HONEST GUHU

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE DJP & ZISENGWE J
MASVINGO 25 OCTOBER 2023 & 21 AUGUST 2024

Criminal Appeal

T Zhuwarara, for the appellant
BE Mathose, for the respondent

MAWADZE DJP: This judgment relates to two appeals being CA 65/17 and CA 79/17.

These two appeals were consolidated by consent and were argued together. The reason for consolidation is that both appeals relate to the same appellant and the facts of both matters are closely connected. The appellant was represented on appeal by the same counsel in both matters and counsel for the respondent was also the same.

A summary of background facts of both matters is useful to put this appeal into context.

Background facts.

In both matters CA 65/17 and 79/17 the appellant was jointly charged with 5 other accused persons. The appellant was the 6th accused.

At the end of very contested trials in both matters it is only the appellant who was convicted in both matters. The other accused were found not guilty and acquitted either at the close of the prosecution case or at the conclusion of the trials save in one matter

In CA 65/17 the appellant and 5 other accused were jointly charged of two counts. Both counts relate to Contravening Section 24 (i) (b) of the Parks and Wild Life Act [*Chapter 20:14*]. The appellant was convicted of both counts and sentenced to 9 years imprisonment on each count in addition to payment of $200 000 as compensation.

In count 1 it was alleged that the appellant and his 5 accomplices on 6 March 2015 tracked and killed a male elephant at Mabalauta, Gonarezhou National Park in Chiredzi. It is alleged that they removed the elephant tusks and vanished unnoticed. This offence was only detected the following day and spent cartridges of **.**375 Rifle were recovered near the elephant carcass. The cartridges were sent to Forensics for a ballistic report.

In count 2 on 18 June 2015 it is said that using the same *modus operandi* the appellant and his 5 accompanies tracked and shot 3 male elephants at Dopoje in Gonarezhou National Park using the same Rifle. They are said to have removed the tusks but were disturbed by officials from Parks and Wild life. There was a brief exchange of gun fire and they were forced to leave the tusks. Again the spent cartridges were recovered and sent for forensic examination.

The appellant and his accomplices were arrested a year later on 15 October 2016 after committing the offences in CA 79/17. Upon that arrest the **.**375 rifle was recovered and it matched the spent cartridges in both count 1 and count 2.

In CA 79/17 the appellant and his 5 accomplices were charged with a total of 4 counts and each count is as follows;

In count 1 it is said they hunted and shot 2 male elephants on 15 October 2016 in Gonarezhou National Parks in contravention of Section 24 (i) (b) of the Parks and Wildlife Act [*Chapter 20:14*]

In count 2 it is said they contravened Section 82 (i) of the Parks and Wild life Act (General Regulations) 362/90 as read with Section 128 (i) (b) of the Parks and Wild Life Act when at Chilonga Bridge, Chiredzi they were found in possession of ivory without a permit.

Count 3 relates to Contravening Section 4 (1) of the Fire Arms Act [*Chapter 10:19*]. The appellant and his accomplices were found on the same date and place as in count 1 and count2 whilst in possession of an unregistered **.**375 Witworth rifle.

In count 4 appellant and his accomplices are said to have contravened Section 24 (i) (e) of the Fire Arms Act [*Chapter 10:19*]when on same date and place as in count 1 to 3 they were found in possession of a silencing device of a firearm.

The appellant hails from Nyangawe Village Chief Chindu, in Karoi. The 1st accused is from Mero Village, Chief Jaliami, Sanyati. The 2nd accused hails from Kazangani Village, Chief Chireya in Gokwe. Accused 3 is from Maponde Village, Chief Marange, Mutare. Accused 4 is from Chief Nemangwe in Gokwe and Accused 5 is from Nyanguva Village, Chief Chundu, Karoi.

The facts in CA 79/17 are that on 15 October 2016 appellant and his 5 accomplices proceeded to Gonarezhou National Park using a Mercedes Benz Reg No. ADA 5804. It was being driven by Accused3 Moses Muchini. They were armed with **.**375 Witworth rifle and an axe. It is said Moses Muchini dropped the other 4 accused including the appellant in Chibwedziva area and went back to Chiredzi with Accused 5. It is said the appellant and other 3 accomplices proceeded into Gonarezhou National Park armed with the said rifle fitted with a silencing device and an axe. It is said they shot and killed 2 male elephants. They removed the tusks. They were then picked by their colleagues at Chibwedziva. However unknown to appellant and his accomplices their movements have been noted by officers from Parks and wildlife and other security apparatus of the state. Road blocks were strategically mounted from all exit roads from Gonarezhou National Parks. The appellant and his accomplices were arrested at Chilonga bridge road block. While driving the said Mercedes Benz Reg No. ADA 5804. A pair of elephant tusks were stashed from the rear seat to the dashboard was recovered. Another pair of elephant tusks was recovered in the boot of the motor vehicle. The **.**375 Witworth rifle and 4 rounds of live ammunition were found hidden under the rear motor vehicle seat. The refile was fitted with a silencer. A total of 5 spent cartridges which matched the **.**375 rifle were recovered at the place the 2 male elephants had been shot and killed.

This matter CA 79/17 proceeded to trial. 1 pose here to note the following;

It is astonishing that Accused1, 2 and 4 were acquitted of all the charges. Their evidence or story of being innocent passengers in the said Mercedes Benz coming from consulting a Traditional healer is not only fanciful but only good as a bed time lullaby. I was pleasantly shocked that the state did not even bother to appeal against such an outrageous verdict. Equally shocking is that the appellant and accused 5 and 3 were found not guilty and acquitted in count 1 relating to the unlawful killing of 2 male elephants whose tusks were found in the Mercedes Benz upon their arrest. No order for the forfeiture of the fire arm was even made. I am baffled by how this matter was handled to say the least.

Be that as it may the appellant and 2 accomplices were found guilty as charged in counts 2, 3 and 4. In count 2 they were sentenced to 9 years imprisonment. In count 3 they were sentenced to 24 months imprisonment with 6 months conditionally suspended for 5 years. In count 4 they were sentenced to 12 months imprisonment.

The appeals in both CA65/17 and 79/17 is by the appellant only.

In CA 65/17 a total of 7 state witnesses testified. The appellant's accomplices being Accused 1, 2 and 3 had charges shockingly withdrawn after the plea by the state ostensibly due to lack of evidence at the close of the prosecution case. The trial proceeded in CA 65/17 only in respect of appellant and Accused 4 and 5. Surprisingly Accused 5 was found not guilty and acquitted on some basis that his *alibi* was truthful. Equally shocking is that Accused5 was believed that he innocently associated with the appellant hence was just hired. In 65/17 only the appellant was thus convicted.

Grounds of Appeal: by the Appellant

RE 65/17:

The appellant raises a total of 8 grounds of appeal in respect of the conviction and one ground of appeal in respect of sentence. I however believe that grounds 1 and 2 relate to one issue which is that the court *a quo* should not have relied on forensic evidence adduced from the ballistic report. Grounds 3 and 4 simply relate to the impropriety of relying on circumstantial evidence in this case. In respect of grounds 5, 6, 7 and 8 all appellant is saying is that his version of events should have been preferred rather than that of the state.

In respect of sentence the appellant is simply aggrieved that the court *a quo* allegedly failed to explain special circumstances to the unrepresented appellant.

The appellant in CA 65/17 prays for his acquittal of both charges. In the alternative he prays to have matter remitted for a proper carrying out of an inquiry into special circumstances.

RE 79/17

In respect of CA 79/17 the appellant initially raised just one ground of appeal. The essence of that single ground of appeal is that the ivory , the firearm and silencing device found in appellant's possession belonged to one Justin Sithole Matalilamo and that the appellant lacked the requisite *mens rea* as he was just a messenger.

In respect of sentence the appellant raised 4 grounds of appeal which are that,

a) In count 3 an incompetent sentence of 24 months was imposed as it exceeds the maximum statutory penalty provision.
b) That the court *a quo* in count 2 failed to properly explain special circumstances to an unrepresented accused.
c) That in count 2 the court *a quo* should have made a finding that there were special circumstances as appellant was just a messenger hence should have escaped the mandatory penalty.
d) That in count 4 the court *a quo* erred in imposing a custodial sentence as the statute provides for an option of a fine.

RE: Both CA 65/17 and 79/17

When *Mr Zhuwarara* took over this matter he raised an additional ground of appeal relevant to both matters. This ground of appeal relates to a point of law hence it was allowed.

The graveman of this ground of appeal is that the proceedings in the court a quo violated the appellant's constitutional rights. As a result the appellant is seeking the vacation of both his convictions in CA 65/17 and CA 79/17.

In respect of this point of law in CA 65/17 and CA79/17 *Mr Mathose* for the respondent conceded that in CA 65/17 there was an omission to explain to the appellant his right to legal

representation at the commencement of the trial. He further conceded that the proceedings in CA 65/17 are as a result null and void. Mr Mathose submitted that these proceedings in CA 65/17 should be quashed.

In respect of CA 79/17 *Mr Mathose* held a different view. He submitted that the appellant's right to legal representation was not violated and that it is the appellant who failed to exercise that right. On the merits *Mr Mathose* submitted that the convictions of the appellant in counts 2 to 4 are proper and that there is nothing amiss in respect of the sentences imposed.

I understand the argument by *Mr Zhuwarara* to be that the court *a quo* failed to protect the appellant's right to legal representation in both matters. The argument in respect of CA 65/17 is that the court a quo totally failed to explain the right to legal representation to the appellant at the commencement of the trial.

In respect of 79/17 the appellant's contention is that his right to legal representation by counsel of choice was violated when the court *a quo* failed to grant him a postponement after his legal practitioner of record failed to turn up. Reliance was placed in the matter of *Bacnet Trading (Pvt) Ltd v Netone cellular (Pvt) Ltd & Others* SC 18/19 in which BHUNU JA invalidated the proceedings in which a postponement in order to obtain legal representation of choice was refused.

The other salient point of law Mr Zhuwarara sought to smuggle during the hearing of the appeal without explaining why it was not initially raised or stating whether it's a new ground appeal relates to the threshold of proof in Criminal matters and the onus on the burden of proof. He cited the cases of *R v Difford* 1937 AD 370 and *State v Kuiper* 2000 (1) ZLR 113 (SC) at 118. I believe that this is not a new ground of appeal at all as it was initially raised by the appellant. What only differs now is the form rather than the substance.

The Law

The right to legal representation in any matter before the court is a fundamental right in terms of the Constitution. It also impacts on the right to a fair hearing.

Section 69 (4) of the Constitution provides as follows;

(4) *Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal, or forum"*

The right is explicitly accorded to accused persons in criminal matters as per Section 70 (i) (d) of the Constitution which states;

(1) 70 Rights of accused persons

(i) Any person accused of any offence has following rights

(d*) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner".*

These provisions are clear and need no further elaboration.

The Criminal Procedure and evidence Act [*Chapter 9:07*] provides in both Section 163 A and Section 191 (a) how, procedurally this fundamental right should be protected and or exercised during a criminal trial.

Section 163 A of the Criminal Procedure and Evidence act [*Chapter 9:07*] (which was inserted by Section 34 of Act 2 of 2016) provides as follows;

"*163* ***Accused in Magistrates court to be informed of Section 191 rights.***

(1) *At the commencement of any trial in a Magistrates court, before the accused is called upon to plead to the summon or charge, the accused shall be informed by the Magistrate of his or her right in terms of Section 191 to legal or other representation in terms of that Section*."

(2) *The Magistrate shall record the fact that the accused has been given the information referred to in subsection (1), and the accused's response to it".(my emphasis)*

It is pertinent to not that these procedural requirements are peremptory and the trial court has no discretion accorded to it. They are mandatory.

Section 191 of the Criminal Procedure and Evidence Act *[Chapter 9:07*] applies in all courts. It provides as follows;

"*191* ***Legal representation.***

Every person charged with an offence may make his defence at his trial and have witnesses examined or cross examined. ———————

(a) By a legal practitioner representing him, or

(b) (not relevant)

(c) Not relevant".

The effect of non-compliance with these laid down principles has been settled by the courts both within and without our borders.

In the South African case of *State v Cornelius & Another* 2008 (1) SA CR 96 (c) SAMELA AJ had this to say;

"*The exercise of the right to legal representation is of critical importance in any trial as it is only the source through which the other rights can be effectively exercised*."

Indeed the right to legal representation is not just rhetorical but is one of the fundamental rights which is related to what constitutes a fair trial or hearing.

See also *State v Sibiya* 2004 (2) SA CR 82 (W).

Within our jurisdiction there are a number of cases which deal with the right to legal representation and the consequences of failure to comply with both the substantive and procedural aspects relating to the exercise of this right.

DUBE-BANDA J both in *State v Maxwell Moyo &Another* HB139/20 and *State v Zvidzai Manetaneta*. HH185/20 made the point that failure to explain the accused's right to legal representation is a fatal irregularity which goes to the root of the proceedings.

In the cases of *Potifa Sewaka v The State* HH 262-20 CHITAPI J and in the case of *The State v Wisdom Mule and Another* HH328-20 CHINAMHORA J took a similar view in relation to the peremptory nature of the right to legal representation. In the case of Sawaka supra CHITAPI J had this to say;

> *"A failure to comply with peremptory provisions amounts to a gross irregularity as envisaged in Section 26 (1) (c) of the high Court Act [Chapter 9:06]. This is so because the peremptory provisions statutorily define trial procedure. A purported trial carried out*

other than in compliance with the peremptory procedural steps cannot qualify to be a trial as envisaged by statute. It becomes some kind of trial not sanctioned by the law. It can not be sanitized. In my considered judgment, a trial which does not comply with the statute which defines how the trial must be conducted renders the trial a nullity and for that reason a nullity begets a nullity".

I respectfully associate myself with this lucid exposé of the legal position. Failure to comply with the peremptory provisions amounts to failure of justice. It is a fatal irregularity.

Applying the Law to the facts of both Appeals

RE: CA 67/17

The trial commenced in this matter on 21 April 2017.

The record of proceedings shows that the appellant's right to legal representation was not explained at all. The concession by *Mr Mathose* for the respondent is therefore properly made. This omission is fatal to the proceedings. There is therefore no need to deal with the merits of the matter in CA 67/17.

The proper course of action is to quash the proceedings in their entirety and order a trial *de novo* before a different Magistrate, if the Prosecutor General so wishes to pursue this matter.

RE CA 79/17

The trial in this matter commenced on 30 January 2017. I take a different view in this matter.

The appellant in CA 79/17 was represented by a *Mr Mugiya* and others by a *Mr Vhudzi*. When the trial was set to commence *Mr Mugiya* failed to avail himself as per the record. The matter was postponed to allow *Mr Mugiya* to avail himself. There was no explanation as to why *Mr Mugiya* had failed to turn up for trial.

When the matter was set to resume on the next date both *Mr Mugiya* and *Mr Vhudzi* were absent. The appellant and his accomplices could not explain why *Mr Mugiya* and *Mr Vhudzi* were absent. In fact the appellant said his counsel *Mr Mugiya* was aware of the trial date and made an undertaking to avail himself.

The court *a quo* engaged the appellant and his accomplices pointing out that two previous postponements had been occasioned by the absence of counsel for appellant and his accomplices. It was common cause that on the second occasion all parties present had agreed that the matter was to proceed on the agreed date being the 3rd occasion. However counsel for appellant and counsel for his accomplices were in a no show. No explanation had been given to trial Prosecutor. The appellant and his accomplices said they were also in the dark as to why *Mr Mugiya* and *Mr Vhudzi* were not present. The appellant then requested the matter to be postponed for the 4th occasion to allow *Mr Mugiya* to attend or to find another legal practitioner. After hearing submissions from the appellant the court *a quo* dismissed the application for further postponement. The court *a quo* indicated that it had to balance the interests of the appellant, the state and those of justice. It ordered the trial to proceed

I find no fault with the position taken by the court *a quo.* The trial court has the duty to regulate its proceedings judicially. An application for postponement is not always there for taking. It may be granted or refused. The trial court is enjoined to exercise its discretion in granting or denying a postponement. It should not act capriciously. Indeed an accused cannot be allowed play the proverbial Russian roulette with the court.

In my respectful view an accused cannot seek to have a criminal trial postponed *ad infitum* on the pretext of exercising the right to legal representation. There should always be good cause for any postponement. I am not persuaded therefore that the appellant was denied his right to legal representation or to be represented by counsel of choice. The court *a quo* properly exercised its mind and dismissed an application for a 4th postponement. Indeed one has to distinguish between the right to legal representation and an abuse of that right.

RE: Merits of the Appeal CA 79/17

When the trial resumed in CA 79/17 the appellant gave a lengthy defence outline in denying all the charges. He cross examined all the 3 state witnesses at length and in a material way. He was made aware of the nature of all 7 exhibits produced by the state.

The facts of this matter are in fact largely common cause. All the appellant was saying is that he lacked the *mens rea* to commit the offences charged as he was a mere emissary of one Justin Matalino Sithole.

I turn to the grounds of appeal in CA 79/17.

The appellant in CA 79/17 raised just one ground of appeal in respect of the conviction in all the counts. He simply said the ivory, the firearm and silencing device belong to one Justin Sithole Matalilano. He did not call this Justin Sithole Matalilano. The court *a quo* disbelieved him and gave reasons thereof.

The court *a quo* was told by Constable Tinashe Chapungu of the Minerals and Border Controls Unit that upon his arrest at the road block at Chilonga bridge the appellant never alleged that the items belonged to Justin Sithole Matalilano. In fact he said appellant sought to exonerate his accomplices and claimed ownership of the items recovered. Similar evidence was given by the investigating officer Tafadzwa Mhako. Elias Mpofu the Area Manager of Gonarezhou National Park indicated that at the material time he was not aware of any employee of the Parks and Wild life called Justin Sithole Matalilano.

On his part the appellant admitted he was in physical possession of the elephant tusks, the firearm and the silencing device without a permit at the time of his arrest. All he said is that the items belonged to Justin Sithole Matalilano who had sent him to collect the items from "*some people"* at Chibwedziva for a fee. This was a lame defence which the trial court rightly dismissed. The appellant could not travel such a long distance at midnight to collect such illegal items unaware of the unlawful nature of his conduct. The name dropping was simple to buttress a poorly thought out defence of innocent possession. No reasonable court would allow such wool to be pulled over its eyes as it were.

The convictions in count 2to 4 are proper and cannot be impugned or vacated.

RE: Sentence in CA 79/17

a] The sentence in count 3 is not incompetent as appellant alleges. The counsel for the appellant may have misread the penalty provision for either Contravening Section 4 (1) of the Fire

Arms Act [*Chapter 10:19*] or Contravening Section 24 (1) (e) of the same Act. It is a fine not exceeding level 10 (us $700) or imprisonment not exceeding 5 years. The appellant in count 3 was sentenced to 24 months imprisonment and to 12 months imprisonment in count 4.

b] It is not factually correct that in count 2 the court *a quo* failed to explain special circumstances properly. The trial Magistrate explained what special circumstances entail and that in the absence of such special circumstances a mandatory sentence of 9 years was unavoidable. All the appellant stated was to stick to his already dismissed explanation that he was simply an emissary for Justin Sithole Matalilano. I therefore find no misdirection by the court *a quo* in this regard.

c] Once factually the issue of Justin Sithole Matalilano is dismissed it is foolhardy for the appellant to insist that a finding of special circumstances should have been made. This ground of appeal lacks merit.

d] In respect of count 4 the court *a quo* did not fail to properly exercise its discretion by imposing a custodial sentence rather than a fine. Unlawful hunting within a National Park which explains possession of tusks, a fire arm and the silencing device cannot be viewed in isolation. A fine could have been appropriate if appellant was just found in some other place with such a silencing device. The court *a quo* rightly considered holistically the circumstances of this case. A custodial sentence was therefore in order and can not be a deemed to be inappropriate.

DISPOSITION

Accordingly, it is ordered as follows;

1. [a] In respect of the appeal in CA 65/17 the point of law taken has merit.

   [b] In the exercise of our review powers as provided in the High Court Act [*Chapter 7:06*] the proceedings relevant to CA 65/17 be and are hereby quashed. The convictions are quashed and the sentences set aside.

[c] The Prosecutor General retains the prerogative to cause the appellant to be tried afresh.

[d] In the event that a fresh prosecution in CA 65/17 is instituted it shall be before a different Magistrate and any period the appellant may have served in respect of CA 65/17 should be considered in the event that appellant is convicted either in count 1 and or in count 2 and a term of imprisonment is imposed.

2. In respect of CA 79/17 the appeal both in respect of convictions and the sentences in all the counts be and is hereby dismissed for lack of merit.

MAWADZE DJP.....

Zisengwe J agrees.....

Zuze Law Chambers, Appellant's Legal Practitioners

National Prosecuting Authority, respondent's Legal Practitioners.