LOVEMORE SITHOLE

And

CLEMENCE SITHOLE

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J. & WAMAMBO J.
MASVINGO, 16 October and 27TH November, 2019

Criminal Appeal

T. Tazvitya for both appellants
T. Chikwati, for the respondent

MAWADZE J: This appeal is solely based on the question of special circumstances.

The 1st appellant aged 44 years and the 2nd appellant aged 36 years are both residents of Charuma Village, Chief Mutema, Chipinge. They were jointly charged with Denny Mtetwa, aged 42 years, Witness Saize aged 29 years and Isaac Mlambo aged 43 years.

The appellants and their alleged accomplices were arraigned before the Magistrate sitting at Chipinge facing the charge of contravening section 82 of the Parks and Wild Life General Regulations SI 362/90 as read with s 128 of the Parks and Wild Life, Act [*Cap 20:04*].

Section 82(1) of the Parks and Wild Life General Regulations SI 362/90 provides as follows: -

"*Restriction on acquisition, possession, sale or transfer of unregistered or unmarked ivory*

82(1) Subject to Section 85, no person shall acquire, have in his possession, sell or transfer 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 this Act; or

(b) was lawfully taken from an animal that 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) not relevant

(3) In any prosecution arising out of contravention of subsection (1), the burden of proof----------

(a) any fact referred to paragraph (1), (b) or (c) of that subsection; and

(b) that the period referred to in that subsection has not lapsed;

shall rest on the accused."

Section 128(1) of the Parks and Wild Life Act [*Cap 20:14*] provides for a special penalty of 9 years in the absence of special circumstances for among other things, unlawful possession of ivory.

The charge both appellants and their alleged accomplices faced was that on 13 October, 2018 at Charuma Village, Chief Mutema, Chipinge they unlawfully and intentionally possessed or dealt in ivory, that is to say each of the accused person or all of them possessed or dealt with two elephant tusks weighing 13.5 kg.

During the trial both appellants together with Denny Mtetwa and Witness Saize were all represented by *Mr Mhungu*. The accused Isaac Mlambo was a self-actor. Both appellants pleaded guilty to the charge and were duly convicted. Denny Mtetwa, Witness Saize and Isaac Mlambo who pleaded not guilty to the charged were referred to trial after separation of trial and their trial is not subject of this appeal. Suffice to state that they were also later convicted of the charge after a protracted trial and their appeal is pending before this court.

During the trial of the appellants *Mr Mhungu* indicated that it was not necessary for the court to put the essential elements of the offence to both appellants as they fully understood the facts and were admitting to all the essential elements charge. The matter thus proceeded on the basis of the agreed facts as outlined in the state outline.

As already said both appellants were duly convicted on their pleas of guilty. After a finding that there are no special circumstances in respect of both appellants each appellant was sentenced to 9 years imprisonment and the two elephant tusks were forfeited to the State.

Aggrieved by the finding that there are no special circumstances in respect of each of the appellants, the appellants appealed to this court only in respect of sentence.

In order to put this appeal into context it is imperative to summarise the agreed facts which inform the conviction of both appellants.

The agreed facts are that on 12 October 2018, Jeremiah Mhlanga employed by the Ministry of Environment and Tourism as an investigator under the Parks and Wild Life Department stationed at Birchenough received information from an unnamed but reliable source to the effect that both appellants and their alleged accomplices were selling elephant tusks at their Birchenough area, Chief Chimutsa in Chipinge. The information relayed was that they were soliciting or looking for the buyers of the elephant tusks. As a result of this information Jeremiah Mhlanga contacted one of the alleged accomplices Isaac Mlambo who confirmed that indeed the appellants and their accomplices had the two elephant tusks for sale. The next day on 13 October 2018 Jeremiah Mhlanga telephoned one of the accomplices Isaac Mlambo and arrangements were made for Jeremiah Mhlanga to meet the appellants and their alleged accomplices that same day at Charuma Primary School, Chief Mutema, Chipinge in order to transact. Jeremiah Mhlanga teamed up with a member of ZRP Birchenough police post one Sgt Denhere at proceeded to Charuma Primary School to meet the appellants and their alleged accomplices. Upon arrival they found both appellants and their alleged accomplices already at Charuma Primary School. The 2nd appellant Clemence Sithole was the one carrying the sack containing the two elephant tusks one weighing 7 kg and the other 6.5 kg. The appellants and the alleged accomplices were then arrested for possession of the two elephant tusks valued at $2 295. These are the agreed facts *Mr Mhungu* indicated that the appellants fully understood and subscribed to.

In the grounds of appeal the appellant contend that there are special circumstances in their case warranting the non-imposition of the mandatory minimum 9 years imprisonment and that the appellants should be given an option to pay a fine.

Despite outlining four grounds of appeal in essence the appellants raise basically two issues as the basis for existence of special circumstances. The appellants pointed out that the court *a quo* erred both in the facts and on the law in that,

(i) the court *a quo* failed to accept the submission that ignorance of the law on the part of the appellants was established and that it amounted to special circumstances; and

(ii) that the appellant were trapped to commit this offence and that entrapment constitute special circumstance

The appellants content thereafter that the court a quo in carrying out the inquiry into special circumstances should not have relied on the facts as contained in the State outline alone but also on what was submitted on behalf of the appellants by *Mr Mhungu* which relate *inter alia*, to the appellants' lack of sophistication and how they ended up in possession the elephant tusks resulting in their arrest.

Before dealing with the grounds of appeal I wish to briefly comment on the procedure *Mr Mhungu* adopted in this matter.

After the court a quo returned the verdict of guilty in respect of both appellants *Mr Mhungu* proceeded to address the court *a quo* in mitigation. Thereafter he proceeded to deal with the issue of special circumstances. While there may not be any magic formular cast in stone in how to proceed in such matters, my respectful view is that it is desirable to deal with the issue of special circumstances first soon after the guilty verdict before delving into ordinary mitigating factors. The same view was expressed by MUREMBA J in the case of *S* v *Manase* 2015 (1) ZLR 160 (H) at 163 F in which the learned Judge taking a leaf from the case of *S* v *Mbewe & Ors.* 1988 (1) ZLR 7 (H) pointed out that special circumstances are to be canvassed immediately after the court has pronounced the verdict of guilty and before mitigation. The State would then respond to submissions made in relation to special circumstances after which the trial court would make a finding as to whether special circumstances exists in that particular case. This approach is desirous in that it will even guide the accused person on what aspects to cover in relation to mitigation.

I now wish to address the grounds of appeal.

It is my considered view that constitutes special circumstances is settled in our law. In the case of *S* v *Mbewe & Ors* *supra* EBRAHIM J (as he then was) pointed out that special circumstances mean any extra ordinary factor arising out of the commission of the offence or which is peculiar to the offender. This is where the relevant Act or statutory provision does not specify whether the special circumstances relate to the factors surrounding the commission of the offence or to the offender. Indeed, the words special circumstances or special reasons have been and can be used interchangeably as I find not distinction between the import of these phrases at law. Thus it was held in the case of *S* v *Chisiwa* 1981 ZLR 666 at 670 that special circumstances or special reasons must be those factors out of the ordinary, either in their extent or their nature. The corollary is that ordinary mitigatory factors on their own do not constitute special circumstances.

I turn to the specific grounds of appeal raised in this matter.

1. Whether entrapment constitutes special circumstances and whether the appellant were trapped

It is trite in our law that in some cases entrapment can amount to special circumstances. In the case of the *S* v *Kamtende* 1983 (1) ZLR 302 SQUIRES J makes a very important distinction in relation to entrapment. The court should make a distinction between trapping which is such that it promotes the commission of the offence as distinguished from the one which simply facilities the arrest of an accused. The one which simply facilitate the arrest of an accused does not amount to special circumstances. The reason for this, in my view, is simple. Entrapment to facilitate an arrest occurs after an accused person has already committed the offence and does not promote the commission of the offence.

In casu the appellants were convicted for unlawful possession of two elephant tusks. As per the agreed facts they were not trapped in order to possess the elephant tusks. When they were lured to Charuma Primary School by Jeremiah Mhlanga they were already in unlawful possession of the elephant tusks looking for buyers. They had already committed the offence!

Put differently, Jeremiah Mhlanga did not entrap them to possess the elephant tusks but simply facilitated their arrest. In fact, as per the appellant's submission they took possession of the elephant tusks in November 2017 well before Jeremiah Mhlanga's involvement a year later in October 2018. I therefore find no merit in this ground of appeal.

2. Whether ignorance of the law constitute special circumstances

Indeed, genuine mistake of the law or well-founded ignorance of the law while not sufficient to excuse the offence, may in appropriate cases amount to a special reason or special circumstances which enjoins the court not to impose the mandatory sentence see *S* v *Chisiwa supra.* The same view is expressed in *S* v *Mbewe and Ors. supra* that *bona fide* ignorance of some statutory provision can constitute special circumstances.

Mr Mhungu submitted in the court *a quo* that the appellants found a dead elephant along the banks of Save river in November 2017. He said as rural dwellers, oblivious of the provisions of the law, decided to take the two elephant tusks. He further submitted that the appellants then kept the two elephant tusks for about a year without any blameworthy state of mind and that they believed that their possession was lawful. *Mr Mhungu* said the appellants did not hunt or kill the elephant and that they believed the dead elephant did not belong to any body. He said they kept the elephant tusks until they were entrapped by one of their alleged accomplices and the alleged informer to sell the tusks. As rural dwellers who are unsophisticated *Mr Mhungu* said the appellants were ignorant of the law relating to unlawful possession of raw ivory or elephant tusks. These are the factors which *Mr Tazvitya* for the appellants argued before this court that the court *a quo* failed to take on board.

I am rather puzzled by *Mr Mhungu's* approach in the court a quo. He seemed to blow hot and cold as it were if I can put it that way. I say so because the record of proceedings clearly shows that both appellants pleaded guilty to charge virtually through him as he explained that both appellants fully understood the offence and its elements. In other words, *Mr Mhungu* was admitting that the appellants had a blame worthy state of mind or that they knew that that possessing the elephant tusks was illegal but nonetheless went on to possess them. If not why would *Mr Mhungu* or the appellants plead guilty to the charge. This is not a strict liability offence. In other words, if the appellants had no intention to illegally possess the elephant tusks they would not have the guilty state of mind necessary to convict them.

Another improper feature of *Mr Mhungu's* approach which both the court *a quo* and the trial prosecutor seemed to condone relates to *Mr Mhungu's* attempt not to only depart from the agreed facts he earlier on accepted but led evidence from the bar. In his submissions before the court *a quo Mr Mhungu* denied that the appellants were looking for a buyer of the elephant tusks.

Instead he said it is some faceless informers who connived with the Parks and Wild Life Officer to entrap the appellants. These are new facts which run contrary to the agreed facts.

There is no explanation proffered as to why the appellants after allegedly stumbling on a dead elephant they decided to take possession of the elephant tusks. If the elephant tusks were of no value to the appellants there is no reason given as to why they kept the tusks for a year. These are the issues the appellants should have explained. The proper approach was for *Mr Mhungu* to lead evidence from the appellants and allow the trial prosecutor to cross examine them in order to test the veracity of such averments. The onus rests with the appellants to show that special circumstances exist in any particular case.

The agreed facts clearly show that the appellants were looking for the buyers of the elephant tusks which led to their arrest. They therefore knew that the elephant tusks were of some value. Their possession of the elephant tusks can reasonably be inferred that it was calculated to benefit item by selling them.

The appellants, on the evidence on record, did not show that they were ignorant of the law in any way. Their alleged rural background or lack of sophistication is not only neither here nor there but is at war with their conduct leading to their arrest.

It is my considered view that the appellants have dismally failed to show that there are special circumstances in their case. I therefore find no misdirection by the court *a quo* in the imposition of the minimum mandatory sentence of 9 years imprisonment in respect of each of the appellants.

Accordingly, I find no merit in the appeal and it must be dismissed.

Wamambo J. agrees .....

Messrs Bere Brothers, counsel for the appellants
National Prosecuting Authority, counsel for the respondents