LISTED MUNKULI
and
KUDAKWASHE NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO 24 January 2024 & 26 September 2024

Criminal appeal

K. Ngwenya for the appellants
K. Shava for the respondent

DUBE-BANDA J:

[1] The appellants, with their two erstwhile co-accused were arraigned at the Magistrates' Court sitting in Victoria Falls, on a charge of contravening s 82(1) of the Parks and Wildlife Regulations S.I. 362/1990 as read with s 128(b) of the Parks and Wildlife Act [*Chapter 20:14*] i.e. "to acquire, possess or transfer raw unmarked ivory without a permit." The appellants and their co-accused pleaded not guilty. It therefore followed that in order to secure a conviction the State had to lead all relevant evidence to link the appellants and their co-accused to the commission of the offence charged. Despite the appellants' plea of not guilty, they were convicted as charged and the co-accused were acquitted.

[2] A summary of the relevant evidence adduced at the trial is as follows. On 2 August 2022 Shadreck Midzi ("Midzi") who works for International Anti-Poaching Foundation received information that there was someone around Victoria Falls who was selling ivory. He later received a call on his mobile phone from a number registered in the name of the first appellant ("Munkuli"), and the caller said he was the one with the ivory. Midzi in the company of an officer from Zimparks and officers from the Zimbabwe Republic Police ("ZRP") proceeded to a place called Mbizha turn off in Victoria Falls. When they arrived at the turn-off they saw four people at a bush on the left side of the road. The second appellant ("Ndlovu") approached the vehicle and informed the officer from Zimparks, that they had ivory. He went back to the bush, and on his return, he was now carrying a white sack. Munkuli joined him and got into the

vehicle. When asked about what was in the sack, they said it contained elephant tusks. The two confirmed that they had no permit to possess the tusks, and they were duly arrested. Munkuli called the two other persons, ("co-accused") who had remained in the bush, the two came to the vehicle and were also arrested. The sack was found to contain two pieces of ivory, and at the trial these pieces were produced as exhibits by consent. The certificate of weight was also produced as an exhibit by consent.

[3] Munkuli and the two erstwhile co-accused did not testify in their defence. Ndlovu testified in his defence and his evidence was that that one Bonde (real name" Midzi") said he must find him people with elephant tusks, and was given US$50.00 with a promise that if he finds such people he would be given a further US$100.00. His version was that he was invited to Mbizha turn-off by the State witnesses and he in turn invited Munkuli to get transport to go and be with his children at a place called Chikanda. He said the sack with ivory was in the vehicle with Midzi and ZRP officers. In essence he denied the allegations of unlawful possession of ivory.

[4] The trial court found that as against the two appellants, the prosecution proved the State case beyond a reasonable doubt. In that at Mbizha turn-off the appellants brought the ivory into the motor vehicle, and they knew it was ivory and they intended to sell it to Midzi and the ZRP officers. The trial court found no special circumstances that warranted a deviation from the minimum sentences prescribed in terms of the law. Accordingly, each appellant was sentenced to nine (9) years imprisonment.

[5] Aggrieved by this result, the appellants noted an appeal against both conviction and sentence to this court. The grounds of appeal are these:

Ad conviction

i. The court *a quo* erred and misdirected itself in both fact and law by convicting appellants of being in possession of raw unmarked / unregistered ivory when the State did not prove its case beyond a reasonable doubt.

ii. The trial court erred and misdirected itself, the appellants' defense, explanation, version of events was not proved to be false or untrue. The appellants were charged with two other people, and all the four's defence was such that they can only either be all acquitted or all found guilty and so was the State evidence. No logical explanation for convicting some and acquitting some is given.

iii. The court a quo erred in law by convicting the appellants when at the end of the trial there were serious discrepancies between the totality of State evidence, and allegations in the State outline.

Ad sentence

iv. Without prejudice to the foregoing, the trial court erred and improperly exercised its discretion in sentencing the appellants to a mandatory minimum nine (9) years yet the circumstances of the case and the totality of evidence established special circumstances warranting or justifying departure from the imposition of the mandatory minimum nine (9) years imprisonment.

[6] At the commencement of the appeal hearing, Mr *Ngwenya* counsel for the appellants submitted that the proceedings in the trial court were irregular and not in accordance with real and substantial justice in that the three accused persons, i.e., Munkuli and the erstwhile two co-accused did not testify in their defence. And the prosecution and the court did not question them in terms of s 198(9) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Counsel submitted further that the defence outlines tendered by the accused did not constitute evidence, and that the failure of the three to testify constituted an irregularity such that this court must in terms of s 29(4) of the High Court Act [Chapter 7:09] review and set aside the proceedings and remit the matter for trial *de novo* before a different magistrate. Mr *Shava* counsel for the respondent associated himself with the submissions made by Mr. *Ngwenya* that the proceedings were irregular. Mr *Shava* submitted further that since at the close of the case for the prosecution, the trial court found that all the accused persons had a case to answer, the three accused did not answer. Counsel then submitted that the proceedings must be reviewed and set aside in terms of s 29(4) of the High Court Act.

[7] The three accused persons exercised their right enshrined in s 70(1)(i) of the Constitution to remain silent and not to testify at the trial. The prosecutor and the court did not exercise the option available to them to question these accused persons in accordance with s 198(9) of the Criminal Procedure and Evidence Act. Which says if an accused declines to give evidence, the prosecutor and the court may nevertheless question him. There is nothing irregular occasioned by an accused person exercising his right to remain silent, and the prosecutor and the court not questioning him in terms of s 198(9). (For completeness, I digress and point out that on the principle of the presumption of constitutionality of legislation s 198(9) is law in this country. Every statute is presumed to be constitutional, that is to say, the legislature is presumed to have acted within the parameters of the Constitution. See *Magaya v Zimbabwe Gender Commission* (105 of 2021) [2021] ZWSC 105 (5 October 2021); *Zimbabwe Electoral Commission & Anor*

v The Commissioner General Zimbabwe Republic Police & Ors SC CCZ 3/14). Therefore, the argument that the failure of the three accused persons to testify in their defence constituted an irregularity in the proceedings is ill-conceived. Equally ill-conceived is the concession made by Mr *Shava* for the respondent. No irregularity occurred in the proceedings. In the circumstances the submission that the proceedings be reviewed and set aside and the matter be remitted for trial *de novo* before a different magistrate has no basis at law and is refused.

[8] The first ground of appeal is that the court *a quo erred* and misdirected itself in both fact and law by convicting the appellants when the State did not prove its case beyond a reasonable doubt. This ground is much too vague and meaningless. A ground of appeal must state concisely and clearly the findings of fact or rulings of law appealed against. This is not a valid ground of appeal. See *Chimaiwache v The State* SC 18/13; *S v Jack* 1990 (2) ZLR 167. In *R v Emerson & Ors* 1958 (1) SA 442 (SR) the court stated that:

> "It is safe, however, to go thus far. If a ground of appeal is that the magistrate erred in law this should be stated and the particular mistake in law which the magistrate is alleged to have made should be set out."

[9] A ground of appeal which says the State did not prove its case beyond a reasonable doubt, without more is vague and meaningless. It requires the appeal court and the respondent to peruse the entire record to answer such a ground. A valid ground must direct the court to a particular mistake the appellant complains about. The first ground of appeal does not state the fact or law on which the trial court is said to have misdirected itself. It is invalid. See *S v Ncube* 1990 (2) ZLR 303 @ 304C-E.

[10] In the second ground of appeal it is contended that trial court *erred* and misdirected itself in convicting the appellants when their defense, explanation, and version of events was not proved to be false. It is further contended that the defence of the appellants and their two erstwhile co-accused, and the adduced evidence at the trial was such that they could all be convicted or acquitted. The court *a quo* is attacked for the alleged failure to provide a logical explanation for convicting the appellants and acquitting their erstwhile co-accused. This ground of appeal requires closer scrutiny.

[11] Munkuli, like all the accused persons filed a written defence outline. In his defence outline he contended that the sack containing ivory was in possession of the occupants in the vehicle, i.e., Midzi and other officers. He contends that he was shocked when they were themselves accused of possessing ivory without a permit. The court *a quo* found from the evidence on

record that it is Munkuli and Ndlovu who were in possession of the ivory. Munkuli did not testify in his defence and therefore did not place his version before the trial court for consideration. It cannot be seriously argued that it was not shown that his version was false, because he had no version before court, all he had was a defence outline. And a defence outline is not evidence and does not amount to a version. In *Dube v The State* SC 83/22 the court said the purpose of a defence outline is to inform the State and the court about the nature of the defence that one intends to adopt as well as to define the issues between the State and the defence. See *S v Hitschmann* SC 2-07. An accused's version can only be placed before the trial court for consideration by means of evidence. Therefore, to argue that his version was not shown to be false cannot be correct. His version was not before court.

[12] Ndlovu testified, and said the sack containing ivory was in the vehicle used by the arresting officers. His evidence was that the officers produced the sack and asked him and Munkuli as to what was inside the sack. Viewed in isolation, his evidence might carry some weight, but evidence is not viewed in separate compartments. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. See *R* v *Difford* 1937 AD 370; *S v Jochems* 1991 (1) SACR 208 (A), *S v Jaffer* 1988 (2) SA 84 (C), *S v Kubeka* 1982 (1) SA 534 (W) at 537 F-H. After considering all the evidence the trial court rejected his version. This is a case where the State's version was so convincing and conclusive as to exclude the reasonable possibility that the second appellant was innocent, no matter his evidence to the contrary. It was false that he and the first appellant found the sack containing ivory in the car used by the officers. The trial court cannot be faulted for rejecting his version as false.

[13] The appellants take issue with the acquittal of their erstwhile co-accused. They contend that the evidence was such that all four would either be convicted or acquitted. Nothing turns on this issue, for the simple reason that the erstwhile co-accused are not before this court. This court cannot, in their absence start to assess whether their acquittals were in accordance with requirements of the law. Without the State appealing the acquittals, their cases have been finalized.

[14] On the facts and the evidence before it, the trial court found that there was sufficient evidence that the two appellants were in possession of the two pieces of ivory. It is trite that the appellate court's limited powers to interfere with a trial court's finding of fact is well established. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them

to be wrong. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645; *S v Kekana* [2012] ZASCA 75; 2013 (1) SACR 101 (SCA) para 8. The appellants were at a bush on the side of the road, Ndlovu approached the vehicle with the officers and informed them that he and others had ivory. He went back to the bush and returned carrying a white sack. On his return he was now with Munkuli and the sack had ivory, leading to the arrests of the two. The factual findings of the trial court that the two were in possession of ivory cannot be faulted.

[15] The third ground of appeal is that the court *a quo erred* in law by convicting the appellants when at end of the trial there were serious discrepancies between the totality of State evidence, and allegations in the State outline. Generally, the difference between the state outline and the witness's evidence during the trial cannot be held against the State, as witnesses do not take part in the preparation of the State's outline. See *Wairosi v The State* SC 20/15. However, a significant and unexplained departure by the State witnesses from the State outline may attract adverse conclusions, and may have consequences, depending on the circumstances of the case. See *S v Nicolle* 1991 (1) ZLR 211 @ 214 B-G; *S v Seda* 1980 ZLR 109 (G) at 110H - 111A; *Ephias Chigova v State* 1992 (2) ZLR 206 at 213 C.

[16] In the heads of argument it is submitted that there are serious discrepancies between the State outline and the evidence adduced at the trial. It was argued that according to the State outline, the police applied for a trap certificate to effect an arrest. However, the evidence is that the trap certificate was not used in the arrest of the appellants and their co-accused. A closer scrutiny of the evidence shows that there is no discrepancy in this regard. The State outline says a certificate was applied for and was granted. The fact that it was granted does not mean it was used in the arrest of the appellants and their erstwhile co-accused.

[17] There is a discrepancy between the State outline and the evidence adduced by the State. According to the State outline Munkuli in the company of Ndlovu approached the vehicle used by officers carrying a sack. The two got into the vehicle, and then phoned their erstwhile co-accused who also came and got into the vehicle. It is said the appellants and their co-accused produced the ivory which was inside the sack, and they got arrested. The evidence adduced in court is that it was Ndlovu who first approached the vehicle, returned to the bush and came back in the company of Munkuli while carrying a white sack containing ivory. Munkuli then called the erstwhile co-accused who had remained in the bush.

[18] It is trite that discrepancies must be material to warrant rejection of a witness' evidence, because they may simply be indicative of an error. See *S v Mkohle* 1990 (1) SACR 95 (A) at

98f; *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 G. 13 *S.* The test is whether the discrepancies are material. In *casu* the discrepancies between the State outline and the evidence adduced in court are immaterial if one looks at the evidence holistically. The State witnesses' version is supported by the manner in which the events of the day unfolded. The evidence clearly shows that it is the appellants who brought the sack containing ivory to the vehicle. A complete spectrum of the case shows that the appellants were in possession of the sack containing ivory. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court *erred* in finding that the defence case is inherently false and fell to be rejected.

[19] It is argued in the heads of argument that the appellants were arrested by use of an illegal trap, and the trap was haphazardly arranged such that one could not say with certainty who exactly was the trap person. Further it was argued that Midzi operating under the pseudonym name "Bonde" was the trap. A closer scrutiny of the evidence does not show that the appellants were arrested by means of a trap. A trap is defined in *S v Malinga and Others* 1963 (1) SA 692 (A) as "a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence." For example, in *Amod v S* 2001 4 AII 13 the conviction and sentence were set aside because the police procedures and conduct in the course of entrapment rendered the trial unfair. In that the police were extremely persistent in selling the gold to the accused. They offered him a reduction of the purchase price after he indicated his unwillingness to conclude the transaction at the initial price. The police resorted to persuasion and also offered him a credit facility. A number of attempts were made over a substantial period of time to entice the accused. The *Amod* case is a text-book example of a trap.

[20] A trap goes beyond affording an accused person an opportunity to commit the offence, e.g. by providing the means to commit the offence. In *casu* Midzi merely afforded the appellants the opportunity to commit the offence. There is nothing in the evidence to show that his activities went beyond affording the opportunity to the appellants to commit the offence. The appellants procured the ivory and looked for a buyer, that is when Midzi acted as a buyer. In *S v Kotze* 2010 (1) SACR 100 (SCA) the court distinguished between traps and undercover operations. The court stated that an undercover operation might involve no element of a trap, e.g. the infiltration by an undercover agent into a gang planning a bank robbery. Where the proposal for the criminal conduct emanates wholly from the accused, who does all the running

around until the final stage where the police create the opportunity for the culmination of the chain of events, it cannot be said that the police conduct amounts to a trap. See *S v Lachman* 2010 (2) SACR 52 (SCA). In *casu* the criminal conduct emanated wholly from the appellants, they procured the ivory and looked for a buyer. The conduct of Midzi cannot be regarded as constituting a trap. He merely afforded the appellants an opportunity to commit the crime. The evidence is that a mobile phone number registered in the name of Munkuli was used to call Midzi. The caller said he was the one with the ivory. Therefore, it is incorrect to contend that the appellants were arrested by means of a trap. They did not.

[21] What, if anything, is to be made of the failure of Munkuli to testify? In *S v Boesak* 2001 (1) SACR 1 (CC) para 24 the court said the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. Whether such a conclusion is justified will depend on the weight of the evidence for the prosecution. In *casu* there is further evidence against Munkuli that a mobile phone number registered in his name was used to call Midzi. The caller said he was the one with the ivory. There is evidence that he was in possession of ivory. With this evidence against him Munkuli shunned the witness stand. That was his constitutional right. However, the choice to remain silent in the face of evidence suggestive of guilty must in an appropriate case, such as this lead to an inference of guilt. See *S v Tandwa [2007] SCA 34 (RSA).* Although Ndlovu testified in his defence, the evidence against him was overwhelming and the trial court cannot be faulted for rejecting his version. In the circumstances, the appeal against conviction has no merit and must fail.

Sentence

[22] It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo.* A court of appeal can only interfere; when there was a material irregularity; or a material misdirection on the facts or on the law; or where the sentence was startlingly inappropriate; or induced a sense of shock; or was such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat in first instance in that irrelevant factors were considered and that the court *a quo* failed to consider relevant factors. See: *S v Ramushu & Ors* SC 25/03; *S v Anderson* 1964(3) SA 494 (AD) at 495 D-H; *S v Rabie* 1975(4) SA 855 (AD) at 857 E.

[23] The appellants were convicted of contravening s 82(1) of the Parks and Wildlife Regulations S.I. 362/1990 as read with s 128(b) of the Parks and Wildlife Act [*Chapter 20:14*] i.e. "to acquire, possess or transfer raw unmarked ivory without a permit." The penalty provided for in s 128(b) is minimum mandatory imprisonment for a period not less than nine years, unless there are special circumstances. Section 3 of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 has codified the definition of special circumstances. It says:

> "Special circumstances' means any extraordinary factor arising out of the commission of the offence or which are peculiar to the offender, but does not include mitigating features which are of general application, justifying why a mandatory sentence should not be imposed."

See *S* v *Mbewe & Ors* 1988 (1) ZLR (7) (H); *Attorney-General* v *Jasi and Nharingo* S-2-87; *S* v *Chaerera* 1988(2) ZLR 226; *S* v *Mugadza* 1983(2) ZLR 67 (H); *S* v *Kudavaranda* 1988 (2) ZLR 367(H); *S* v *Bain* 1977 (3) SA 494 (R); *S v Chisiwa* 1981 ZLR 667 @ 671.

[24] The court *a quo* found that there were no special circumstances warranting a departure from the minimum mandatory sentence of nine years. This finding cannot be faulted. There are no extraordinary factors arising out of the commission of this offence. The appellants merely wanted to sell ivory and make some income. The court *a quo* cannot be faulted in coming to the conclusion that there were no special circumstances in this case warranting a departure from the minimum mandatory sentence provided for in the law. In the result the appeal against sentence must also fail.

In the circumstances, the appeal is dismissed in its entirety.

DUBE BANDA J: .....

DUBE JP: .....**Agrees**

Dube, Nkala, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners