WELCOME MUNSAKA

SHAMISO DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 8 OCTOBER 2018 & 16 JANUARY 2020

Criminal Appeal

K Ngwenya, for the appellant
Mrs T R Takuva, for the respondent

MABHIKWA J: The appellants and 2 others appeared before a Magistrate sitting at Hwange Magistrate's Court. They were charged with the crime of contravening section 82 (1) of Statutory Instrument 362/90 as read with section 128 (b) of the Parks and Wildlife Act (Chapter 20:14) as amended in section 11 of the General Laws Amendment Act Number 5 of 2011 "Unlawful Possession of Ivory".

The appellants were the 1st and 3rd accused respectively during the trial. All four (4) pleaded not guilty to the charge. However, after the trial, the appellants were convicted and each sentenced to 9 years imprisonment. The ivory, (two tusks) weighing 19 kgs were forfeited to the state following an application for forfeiture by the Public Prosecutor.

Dissatisfied with the conviction and sentence by the court *a quo,* the appellant appealed to this Honourabe Court. In short, the grounds of appeal are that;

(1) The court *a quo* erred grossly in finding that the appellants had possessed ivory when none of them was found with the said ivory.
(2) The court *a quo* erred in convicting the 2nd appellant when there was a reasonable doubt of his guilt, and should have been given the benefit of the doubt

Just like at the trial, the issues to be decided on appeal are:

1) Whether the appellants "possessed "the ivory" in question.
2) Whether or not the appellants "traded" in ivory as alleged.
3) Whether the conviction was erroneously based on the "hearsay" evidence of an unknown and unnamed police informer.

Perhaps due to the nature and circumstances of this case, the state case was made up of evidence of three (3) police officers only.

Daniel Rusinga

This witness was the Officer-In-Charge of the Victoria Falls Police Station and was the lead detail of the arresting team. From the long evidence and cross-examination, his evidence in short was to the following effect;

On 13 May 2016 at around 7 pm in the evening, he received information that there was an individual selling ivory. He got this tip off from an informant he would not disclose as per police practice and ethics. He then arranged to meet the person, (one Welcome) with the informer. He was told that the suspect and the informer were at some bar referred to in the trial as "the Grid bar". It was 12 km from Victoria Falls Police station. He got to the Grid bar and found them seated on the outside tables. He was in the company of Constable Chimwanda. The informant introduced the 1st appellant as the person selling the tusks. The witness started negotiating the price. He was charged $35-00 per kg. The 1st appellant charged a total of $500-00 for both. The witness agreed to pay but told the appellant that he had no money on him at the time. He however asked the 1st appellant to give him the tusks. The 1st appellant said he had left the tusks at Chinotimba suburbs. The witness asked where he got the tusks from. He said he brought them from Jambezi to find a buyer at Victoria Falls. The witness, the 1st appellant, the informer and Constable Chimwanda then agreed to go and get the tusks from Chinotimba suburb. As they drove to Chinotimba, the witness kept asking the appellant to lower the price. He said he could not lower the price because he was selling the tusks on behalf of the 2nd appellant. He needed his permission to lower the price. Perhaps to avoid being seen by those who might know them, the two police officers dropped off in a certain street outside the houses at Chinotimba. The 1st appellant and the informer went into one of the houses. They

returned with two (2) elephant tusks. 1st appellant put the tusks in the boot of the car. The informer then remained at Chinotimba whilst the witness, the 1st appellant and Constable Chimwanda drove back to Grid bar where two (2) Sergeants, including Sergeant Muramba had remained behind. As they drove, 1st appellant was actually sitting at the front passenger seat chatting with the witness. The witness asked him why he did not just remain at Victoria Falls whilst they proceeded to Hwange to pay the 2nd appellant for the ivory. The appellant said that he had to go to Hwange to get his share. He also reiterated that he could not decide on the price himself in the absence of Shamiso lest Shamiso thinks he was cheated.

The witness decided to proceed to Hwange with the 1st appellant and other officers. He left Constable Chimwanda at the Grid bar but picked up Sergeants Murowa and Mufudzi. The 1st appellant assured the witness that they would find the 2nd appellant and called one Masauso Mwembe (formerly accused 2) on the phone. Masauso came in about 25 minutes after being called at and waited from Makwika Shops in Hwange. It is Masauso who went to collect 2nd appellant from his house. The 1st appellant introduced the witness and others to the 2nd appellant. The disguised police officers then negotiated the price with 2nd appellant after he had confirmed that he was the "owner" of the tusks. He was infact asked to first describe the elephant tusks. He described them in a manner that matched well the tusks that had been placed by the 1st appellant in the boot of the car at Chinotimba in Victoria Falls.

The witness, after the description by 2nd appellant, briefly removed the tusks from the boot of the car and put them on the tarmac after which the 1st appellant put them back in the car boot. Ultimately the witness told Shamiso, the 1st appellant and Masauso that he would pay the $500 but he had $250 and would need to withdraw a further $250 from the bank. The witness, the two Sergeants, and the appellants got into the car looked for a Banc ABC Automated Teller Machine (ATM). The witness and Sergeant Murowa went up to the ATM and pretended to be withdrawing cash. On their return, the witness went and stood at the passenger door's side blocking the 1st appellant. Sergeant Murowa pretended to be paying for the tusks, and the three (3) were immediately arrested.

Firstly, save for a few expected departures here and there, the above narration of the events was largely corroborated by the state's other witnesses. Emmanuel Chimwanda (Constable) and Sergeant Pretty Anna Maravu on the material facts. Chimwanda at page 50 and 51 of the record of proceedings testified that he and Inspector met the informer and the

appellant in Victoria Falls. They then drove together to Chinotimba Township to collect the ivory. He and the Inspector dropped somewhere at Chinotimba whilst the informer and the 1st appellant went with the car. After sometime, the 1st appellant and the informer returned with 2 elephant tusks. The appellant opened the boot and showed them the tusks in a sack. The 1st appellant went on to say that he could not make a final decision on the price because the owners of the ivory were in Hwange. He and the informer then remained in Victoria Falls whilst Inspector Rusinga, Sergeants Mufudza, Sergeant Muravu and the 1st appellant went to Hwange to continue and finalise the "sale negotiations".

Preety Anna Muravu also testified at page 56 of the record of proceedings that she joined at the time that Inspector Rusinga, Sergeant Mufudza and the 1st appellant were leaving for Hwange. She got into the car with them. Rusinga introduced her to the 1st appellant. He also told her that the ivory was in the boot and that they were going to the owner in Hwange. The 1st appellant could not receive the money as he was only an agent. It must be noted that the 1st appellant, who was present did not dispute that assertion. She said on the way to Hwange, the 1st appellant tried to call the 2nd appellant who he claimed was the owner of the tusks. Eventually he decided to call Masauso who in turn facilitated the attendance of 2nd appellant. 2nd appellant described and identified the ivory as his whereafter a price was agreed on. This led to the pretence by Rusinga and her that they were withdrawing cash from an ATM, and ultimately the arrest of the three suspects.

All the witnesses were clear that right from the beginning to the end, they successfully disguised themselves as people keen to buy the elephant tusks. The suspects never at any stage realised that they were in fact police officers intending to arrest them right up to the arrest itself. This court has no reason to believe otherwise. The claim by one or two of the suspects during the trial that they knew that Chimwanda was a policeman was clearly not true. Equally false is the claim that right from the onset the tusks were in the possession of the police officers and that the appellants and their colleagues were just surprisingly arrested and made to go along with what the Police wanted to do at each and every turn.

From the narration of the state witness as shown above, it is inconceivable how the police, starting with Inspector Rusinga, could have concocted such a well knit story and sequence of events from the police station at Victoria Falls, to Grid bar, to Chinotimba township, to Hwange, to Makwika Shopping Centre and then to an ABC Bank's ATM at

Hwange town right up to the arrest simply because they wanted to make false allegations against the appellants and arrest them. If the officers always had the elephant tusks in Rusinga's car, the appellant could have easily been arrested at the very first port of call at Grid bar when he was found seated with the informer at the outside chairs.

Unless there is a tangible, clearly explained prior fall out or grudge with the said police officers there is no reason why any court should be persuaded to believe that the police officers would waste their time and resources throughout the evening driving 12 km from the Police Station to the Grid bar, then to Chinotimba, back to Grid bar and then about 100 km to Hwange and another 100 km back if they were not simply pursuing suspects who committed a crime. Further, the evidence shows the police officers getting involved in the matter at different times and taking varying roles and degrees of participation in a manner that can surely not be pre-planned and be put into motion like a chess game as implied by the appellant. Apart from that, the evidence also shows the suspects themselves getting involved at different stages and involved at different stages and playing different roles, as the evening and its events unfold naturally. It cannot be said that all those events either did not happen at all or that they were deliberately made to occur by the police only because they wanted to arrest innocent people whom they had no prior knowledge of. For what motive and benefit would the officers to that?

It is for the foregoing that we find that there was absolutely no misdirection from the magistrate. She correctly assessed and accepted the state witnesses' evidence as the truth of what transpired on the day. In any event, the assessment and credibility of witness is, unless otherwise shown, the domain of the of trier of facts, the trial court.

I come now to the issue of possession and trading in ivory.

In *State* v *Mpa* 2014 (1) ZLR 52 (H) it was held that;

> Where a person is charged with a crime involving the element of criminal "possession" it is crucial to recognize that the legal definition of "possession" is much broader than the common definition. At law, a person has "possession" of something if the person knows of its presence and has physical control of it or has the power and intention to control it. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession. A person who has direct physical control of something on or around his person is then in actual possession of it."

See also *State* v *Young* – 1983 (1) ZLR 258 (S) and *State* v *Smith* 1965 (4) SA 166 per COBBERT J who pointed out an important view that:

> "With the greatest deference I would venture to suggest that in a number of cases establishing this proposition the court has failed to distinguish clearly between the mental element necessary to establish custody or possession, as the case may be, and the mental element constituting *mens rea*. The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of *corpus*, i.e. physical custody or control over the res question, exercises either mediately or immediately, and the mental element of *animus*, i.e. the intention to exercise control over the thing … At the same time there is a general rule that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question is innocent: *actus non facit reum nisi mens sit rea*."

There is no doubt in the case *in casu* that the appellants "possessed" the ivory. 1st appellant confirmed to Inspector Rusinga who was posing as a buyer at the Grid bar that he had the tusks at Chinotimba. They drove to Chinotimba. He and the informant drove further into the houses and indeed came back with two elephant tusks in a sack. It is the 1st appellant himself, not the informer who removed the tusks from the boot of the car and from the sack and showed them to Rusinga and Chimwanda. He also did the same when Murawa arrived. It was also him, not the informer, who said he brought the tusks from Jambezi to find a buyer at Victoria Falls. It was him again who said as for the selling price, he would need the presence and concurrence of the 2nd appellant who was the "owner" not "possessor" of the tusks at the time. It was for that reason that the appellant and the state witnesses drove all the way, a 100 km to Hwange and the appellant facilitated the presence of the 1st appellant. As at that stage, the 1st appellant's possession of the ivory had long been established and proven. The 2nd appellant's "ownership" of the ivory is a different issue altogether which has nothing to do with the appellant's possession. At Hwange the 2nd appellant also confirmed his ownership of the tusks and first described them to the satisfaction of all present. Thereafter the sale was negotiated by both. In so doing both appellants confirmed their physical and mental custody and control of the tusks.

To that extent therefore, the role and evidence of the informer in this case becomes completely irrelevant and unnecessary. The appellants did everything, independent of the informer, establishing their possession and control of the ivory to the extent that the informer remained at Chinotimba and the rest was done in his absence. This point was even realised

and acknowledged by the appellant's counsel at pages 38-39 of the record of proceedings in cross-examining the first witness. The following is revealed.

"Q - Its not in dispute that Welcome and your informer know each other.

A - It's not in dispute

Q - But you still insist on hiding his name yet all accused know him.

A - I will not disclose it."

It must be noticed herein therefore that the facts of *State* v *Mpa* (supra) and the facts *in casu* are completely distinguishable in that Mpa's facts were that the police got a tip off that there was an elderly man of Congolese origin at Rhodesville Shopping Centre who was driving a pick-up truck in possession of unmarked ivory and looking for buyers for the said ivory. Police details set out to arrest. Upon arrival, they observed a pick-up truck fitting the description given to them by the informer. They saw a person fitting their suspect. He was sitting in the passenger seat. After placing the truck under surveillance, they pounced and arrested the man. They recovered 21 pieces of ivory from the truck. In convicting the appellant in that case, the court *a quo* relied on the following evidence

1. That when he was arrested, the appellant's wallet was found in the glove compartment of the motor vehicle. Therefore the court reasoned that he was more than a mere passenger.
2. That there was a police informer who gave the details about the appellant, the motor vehicle and its contraband cargo as well as where it was to be found.
3. That the appellant was the only person observed to be inside the motor vehicle for some 10 to 15 minutes before the arrest.

From the above, what is clear is that in Mpa's case the court largely relied on what the police said was given to them by the informer who did not testify. The appellant seemingly did not even know or see the informer whose "information" was relied upon to convict him. *In casu*, and as already shown elsewhere above, the court relied on what the appellants themselves and the police did and observed. The appellants and colleagues were known to the informer. The informer simply introduced the 1st appellant and the then undercover Inspector Rusinga. The 1st appellant happily indicated on his own that he had two (2) tusks and was

looking for a buyer. He went with the informer into a house at Chinotimba Township and brought the 2 tusks and continued to transact in respect of the ivory right up to Victoria Falls and even roping in the other suspects long the way after the informer had long gone. The difference between the two cases is a clear demonstration of the important tenet of our law that "each case depends, and is decided on its own facts and circumstances." In Mpa's case, a conviction would not stand in the absence of the informer's testimony. *In casu*, the informer's evidence would be absolutely irrelevant and unnecessary.

See also *State* v *Makawa & Another* 1991 (1) ZLR 142 (S) on the evidence of traps.

I come then to the issue of the allegation that the court relied on hearsay evidence to convict. I have already alluded largely to this issue above. I wish to add however that throughout his cross-examination of state witnesses and in his submissions including on appeal, counsel for the appellant appears to be completely mistaken on what exactly, constitutes hearsay evidence. It is erroneous to believe that because there is an informer who was not called to testify, then the police evidence should be regarded as hearsay as in Mpa's case. Surprisingly the following is what transpired in counsel's cross-examination of the first state witness (Inspector Rusinga) at page 21 of the record of proceedings.

'Q - Did he appreciate that you intended to purchase ivory?

A - Yes, he said he was going to get a share after the sale. He even said I cannot charge you before Shamiso comes because he will think we have cheated him.

Q - Did you enquire why Masauso came before Shamiso?

A - "Welcome tried to call Shamiso but his number was not reachable. He said let me call his cousin Masauso. He knows the deal. He stays in the same village with Shamiso. Further to that, Welcome spoke to Masauso before we got to Hwange to tell him we were on our way."

Again at page 39 of the record, the following interchange between the same defence counsel and the 2nd state witness took place in cross-examination.

"Q - You negotiated a price for ivory with 1st accused (appellant)?

A - Yes

Q - Did you pay 1st accused?

A - No

Q - Why not?

A - He said he is an agent, so he cannot collect money if the others are not there especially since they were asking 35 per kg that is what he agreed on."

Having regard to the above and the rest of the direct evidence of incriminating actions by the appellant, there is absolutely no "hearsay" evidence for counsel to talk about. Equally wrong is the claim that the court *a quo* relied on mere confessions. I must mention also that the state witnesses in this case were improperly and repeatedly accused of giving evidence in conflict with the state outline even when they aptly explained firstly that they as witnesses, did not prepare the state outline and secondly when they explained the possible origins or sources of the few discrepancies. In any event any alleged contradictions between the state outline and witnesses evidence must go to the root of the state case and yet remain unexplained. The alleged contradictions in this case did not go to the root of the state case so as to discredit it.

In the South African case of *State* v *Smith* – 1965 (4) C P D 166 per CORBETT J, the court pointed out the importance of distinguishing between mental element necessary to establish possession and the guilty state of mind constituting *mens rea.* The onus to establish possession is on the state. The onus to establish the absence of *mens rea* is on the accused, unless an enactment provides that *mens rea* is an element of the offence. Where both the physical and mental element (animus) constituting custody and possession have been established, the onus of negativing *mens rea* rests upon the accused. *In casu,* both intention to possess and the physical element were established. There was no misdirection whatsoever by the court *a quo*. In fact, even accused two, considering the facts was lucky to escape conviction.

As regards sentence, the court *a quo* found no special circumstances necessitating a departure from the statutory minimum mandatory sentence. No misdirection was alleged or shown. The court was "kindly implored" to "temper justice with mercy" and consider the minimum of sentences, a sentence which would be "rehabilitative and reformative" one. The court *a quo* did as implored. There being no special circumstances, it opted for the minimum mandatory sentence and no more. Again there was no misdirection.

In the circumstances, the appeal is dismissed in its entirety.

Makonese J……. I agree

Mvhiringi and Associates c/o T J Mabhikwa and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners