NDUMISO SIBANDA

Versus

MR N. MASUKU N.O.

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 26 JANUARY & 16 MARCH 2023

Review

N. Ncube for the applicant

KABASA J: This matter was set down in Motion Court. It is a review application seeking the following order:

> "1. The decision of the magistrate sitting at Lupane under case number CRB LPN 169/19, wherein the applicant was convicted and sentenced to nine (9) years mandatory minimum sentence is hereby set aside and is substituted with the following order:
>
> 'The trial be heard *de novo* before a different magistrate.'
>
> 2. No order as to costs."

I queried with counsel for the applicant regarding the competency of a single judge to grant such an order. The query was informed by the provisions of section 29 of the High Court Act, Chapter 7:06.

Section 29 provides for the powers of the High Court on review of criminal proceedings. Section 29 (2) thereof provides as follows:

> "If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings –
> (a) …
> (b) Are not in accordance with real and substantial justice, it may, subject to this section –
>
> (i) alter or quash the conviction; or
> (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal.

(iii) …
(iv) …
(v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit.

Provided that a judge of the High Court shall not exercise any of the powers conferred by subparagraph (i), (ii) or (iii) of paragraph (b) of subsection (2) unless another judge of the High Court has agreed with the exercise of the power in that particular case."

Counsel appeared to appreciate my concerns. I then removed the matter from the roll. Counsel subsequently addressed a letter to the court seeking directions. The matter was then referred to me to attend to and whichever decision I was to make, seek the concurrence of another judge if I exercised the powers conferred by subparagraph (i), (ii) or (iii) of subsection 2.

This application was filed against the following background;

The applicant appeared before the 1st respondent charged with contravening section 45 (1) (b) as read with section 128 (1) (b) of the Parks and Wildlife Act, Chapter 20:14, it being alleged that he was found in possession of a python skin without a permit.

The applicant who was unrepresented at the time pleaded guilty and the following is what transpired as the court *a quo* sought to test the genuineness of the plea of guilty.

"Q - Correct on the 29th of May 2019 and at your own homestead, Zijimu Village 1, Lupane you were found in possession of a python skin measuring 4,35metres?
A - Correct
Q - Did you have any permit or licence for possessing a python skin?
A - No
Q - Any right to act as you did?
A - None
Q - Any defence to offer?
A - None
Q - Is your plea a genuine admission of the charge, the facts and the essential elements as put to you?
A - Yes

The court a quo then proceeded to enter a verdict of guilty.

Section 128 of the Parks and Wildlife Act provides that:

"(1) Notwithstanding any other provisions of this Act, any person who is guilty of an offence under this Act involving;
(a) …
(b) The unlawful possession of or trading in ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by statutory instrument shall be liable –
(i) On a first conviction, to imprisonment for a period of not less than nine years.

Provided that where on conviction the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

Section 43 of the Act provides that the animals specified in the Sixth Schedule are hereby declared to be specially protected animals and section 44 allows the Minister to amend the Sixth Schedule by adding or removing therefrom the name of any animal by notice in a statutory instrument. What this means therefore is that any animal that is listed in the Sixth Schedule is a specially protected animal and the killing or possession of the trophy of such animal attracts the mandatory minimum 9 years imprisonment unless there are special circumstances.

A python is listed in the Sixth Schedule. As a result the court *a quo* sought for special circumstances and the applicant submitted that the python skin belonged to his father who was a traditional healer. The father passed on and he as the heir was given his tools of trade awaiting their distribution or disposal. He could not dispose of the python skin for fear that some calamity or illness would befall the family. The applicant's sister confirmed this story and a note purportedly authored by the village head was also produced in support of this story.

As at the time of adduction of this evidence relating to special circumstances, the applicant had now secured the services of a legal practitioner. The court *a quo* dismissed his story ostensibly because the sister had shown that she would protect her brother at all costs, a death certificate was not produced confirming the father's death and no registration certificate was produced confirming that the father was a traditional healer. The court therefore ruled that there were no special circumstances and proceeded to impose the mandatory 9 years imprisonment.

This is the decision that is now the subject of this review. The grounds thereof were couched as follows:

Ad conviction

1. The court *a quo* fundamentally erred and misdirected itself at law in holding that the applicant's plea of guilt (*sic*) was an unequivocal admission of guilt which did not amount to any defences at law whereas the applicant was raising full defences to the charge.
2. The court *a quo* misdirected itself by failing to appreciate that the applicant's explanation and evidence led as evidence (*sic*) to prove special circumstances was in fact a challenge to intention to commit the crime charged.
3. The court *a quo* erred and misdirected itself by failing to attach due weight to the applicant's defence and testimonies from applicant's sister and village head.

Ad sentence

4. The court *a quo* fundamentally erred and committed a gross misdirection at law in imposing upon the applicant the purported "minimum mandatory nine (9) year jail terms" (*sic*) not provided for at law.
5. The purported sentence is *ultra vires* the power of the court and not supportable at law.

The state did not oppose the relief sought and submitted that the matter should have proceeded to trial because of the applicant's assertion that the python skin belonged to his late father.

It was the state's submission that a python has not been elevated to the status of a rhinoceros by enactment of a statutory instrument and so the penalty provided for in section 128 did not apply.

As regards conviction, the applicant admitted possession of the python skin. He was keeping it and had no permit which allowed him to possess the python skin. The fact that it used to belong to his late father did not change the fact that he took it into his possession upon the father's demise. The father was no longer the one in possession but him.

The essential elements were put to him and he understood them and his plea was an unequivocal plea.

The explanation regarding how he came to possess the python skin speaks to the aspect of special circumstances and not to the possession.

The state's concession was therefore not properly made. All the questions put by the court *a quo* and the responses thereto spoke to an unequivocal plea of guilty. *(S* v *Bvuto and Ors* 2018 (1) ZLR 119). The essential elements were put in a manner that was clear and the responses thereto pointed to an unequivocal plea of guilty. (*Phir*i v *State* HB-62-93).

The sentiments made by the applicant regarding how he came to possess the python skin did not raise doubt as to the genuineness of his plea warranting an alteration of the plea to that of not guilty (*S* v *Bvunda* HH-278-90).

The conviction is therefore unassailable. However as regards sentence the issue really rests on whether there are special circumstances to justify the imposition of a lesser penalty.

I say so because a python is listed in the Sixth Schedule. Animals in the Sixth Schedule are specially protected animals and possession of a trophy of these animals attracts the minimum mandatory sentence unless special circumstances are present in which case the penalty is a fine four times the value of the trophy or imprisonment not exceeding 5 years.

It would not make sense to argue that the Minister must enact a Statutory Instrument to include a python when such python is already included in the Sixth Schedule. The Minister would by notice in a statutory instrument exclude the python or remove it from the Sixth Schedule if it is his intention not to have it as a specially protected animal whose possession would attract the minimum mandatory sentence. It would be absurd for the Minister to come up with a statutory instrument listing an animal already in the Sixth Schedule. What would be the purpose of that? If a python was not in the Sixth Schedule it would require a notice in a statutory instrument to include it or add it for it to be specially protected animal whose possession attracts the minimum mandatory sentence provided for in section 128.

Section 128 states that "Notwithstanding any other provision of this Act" and it therefore follows that once an animal is in the Sixth Schedule the penalty is as per section 128. Notwithstanding may be read as "For the avoidance of doubt". If the animal is not in the Sixth Schedule then the penalty is as per whatever other provision that relates to possession of such animal or trophy and in this case it will be section 45 (2). Put differently, if a python is not listed in the Sixth Schedule and has not been added by the Minister by notice in a statutory

instrument the penalty for possession of such is found in section 45 (2) which is a fine not exceeding level 8 or imprisonment not exceeding 3 years. I would say the question to pose here is, 'under what circumstances would the Minister issue a Statutory Instrument envisaged in section 44 of the Act? The answer, in my considered view is when the Minister intends to add an animal which is not already in the Sixth Schedule or to remove an animal from the Sixth Schedule, such addition or removal being meant to either regard such animal as not specially protected and so not liable for a section 128 penalty or making it a specially protected animal and so liable for the section 128 mandatory minimum sentence. It would therefore not make sense for the Minister to come up with a notice published in a Statutory Instrument re-stating what is already in the Sixth Schedule, unless section 44 was to the effect that notwithstanding the Sixth Schedule the Minister shall by notice in a Statutory Instrument give a list of those animals which are to be liable to the minimum mandatory penalty. Without the use of the word "notwithstanding" in section 128 one could argue that where a statute provides for two different penalties for the same offence, the accused is entitled to the benefit of the lesser penalty

That said I do not agree with the state's concession that the issue of special circumstances did not arise because there is no statutory instrument that includes a python. Until such a time that a statutory instrument is enacted removing the python from the Sixth Schedule, a python is a specially protected animal the possession or killing of which would attract the minimum mandatory sentence unless there are special circumstances.

Turning to the matter at hand the court *a quo* ought to have made it known to the applicant that his explanation was not being accepted and allow him to adduce evidence or produce the registration certificate relating to his late father's traditional healer status, call the village head to testify regarding the death and burial of the applicant's father and not dismiss what the applicant said without affording him the opportunity to address the court's concerns.

On a reading of the record the applicant's submissions, supported by the sister's testimony and the Ndebele untranslated note from the village head (which ought to have been translated into English and certified by the court interpreter), special circumstances existed justifying the imposition of a lesser penalty.

The court *a quo* therefore committed an irregularity when it failed to make a finding that special circumstances existed. The applicant did not go out of his way to acquire this python skin and he did not intend to derive any commercial benefit from it, special

circumstances existed and a lesser penalty ought to have been imposed. (*S* v *Elias Damba* HB-93-94).

In the result I make the following order.

1. The conviction be and is hereby confirmed.
2. The sentence be and is hereby set aside. The matter is remitted to the court *a quo* before the same magistrate who should consider sentence in light of a finding of the existence of special circumstances.

Kabasa J …….

Dube-Banda J …….. I agree