HLUPHANI AUSTIN SIBANDA

AND

ELIMANE NKOMO

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND CHIVAYO JJ
BULAWAYO, 24 October 2024 and 10 January 2025

Criminal Appeal

K. Ngwenya for appellants
N. Ngwenya for the respondent

MUTEVEDZI J: A man who seeks to cross a river riding on the back of a crocodile risks being killed in the reptile's infamous death roll. Similarly, an accused who raises a palpably false defence at his trial and not caring to check whether that defence is a valid one or not exposes himself to a conviction without much ado. As will be demonstrated later, the two appellants in this case tendered an explanation for their unlawful possession of ivory tusks, which the trial magistrate did not hesitate to dismiss not only as out rightly false but also totally preposterous because it was invalid.

[1] The background of the case is that on 11 April 2024, police detectives got a tip off that the Hluphani Austin Sibanda (first appellant) and Elimane Nkomo (second appellant) were in unlawful possession of pieces of ivory. The detectives tracked and waylaid the appellants in a suburb called Entumbane in Bulawayo. They found them standing by the side of a gravel road which led into residential stands. The first appellant was carrying a white sack which appeared loaded. When the police approached them and identified them as such, the appellants attempted to run away. They were only apprehended after the detectives fired warning shots, chased and subdued them. They were searched and two pieces of

ivory were recovered from the sack which was in their possession. The pieces were taken for examination by an ecologist who confirmed that they were indeed pieces of raw ivory. They were subsequently formally charged and appeared before the court *a quo* on allegations of contravening s 82(1) of Statutory Instrument 362/90 as read with s 128(b) of the Parks and Wildlife Act [Chapter 20;14] as amended by s 11 of the General Laws Amendment Act No. 5/2011 i.e possession of raw unmarked/ unregistered ivory.

Proceedings in the court *a quo*

[2] At their trial both appellants pleaded not guilty. Their defence was astonishing. They said that the first appellant had, on 9 April 2024, been summoned to Lupane by his uncle to assist in looking for the uncle's cattle which had strayed. The search began on the morning of 10 April 20204. It was whilst he was in the bush that morning, that the first appellant stumbled upon the elephant horns. He immediately contacted the second appellant who was in Bulawayo. The second appellant advised the first appellant that he had previously heard that if one came into possession of ivory among other mentioned animals and artefacts, one could surrender it to the department of Parks and Wildlife for a reward. The two then agreed and arranged that the first appellant would find transport early on the morning of 11 April 2024 to come to Bulawayo so that they could proceed to surrender the ivory at the Parks offices found along 15th Avenue between streets described as Fort and JMN Nkomo in Bulawayo and subsequently claim their reward for it. As per their plan, the first appellant travelled from Lupane to Bulawayo in the odd hours of 11 April 2024. He met the second appellant in Entumbane. They were arrested around 0600 hours. They alleged that they were waiting for transport to get into town to complete the surrender of the ivory to parks officials. They further claimed that they were arrested before the expiration of the fifteen (15) days within which the surrender of the ivory to the Parks department was supposed to have been done in accordance with s 77 of SI 362/90.

[3] To prove its case against the appellants, the state produced various exhibits such as the assay certificate which proved that the pieces were ivory, a certificate of measurements which proved the weight of the ivory tusks and their estimated street value and the certificate of seizure completed by the police details who arrested and confiscated the

ivory from the appellants. The fact that the material which the appellants were in possession of was ivory was not contested.

[4] The state called the oral testimonies evidence of two witnesses. Both of them were police detectives. Albert Venganai was the first. He testified that he had been advised that the appellants intended to sell ivory in Entumbane. He teamed up with his colleagues and proceeded there. They found the appellants as earlier described. The first appellant was standing some distance from the second appellant. The witness said when they introduced themselves as detectives, the first appellant attempted to flee. He only stopped after the detectives fired warning shots and pursued him. The first appellant was the one who held the sack which contained the elephant horns. The witness's testimony was corroborated in all material respects by that of Honest Zvoushe another detective who was part of the team which arrested the appellants. When it was suggested to him that the appellants had picked up the raw ivory in a bush in Lupane and intended to surrender it to the Parks offices, the detective said that that story was incredible because if it were true, the appellants ought to have surrendered the ivory at any of Lupane Parks office, ZRP Lupane, any responsible authority like chiefs in the area or at ZimParks headquarters in Hwange all of which were nearer to where they alleged to have picked the ivory than Bulawayo.

[5] In their defences, both appellants maintained their defence as earlier narrated.

Findings by the court *a quo*

[6] After analysing the evidence before it, the court *a quo* made several findings. First it said the first appellant admitted during cross examination by counsel for prosecution that he had grown up in the area of Lupane but surprisingly said he was not aware that there were ZimParks offices in that area. Second the trial magistrate said the first appellant admitted that he did not disclose, in fact, it said he hid his discovery of the tusks from his uncle who had called him to assist finding the cattle which had strayed. The court *a quo* also found as a fact that the first appellant left his uncle's homestead for Bulawayo at 0300 hours on the morning of 11 April 2024.

[7] Critically, the trial court dealt with the appellants' defence that they intended to surrender the ivory to Parks offices for a reward. It referred to s 77, 82 and 85 of SI 362/1990 and concluded that the provisions did not apply to the appellants' case. In its reasoning the trial

court argued that the law maker did not intent that even a person in unlawful possession of ivory could take it to Parks officials, surrender it and claim a reward without questions being asked. It said the onus remained on the person found in possession of the ivory to prove that their possession of it was lawful. After interpreting the meaning of s 77 the court returned to reemphasise that the actions of the appellants demonstrated that they knew their possession of the ivory was unlawful. It added that if they had lawfully possessed the tusks, there would have been no reason for the appellants to run away from the police when the detectives accosted them; they should have surrendered the ivory to the nearest Parks office, the police in Lupane or any such other institution. It further said there would have been no reason for the appellants to hide the ivory from the first appellant's uncle and to travel from Lupane to Bulawayo at the very odd hours that the first appellant had chosen.

[8] In the end the court *a quo* rejected the appellants' defence as out rightly false and not reasonably possibly true. It convicted both of them. The magistrate found that the first appellant was a repeat offender. It sentenced him to the minimum mandatory eleven (11) years imprisonment. The second appellant who was a first offender was sentenced to the minimum mandatory nine (9) years imprisonment.

Proceedings before this court

[9] Both appellants were apparently aggrieved by their convictions and sentences. They appealed to this court. The hearing of their appeal was set for 24 October 2024. We heard argument in the appeal and soon thereafter dismissed the appeal after giving extempore reasons. The two subsequently requested the court to give them its full reasons for the decision. This judgment constitutes those reasons.

[10] In their notice and grounds of appeal which they filed on 19 June 2024, the appellants stated several grounds upon which they challenged their conviction and one on against sentence. Those grounds were couched as follows:

Ad conviction

i. The court *a quo* erred and misdirected itself in both the law and facts by convicting the appellants on a charge of 'possession of raw and unmarked/unregistered ivory' when the state had failed to discharge the onus , as required by s 18 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], to prove beyond a reasonable doubt two of the essential

elements of the offence charged, namely the requirement to possess a licence or permit and the contravention of the law as alleged in the charge

ii. The court *a quo* erred and misdirected itself in both the law and facts by convicting the appellants on a charge of 'possession of raw and unmarked/unregistered ivory' in that its reasoning and interpretation of s 77of SI 362/1990 is wrong, unreasonable and unjustified having regard to the evidence placed before the court

iii. The court *a quo* erred and misdirected itself in both the law and facts by convicting the appellants on a charge of 'possession of raw and unmarked/unregistered ivory' in that the conviction is not unjustified having regard to the evidence placed before the court proving that 15 days had not lapsed from the date the appellants had come into possession of the unregistered raw ivory

iv. The court *a quo* erred and misdirected itself in both the law and facts by convicting the appellants on a charge of 'possession of raw and unmarked/unregistered ivory' in that it failed to appreciate that s 82(1) of SI 362/1990 is subject to s 85(1) of SI 362/90, resulting in a wrong, unreasonable and unjustified decision having regard to the evidence placed before the court

v. The court *a quo* erred and misdirected itself in both the law and facts by rejecting the appellants' defence, explanation and version of events yet the evidence by the state did not disprove, controvert and/or prove that their defence, explanation and version of events was false beyond a reasonable doubt

vi. The court *a quo* erred and misdirected itself in both the law and facts by convicting the appellants on a charge of 'possession of raw and unmarked/unregistered ivory' in that its findings and assessment of the totality of evidence is so outrageous in its defiance of logic that no reasonable court applying its mind to the matter could have arrived at such a decision

Ad sentence

vii. Without prejudice to the foregoing, erred and improperly exercised its discretion in sentencing appellants to mandatory minimum sentences of eleven (11) years and nine (9) years imprisonment respectively yet the circumstances of the case and the totality of evidence established special circumstances warranting departure from the imposition of the minimum mandatory sentences of 11 years and 9 years imprisonment.

viii.

[11] Needless to state both appellants prayed for the setting aside of their convictions and their substitution with verdicts of not guilty and acquitted of the charge they were facing. Alternatively, if the appeal against conviction failed, they both prayed for a setting aside of their respective sentences and their substitution thereof with twenty-four months imprisonment wholly suspended on conditions of good behaviour and community service.

[12] Ms *Ngwenya* who appeared for the respondent was, and for good reason, brief in her opposition of the appeal. She argued that the appellants were misreading the relevant provisions of SI 362/1990 particularly ss 77 and 82. In her view, the purpose of the two provisions is to ensure that all raw ivory which is lawfully acquired or imported is registered within the prescribed timeframes. She further argued that both the appellants in this appeal had not lawfully acquired the ivory. As such they could not benefit from the provisions in issue. Their conviction was therefore unassailable.

The issue

[13] Our view is that the numerous grounds of appeal can all be resolved by the determination of the second and fourth grounds of appeal which relate to the interpretation of ss 77, 82 (1) and 85 (1) of SI 362/1990. Both appellants did not deny being found in possession of the elephant horns. They did not deny that the horns were examined and were found to be raw/unmarked ivory. As a result, the only question in this case is whether or not the appellants were in lawful possession of that ivory.

The law

[14] Section 82(1) of SI 362/1990 provides that:

> 1) "Subject to s 85, no person shall acquire, have in his possession, sell, or transfer any 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 the Act, or
> b. Was lawfully taken from an animal that died on any land for which that person is the appropriate authority, or
> c. Has been lawfully imported into Zimbabwe, and
>
> that the period within which that person is required to produce the ivory for registration in terms of the s 77 has not lapsed
>
> 2) ….
> **3) In any prosecution arising out of a contravention of subsection (1), the burden of proving—**
>
> **(a) any fact referred to in paragraph (a), (b) or (c) of that subsection; and**
> **(b) that the period referred to in that subsection has not elapsed; shall rest on the accused.** (The bolding is my emphasis)

[15] The language used in s 82(1) is plain and unambiguous. Its ordinary grammatical meaning must therefore be resorted to. There is no point in the court employing other cannons of statutory interpretation in such circumstances. The section proscribes, the acquisition by whatever means, the possession, sell or transfer to another of raw ivory. A person charged with the contravention of s 82(1) can only escape liability if he/she demonstrates that his/her possession/sell/transfer to another of raw ivory was lawful. That lawfulness can only be proved if that person demonstrates that he/she obtained the ivory by either taking it from an animal which they had lawfully hunted in terms of the Parks and Wildlife Act or from an animal which had died. The critical aspect however is that the animal must have died on a land for which the accused person was the appropriate

authority. The last avenue for escaping criminal liability would be for them to illustrate that they lawfully imported the ivory into Zimbabwe from another country.

[16] Section 82 (1) refers to s 77 which in turn sets out the requirements for registration of raw/unmarked ivory. It provides that:

> (1) Any person who-
> (a) acquires, or comes into possession of any unregistered raw ivory or horn shall, within fifteen days of such acquisition or coming into possession; or
> (b) imports into Zimbabwe any unregistered raw ivory or horn shall, within twenty-four hours of such importation
>
> Produce the ivory or horn to a specified officer
>
> (2) A specified officer shall require evidence that any ivory or horn has been lawfully acquired or imported or is lawfully possessed, as the case may be, by the person seeking to have it registered
> (3) After satisfying himself as to the matters referred to in subsection (2), the specified officer shall register the ivory or horn and shall-
> (a) Cause it to be marked with a distinctive mark as provided in Part II of the 7th schedule; and
> (b) Issue a certificate of ownership in the form prescribed in the 8th schedule

[17] Once again, the language employed in s 77 admits of no ambiguity. What we discern from s 77 is that it is possible for a person who has acquired or who possesses or who has imported raw unmarked ivory to approach a specified officer and register it. But there is a catch and two issues arise. First the requirement for lawful possession, acquisition or importation of the raw ivory rears its head again. It means that a person who approaches a specified officer seeking registration of his/her ivory must show that he lawfully possesses it, acquired or imported it. Second there is a general rule of statutory interpretation which prescribes that sections of the same statute must be read together. Even where they may be in conflict the law requires courts to endeavour to interpret them in a way that reconciles them. See the case of *Tamanikwa and others v Zimbabwe Manpower Development Fund* 2013 (2) ZLR 46 (S) generally on that aspect. In that regard, our view is that one cannot seek to read s 77 to the exclusion of s 82 of SI 362/90. A reading together of the two provisions would show the harmony between them. Whilst s 77 simply allows for the registration of lawfully possessed, acquired or imported raw ivory, s 82 criminalises the unlawful possession, acquisition or importation of such raw ivory. The sections therefore compliment each other. Once that is accepted, it must follow that a person cannot register unlawfully possessed, acquired or imported raw ivory without

committing the offence(s) specified under s 82. Conversely, one cannot commit an offence specified in s 82 and still be able to register the raw ivory in terms of s 77.

[18] Granted that the argument which counsel for the appellants raised that s 82 (1) is made subject to s 85 is correct. In plain English the phrase 'subject to' implies that the relevant section is governed by the one to which it is made subject. Put differently, it is subordinated to that provision or that its application is contingent upon certain conditions which appear in the latter provision. It is an obstante clause and is the direct opposite of a non-obstante clause such as 'notwithstanding.' See the case of *Marx Mupungu v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 7/21 for a fuller exposition of that issue.

[19] In the case of s 82, there are conditions which are stated in s 85 which make it subordinate to that provision. The conditions are in the form of exemptions. They are specific instances which make it possible for someone to possess, acquire or import raw ivory without requiring it to be registered. To put that into context a recital of s 85 which is couched in the following manner may be necessary:

> **85. Exemptions**
>
> (1) Sections 77, 82 and subsection (1) of s 84 shall not apply in respect of the acquisition or possession of ivory or a horn by any museum or educational institution, where such ivory or horn is bona fide acquired or possessed for the purposes of the museum or for scientific or educational purposes
> (2) Sections 77, 82 and subsection (1) of s 84 shall not apply in respect of the acquisition or possession, sale or transfer of any ivory or a horn by any person in the lawful execution of duties on behalf of the state
> (3) Section 82 shall not apply in respect of the acquisition or possession of-
> (a) Any unregistered ivory by any person in accordance with any authority granted to him by the Director; or
> (b) Any marked ivory that has been lawfully imported into Zimbabwe after being manufactured outside Zimbabwe; or
> (c) Any marked ivory that was manufactured prior the 19th December 1986
> (4) In any prosecution arising out of a contravention of s 77, 82, or subsection (1) of s 84, the burden of proving that he was entitled to an exemption in terms of this section shall rest on the person claiming the exemption (underlining is my emphasis)

[20] The emphasised provisions in sections 82 (3) and 85 (4) place a reverse onus on any person accused of violating the law. In other words, in a prosecution for contravening s 82 all that a prosecutor needs to do is to allege that a person unlawfully acquired or possessed or imported or transferred raw unmarked ivory and stop there. The onus is on

that accused person to prove that he got the ivory through any of the means that are listed in paragraphs (a), (b) or (c) of subsection (1) of s 82. The same applies to the exemptions stated in subsection (4) of s 85. The burden lies on the person who wishes to rely on the exemptions to prove his/her entitlement to them.

Application of the law to the facts

[21] The argument which the appellants made is that they were in possession of ivory which one of them had picked in a bush in Lupane. They did not state whether the ivory was hidden in that bush or it was extracted from the carcass of an animal which the first appellant found in the forest. It was not apparent from their defence whether the first appellant hunted the animal whose horns they had. Whichever way, the onus remained on them to prove that their possession of the elephant tusks resulted from of one or more of the circumstances listed in paragraphs (a), (b) or (c) of subsection (1) of s 82. The argument that they wanted to take the ivory to Parks officials in order to claim a reward is illogical because it is not provided for in terms of the law. S 77 of SI 362/90 does not speak to rewards. It speaks to registration not of ivory acquired in any manner but acquired lawfully. Picking ivory, whether abandoned or hidden in a bush is not one of the means which can lead to lawful possession. The same applies to extracting it from a dead animal. The requirement for that to be lawful is that the animal must have died **on a land to which the person found in possession of the ivory was the appropriate authority**. The question of who is an appropriate authority once again fell squarely within the paragraphs where the burden lied with the appellants to prove. It was upon them to do so if they had wished. What an appropriate authority is, was defined in the interpretation section of the Parks and Wildlife Act. As already said, it was incumbent upon the appellants to allege and prove that they were an appropriate authority of the land in question. Given that they said the ivory was picked from a forest, it is doubtful that anything would have come out of such an argument. In fact, they did not even argue that they had taken it from a dead elephant. The record of proceedings is bereft of any attempt by the appellants to discharge any of the onus which rested on them. Instead, their counsel was thoroughly mistaken to think that the prosecution bore the duty to prove what he deemed to be the essential elements of the offence.

[22] Our reading of s 82(1) demonstrates that the offence is complete once one is found in possession of raw/unmarked ivory. The prosecution ought to have simply alleged that the appellants unlawfully possessed raw/unmarked ivory. The allegation that the appellants did not have a permit to do so was superfluous but certainly not prejudicial to any defence that the appellants may have raised. In any case, the observation by counsel for the appellants that the provisions do not mention the requirements for licences or permits is wrong.

[23] We said earlier that the provisions regulating the possession or acquisition of ivory must be read together. If they are it would be apparent that s 77 (3) (b) requires that when unmarked /raw ivory is registered, the specified officer shall issue a certificate of ownership in the form prescribed in the eighth schedule, in favour of the person in whose name the registration would have been done. It is that certificate which becomes the licence or permit authorising the person to possess ivory. For purposes of completeness, we restate once more that, the burden to prove the absence of a permit or a licence was not the duty of the prosecution but that of the appellants because the law places it upon them.

[24] The only issue which could have burdened the state and which it was necessary for the state to prove was that the appellants possessed the ivory. Fortunately for the respondent, in this case proof of such was unnecessary because the appellants outrightly admitted possession. They were well advised to do so because there could have been no denying it. Both of them said they intended to surrender the ivory to National Parks and claim a reward. They could not have done so with ivory which they were not in possession of.

[25] Clearly, the provisions regulating possession and acquisition of ivory are uncompromising. One cannot touch ivory unless one is qualified/authorised to do so in terms of the law. It meant that in the appellants' case, whatever intentions they had, they ought to have left the ivory wherever they had seen it, if their cock and bull story were to be believed and then inform the authorities of their discovery. Possibly, that way, they could have claimed the reward which they craved. Possessing it and hiding it from all the officials and offices in and near Lupane as correctly pointed out by the trial magistrate betrayed their resolve to appropriate the ivory for themselves.

[26] From the above analysis, we cannot fault the court *a quo's* interpretation of the relevant provisions of SI 362/90. Admittedly, the interpretation could have been more elegantly put across but the long and short of it is that it was essentially correct. Above, we have already demonstrated the shortcomings of the argument that the interpretation was not correct because the court *a quo* failed to appreciate that s 82(1) was made subject to s 85.

[27] In the same breadth, our considered opinion is that the view expressed by counsel for the appellants that they still had fifteen days to surrender the ivory to Parks officials is equally flawed. As already stated, the fifteen days period is applicable to persons who have lawfully acquired, possessed or imported raw ivory. It is not meant to enable them to claim a reward declared at some exhibition forum like the Zimbabwe International Trade Fair but is intended for the registration of the ivory in terms of the law. The appellants were not in lawful possession of the ivory. At the very least they did not proffer any explanation as to justify their possession. The explanation that they wanted to be rewarded for it fell outside the confines of the law and made their possession illegal. Even if they had proceeded with the ivory to the Parks offices, (which is doubtful given all the indiscretions pointed out by the trial magistrate in discrediting their story), chances are high that they may still have ended up in the same trouble that they found themselves in.

[28] So, given the above, the court *a quo* had no discretion to accept or not to accept the appellants' defence. Any defence regarding their possession which fell outside the considerations stated under s 82 would have been irrelevant. The explanation given by the appellants was therefore an invalid defence for the offence they were charged with. It was not only inapposite but so illogical, that even if the crime were open to any defence, the trial magistrate would still have been justified to reject it on the basis of the unassailable reasons which she gave.

Disposition

[29] The above findings extinguished the debate about the interpretation of sections 77, 82 and 85 of SI 362/90. As is apparent, the conclusions we reached straddled across all the grounds of appeal against conviction raised by the appellants and resolved them in one fell swoop. None of them had any merit. The appellants' interpretation of the relevant

provisions was wrong; The absurdity in the meaning they ascribed to s 77 is graphic. It would allow even a poacher who killed an elephant to approach a specified officer and demand the registration of his/her ill-gotten ivory. It was the appellants who had the onus to prove that they had lawful possession of the ivory; their defence was invalid and the totality of the evidence pointed to their guilt. It was for those reasons that we had no hesitation to dismiss the appeal against conviction like we did.

The appeal against sentence

[30] The sole ground of appeal against sentence was that the court *a quo* was wrong to conclude that there were no special circumstances in this case because there were. As such, so the argument went, the trial magistrate was not entitled to impose the applicable minimum mandatory sentences.

[31] From the authorities that they referred to both at the time of sentencing in the court *a quo* and in their heads of argument and oral submissions in this court, it appeared to us that all parties involved properly appreciated what special circumstances are.

[32] In their submissions motivating the court *a quo* to find in their favour, the appellants' argument was simple. They had not killed any elephant for the ivory but had just picked the tusks in a bush. That fact, so they argued, amounted to special circumstances. The court *a quo* was therefore entitled to depart from imposing the minimum mandatory sentences and impose any other commensurate sentence. In addition, each of them chronicled their personal statuses and urged the court to take them and the circumstances of their possession of the ivory cumulatively, to find special circumstances. Both appellants said they were infected with HIV and were on antiretroviral treatment. They both claimed to be breadwinners for fairly large families which included both or the other of their parents. The first appellant said he was 60 years old and was a subsistence farmer whilst the second appellant stated his age as 40 years.

[33] Counsel for prosecution rubbished those claims. He said that the first appellant was a repeat offender having been convicted and sentenced for the same offence in 2018. The first appellant apparently admitted that previous conviction. The prosecutor said as such, the first appellant could not feign ignorance about the consequences of illegal possession of ivory. The further argument was that the second appellant was the one who instigated

the first appellant to bring the ivory from Lupane to Bulawayo. He thus urged the court *a quo* to reject the appellants' contention that the submissions amounted to special circumstances. The trial regional magistrate, after referring to some authorities and analysing the arguments, ruled that what the appellants had submitted did not amount to special circumstances and that she was therefore obliged to impose the minimum mandatory penalties prescribed by the law.

[34] The only issue for determination is therefore whether or not the trial court erred by determining that the appellants' submissions did not amount to special circumstances.

[35] This court has, in many instances, pronounced what constitutes special circumstances. Recently in the case of *S v Manyengavana* HH 102/23 CHILIMBE J aptly described the question of special circumstances as a fluid concept. He said as a result a court must feel at large in its investigation of the question of their existence or otherwise. His LORDSHIP was however discussing the issue in the context of unrepresented accused persons. In *S v Kambuzuma* HH 175/15 MUREMBA J cited with approval the case of *R* v *DA Costa Silva* 1956 92) SA 173 (SR) in which BEADLE J said,

> "There is, to my mind, some difference between 'a circumstance of the case' and 'a circumstance of the offence'. The Court is here dealing with the quantum of punishment, and in making a decision on this I think that any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as 'a circumstance of the case', even though it may not be 'a circumstance of the offence'. An example might perhaps best illustrate this point. If a very elderly man who is suffering from some chronic disease which requires special diet and specialised medical treatment were convicted of driving a car whilst not insured against third party risks, and if it were shown that a sentence of imprisonment would be likely to cause his death, it seems to me that this would be a proper factor which the court could take into account in imposing a sentence of a fine instead of a sentence of imprisonment, although it would be a circumstance 'special' to the offender, and not 'special to the offence…. I fail to see why in assessing punishment a circumstance which is special to the offender cannot be regarded as 'a circumstance of the case' simply because it is not related to the offence. It may well be that many circumstances of a case which relate only to the offender, and not to the offence, should not be taken into account; but this is because they would rightly be regarded as 'general', as opposed to 'special', circumstances."

[36] What the above findings, which I entirely agree with, simply do, is to demonstrate that there is a distinction between special circumstances peculiar to a case and special circumstances peculiar to an offence. The term 'special circumstances peculiar to the case' is more liberal than 'special circumstances peculiar to an offence.' It must therefore be approached with an open mind to accommodate anything that may possibly persuade the

court to depart from imposing the minimum mandatory sentence. It must be able to accommodate the 'triad of the offender, the offence and the interests of society.'

[37] Another central principle which comes out of the authorities is that whatever it is and whichever side between special circumstances 'peculiar to a case' or 'peculiar to an offence' that a court may be dealing with, the circumstances must be extraordinary in their nature. Perhaps KUDYA J (now JA), in the case of *S v Telecel Zimbabwe (Pvt) Ltd 2006 (1) ZLR page 467* put it more graphically than in any other authority when he held that:

> "It is apparent from decided cases therefore that the question of special reasons is dependent on the particular facts of the matter before the court. These factors must be abnormal, unusual; extraordinary in the sense approximating to a choice between life and death, that is, that the accused person is left with no choice but to break the law in order to save his or her life or the life of some other person."

[38] Further, the reason why statutes use the two different terms is deliberate. It is neither decorative nor intended to showcase the drafters' eloquence. The purpose is to distinguish the requirement for particular offences.

[39] The proviso to s 128 of the Parks and Wildlife Act is couched as follows:

> 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 specified in a notice published under section 104(2) for a rhinoceros, elephant or other specially protected animal, or four times the value of the ivory or any trophy, as the case may be, or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. (Underlining is my emphasis)

It must follow therefore that the considerations here must include the triad of the offence, the offender and the interests of society which we pointed out above save to mention that the personal circumstances of the offender which may be considered are only those that are special in nature.

[40] But before we advert to the facts of this matter, we wish to also point out other relevant considerations. In the case of *S* v *Stouyannides* 1984(1) ZLR 144 at 152 C-D, GUBBAY JA, (later CJ) held that:

> "Where a finding on whether special reasons exist or not is left by the lawmaker to the opinion of the trial court, in the absence of a misdirection on the facts upon which that opinion is based, the power of an appeal court to overrule it is curtailed. It will only interfere with the opinion of the trial court if satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the facts."

In *S v Ndlovu* HH 522/23, I also expressed the view that:

> "the assessment of whether or not special circumstances exist in a particular case is a function which is left to the opinion of the trial court. As long as there is no misdirection a challenge that another court may have seen issues differently is insufficient."

[41] Put in another way, a finding of the existence or otherwise of special circumstances is a finding of fact which an appellate court can only interfere with if it is illustrated that the trial court misdirected itself. As such an aggrieved party must not only allege a misdirection but must demonstrate the way in which the allege the decision of the trial court to be so outrageous that no court acting reasonably could have arrived at such a decision, such as alleging that the decision is contrary to the evidence submitted to the court.

Application of the law to the facts

[42] We have already mentioned that the stand out argument by the appellants was that the ivory was picked in the bush and not taken from an elephant that they had killed. We wish to reassert the strictness which is apparent in the provisions of the Parks and Wildlife Act as well as the regulations made under it. The appellants were not self-actors in the court *a quo*. They were represented by counsel. As such the onerous expectations attendant on the trial magistrate that we discussed above did not apply.

[43] Picking ivory in a bush hoping to make a quick dollar out of it can hardly be the matter of life or death that this court alluded to in *S v Telecel* (supra). If anything, it was simply greed on the part of the appellants. What is striking is that the first appellant said he was not resident in Lupane although he had grown up there. Instead, without disclosing where he was coming from, he said he had been invited there by his uncle to help him look for the uncle's cattle that were lost. When he went to look for the cattle, it was then that he stumbled upon the precious ivory in the bush. He appeared to have been a lucky man. But that luck had not struck once. A few years earlier he had equally been lucky to be found in unlawful possession of ivory. The coincidence was simply remarkable. In fact, too remarkable to be true. It appeared like ivory followed him wherever he went. The trial magistrate concluded that the first appellant had been through the same road before and was well aware of the consequences of illegally possessing ivory. We have said already that appealing against the court *a quo's* finding could not be based on supposing that this

court could have made a different finding. It had to be premised on a demonstration of a misdirection by the court *a quo*. The appellants were required to show us that the finding by the trial court that picking ivory from a bush in Lupane, hiding it from all prying eyes, skipping to report the finding at numerous relevant institutions in and around Lupane, travelling hundreds of kilometres away with the discovery concealed in a sack and then bolting away at the sight of police officers was outrageous in its defiance of logic that no court acting with reason could have made it. At the end of that long journey, was the second appellant who was waiting to lead the first appellant to claiming a reward for his discovery. In our view the court *a quo* was right to refuse to be hoodwinked by the appellants' unbelievable story. What must have struck the appellants was that the court *a quo* had already rejected their pathetic explanation during trial. It rejected the story as palpably false. It was going to take a moving of mountains to turn around at the sentencing stage and convince the court to accept that false story. In the end we do not see any misdirection on the part of the court *a quo* to find that such submissions did not amount to special circumstances.

[44] We said there were other submissions which were proffered regarding the personal circumstances of the appellants. The majority of them such as their ages and the dependency of their families on them were not extraordinary in any way. They were general items of mitigation which this court in previous pronouncements has ruled as not constituting special circumstances even when taken cumulatively. But perhaps what needs special mention among those is the submission by both appellants that they were infected with HIV, the virus that causes AIDS. We were not sure what they wanted to achieve from that. Much as being HIV positive used to be scary and was viewed by many as terminal, it is a notorious fact, which the court will take judicial notice of, that this is no longer the case. Many forms of treatment have been developed over the years to mitigate the effects of HIV on humans. Dr Amos[1] had the following to say regarding the previously catastrophic effects of the condition:

[1] The doctor's profile appears on: https://www.startswithme.org.uk/story/hiv-is-a-death-sentence-right#:~:text=Dr%20Amos%20said%3A%20'Treatments%20used,on%20someone's%20health%20are%20limited.; accessed on 9 January 2025

> "'Treatments used, mean people living with HIV live long and healthy lives because the virus is controlled and its effects on someone's health are limited. The treatment also brings the level of virus in the body of someone living with HIV down to such low levels that it can't be detected by HIV tests – and this also means that it can't be passed on to someone's sexual partners, whether they use condoms or not."

[45] Writers Suhayfa Bhamjee and Ann Strode,[2] argue that:

> "Sub-Saharan Africa has just over 10% of the world's population, but is home to more than 60% of all people living with HIV – 25.8-million. In 2005, an estimated 3.2-million people in the region became newly infected, while 2.4- million adults and children died of AIDS."

The authors further argued that because of those numbers the expectation is that HIV would take centre stage as a factor in mitigation of sentence but that it would result in unexpected consequences because of the high likelihood that a significant proportion of offenders could be HIV positive. They therefore could conceivably argue that their condition ought to be considered during sentencing. Even sentenced prisoners could take advantage of that and appeal against their sentences of imprisonment on the premises of their HIV statuses.

[46] In our case, as far back as 1993 when being infected with HIV was still viewed as a death penalty, this court in the case of *S v Mahachi* (1993 2 SACR 36 (Z)), rejected the notion of treating those with HIV as a special category of offenders. It held that HIV could not be treated any differently to any other life-threatening illness. It further said sickness must be considered as a factor in conjunction with other relevant considerations when determining an appropriate sentence. In its final determination, it held further that because the accused it was sentencing had previous convictions, his state of health was not decisive. It sentenced him to imprisonment regardless of his HIV condition.

[47] The remarks by Bhamjee and Strode and the decision in *Mahachi*, are critical. I entirely agree with their conclusions. I also wish to add that the effects of HIV have since been downgraded to the levels of any other disease and conditions like the common colds, diabetes, and hypertension among others. In fact, it is a fact that there are more deadly infections and diseases than HIV. It is time therefore that people accused of crime must stop seeking special sentences on the guise of their HIV statuses because their conditions are no different from other illnesses. The courts will view that as nothing but an abuse of

[2]HIV Status as a Mitigating Factor In Sentencing: A Critical Review: S v Magida 2005 2 SACR 591 (SCA); University of KwaZulu-Natal, Pietermaritzburg; accessed on 9 January 2025 from file:///C:/Users/HP/Downloads/2vol+_17_+case+bhamjee+strode+HIV+Magida+case.pdf;

one's medical condition. For the avoidance of doubt, being HIV positive, like any other ailment, and without more is not a special circumstance warranting a court to depart from imposing a prescribed minimum sentence on an offender.

[48] Like in *Mahachi,* the first appellant was a repeat offender. The court *a quo* was correct to impose the minimum mandatory eleven years on him regardless of his HIV condition. Equally the sentence of nine years imprisonment imposed on the second appellant was an appropriate one. It was for the above reasons, that we also dismissed the appeal against sentence.

Mutevedzi J …….

Chivayo J …… I agree

Messrs J T Mabhikwa, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners