

FREDRICK NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA & DUBE-BANDA JJ
BULAWAYO 13 November 2023 & 23 November 2023

Criminal appeal

K. Ngwenya, for the applicant
K.M. Nyoni, for the respondent

DUBE-BANDA J:

[1] This judgment relates to an appeal against conviction and sentence which came before us on 13 November 2023. The appellant appeared in the magistrates' court sitting at Hwange on a charge of possession of raw ivory in contravention of s 82(1) of S.I. 326/1990 as read with s 128(b) of the Parks and Wildlife Act [Chapter 20:14] i.e., unlawful possession of unregistered raw ivory. It being alleged that on 1 February 2021 and at Lupinyu Business Centre, Victoria Falls, the appellant unlawfully and intentionally possessed two pieces of unregistered raw ivory weighing 1.09 kgs and 0.55 kgs.

[2] He pleaded not guilty and a contested trial ensued. The court *a quo* found as false that the appellant was given the satchel by a third party and found that he had knowledge of the contents of the satchel. It dismissed his version of a conspiracy between the officers and the informer to cause his arrest on planted evidence. It found further that the issues turning on failing to involve the appellant in testing the pieces of ivory were mere technicalities which did not create a doubt that the appellant was in possession of the two pieces of raw ivory without a permit. The court *a quo* concluded that the prosecution had proved its case beyond a reasonable doubt as required by the law. He was convicted and the court *a quo* having failed to find special circumstances as required by law sentenced him to the minimum mandatory sentence of nine years imprisonment.

[3] Aggrieved by the conviction and sentence the appellant noted an appeal to this court. In the notice of appeal, the appellant raised twelve grounds of appeal. Some of the grounds of appeal turned on thoughtlessness. However, during the hearing of the matter, Mr. *Ngwenya*, counsel for

the appellant conceded that from the grounds of appeal only two issues arise for determination in this appeal. These are:

- i. Whether there is credible evidence that the appellant had knowledge of the contents of the satchel.
- ii. Whether there is evidence that the pieces of ivory seized from the appellant are the same pieces that were tested and produced in court as an exhibit.

[4] It is well established that a court of appeal is not at liberty to substitute its views for that of the trial court. The rule when dealing with appeals was stated in *S v Level* 2011 (1) SACR 87 (E) as follows:

‘The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right to appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s finding of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of the evidence reveals that those findings were patently wrong. The trial court’s findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in a better position to determine where the truth lies.’

See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *Mupande & Ors v The State* SC 58/22; *Chioza v Siziba* SC 16/11.

[5] It is against the backdrop of these legal principles that this appeal is considered and determined.

[6] The evidence in this matter may be summarised as follows: the police received information that the appellant was selling ivory and a trap was applied for and a trap certificate was issued. The arresting officer was in the company of an officer from Parks and Wildlife Department. On the phone the appellant directed the officers to his exact location, and on their arrival, he approached them carrying a black satchel on his back. The officer from Parks asked the appellant to produce the ivory as per their phone discussion, and he produced two pieces of ivory and handed them over to the officer. The officer negotiated a price deal, and finally the appellant agreed to reduce the price of the two pieces of ivory. The appellant was subsequently arrested, charged, convicted and sentenced as stated above.

[7] In the first ground of appeal it is contended that there is no credible evidence that the appellant had no knowledge of the contents of the satchel. However, a careful and sober reading of the record shows that information was received from an informer that the appellant was selling pieces of raw ivory. A trap was put in place, and he fell into the trap. On the phone he indicated his position to the officers and directed them to where he was and he was found exactly at the indicated position. He approached the officers carrying a satchel on his back. He negotiated the price of the pieces of ivory and finally agreed on a price. At no point in time did he mention to the officers that the satchel and its contents belonged to a third party and that he did not have knowledge of the contents of the satchel. The appellant did not inform the officers that he was innocently carrying the satchel and its contents on behalf of a third party. According to his version the third party had said he was briefly going to answer a call of nature, if his version were true, he would have simply told the officers to wait for that third party. He did not do so. To argue that the appellant was holding the satchel at the instance of a third party and did not know of its contents is just unsustainable. No amount of ingenuity can change the fact that the appellant was in possession of the satchel and had knowledge of its contents. Therefore, the first ground of appeal has no merit.

[8] In the second ground of appeal the appellant contends that there is no evidence that the pieces of ivory seized from him are the same pieces ivory that were tested, examined and produced in court as an exhibit. One of the core arguments advanced by Mr *Ngwenya* was that there is no evidence that the pieces of ivory that were tendered in court as exhibits were those seized from the appellant. The appellant complains that he was excluded from attending the testing and examination of these pieces of ivory. The argument simply is that the chain of evidence did not remain intact or was broken in connection with these exhibits and therefore that the State did not prove its case beyond a reasonable doubt as required by the law.

[9] The two pieces of ivory are real evidence. Real evidence was described as the term used to cover the production of material objects for inspection by the court, and the only requirement for admissibility in respect of real evidence is that it must be relevant. See *Principles of Evidence* by P J Schwikkard, A St. Q Skeen and S E van der Merwe, First Ed at 254. *S v Mpumlo and Others* 1986 (3) SA 485 (E). *The South African Law of Evidence* by L H Hoffmann and D T Zeffert 4th Ed. p. 404. Relevancy requires that there must be evidence

to identify the exhibit as the exact exhibit collected from the scene of crime or from a person. For completeness, I must state that there may be instances where real evidence is relevant and admissible, and the only attack is directed at its authenticity and integrity. In such a case it becomes an issue of weight not admissibility. That is not the case in this matter.

[10] The continuity of possession of evidence or custody of exhibits and its movement and location from the point of recovery at the scene of a crime or from a person, to its transportation to the laboratory for examination and until the time it is allowed and admitted in the court, is known as the chain of custody or chain of evidence. The chain of custody is the most critical process of evidence documentation. It is a must to assure the court of law that the evidence is relevant and authentic, i.e., it is the same exhibit seized at the crime scene and it was, at all times, in the custody of a person designated to handle it and for which it was never unaccounted. Although it is a lengthy process, it is required for evidence to be relevant and admissible in the court. In *S v Matshaba* 2016 (2) SACR 651 (NWM) the court held as follows:

“The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of evidence. If no admissions are made by the defence, the State bears the onus to prove the chain of evidence. The State must establish the name of each person who handles the evidence, the date on which it was handled and the duration. Failure to establish the chain of evidence affects the integrity of such evidence and thus renders it inadmissible.”

See *Officila v S* (A346/2019) [2021] ZAGPPHC 244 (4 May 2021).

[11] The chain of custody proves the relevancy and integrity of a piece of evidence. A paper trail is maintained so that the persons who had charge of the evidence at any given time can be known quickly and summoned to testify during the trial if required. It is accepted that in order to save time instead of leading of evidence of the chain of evidence or to provide proof of the chain of custody when it is not really in dispute, the prosecution may make use of the procedure provided in s 278 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act) by producing affidavits indicating such a chain. This would constitute *prima facie* evidence which may become conclusive if not attacked or controverted.

[12] At the trial two pieces of ivory were produced and marked exhibit 6, and three affidavits deposited to in terms of s 278 (1) of the CP & E Act were produced. The first was exhibit 2,

an affidavit deposed by the Postal Manager at Zimpost Victoria Falls. He weighed two elephant tusks and noted that one weighed 1.09 kg and the other 0.55 kg. The second was exhibit 3, an affidavit deposed by a veterinary surgeon who concluded that the two pieces handed over to him for testing were indeed ivory. The third was exhibit 4, deposed to by an expert in wildlife who concluded that the ivory he examined was not registered with the Zimbabwe Parks and Wildlife Management Authority.

[13] The Postal Manager at Zimpost neither identified the person who handed him the ivory nor the person he handed the ivory to after weighing it. The veterinary surgeon says he received the two elephants tusks he examined from one T Muvazhi from CID MFFU Victoria Falls. He did the testing in the presence of T Muvazhi and Happiness Sibanda. The wildlife expert says he did his examination at the instance of Constable Tafadzwa Muvazhi, and that the exhibits were for the case of the appellant.

[14] Two witnesses testified for the prosecution, i.e., Tapera Chimucheka the arresting officer and Nancy Mugari the Parks officer who was present at the arrest of the appellant. These are the officers who testified that they arrested the appellant and seized the pieces of ivory from him. It is important to bear in mind that at law at the time the items were seized from the appellant there was a reasonable suspicion that they were raw ivory. Testing and examination by experts were required to prove that they were indeed raw ivory.

[15] There is no documentary evidence showing what was seized from the appellant. There is no evidence of what happened to the seized items, and no evidence of how these seized items were handled and kept. No evidence that exhibits numbers were assigned to these exhibits and that they were recorded in an official exhibit register. Further, it is Constable T Muvazhi who handed over the pieces of ivory for examination to the veterinary surgeon and the wildlife expert. There is no evidence to show that the pieces of ivory T. Muvazhi handed over to the experts are the items seized from the appellant by Tapera Chimucheka and Nancy Mugari. There is no evidence of where T Muvazhi obtained these two pieces of ivory. No evidence to show that the items seized from the appellant were assigned reference numbers and entered into an official exhibit register kept at the police station. No evidence to show who booked out these exhibits for testing and examination and returned them for safekeeping and who received

them at the police station. The wildlife expert says the exhibits he examined were for the case of the appellant. The record does not show how he arrived at this conclusion.

[16] In this case the chain of custody was broken right at the time of collection of the exhibits at the scene of crime. It therefore cannot be said that the actual items seized at the scene of the appellant's arrest are the two pieces of ivory submitted for subsequent weighing, testing and examination and produced in court as exhibit 6. A point must be made though, that it is not a requirement that an accused be present when the exhibits are examined or tested, what is important is the paper trail or evidence speaking to the chain of custody.

[17] In this matter the two pieces of ivory would only be relevant in this case if the chain of custody was proved. The State bears the *onus* to prove the chain of custody. It must establish the name of each person who handles the exhibit, the date on which it was handled and the duration. Failure to establish the chain of evidence affects the relevancy of such exhibit and thus renders it inadmissible.

[18] The issue turning on the chain of custody is not merely a technical nicety of no legal consequence. It is a matter of substance. It is at the centre of a matter where exhibits are produced in court. It is a matter of relevancy. The trial court must be satisfied that it is dealing with the same items that were seized from the scene of crime. The court *a quo* was patently wrong in finding that the two pieces of ivory produced in court were the same items seized from the appellant. In this case the chain of custody of the exhibits was broken. There is no evidence that the items seized from the appellant were the two pieces of ivory examined by the experts and produced as exhibits at the trial. Therefore, the two pieces of ivory ought to have been ruled inadmissible in evidence.

[19] Maintaining the chain of custody should be considered a professional and ethical responsibility by those in charge of the exhibits. It is imperative to create appropriate awareness regarding the importance and correct procedures of maintaining the chain of custody of exhibits among the people dealing with such cases. It must remain in their minds that how they collect the exhibit and handle it, is critical because it ultimately decides the admissibility and authenticity of the exhibit in the court of law.

[20] In conclusion, without the *nexus* between the items seized from the appellant and the exhibits produced in court he ought to have been acquitted. The conviction and consequent sentence will therefore be set aside.

Accordingly, the following order will issue.

The appeal be and is hereby allowed.

The judgment of the court *a quo* is set aside and substituted with the following:

“The accused is found not guilty and acquitted.”

Dube-Banda J.....

Kabasa J..... Agrees

Mvhiringi & Associates, appellant’s legal practitioners
National Prosecution Authority, respondent’s legal practitioners