HENRY REZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 25 & 29 October 2021

Criminal Appeal

S Chikotora, for the applicant
R Chikosha, for the respondent

CHIKOWERO J: This is an appeal against the judgment of the magistrates court convicting the appellant on a charge of contravening s 82(1) of the Parks and Wildlife Statutory Instrument 362/90 as read with s 128(5) (B) of the Parks and Wildlife Act [*Chapter 20:14*]

Having found that there were no special circumstances, the court below imposed the mandatory minimum sentence of 9 years imprisonment. Counsel for the appellant, at the hearing, abandoned the appeal against sentence. He was correct in conceding that the finding of no special circumstances was unimpeachable.

The two arresting details were the only witnesses called by the respondent. The appellant testified. He did not call any witness.

Having reposed credibility in the respondent's witness, the magistrate convicted the appellant. That evidence was essentially this. Acting on information received, the two state witnesses posed as buyers of elephant tusks. Detective Sergeant James Manyuchi, who was the first witness, proceeded to phone one Nefta Charlie. The latter directed Manyuchi to stand number 5442 Hull Road, Chinhoyi. Manyuchi was in the company of another police officer (Tafadzwa Tryson Pemba), the informer as well as the driver, one Henry. Despite getting lost along the way, the team ultimately met Charlie who, on boarding the vehicle, led them to stand number 5442 Hull Road, Chinhoyi. This was around 7.00pm. Charlie alighted from the motor vehicle. He called the appellant, who was inside a room. Manyuchi and his companions remained in the car. Charlie and

the appellant held a brief discussion. The appellant returned to the room only to emerge carrying a white sack. He got into the vehicle. So did Charlie. Manyuchi and Pemba (the latter also testified *a quo*) requested to see the ivory. The appellant, who was holding the sack, opened it. Since it was dark, the appellant switched on his mobile phone torch. He showed them the two elephant tusks. The witnesses expressed interest in purchasing the ivory whereupon they requested that the entourage proceeds to a house in Orange Groove, where there was a scale, to weigh the ivory. The appellant and Charlie agreed to this. The driver used a road that passes by the police station. But the intention was to drive into the police station and therein effect Charlie and the appellant's arrest. The gate was opened. The vehicle was driven inside. Realizing that they had been driven into the police station, there was commotion inside the vehicle as both Charlie and the appellant attempted to flee. Charlie bolted out of the motor vehicle. He escaped. The appellant was subdued and arrested for possessing the ivory without a permit or licence. For completeness sake, it was the appellant who had charged the price for the ivory as $200 per kilogram. Both had promised that if the sale was successful they would supply more ivory.

In his defence, the appellant had heaped all the blame on Charlie. It was Charlie who possessed the ivory. The appellant did not even know, until after Charlie had escaped, that the latter's sack contained ivory. The appellant was surprised to see Charlie escaping. The reason why Charlie fled while the appellant remained behind is that the latter had simply been offered transport from his workplace into the town centre wherefrom he would then board lifts to his residence. He neither possessed the ivory himself nor conducted himself in a way which suggests that he was acting in common purpose with Charlie.

The magistrate found his defence to be beyond reasonable doubt false. The court accepted the evidence of the two state witnesses, that they corroborated each other, and that they had no reason to lie that appellant participated in the commission of the offence.

The grounds of appeal read as follows:

> "1. The court *a quo* erred in convicting on the main basis that the appellant had not challenged the fact that he is the one who was holding the sack that contained the alleged ivory from the office to the detectives' car when in actual fact the appellant had specifically and from the totality of his evidence put that in issue and had vehemently denied carrying the sack and any knowledge of the same.
> 2. The court *a quo* erred in concluding that the appellant is the one that possessed the sack with alleged ivory at the material times when in actual fact the fact that there was no full receipt for

the seizure of the alleged ivory and other exhibits that was compiled in terms of s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] rendered such a finding doubtful.

3. The court *a quo* erred in making a finding that the appellant was part of the ivory deal on the basis that he had went into town with the detectives' car and dismissing his explanation that he merely wanted a lift when in actual fact the appellant had given a reasonable explanation in his defence that he had only sought a lift to town since there are no lifts that ply the industrial area.
4. The court *a quo* erred in believing the testimony of the police details in coming up with a conviction when in actual fact there was a great danger of the police details being moved by malice more specifically in that it was common cause that Nefta Charlie fled from justice which would reasonable prompt the police details to maliciously put every blame on the appellant who was present.
5. It being case of the police details word versus that of the appellant, the court *a quo* erred in convicting in the absence of any other features of the case which would tilt the scales of probabilities in favour of believing the state witnesses whose evidence was marred with material contradictions in any event."

At the heart of all the grounds of appeal lies the contention that it was wrong for the court below to believe the state witnesses. The appellant took this point because it is common cause that the conviction was founded on the court a quo's conclusion that the respondent's witnesses could be safely relied upon. In other words, the court accepted that they were credible witnesses. This means we can only interfere if satisfied that there is something grossly irregular in the proceedings. The trial court's findings must defy reason or common sense. Otherwise we cannot interfere. In *S* v *Soko* SC 118/92 EBRAHIM JA, at p 8, put the test in these words:

> "A court of appeal will not interfere with the trial court's assessment on credibility lightly. There must be something grossly irregular in the proceedings to warrant such interference. This is so because the trial court by having the witnesses before it is able to make all other factors relevant in assessing credibility. The court of appeal on the other hand is confined to the record."

The same principle was reiterated by the same court in *S* v *Mlambo* 1994(2) ZLR 410(S) at 413, per GUBBAY CJ, as follows:

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by the appellate court unless satisfied that it defies reason and common sense."
>
> See also *S* v *Chingurume* 2014(2) ZLR 260(H).

It is true that the trial court found that the appellant had not specifically challenged the evidence of the two State witnesses that it was him, and not Charlie, who was holding the sack containing the ivory and brought it to the car. It equally is true that the appellant's defence and evidence, in context, was a denial of that piece of evidence. But the appellant's failure to

specifically dispute holding the sack and bringing it to the motor vehicle was not the main basis on which the conviction was founded. To that extent, this appeal does not turn on the first ground of appeal. The first ground misconceives ratio *decidendi* of the judgment *a quo.*

Section 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gives the police the discretion to seize articles, among other instances, reasonably believed to afford evidence of the commission of an offence. Section 49(2)(a) then provides as follows:

> "(2) A police officer who seizes and removes any article in accordance with this part, whether under or without a warrant, must make a full receipt in duplicate for the article so seized and removed and –
>
> (a) Give a copy of it to the owner or possessor thereof …"

Mr *Chikotora* argued that the failure to issue the receipt contemplated in s 49(2) (a) introduces reasonable doubt that the appellant was in possession of the ivory.

We do not think that the provisions of 49(2)(a) apply to the circumstances of this matter. The police officers who testified a quo neither seized nor removed the ivory from Stand 5442 Hull Road, Chinhoyi. This was common cause both at the trial and at the hearing of the appeal. The only dispute at the trial was whether it was Charlie who brought the sack containing the ivory to the car, from a shed near the gate to 5442 Hull road or the appellant who did so, from the stand itself. The second ground of appeal is likewise misplaced.

In any event, the fact that the receipt was not issued would not affect the correctness of the magistrate's finding that the appellant possessed the ivory, at 5442 Hill road, Chinhoyi. The ivory scale and affidavit from an official of the Zimbabwe Parks and Wildlife Management Authority were produced as exhibits. The latter related to the weight and value of the ivory. In addition the court had oral testimony before it. It assessed all the evidence. It found credence in the evidence of the State, and rejected the appellant's defence as false. There was adequate and quality evidence enabling the court to safely convict. Even if the full receipt had been a requirement, the available evidence rendered its absence of no consequence. Accordingly there is no merit in the second ground of appeal.

Grounds 3, 4 and 5 raise the same issue. It is the magistrate's decision to repose confidence in the testimony of the State's witnesses which is under attack. That is not an easy task. We have read the record. The evidence of the two State witnesses is rich in detail. The roles of the appellant

and Charlie come out clearly from that testimony. Nowhere do we see the witnesses lessening Charlie's involvement, just because he escaped, and magnifying that of the appellant, just because he did not succeed in taking flight.

The two witnesses corroborated each other. Charlie, who was on the phone, led the witnesses to the appellant's place. That is where the ivory was. Upon arrival, the appellant and Charlie briefly conferred. The appellant then brought the ivory to the car, exhibited it to the witnesses and charged the price of $200 per kilogramme. Thereafter, the appellant and Charlie got into the vehicle, under the belief they were going to weigh the ivory. Both tussled with the witnesses inside the vehicle when it dawned upon them that the supposed buyers were driving them straight into the police station. The only difference between Charlie and the appellant is that the former got out of the motor vehicle and fled. The appellant's bid to do likewise was in vain.

In addition to being detailed and corroborative of each other, the State witnesses' testimony found support in that most of the facts were common cause. The only disputed pieces of evidence were those that implicated the appellant. The trial court resolved the disputes in favour of the respondent. We do not see anything grossly irregular in the magistrate's findings in this regard. Indeed, those findings do not defy logic and common sense. The Magistrate had the advantage of observing all the witnesses, including the appellant, as they testified. We do not have that benefit.

What has not escaped us is that, from a reading of the record, the cross-examiner completely failed to dent the evidence of the two police officers. The cross-examination of both witnesses ended with counsel for the appellant virtually accepting that he had failed to discredit the witnesses. In respect of Manyuchi, the following appears on p 38 of the record:

> "Q. Lastly he will put it to you that he never possessed the sack. Accused is on ….. flew.
> A. I saw accused enter the room and brought the sack which had ivory.
>
> No further questions."

As for Pemba, the cross-examination ended on this note, at record p 46:

> "Q. He states you knew the person was Nefta ran away.
> A. What I know is accused went to collect the tusks. Nefta led us to the accused.
>
> No further questions."

The witnesses were clear that they did not offer transport to members of the public. They were simply police officers whose duties involved detection of crime and arresting offenders.

They acted on information received. That information led them to the appellant's workplace. That is where Charlie, the appellant, the ivory and the weighing scales were. The witnesses were simply police officers on duty executing their functions. They did not know the appellant. They had no reason to be malicious by lying that the appellant possessed the ivory. They said the same thing about Charlie, even though he was at large. The trial magistrate properly found that the mere reason that they were police officers was not a valid ground to disbelieve their evidence. The few discrepancies in their evidence were immaterial. We share the same view.

We have already indicated that most of the evidence was common cause. The trial was not a boxing match. It was not a case of the word of the appellant against the "word" of the two State witnesses.

The convergence of the testimony of the State witnesses and that of the appellant was a feature which the trial court took into account in finding that the State witnesses were credible. The ivory, scale and the affidavit by the Zimbabwe Parks and Wildlife Management Authority official were further pieces of evidence each of which spoke for itself. The witnesses proffered a valid reason why the informer did not testify. It is understandable that such a person would need their identity to remain undisclosed. The trial court took this into account.

Mr *Chikotora* submitted that Henry, who drove the witnesses to the scene of crime and into the police station, ought to have testified for the respondent. It was argued that he would have been an independent witness. What counsel appears to have overlooked was that the driver was a key figure in the upliftment of the ivory from the appellant's workplace and the arrest of the appellant. He provided the means of transport.

It seems to us that the same argument that Manyuchi and Pemba were not independent witnesses would have been raised in relation to Henry, had he testified and the magistrate accepted the testimony. Nothing therefore turns on the driver not having been called *a quo*. The prosecution of the appellant was a result of police details acting on a tip-off from an informer. In such circumstances, it would be expected that the police officers concerned would be the State's witnesses. In any event, it is the prosecution which decides who to call as a witness. The real

question is whether such witnesses as it called in this matter led sufficient evidence to justify the conviction. The trial magistrate found the evidence sufficient. We take the same view.

This appeal is without merit.

In the result, the appeal be and is dismissed.

ZHOU J agrees: …….

Rubaya and Chatambudza, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners