

THE STATE

vs

STANLEY DUBE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 31<sup>st</sup> July, 2019

### **Criminal Review**

MAWADZE J: This matter is a cocktail of legal disaster to put it mildly. It is clearly a matter which was poorly investigated, ineptly prosecuted and defended and finally thoroughly bungled by the trial Magistrate. Even Mr Zvekare for the National Prosecuting Authority to whom I referred the matter for his views had uncomplimentary comments for the police, the trial prosecutor, accused's legal practitioners and the trial Magistrate. My sense of justice was greatly offended by how this matter was handled.

This record of proceedings was referred to me for review in terms of s 57(1)(ii) as read with s 57(2) of the Magistrates Court Act [*Cap 7:10*] as the accused or applicant was legally represented. Initially when I received the record the trial Magistrate had not complied with the provisions of s 57(2)(b) of the Magistrates Act [*Cap 7:10*] which enjoins the trial Magistrate to comment on the reasons for referral for review. After this had been rectified I referred the record to the Prosecutor General's representative in Masvingo for his views on whether the accused or applicant Stanley Dube was properly convicted for possession of elephant tusks in light of the evidence on record. I am greatly indebted to Mr Zvekare's detailed response despite his rather unsavoury language directed at all the persons who handled this matter. Indeed, his anger is quite understandable and his suspicion of some possible impropriety may have some basis. Ultimately his view was that the conviction and sentence of Stanley Dube the accused (applicant) was improper and should be set aside in the interests of justice as it is not in

accordance with real and substantial justice. I share the same views for the reasons I now proceed to outline.

The 38-year-old accused who hails from Manzini Village, Headman Samu, Chief Sengwe in Chiredzi was jointly charged with Recias Chijole (Chijole) aged 36 years and Taurai Chauke aged 25 years (Chauke) both of Village Mafunjwa, Headman Ngwenya, Chief Sengwe, Chiredzi of contravening section 82(1) of the Parks and Wild Life (General Regulations) SI 362 of 1990 as read with s 128(1)(b) of the Parks and Wild Life, Act [*Cap 20:04*] which relates to possession of three pieces of elephant tusks without a permit or licence. The tusks weigh 3.89 kg and are valued at US\$700.20.

During the trial before the Magistrate sitting at Chiredzi whose designation is not clear the accused was represented by *Mr Chavi* of Kwirira & Magwiliba and his two co-accused were represented by *Mr Ganyani* of PC Ganyani Legal Practitioners.

The material facts in this matter are as follows:

On 17 November 2016 the accused and his alleged accomplices were arrested by police details who were patrolling our border with Mozambique around 22.00 hrs. when they were apparently coming from Mozambique with other smugglers using an illegal point of entry. Chijole was driving the motor vehicle they were using which was intercepted, a Nissan hardbody single cab with South African registration number DVJ 040 L. In the front seat of the said vehicle was Chauke his “assistant”. It is not clear from the evidence if there was a third person (a female) also in the front seat). The accused and other smugglers about 7 of them were in the loading box of the motor vehicle with their smuggled goods. The accused was in possession of a satchel containing medicinal drugs. Two police details (Sgt Musariri) and Cst Nelson Dube (Cst Dube) were the police details from Dumisa police base who intercepted this motor vehicle and ordered it to proceed to the police base with all the passengers on board together with the police details.

At the police base all the passengers were ordered to take their luggage which was basically smuggled goods. The 8 people in the loading box of the motor vehicle complied including the accused. Thereafter the police details called in Chijole and Chauke the “owner” of the motor vehicle in order to search the vehicle. Behind the driver’s seat or front seat of the single cab motor vehicle the police recovered 3 pieces of elephant tusks covered with a blanket or blankets and in a sack. This led to the arrest of Chijole and Chauke for unlawful possession of the elephant tusks. About an hour later Chauke sought audience with the police details and alleged that the elephant tusks belonged to the accused and that it is the accused who had put

them at the back of the front seat. The accused protested his innocence but was nonetheless arrested, and jointly charged with Chijole and Chauke. The following day Sgt Shepherd Kampondeni based at the Minerals and Border Unit, Chiredzi took over the matter as an investigations officer.

During the trial Chijole and Chauke together with the accused applied to be discharged at the close of the prosecution case in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The trial prosecutor in his wisdom or lack thereof did not oppose Chijole and Chauke's application. Interestingly the trial Magistrate found nothing wrong with this concession and proceeded to discharge both Chijole and Chauke who were found not guilty and acquitted at the close of the state case. The accused remained alone in the dock furiously protesting his innocence. The trial Magistrate was unimpressed. He or she convicted him and slapped him with a 9-year jail term.

Irked by the turn of events the accused then requested for a review of the proceedings on 25 October 2017. The mind boggles as to why the accused did not simply appeal against his conviction but rather opted for the narrow option of a review which was poorly presented.

The accused raised basically 3 grounds for review which are;

*“(a) that the trial court erred when it barred the accused from making closing submissions in relation to a trial within a trial which led to the admission of accused's unconfirmed warned and cautioned statement.”*

The trial court alleged the accused was out of time whatever that means.

*“(b) that the court a quo erred in accepting two certificates of weight Exhibits 4 and 5 of the elephant tusks and also accused's 2 warned and cautioned statements.*

Again this ground for review is difficult to understand as the investigating officer said initially the original docket had gone missing and reliance was placed upon duplicate documents. The substance of the accused's complaint is difficult to appreciate in this regard.

*“(c) that the trial court erred in making a finding that there are no special circumstances in this matter and improperly imposed a mandatory term.”*

Indeed, if the accused is found to have been in possession of the 3 elephant tusks I am unable to find any special circumstances in his case.

As already pointed out it is mind boggling why *Mr Chavi* for the accused opted for a review rather than an appeal, worse still for him to raise meaningless grounds for review. Despite *Mr Chavi's* shoddiness in dealing with this matter and raising inconsequential grounds

for review this court cannot turn a blind eye to the bigger picture, which is whether these proceedings are in accordance with real and substantial justice. After going through all the evidence led the question which loomed large in my mind is whether the accused was properly convicted. This leads me to the evidence on record.

The defence outline tendered by *Mr Chavi* for the accused is totally incomprehensible. It is very brief and unhelpful. The accused denied the charge. He went on to allege rather incomprehensibly that the charge is vague and does not disclose an offence. I find this shocking to say the least. Lastly, the accused said he was tortured while in police custody. The defence outline does not address a simple and material issue, which is why accused denies being in possession of the ivory. This only emerges from the accused's own evidence during the course of trial.

Chijole and Chauke gave the following defence outline. Chijole said he was driving the motor vehicle in question and that Chauke was his "conductor". They said accused was one of their passengers together with 14 other people. They alleged that it is the accused who put the elephant tusks in their motor vehicle without the knowledge of both Chijole and Chauke. They said accused later admitted to the police that he is the owner of the ivory. Again in a rather shocking revelation Chijole and Chauke said they were simply jointly charged with the accused as a way to ensure that the accused would not deny the offence in court.

The defence outline by Chijole and Chauke is baffling. How did they know accused placed the ivory in their motor vehicle? At what stage was the elephant tusks put in their motor vehicle? Who had told them that they were jointly charged with accused in order to facilitate the accused's conviction? Indeed, these strange defence outlines tendered by legal practitioners was the genesis of the miscarriage of justice in this matter. No wonder why Mr Zvekare felt counsel simply went through the motions of a criminal trial to simply justify a pre-determined verdict or objective.

The 3 pieces of elephant tusks were tendered as exhibits. They weighed 2.4 kg valued at \$432; 0.84 kg valued at \$151.20 and 0.65 kg valued at \$117. The total weight is 3.89 kg valued at \$700.20.

The meaningless point raised by *Mr Chavi* relates to 2 certificates of weight Exhibit 4 and Exhibit 5 which show the weight of the elephant tusks as 3.89 on both exhibits. One copy is simply a duplicate of the other and does not help the accused's cause in any way. The same comment can be made in relation to Exhibit 7 and Exhibit 8 which are both accused's warned and cautioned statements which are similar in content. In both statements the accused allegedly

said he admitted to the charge as he had the three pieces of ivory in a satchel bag wrapped in a sack and at the back of the seat of the motor vehicle hidden, where they were found after a search of the motor vehicle by police. Accused allegedly said he had found the ivory while herding cattle in a bush and had taken them to Mozambique for sale.

It is upon this warned and cautioned statement that the trial Magistrate crucified the accused. The process was unrelenting. Firstly, when accused denied having made the statement a trial within a trial was held. The accused's protestations were thrown out and the statement was admitted. Immediately thereafter his co-accused Chijole and Chauke were liberated. The trial proceeded. The conviction was then found solely on the basis of this statement!! It never dawned on the trial Magistrate that from the evidence led the pieces of elephant tusks were not in a satchel bag when recovered!!

In my view a lot of time was simply wasted on the veterinary doctor one Kudakwashe Makwangudze whose expert evidence simply confirmed that the recovered pieces were elephant tusks. The real issue for determination was who was in possession of the elephant tusks.

The evidence of D/Cst Mako was to simply rebut the accused's assertion that the warned and cautioned statement recorded in his presence by Sgt Kampaneni was obtained through duress.

On his part Sgt Kampaneni the investigating officer apparently did not carry out any investigations at all except to latch on to the accused's warned and cautioned statement. He did not seek to establish the circumstances under which the elephant tusks found their way at the back of the front seat of Chijole and Chauke's motor vehicle.

This leads me to the evidence of Sgt Musariri and Cst Dube. I need not be detained by their contradictory aspects of their evidence which relate to *inter alia* whether they intercepted one motor vehicle as per Sgt Musariri or two motor vehicles as per Cst Dube, whether there were 2 blankets at the back of the seat of the motor vehicle as per Cst Dube or just one blanket as per Sgt Musariri or whether the 3 elephant tusks were in a sack or in a blanket. I find this to be immaterial as it is common cause that the 3 elephant tusks were recovered from the back of the front seat of Chijole and Chauke's motor vehicle.

#### Cst Dube's Evidence

Cst Dube said after all passengers had disembarked from the motor vehicle with their smuggled goods he and Sgt Musariri invited both Chijole and Chauke to the motor vehicle in order to carry out a search. He said after the front seat was tilted Chauke was ordered to remove

the blankets and as he did so 3 elephant tusks fell off. This led to the arrest of Chijole and Chauke being the “owners” of the vehicle as all other people were passengers seated in the loading box. He said the tusks were behind the seat wrapped in a blanket belonging to Chijole and Chauke, and this is where the car jack was also secured together with a pump. Cst Dube was not sure if the tusks were also put in a sack as Sgt Musariri was closer to the scene.

What is critical as regards Cst Dube’s evidence is the following;

- i. that as Chauke was removing the blanket at the back of the seat of the motor vehicle Chauke was visibly uneasy and this raised Cst Dube’s suspicions
- ii. the blankets or blanket which covered the elephant tusks belonged to Chijole and Chauke
- iii. that Chauke only approached the police officer an hour of his arrest saying he had seen accused placing the elephant tusks into the motor vehicle. Chauke did not rise this at the time passengers were asked to take their luggage or at time the tusks were recovered
- iv. that police arrested the accused as he was implicated by Chauke
- v. that accused upon arrest denied any knowledge of the elephant tusks

#### Sgt Musariri’s Evidence

Sgt Musariri said he summoned Chijole and Chauke to their motor vehicle after all other passengers disembarked with their luggage in order to carry out a search. He ordered Chauke to open the cabin of the motor vehicle and Chijole to tilt the seat in order to check behind the seat. He said Chijole was hesitant as he removed blankets behind the seat and was literally shivering. As the sack was being lifted the 3 pieces of elephant tusks fell off hence he arrested Chijole and Chauke.

What I find material about Sgt. Musariri’s testimony is as follows;

- i. that accused was amongst passengers seated at the back (loading box) of the motor vehicle and had a satchel containing tablets
- ii. that Chijole was literally shivering as the police checked the back of the tilted seat of the motor vehicle
- iii. that besides the elephant tusk at the back of the seat there were 2 blankets, car jack, pump, spanners and small vehicle accessories all belonging to Chijole and Chauke
- iv. that Chauke and Chijole admitted that the blankets were theirs

- v. that they arrested accused much later at the behest of Chauke who implicated the accused

The next question to consider is whether given this evidence was it proper for the trial court to discharge Chijole and Chauke at the close of the state case?

The import of s 198(3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] is well settled in our law. An accused can only be discharged at the close of the prosecution case under these circumstances;

(1) where there is no evidence to prove an essential element(s) of the offence. See *Attorney General v Bvuma & Anor.* 1998 (2) ZLR 96 (S). For some strange reason the trial court was of the weird view that both Chijole and Chauke were not in actual or constructive possession of the elephant tusks. The trial court misrepresented evidence that neither the sack or the blanket(s) belonged to Chauke and Chijole. Both Cst Dube and Sgt Musariri were clear that Chijole and Chauke claimed ownership of the blanket(s) which covered the elephant tusks. Both Chijole and Chauke had not put any evidence before the court explaining which items at the back of the seat were not theirs. It is common cause that Chijole and Chauke were owners of this motor vehicle. Even assuming they were not legal owners of the vehicle they were at least in control of the motor vehicle. All other persons were passengers worse still who were seated at the back of the truck. *Prima facie* they were in possession of elephant tusks and it was only prudent to exonerate them after hearing their side of the story, which is their evidence

(2) where there is no evidence on which a reasonable court acting carefully might properly convict. See *Attorney General v Mzizi* 1999 (2) ZLR 321 (S). From the evidence of Cst Dube and Sgt Musariri would a reasonable court exonerate Chijole and Chauke? The elephant tusks were found in their motor vehicle. Their demeanour was not consistent with innocence when police were searching the vehicle. They were said to be uneasy and shivering. There was every reason for them to explain themselves. It was necessary for Chijole and Chauke to explain the following;

- (i) at what point were the elephant tusks put at the back of the seat of their vehicle
- (ii) why did they allow accused to allegedly put the elephant tusks there
- (iii) why did they not alert police if they saw accused hiding the elephant tusks

(iv) why did they not tell the police at the time the elephant tusks were recovered that they belonged to the accused, more so when they were being arrested themselves

(v) why did it take them almost an hour after their arrest to implicate accused?

All these issues could only be ventilated if Chijole and Chauke were put to their defence.

(3) Where the evidence led by the state is manifestly unreliable that no reasonable court could safely act on it. See *Attorney General v Tarwirei* 1997 (1) ZLR 575 (S). *In casu* how and where the elephant tusks were recovered is common cause. It cannot be said by wildest and most fertile mind that the evidence of Cst Dube and Sgt Musariri who are the key witnesses was discredited at all during cross examination. It cannot be said that it was manifestly unreliable that no single material part of their testimony can be relied upon.

The application for discharge of Chijole and Chauke should have been strenuously opposed by any reasonable and fair minded prosecutor. I am alarmed that the trial prosecutor consented to such a misplaced application. The trial Magistrate had no cause on the evidence on record to discharge Chijole and Chauke. While the state is *dominus litis* once evidence is placed before a trial court any decision made should be on the basis of such evidence and not the incompetence or inappropriate concessions made by state counsel.

Whatever ruling the trial court made on the trial within a trial, the so called confession of the accused did not exonerate Chijole and Chauke moreso as accused did put into issue that confession at the time Chijole and Chauke were discharged and throughout the trial.

The only basis upon which the accused was convicted was the warned and cautioned statement. While in terms of s 256(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] a court may convict an accused on the basis of a confession caution should always be exercised. What I find worrying is that the trial Magistrate was so keen to convict the accused that he or she manufactured evidence in his or her judgment. It is untrue that any evidence was led to show that accused, while at the police base removed the elephant tusks from his satchel and put them at the back of the seat of the motor vehicle. This is clearly speculation on the part of the trial Magistrate which unfortunately is taken as a fact proved.

I am not persuaded that the trial Magistrate properly applied his or her mind to the evidence led in the trial within a trial. The unconfirmed statement sought to be relied upon leave much to be desired. How did accused at the police base manage to go to the vehicle

impounded by the police to hide the elephant tusks? Why was he seen by Chauke only and not by all other people arrested with him? Did the accused have that opportunity to go and open the vehicle, tilt the seat and put tusks underneath the other items belonging to Chijole and Chauke?

The accused throughout the trial within a trial maintained that he was forced to sign the unconfirmed statement. The only reason he was disbelieved was that he should have raised such complaints at his initial remand. This is an unconfirmed statement. No reason was given as to why it was not confirmed which would have been the proper forum for accused to raise whatever concerns he had about that statement. Even Mr Zvekare believes the confession relied upon by the court to convict the accused was not freely and voluntarily made. It is preposterous that the accused who denied any knowledge of the elephant tusks to Cst Dube and Sgt Musariri would suddenly confess to such possession in a statement to other police details more so as the elephant tusks were not found in his possession but in other persons' motor vehicle.

I share Mr Zvekare's views that it may be unfortunate that the accused's counsel did not represent him well during what he calls a contrived trial. I cannot do more than to refer Mr Zvekare's sentiments in which he said;

*"At the end of the day, it is the Prosecutor General's respectful submission that this was a contrived trial as argued above which was meant to defeat the due course of justice. It is apparent from the facts of the case and the conduct of the trial that the prosecution deliberately failed to prove the charges against the real culprits in apparent connivance with the trial Magistrate, the police witnesses and possibly the defence leading to the farcical conviction of an innocent soul who is languishing in prison as we speak.*

*Accordingly, it is conceded that the conviction of Stanley Dube (accused) should be set aside in the interests of justice as the conviction is not safe in the circumstances as it is not backed by real and substantial evidence."*

Despite the rather strong language used by Mr Zvekare and his alleged perception of connivance which may be possible, the point is made that there was a serious miscarriage of justice in the conviction of the accused. The real culprits may indeed be smiling all the way back to their devious ways.

The convictions of the accused is unsafe and should be set aside. If the accused is not a beneficiary of the Presidential Amnesty he should be immediately released. The proceedings in this matter are not in accordance with real and substantial justice.

In the result, it is ordered that;

1. The conviction of the accused Stanley Dube be and is hereby quashed and the sentence is set aside.
2. The accused is entitled to his immediate release.

Mafusire J. agrees.....

*Kwirira & Magwaliba legal practitioners, counsel for the accused.*