WISDOM MBIZA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J AND MAFUSIRE J
MASVINGO 8 FEBRUAURY 2017 AND 8 JUNE, 2020

Criminal Appeal

P. C. Ganyami, for the appellant
B.E Mathose, for the respondent

MAWADZE J: This judgement has been necessitated by the decision I made with the concurrence of MAFUSIRE J in the appeal case of *Tatenda Mhango and 2 ors* vs *The State* HMA 33/19. In that criminal appeal judgement we upheld the appeal in respect of the mandatory minimum 9-year jail term on the basis that a pangolin was not a specially protected animal for purposes of section 128 of the Parks and Wildlife Act *[Chapter 20:14]*. This was contrary to other earlier decisions we and other judges had made in previous cases dealing with accused persons convicted for pangolin related offences.

In the Tatenda *Mhango And Ors vs The State* case *supra* our reasoning was that it was improper to invoke the sentencing provisions section 128 in of the Parks and Wildlife Act *[Chapter 20:14]*in relation to pangolin related offences (which generally attracted a minimum of 9 years imprisonment in the absence of special circumstances). Our view was that the correct penalty provision for pangolin related offences is provided for in section 45 (2) of the Parks and Wildlife Act *[Chapter 20:14]* instead of section 128 of the same Act. This position seems now to have

been vindicated by the promulgation of Statutory Instrument 71/2020 published in the Government Gazette on 20 March 2020. In that Statutory Instrument 71/2020 the Minister of Environment, Climate, Tourism and Hospitality has now designated a pangolin as one of the specially protected animals listed for purposes of section 128 of the Parks and Wild life Act *[Chapter 20:14]*. The net effect of the Statutory Instrument 71/2020 [Parks and Wild Life Specially Protected Animal Regulations] 2020 is to reinstate the special mandatory minimum sentence of 9 years imprisonment for pangolin related offences in the absence of special circumstances for purposes of contravening section 128 of the Parks and Wild life Act *[Chapter 20:14]*.

In the absence of the Statutory Instrument 71/2020 the question which had vexed this court in light of the *Tatenda Mhango and Ors vs The State supra* has been how to rectify the anomaly in relation to those accused persons hitherto improperly sentenced to the minimum of 9 years imprisonment (in the absence of special circumstances) for pangolin related offences prior to the enactment of the Statutory Instrument 71/2020 on 20 March 2020. As a way of rectifying this anomaly the JUDGE PRESIDENT in consultation with the Chief Magistrate has called for all such matters to be placed before judges of the High Court so that corrective measures are taken by possibly exercising the inherent review powers vested in the judges in order to avoid the attendant prejudice to all accused persons currently serving the mandatory minimum 9 years jail sentences or more for pangolin related offences. This matter therefore is one such cased referred to me for purposes of possible exercising such review powers.

Unfortunately I could not deal with this matter for I held the view that this court is now *functus officio*. This was on the basis that MAFUSIRE J and myself had on 8 February 2017 dismissed the accused's appeal in relation to the minimum 9 year imprisonment term during an appeal hearing against that sentence. My respectful view therefore is that only the Supreme court can take such necessary corrective measures [see the attached correspondence to this record]. The CHIEF JUSTICE as per the minute dated 20 May 2020 then directed that we provide written reasons for our decision in this matter on the appeal hearing of 8 February 2017 [we had given *ex tempore* reasons) prior to our different decision in *Tatenda Mhango and Ors vs The State* matter *supra* on 31 July 2019 [to enable the Supreme court to possibly deal with this apparent anomaly. I now provide the reasons hereunder.

The 41 year old appellant was arraigned before a Chiredzi magistrate on charge described as contravening section 45 (1) (b) as read with section 128 of the Parks and Wild life Act *[Chapter 20:14]*. This related to possession and or selling of a pangolin. The appellant was legally represented. He was jointly charged with two other persons Mike Mbiza aged 43 years and Samuel Chauke aged 46 years who both denied the charge resulting in a separation of trial. The appellant was duly convicted on his own plea of guilty.

In brief the agreed facts informing the appellant's conviction are as follows;

On 16 September 2016 a police officer Emmanuel Chadenga of the Minerals and Border Control unit received information from an informer that the accused Mike Mbiza was selling a pangolin. The police officer subtly linked up with Mike Mbiza pretending to be a potential buyer of the said pangolin. The police officer was with other two police details who also pretended to be potential buyers. The said Mike Mbiza who was in Chiredzi town took the bait and directed the police officers to the appellant and Samuel Chauke who were in possession of the pangolin in rural Chikombedzi. The three police officers were able to telephonically communicate with the appellant and travelled all the way to Chikombedzi ostensibly to buy the pangolin from the appellant and Samuel Chauke. They met the appellant and Samuel Chauke along Mwenezi river who were riding a motor cycle carrying the live pangolin in a bucket. Upon meeting the police officers the appellant who believed the police officers were potential buyers brought the live pangolin contained in a bucket and he was arrested. The live pangolin valued $500.00, the bucket and the motor cycle were all taken as exhibits.

During the court proceedings the appellant unequivocally pleaded guilty to the charge. The appellant's counsel advised the court to dispense of even explaining the essential elements of the charge to the appellant as the appellant fully understood and agreed to the same. The appellant, after his counsel Mr Ganyani's explanation was duly convicted.

In his address to the trial court the appellant's counsel Mr Ganyani combined both the mitigatory factors and the address on special circumstances.

In mitigation it was submitted on the appellant's behalf that he is a qualified builder married with 6 children and looking after 3 other dependants. The appellant owns a grinding mill, 21 cattle, 18 goats and 4 donkeys.

In relation to special circumstances it was submitted on the appellant's behalf that the appellant is an unsophisticated rural person (despite him owning a grinding mill and being able to drive a motor cycle!).

It was said that it is the appellant's herdboy who had found the pangolin and brought it to the appellant who decided to keep it. It was never explained why the appellant decided to keep the pangolin in the first place after it had been allegedly brought to him. The appellant as per the agreed facts secured the live pangolin in a bucket and offered it to disguised police officers for sale resulting in his arrest.

In the court *a qou* Mr Ganyani for the appellant submitted that there were special circumstances in the case as the appellant was entrapped by the police officers to offer the pangolin for sale. The trial court rejected this submission together with the one relating to the accused's rural unsophisticated background making him ignorant of the law. The appellant was then sentenced to 9 years imprisonment on 19 September 2016.

Aggrieved by this sentence the appellant noted an appeal against sentence to this court on 28 September 2016.

The grounds of appeal are badly drafted to say the least. The appellant insisted that he was entrapped to commit the offence and should have been spared the minimum mandatory 9 year jail term.

Due to the movement of this record I now noted that the heads of argument for both counsel are no longer in the record. I nonetheless was able to rely on my detailed notes.

During the appeal hearing Mr Ganyani for the appellant tried vainly to introduce new facts to this case despite his adherence to the agreed facts in the court a *qou*. He now alleged that the appellant kept the pangolin for a few days (without specifying the number of days or why he kept it). Mr Ganyani insisted that the live pangolin had been foistered on the appellant by the herd boy without explaining how that was possible.

The thrust of Mr Ganyani's submission before us was that there are special circumstances in this case because;

(a) The appellant did not go out of his way to hunt for the pangolin but it was brought to him by his herd boy. What escaped Mr Ganyani's mind is that appellant was not being charged for hunting of a pangolin as defined in section 45(1) (a) of the Parks and Wild life Act

[Chapter 20:14] but for contravening section 45 (1) (b) of the Parks and Wild life Act *[Chapter 20:14]* relating to possession and or selling of a pangolin.

(b) That the appellant was an unsophisticated rural man who was unaware that it was unlawful to possess a pangolin. As already said the appellant's background does not project him as such as per factors in mitigation.

(c) that the appellant acted in common purpose with Mike Mbiza and Samuel Chauke. The mind boggles as to how this amounts to special circumstances. In any event both Mike Mbiza and Samuel Chauke pleaded not guilty to the charge resulting in a separation of trials. The appellant who was legally represented admitted to the charge unequivocally. His alleged accomplices will have their day in court and at this stage one can not speculate as to their roles.

(d) that the appellant was entrapped to commit the offence. Again what seemed to escape Mr Ganyani's mind is that the appellant was not entrapped to possess the pangolin in contravention of section 45(1) (b) of the Parks and Wild life Act *[Chapter 20:14]*. Further the trap by the police officers was simply to facilitate appellant's arrest rather than to induce him to either possess or to sell the live pangolin.

We therefore agree with Mr Mathose for the state that the court *aqou* rightly found that there are no special circumstances in this case and that all that was meaningfully submitted on appellant's behalf are mitigatory factors rather than special circumstances.

Our considered view is that Mr Ganyani for the appellant had nothing meaningful or new to submit on behalf of the appellant in relation to the existence of special circumstances. He simply regurgitated the same issues rejected by the court *a qou* without showing how the court *a qou* misdirected itself. Further it was improper for him to attempt to reconstruct the agreed facts without explaining the basis for such reconstruction.

As already said the grounds of appeal, if I can call them as such, are badly drafted. In his submissions before this court Mr Ganyani, in my respectful view, had nothing meaningful to say other than to try and cause confusion by creating new facts from the bar on appeal.

This matter can simply be resolved on the facts rather than the law. The appellant was in possession of the pangolin which he offered for sale. He was not entrapped to possess the live pangolin or to offer it for sale as it were. The police officers travelled all the way from Chiredzi

town to rural Chikombedzi communicating with the appellant posing as potential buyers. It is false that the appellant proceeded to meet the police officers in order to report that he was in possession of the live pangolin but to offer it for sale as per the agreed facts. In fact the appellant did not even know that there were police officers but believed there were potential buyers.

The appellant, as already said, was not entrapped to possess the live pangolin. The truth of the matter was that the trap was simply to facilitate the appellant's arrest rather than the commission of the offence.

There are indeed no special circumstances in this case. The appeal totally lacks merit and can not succeed. The court *a qou* did not misdirect itself in any manner. This is the basis upon which we ordered that the appeal against sentence be dismissed.

In light of our decision later in the matter of *Tatenda Mhango* and *ORS vs The State supra* the appellant should not have been sentenced under Section 128 of the Parks and Wild life Act *[Chapter 20:14]* but under section 45 (1) of the same Act hence the issue of special circumstances and the mandatory minimum 9 year prison term should not have arisen. This is the anomaly the Supreme Court is being invited to correct. Again the Statutory Instrument 71/2020 published on 20 March 2020 has no retrospective effect and is only operational as from 20 March 2020.

The above inform the reasons for dismissing the appeal on 8 February 2017.

MAFUSIRE J agrees……

P.C Ganyani Legal Practitioners, counsel for the appellant
National Prosecuting Authority, counsel for the respondent