MTHABISI SIVAKO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO & DUBE-BABDA JJ
BULAWAYO, 27 SEPTEMBER 2021

Criminal appeal

Z. Ncube, for the appellant
B. Gundani, for the respondent

DUBE-BANDA J: At the conclusion of submission by counsel, in an *ex tempore* judgment we allowed the appeal and set aside the sentence, and indicated that the full reasons for judgment would follow. The following are the full reasons for judgment.

This is an appeal against the whole judgment of the Magistrate's Court, sitting at Beitbridge Court. The appellant was charged in the court *a quo* together with two accomplices with the crime of contravening section 45(1) as read with section 128(b) of the Parks and Wildlife Act [Chapter 20:14] (Act), as amended in section 11 of the General Laws Amendment Act No. 5 of 11- "Found in possession of or keeping a specially protected animal (one pangolin) without a permit." It being alleged that on the 5th September 2018, and along an unnamed tarred road opposite stand number 5720 Luveve 5, Bulawayo, appellant and two accomplices were found in possession of or keeping a live Pangolin, a specially protected animal without a permit.

The case for the prosecution was that on the on the 5th September 2018, detectives from Minerals and Boarder Control Unit Crack Team who were on a joint operation with members from the Department of Parks and Wildlife received a tip-off to the effect that the appellant and his two accomplices were in possession of a pangolin. The police searched the vehicle boot and recovered a pangolin inside a box.

The appellant and his two accomplices pleaded not guilty. At the conclusion of the trial appellant and one accomplice were convicted as charged. One of the accomplices in the trial was found not guilty and acquitted. The trial court failed to find special circumstances and sentenced appellant to a mandatory term of 9 years imprisonment. Aggrieved by the conviction,

and sentence appellant noted an appeal to this court. There are five grounds of appeal against conviction and three grounds of appeal against sentence. These are:

Ad conviction.

1. The court *a quo erred* and misdirected itself at law in finding in general that the State had proved its case beyond a reasonable doubt whereas it had dismally failed to do so.
2. The court *a quo* fundamentally erred and misdirected itself at law in admitting and placing heavy reliance on extra-curial statements allegedly made by appellant without satisfying the preliminary procedural requirements for admissibility of such evidence.
3. The court *a quo* further erred and misdirected itself at law in placing the appellant on his defence at the close of State whereas there was no evidence warranting it to do so, and based on the defence outlines of his co-accused on which it was not entitled at law to rely.
4. The court *a quo erred* and misdirected itself both at law and on fact in dismissing the appellant's defence out of hand without applying the requisite test prescribed by law, and was gratuitously receptive to the State case and his co-accused's story whilst being unduly intolerant to the appellant's story as to be hostile to it.
5. By so placing the appellant and his co-accused on their defence in order for them to implicate one another and bolster a State case which had no feet to stand on the court a quo thus violated the appellant's inviolable right to a fair trial and his right to the protection of the law as constitutionally guaranteed.

Ad sentence

1. The court *a quo* fundamentally erred and misdirected itself at law by imposing an incompetent minimum mandatory sentence of 9 years imprisonment for possession of a pangolin whereas there is no such sanction provided for in terms of the law. It imposed a sentence that is ultra vires its powers or legislative authority granted it by law.
2. The court *a quo* further fundamentally erred and misdirected itself at law by imposing the minimum mandatory sentence of 9 years imprisonment, even if it

were competent to do so, without conducting an inquiry whatsoever as to the existence or otherwise of special circumstances as required by the law.

3. The court *a quo* thus committed a gross irregularity in that regard and passed an incompetent sentence.

The court *a quo* convicted the appellant on the basis that the animal was confirmed to be a pangolin by a Government Doctor, i.e. Dr. Mkwananzi. It accepted the evidence of Maimbo and accused two in the trial that appellant was in possession of a pangolin as anticipated in the provisions of the Parks and Wildlife Act.

Appellant was charged with the crime of being found in possession of or keeping a specially protected animal a pangolin without a permit. The issue the State had to prove was the identity of the animal, that it was a pangolin. The charge is anchored on an animal called a pangolin. The State adduced evidence from one Shingirai Givemore Maimbo**.** This witness testified that he was a detective Sergeant in the Zimbabwe Republic Police (ZRP). In the company of others he opened the box that was in the boot of the car in which appellant was a passenger. He recovered a pangolin in a box. Appellant was asked to produce a permit or licence issued in terms of the Act, he failed and thereafter he was arrested. The animal was taken to the Department of Parks and Wildlife and weighed. It weighed 5kg and its value was $5000.00. It was taken to a Government doctor who confirmed the animal was indeed a pangolin. After the re-examination of this witness the State closed its case.

The record of proceedings show that no official from the Department of Parks and Wildlife testified about the weight and the value of the animal. The record of proceedings show that the said Dr. Mkwananzi, the Government doctor who is alleged to have confirmed the identity of the animal as a pangolin neither testified orally nor deposed to an affidavit in terms section 278(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. However, there is a copy of a letter on record addressed to "To whom it may concern" allegedly from Dr. Mkwananzi, a District Veterinary Officer confirming that an animal brought to him by the police was indeed a pangolin. Again, there is a copy of a letter from one Stanley Nyamayedenga, employed by the Parks and Wildlife Management Authority confirming that he weighed a live pangolin and ascertained its value. He says he did so in the presence of the police and the appellant.

At the close of State case only one witness, Shingirai Givemore Maimbo had adduced evidence before court. At the close of State case there was only one real exhibit that had been tendered in evidence, i. e. Lebena Cardboard Box: Exhibit 1. The documents from Dr. Mkwananzi and Stanley Nyamayedenga were not tendered as exhibits before court. These documents do not even have exhibit numbers. Be that as it may these two documents are not affidavits in terms of section 278(1) of the Criminal Procedure and Evidence Act [Chapter 9:07], as they would have been required to be admitted by consent or through the testimony of the respective authors. No such thing happened. It is a mystery how these documents manoeuvred their way into the record of proceedings. However, I take these documents are not part of the record of proceedings.

Thus the fact that the animal was not physically tendered as an exhibit does not taint the trial court's finding that an animal was found in the boot of the vehicle. The issue is the identity of the animal. Its identity had to be proved by expert evidence. The oral evidence of an expert, or affidavit in terms of section 278(1) of the Criminal Procedure and Evidence Act or a certificate of identification wold have proved that the animal was indeed a pangolin. The court *a quo* misdirected itself in finding, without evidence that what was found in the boot of a vehicle and what the appellant was arrested for was a pangolin. Reliance of the document written by Dr. Mkwananzi confirming that the animal brought by the police to him was a pangolin was a misdirection, as this document was not properly before court. Again, there is no evidence that the animal presented to Dr. Mkwananzi was the same animal found in the boot of the vehicle and which appellant was arrested for.

Having said this, I have considered the import first of section 97(6) of the Parks and Wildlife Act [*Chapter 26:14*] which says:

> Where any animal, fish or plant is found upon or in any vehicle, boat or aircraft or at any camping place, every person who is upon or in any way associated with such vehicle, boat or aircraft or who is at or in any way associated with such camping place, shall be presumed, unless the contrary is proved, to be in possession of such animal, fish or plant.

I have also considered the import of section 97(13) of the Parks and Wildlife Act [*Chapter 26:14*] which says:

> Whenever in any prosecution in respect of an offence in terms of this Act it is alleged in any indictment or charge that the offence was committed in connection with or in respect any species of animal, fish or plant stated in such indictment or charge, it shall be presumed that the offence was committed in connection with or in respect of such species of animal, fish or plant unless the contrary is proved.

I take the view that for the presumption or reverse *onus* contained in section 97(6) of the Act to become active or operational, there is first an *onus* on the prosecution to prove the identity of the animal, in this case that it is a pangolin. Once that is proved, possession is presumed unless the accused proves the contrary. Again, my view is that section 97(13) kicks in when the prosecution proves the identity of the animal, thereafter it shall be presumed that the accused was indeed in possession of the animal, that his possession was unlawful and that he did not have a permit. The *onus* will shift to him to show that he was not in possession, or if he was, that he has a permit or that such possession was lawful. The identity of the animal would never be presumed. That is what the prosecution must prove to bring the accused within the general framework of the Parks and Wildlife Act before any *onus* can be thrust upon him to prove his defence. See: *S v Kuruneri* HH 59/2007, *S v Broughton's Jewellers (Pvt) Ltd* 1971(2) RLR 276(A) at 279 E-G, 1971(4) SA 394 (RA) at 396 E-F; *S v Marwane* 1982(3) SA 717(A) at 755 H-756 C. Thus there is no duty that falls on the accused to discharge a reverse *onus* unless the prosecution has proved the identity of the animal, in this case that what was found in the boot of the vehicle and what the appellant was arrested for was a pangolin. It is on this point, the absence of expert evidence to show that the animal found in the boot of the vehicle was a pangolin that the appeal against conviction must succeed.

I am constrained though by the facts of this matter to note in passing that the court *a quo* permitted counsel for the 2nd accused to cross-examine the appellant on his previous convictions. In this jurisdiction no cross-examination on previous convictions is admissible unless the accused claimed to be of good character, attacked the character of a witness in the trial or the proof that he has committed or has been convicted of such offence is admissible evidence to show that he is guilty of the offence he is charged.[1] This in my view is an

[1] Section 260 as read with section 290 of the Criminal Procedure and Evidence Act [Chapter 9:07].

irregularity which militates against any perception of fair play, and was prejudicial to the appellant in the sense that it negatively affected his right to a fair trial.

The State did not support the conviction. The concession was properly taken. There is no evidence that what was found in the boot of the vehicle and what appellant was arrested for was a pangolin. It is for these reasons that we allowed the appeal at the conclusion of argument and ordered the conviction and sentence to be set aside.

Moyo J …….. I agree

Ncube and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners