GIVEMORE SIGAUKE
and
DUDZAI NJOBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA & MUZENDA JJ
MUTARE, 23 March 2022

**CRIMINAL APPEAL**

*D Mwonzora*, for the appellant
*M Musarurwa*, for the respondent

MUZENDA J: This is an appeal against the entire judgment of a Magistrate sitting at Mutare where the court *a quo* convicted the two appellants of contravening s 45 (1)(b) as read with s 128 of Parks and Wildlife Act [*Chapter 2014*] as read with s 2 of Statutory Instrument 71 of 2002. The two appellants were sentenced to the mandatory 9 years imprisonment. They appealed against both conviction and sentence. The appeal is opposed by the state.

Background

Facts as outlined by the state are as follows: first appellant was aged 40 years at the time of his arrest, he is unemployed. Second appellant was aged 49 years and also not employed. On 10 August 2021 police details in Mutare received information pertaining to the appellants being in illegal possession of two live pangolins. The detectives contacted first appellant using a cell phone and met him at Nyanga turn off along Mutare-Harare highway. Whilst the detectives were pretending to be potential buyers, first appellant informed detectives that the pangolins were with second appellant at Kazozo Township. First appellant and detectives proceeded to Kazozo Township where first appellant introduced second appellant to the police detectives. In turn second appellant informed police detectives that the pangolins were in Fombe area near a clinic. The 2 appellants and detectives drove to Fombe area. On 11 August 2021 at 0130 hours, both appellants instructed detectives to stop the car at a nearby bush, disembarked from the car and entered a bush after a few minutes, both appellants emerged holding a sack with two live pangolins. It was at that moment that the detectives

revealed their actual identity and arrested the two. The two pangolins are valued at US$10 000 and were recovered.

On the date of trial both appellants were not legally represented. Both pleaded not guilty. In his defence outline first appellant stated that on 10 August 2021 he was with one Aaron Madzima. On their way from Chimanimani Aaron Madzima was communicating with detectives. It was Aaron Madzima who had the pangolins. At Nyanga turn off first appellant and Aaron Madzima went with police detectives who wanted to buy the pangolins. At Kazozo Township first appellant begged second appellant to assist him since first appellant had a misunderstanding with police detectives. That is how first appellant went to Fombe with second appellant. First appellant denied possession of pangolins, he denied arranging the selling of pangolins, and claimed that he was not aware of the issue.

Second appellant denied keeping, possessing or selling the pangolins in question. On the day in question he was requested by first appellant and one Aaron Madzima while at Kazozo Shopping Centre to accompany first appellant to Fombe area. He was advised that Aaron Madzima wanted to sell some chickens to the people he now knew to be detectives. Upon arrival at Fombe second appellant disembarked from the car waiting for first appellant and Aaron Madzima to go and fetch the "*chickens*". He moved about 20 meters from the motor vehicle to relieve himself. He saw Aaron Madzima coming back with first appellant. Aaron Madzima was carrying a sack. Second appellant contended that he did not know what was inside the sack. He was surprised to be advised by police detectives that he had been arrested for possessing pangolins. At the scene of arrest a third person who was in the company of first appellant and Aaron Madzima ran away. Second appellant further stated in his defence outline that while in police custody Aaron Madzima was released for undisclosed reasons. Both appellants in the court *a quo* prayed for their acquittal.

Proceedings before the trial court

Blessed Tsaurai is a duly attested member of the Zimbabwe Republic Police attached to Flora and Fauna. On 10 August 2021 he was in the company of Detective Constable Dzviti when they received information about the issue of pangolins. Detective Constable Dzviti drove along Mutare-Harare Road and met first appellant at Nyanga turnoff where thy picked first appellant. All the detectives and first appellant then drove to Kazozo Business Centre where they picked second appellant upon the directions of first appellant. First appellant had told detectives that the second appellant had the pangolins. At Kazozo the second appellant

indicated to the detectives that the pangolins were at a place near Fombe Clinic. All proceeded to Fombe. According to the witness both appellants disembarked from the car, took about 15 minutes in the bush and later on came back and first appellant was carrying a brown satchel and first appellant was ordered to enter the car and second appellant remained standing outside the car. First appellant was arrested whilst in the car and second appellant was arrested whilst standing outside the car. Blessed Tsaurai stated that he did not know Aaron Madzima. He also denied any misunderstanding between detectives and first appellant. According to the witness, it was second appellant who told detectives that there were two live pangolins at Fombe and he was the one giving directions. He also vehemently denied the issue of real chickens. No one else ran away from the scene. It was in fact second appellant who attempted to run away. Only two people were involved: first and second appellant.

The second witness was Detective Constable Percy Tichaona Nyamutsa. His testimony is on all fours with the first witness and needs no repetition. However what is important is that he stated that second appellant insisted on seeing the money and the detectives, also counter-claimed to see the pangolins first before showing second appellant the money. The second witness also told the court that second appellant used a code name "huku" "chickens" but would be referring to pangolins.

The trial court accepted the evidence of the state. To the trial court the police detectives acted as prospective buyers for pangolins. Detectives communicated with first appellant who indicated that second appellant had two pangolins in Nyanga. The trial court was satisfied that at one point there was the mental element in the sense that both appellants had possession of the two pangolins and at a later stage both appellants had the physical possession when they were keeping them, they both knew they were keeping the pangolins. The court *a quo* rejected both appellants' defence and came to a conclusion that no person by name of Aaron Madzima was at the scene and accepted state evidence to the effect that the people who were at the scene other than police detectives were both appellants. The court also dismissed the appellants' argument about chickens and came to a conclusion further that the "chickens" alluded to pangolins. In any case even if chickens were mentioned by appellants, at 0130 hours on 11 August 2021 both appellants brought to the police detectives two live pangolins leading to the appellants' arrest. First appellant had communicated with detectives about the sale of pangolins. The trial court painstakingly reiterated the burden of proof which is the duty of the state and not of the accused and even added that if an accused's version is reasonably possibly true or substantially true then benefit must be accorded to him or her. However given the nature

of evidence adduced by the state the trial court concluded that both appellants' defence was palpably false and consequently found that the state had proved its case beyond reasonable doubt. Aaron Madzima was adjudged by the court *a quo* to be a fictitious person. After a very careful analysis of evidence the court *a quo* convicted both appellants.

On page 16 of the record, the final court recorded its reasons for sentence. In the absence of special circumstances advanced by the defence, the court *a quo* returned the mandatory sentence of 9 years. Aggrieved by both conviction and sentence, both appellants noted an appeal and outlined the grounds as follows:

Grounds of appeal

A. Against Conviction

1. The learned magistrate erred fundamentally in holding that the state had been able to prove its case beyond a reasonable doubt, even in the absence of key evidence that should have been led by the state.
2. The learned magistrate erred in holding that one, Aaron Madzima was a fictitious being without key evidence to back that finding. The learned magistrate erred in not considering that the onus to disprove the existence of Aaron Madzima was on the state.
3. The learned magistrate erred in not considering the defence's submission that it was imperative for the state to investigate whether Aaron Madzima existed or not. The state failed in this regard.
4. The learned magistrate erred in disregarding the defence submission that it was imperative for the state to produce phone records that would show the person that Constable Dzviti had discussed the deal with on the day in question in view of the denial by first appellant that he was the one who had discussed with Constable Dzviti over the phone.
5. The learned magistrate erred in disregarding that the failure to call Constable Dzviti to testify was fatal to the state case.
6. The learned magistrate completely disregarded the major contradictions in the evidence of the state witnesses. He erred completely at law in this regard.

7. The learned magistrate erred in disregarding the defence submission that the failure by the state to cross-examine the appellants on key aspects of their evidence was fatal to the state case.
8. The learned magistrate erred in accepting that reference to chicken by the appellants was reference to pangolins.
9. The learned magistrate erred in completely disregarding the un-contradicted evidence that the said Aaron Madzima was a contract chicken farmer who had chicken business in the Fombe area.
10. The learned magistrate erred in holding that the state had proven the essential elements of the charges in this case.
11. The learned magistrate erred in not giving the accused the benefit of doubt given the nature of the evidence led in the trial.
12. The learned magistrate erred in ignoring the defence submission that given the nature of the case, this was a clear case of the word of the two police officers against that of the two appellants.
13. Given the unsatisfactory nature of the police officers' evidence same needed corroboration and the learned magistrate erred in accepting the uncorroborated evidence of the state witnesses.
14. The learned magistrate completely ignored the fact that the appellants were largely consistent and that unlike the state witnesses they had not been shaken under cross-examination.

B. Against Sentence

1. The learned magistrate erred in passing a sentence provided for in s 128(1)(b) and not the sentence provide by s 45(1)(b) of the Parks and Wildlife Act, despite the fact that the pangolins were found alive.
2. The learned magistrate erred in not considering imposing a fine as provided in s 45(1)(b) given the circumstances of the case.

**WHEREFORE THE APPELLANTS WILL PRAY FOR AN ORDER THAT:**

**"1. The appeal succeeds and the conviction of the two accused be and is hereby quashed.**
**2. The accused be and are hereby acquitted.**
**3. The sentence imposed on the two appellants be and is hereby quashed".**

Proceeding before the court

On the date of hearing Counsel for the appellant, Mr *D.T Mwonzora* was put to task to address the court on the nature and structure of the grounds of appeal as well as the prayer. He conceded that grounds 5, 6, 7, 10, 11, 12, 13 and 14 were meandering, vague and argumentative and that all were poorly crafted. All the seven grounds of appeal buttress and ratify the first ground of appeal, *that is whether the court erred to hold that the state had proved its case beyond reasonable doubt* given all the aspects spell out in those stated grounds of appeal. The state indicated to the court that it agreed with the interpretation of those seven grounds to be repetitive of the first ground of appeal that the appellant's Counsel agreed. Grounds 2, 3, 8 and 9 relate to the issue of Aaron Madzima and all four grounds in substance do not disclose any ground of appeal, Grounds 7 and 14 speak of the trial court disregarding appellants' submissions that the failure by the state to cross-examine appellants on key aspects of their evidence was fatal to state case, the two grounds suffer the same defect as grounds 5, 6, 7, 10, 11 13 and 14. They are vague, repetitive and argumentative. What key aspects of defence evidence was not covered in cross examination by the state? Counsel for appellant conceded and applied to have all grounds 2 – 14 expunged to remain with only one ground: whether the state proved its case beyond reasonable doubt.

Having streamlined the expansive grounds of appeal, appellants' Counsel was asked to address the court on the relief sought. It was apparent that the format partly conforms to the standard accepted by superior courts. The first line should unambiguously read: "The Appeal be and is hereby upheld" or "The Appeal succeeds". The next line should read as follows:

> "The order of court *a quo* convicting the appellants is set aside and substituted by the following: "Both accused are found not guilty and acquitted".

In the alternative where the appeal court interferes with sentence of the trail court the prayer sought ought to read:

> "The appeal against sentence succeeds, the sentence is set aside and substituted by ……..."

The prayer by the appellants in *casu* reads:

> "The sentence imposed on the two appellants be and is hereby quashed".

Appellant belatedly sought during reply to respondent's submission to apply for an amendment of the prayer. Quite properly the state opposed such an application as being unprocedural. No application was made by appellants' right at the outset to correct or amend its papers and they proceeded to address the court on an appeal containing defects.

Issues for determination

***Whether the court a quo erred in holding that the state had proved its case beyond reasonable doubt?***

Submission by parties

Mr *D.T. Mwonzora* for the appellants submitted that the failure by the state to call Detective Constable Dzviti was fatal to the state case. It was also submitted that the state did not lead evidence to disprove by way of police records that Aaron Madzima did not exist. Hence the trial court erred by finding that Aaron Madzima was a fictitious person and the failure by the state to disprove that Aaron Madzima existed was fatal to the state case. Appellants further submitted that the state witnesses' evidence was contradictory and emphasised on two areas, first was on the aspect of the purchase price of pangolins and then whether there were figures as well as amount. In total appellants averred that the police witnesses' evidence was suspicious and unreliable. To the contrary appellant submitted that both appellants' testimony was consistent, credible and were not shaken under cross-examination by the prosecution.

On the aspect of sentence, appellants submitted that the pangolins were recovered alive and hence there was no justification by the trial court to impose the mandatory sentence contained in s 128 (b) of the relevant statute, as such the sentence was manifestly excessive in the circumstances.

Mr *M. Musarurwa* for the state submitted that the evidence of Detective Constable Dzviti was and is not on record. There is no probative value in proving whether Aaron Madzima existed or not because to the state what is fundamental are the events that occurred in the bush near Fombe Clinic which led to the arrest of both appellants. It was further submitted by the state counsel that all the detectives and both appellants travelled from Kazozo to Fombe area and the two appellants brought two live pangolins to the detectives who were posing as buyers. The state witnesses consistently denied the existence or presence of Aaron Madzima at the scene. Consequently in the eyes of the state both convictions were safe.

On the aspect of sentence, the respondent submitted further that pangolins are specially protected animals and in the absence of special circumstances, a jail sentence is mandatory and a fine was not applicable in the circumstances. The state prayed for the dismissal of the appeal in its entirety.

Analysis of the case

The appeal before the court largely depends on facts placed before the court *a quo* by the state. Incidentally it appears the bulk of the facts is common cause and not in dispute.

(a) Police detectives got information to the effect that appellants were in possession of two live pangolins and police decided to pose to the appellants as potential buyers.
(b) First appellant contacted the detectives and met them at Nyanga turn off along Mutare-Harare road, all the three detectives and first appellant discussed the matter and first appellant indicated to police detectives that second appellant had the pangolins but was at Kazozo Business Centre.
(c) Second appellant was picked at Kazozo by detectives at the indications of first appellant.
(d) It was second appellant who indicated in turn that the two live pangolins were in a bush at Fombe area and directed the detectives to the scene.
(e) Both appellants ordered the police car to stop at a place at Fombe and the two disembarked from the car and upon their return brought two live pangolins. Police detectives then identified themselves to the appellants and arrested them.
(f) In his defence outline (p 27 of the record) first appellant was aware that the police detectives were looking for pangolins to buy and according to first appellant Aaron Madzima had the pangolins and first appellant went with the police detectives who wanted to buy pangolins.
(g) Second appellant confirms in his defence outline (on p 27 of the record) that first appellant requested him to go with first appellant from Kazozo to Fombe area where second appellant was subsequently arrested.

These issues squarely confirm what happened on 10 and 11 August 2021 right from the time the detectives met first applicant to the point of arrest. Both appellants admit this clearly spelt course of events. There is no mention of chickens by either appellants. In as far as first appellant is concerned, right from the onset he was fully aware that what was being sold are pangolins and not chickens. To corroborate the state case further on p 80 of the record the

following exchange occurred between the first applicant and questioner during the cross-examination:

> "Q. You got out and came out with pangolins when the argument was there?
> A. Yes."

First appellant answered two contentious issues by this answer, first, he was the one who brought the pangolins to the police detectives and was in both physical and mental possession of the pangolins. He knew where they were kept and directed the driver to stop at a place at Fombe so that he could go and collect the pangolins. In as far as first appellant is concerned the defence outline, the oral testimony of the police detectives and evidence he volunteered during cross examination unerringly places him at the centre of what was happening and aligns all facts to the essential elements of the charge he was convicted of.

The second appellant seems to distance himself from first appellant's activities on the night in question. He admits being requested to accompany first appellant to Fombe area, he was the one directing a police vehicle towards the scene. State witnesses consistently told the trial court that it was second appellant who negotiated the prices for the pangolins and second appellant did not meaningfully dispute that evidence. Second appellant went out at the direction and in the company of first appellant and jointly returned then with the pangolins which led to their arrest.

Looking at all these factors cumulatively, I fail to see where the trial court misdirected itself. In its judgment it carefully analysed every aspect raised by the defence but nonetheless resultantly believed the state witnesses as being credible. I detect no fault with such a finding. Both appellants fail to advance any plausible reason why police details would travel at night to Fombe area to plant pangolins on the person of the appellants. First appellant contacted second appellant who was at Kazozo and then second appellant knew where he kept the pangolins and second appellant unsuspectingly led the detectives to where the pangolins were kept. In my view the conviction was safe and the appeal against conviction has no merit and it is dismissed.

On the aspect of sentence, it is not in dispute that pangolins are specially protected animals, appellants accept this. The red herring thrown by the defence in this matter was that the two pangolins were recovered alive and that ought to distinguish this matter from those where the pangolins are killed. That may possibly be a genius argument by the appellants but unfortunately it does not trans-mutate into a genre of special circumstances that can potentially persuade a sentencing court to depart from a mandatory sentence. In its reasons for sentence the court a quo did not find any special circumstances and resolved to pass a mandatory

sentence. I again fail to see any misdirection on the part of the trial court. Equally so the appeal against sentence has no merit and it is dismissed.

Disposition

**It is ordered as follows:**

**The appeal against both conviction and sentence is dismissed.**

CHAREWA J agrees_____

*Mwonzora and Associates*, for the appellants
*National Prosecuting Authority*, for the state