

HH 714/17
CA 853/13
CRB B 1283-6/13

FRANCIS HAZANGWI
and
FRANCIS NYIKADZINO
and
ZULU MAKIWA
and
MARTIN MAURUKIRA
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & TAGU JJ
HARARE 27 FEBRUARY & 25 OCTOBER 2017

Criminal Appeal

Mrs *D. Machaya*, for the appellants
E. Mavuto, for the respondent

BERE J: The appellants were arraigned before a Bindura Magistrate facing a charge of contravening section 45(1)(b) as read with section 128(1)(b) of the Parks and Wildlife Act Chapter 20:14 “found in possession of ivory”.

After a protracted trial the appellants were convicted and the trial magistrate having found that there were no special circumstances sentenced each of the appellant to 9 years imprisonment.

Aggrieved by the conviction and sentence the appellants filed an appeal against both.

In their grounds of appeal against conviction the appellants contended as follows:

- “1. That the court erred in finding the appellants guilty of an offence whose essential elements were not proved in that the state failed to prove that elephants are specially protected animals in terms of section 43 of the Parks and Wildlife Act Chapter 20:14.

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2. That even if the charge was that of unlawful possession of raw ivory in terms of the Regulations, there was no evidence that appellants had been in such possession in excess of 15 days.”

As against sentence the grounds of appeal were framed as follows:

“That the court *a quo* erred in any one or more of the following ways:

1. That the court failed to consider that the appellants are first offenders who deserved more rehabilitation than punishment.
2. That the court adopted a narrow interpretation of special circumstances resulting in its imposition of the heavy sentence it imposed.

I wish to mention in passing that when the appellants appeared for trial they were legally represented and they gave the following defence outline:

“Accuseds’ defence outline

1. Accused persons will deny the charge levelled against them.
2. They will state that they were not required and are not required by law in terms of section 45 of the parks and Wildlife Act to acquire or possess a permit for possessing elephant tusks for these are not products of specially protected animals.

Wherefore accused persons will pray for their acquittal.”

In arguments presented in court *Mrs Machaya* who appeared for the appellants dwelt at length on the defect of the charge sheet which formed the basis of the prosecution of the appellants. The thrust of counsel’s submissions was that elephants have not been elevated to the class of specially protected animals and that because of this the appellants could not have been convicted of the offence as framed and as presented in the court *a quo*. I did not hear counsel for the appellants to be arguing that because of the alleged defect in the charge sheet the appellants did not commit any offence and that this court should acquit them. Such an argument would have been a toll request if regard is had to the proceedings in the lower court.

In response to the position taken by the appellants’ counsel, *Mr Mavuto* who appeared for the respondent conceded that the appellants were wrongly charged and that the correct charge ought to have been contravening section 182 (1) of the Parks and Wildlife General Regulations SI

362/1990 as read with section 128(1) (b) of the Parks and Wildlife Act [Chapter 20:24] “unlawful possession of unregistered or unmarked ivory.”

Mr Mavuto argued that the explanation given by the appellant and the judgment of the court *a quo* supports the charge as proposed by him and that because of this appellants cannot possibly be prejudiced by the correctly framed indictment.

Assessment of the submissions made

Section 203 of the Criminal Procedure and Evidence Act [Chapter 9:07] provides that where there is a defect in the indictment, summons or charge sheet such a defect may be cured by evidence.

It occurs to me that the evidence canvassed in this case in the court *a quo* and to which the appellants proffered quite some detailed explanations was well within the parameters of the correct indictment as proposed by *Mr Mavuto* for the respondent and the appellants cannot argue that they stand to be prejudiced by the amendment or correction of the indictment.

At the conclusion of the case the appellants were invited to make submissions in summation of their case and on the existence of special circumstances.

Through their counsel the appellants, clearly unaware that the elephant had been elevated to the status of a specially protected animal by virtue of SI 362/1990 continued to labour under the obviously mistaken view that the elephant was not a specially protected animal. It is clear from the record that throughout the hearing of this case in the lower court, the appellants believed (unfortunately wrongly so) that the elephant was not a specially protected animal.

This position was consistent with their defence outline and they genuinely believed that it was the decisive point in the prosecution of their case. Unfortunately it was not.

After the appellants' conviction in the lower court their counsel, fully aware of the possibility of a mandatory sentence in the absence of special circumstances went out of his way to try and demonstrate such circumstances existed. The appellants' counsel made elaborate submissions in this regard.

I am mentioning all this to demonstrate that the conduct of the proceedings in the court a quo was such that it cured the defect in the charge sheet that the appellants pleaded to and that a correction of the indictment at the stage of this appeal cannot possibly be said to be prejudicial to the appellants.

In the case of *S v Carlson En 'Ander*¹ the court held that failure to refer to the correct section at all or reference to a wrong section of a statute does not affect the validity of a charge provided that it is clear that the accused, because of factual description of the alleged offence was aware of the nature of the charge and was not prejudiced. The same position of the law also finds expression in the case of *S v Siphambili* where the head note puts the position of the law as follows:

“... any embarrassment which might have resulted from the inaccuracy in the charge should have been raised before plea, as a request for further particulars or as an exception. An accused who does not object before plea to the lack of particularity in a charge which discloses an offence cannot rely on the defectiveness of the charge at the end of the trial.”²

I may add and say this must be the position especially where an accused person has been represented throughout the proceedings as in this case.

There can be no doubt in this case that the defect in the indictment as highlighted by the appellants' counsel and as conceded by state counsel was sufficiently cured by the conduct of the proceedings.

¹ 1973 (4) SA 615

² 1995 (2) ZLR 337 at 337H-338A

Sentence

There was very little in terms of substance advanced on behalf of the appellants to warrant this court interfering with the decision arrived at by the court a quo. We have considered the reasons advanced by the trial court which informed the sentence.

We are of the firm view that the court *a quo* properly exercised its discretion and we are unable to interfere with that sentence.

Consequently, other than correcting the charge sheet to read “C/S 82 (i) of the Parks and Wildlife General Regulations SI 362/1990 as read with section 128(1)(b) of the Parks and Wildlife Act [Chapter 20:24] “unlawful possession of unregistered or unmarked ivory”, we believe the appeal against both conviction and sentence has no merit.

It is accordingly dismissed.

Tagu J I agree

Messrs Kajokoto & Company, appellants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners