mitigation and what he put forward as special circumstances.

In mitigation he said he was 24 years married with one child and was not employed. He was in the business of thatching people's huts in the rural areas and charges $30 per job. He had no savings and assets.

When addressing the court on special circumstances after being told that those are circumstances out of the ordinary and were beyond mitigation he had this to say.

He said although he was married he had not yet paid lobola for his wife. This is a serious

matter when regard is had to the fact that he has a child with the wife. The baby is a pre-mature. Because he has not paid any lobola, the wife's parents have threatened to take him to court to get their money for lobola. Another serious matter he raised was that his own parents are now on separation. As if that was not enough, his mother is of ill-health and depends on medication. His family is poor and has no livestock of any description. There is serious starvation at his home. He does piece jobs to support his family and siblings.

Unfortunately what he gave to the court does not amount to special circumstances. These points only amount to mitigation factors. It is, however, not correct to suggest that the explanation was inadequate when accused appears to have understood the explanation and attempted to differentiate between mitigation and special circumstances.

It is difficult to understand what the legal practitioner meant by "the necessary circumstances". No conceivable special circumstance could have been found to exist in this matter. The accused and a colleague of his put cynide in water at points where elephants and other game used to drink. That was a very serious matter which was aggravate by the death of eight elephants which drank water from these points. The accused removed eight tusks from some of those elephants. This is one of the bad cases of this nature. The submission that there could have been special circumstances in this case, is therefore without any merit.

The applicant complained about the sentence of 16 years imprisonment, of which 1 year imprisonment was suspended on condition that the applicant paid compensation to the appropriate authority in the sum of US$200 000,00 imposed by the court.

The applicant's submission that the sentence was not proper has merit. He has a point there, because the sentence is in fact incompetent. The permissible sentence in terms of section 128 (1) (b) for a person convicted by a provincial magistrate of an offence under the Act of unlawful possession of ivory is a term of imprisonment of not less than 9 years for a first conviction. The provincial magistrate derives his or her authority from section 100 (b) of the Act which confers special jurisdiction to Magistrates' Courts. Section 100 (b) provides that:-

"100. Notwithstanding anything to the contrary in the Magistrates' Court Act [Chapter 7:10], for an offence in terms of this Act –

(a) …
(b) A provincial magistrate or a senior magistrate shall have jurisdiction to impose a fine of level twelve or imprisonment for a period of ten years or both such fine and imprisonment.
(c) …

Provided that nothing in paragraph (b) or (c) shall be construed as authorizing a court to impose a punishment for an offence which is greater than the maximum punishment that may be imposed for that offence in terms of this Act or any other law of land."

The above provisions empower a provincial magistrate and senior magistrate to impose a sentence of 10 years for as long as the ten years imprisonment is not in excess of the maximum punishment provided for that offence by the Parks and Wild Life Act [Chapter 20:14].

Section 128 (1) (b) of the Act stipulates a sentence of not less than 9 years for a first conviction of unlawful possession of ivory.

In casu, the maximum sentence of not less than 9 years the court a quo could have imposed was 10 years imprisonment as laid down in section 100 (b) supra. It had no authority to impose a sentence of 16 years imprisonment. That sentence can, therefore, not be allowed to stand.

This court shall exercise its powers in terms of section 29 (2) (b) (ii) of the High Court Act [Chapter 7:06] and reduce the sentence imposed by the court a quo to 10 years imprisonment.

Similarly in terms of the provisions of section 29 (2) (b) (iii) of the said Act this court shall correct the indictment to read:-

> "Charged with contravening section 128 (1) (b) of the parks and Wild Life (General) Regulations SI 362 of 1990 as read with section 128 (1) (b) of the Parks and Wild Life Act [Chapter 20:14].

The trial court is directed to recall the accused and inform him of the amendment to the indictment and the reduced sentence.

Takuva J …….. I agree

Messrs Moyo & Nyoni, appellant's legal practitioners