TINASHE FIFITINI
versus
THE SATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 31 October 2022

Criminal Appeal

T Rukwandi, for the appellant
L Chitanda, for the respondent

CHIKOWERO J:

1. This is an appeal against both conviction and sentence. The appellant and three others were convicted after a full trial on a charge of unlawful possession of raw unmarked ivory as defined in s 82(1) of Statutory Instrument 69/90 as read with s 128(b) of the Parks and Wildlife Act [*Chapter 20:14*]. Finding that there were no special circumstances, the trial court sentenced the four to the mandatory minimum nine years imprisonment.
2. As regards the appeal against the conviction, the sole issue is whether the court correctly found that the appellant possessed the two tusks of unmarked raw ivory whose total weight was 21.28 kg. It was common cause that the appellant, and the other accused persons who are not before us for that matter, did not hold licences permitting them to lawfully possess the ivory.
3. In *Mpai* v *Stat*e HH 469/14 the court explained that a person has possession of something if he knows of its presence and has physical control of it, or has the power and intention to control it. See also *Bacar* v *State* HH 104/15; *AG* v *Mbewe* 2004 (2) ZLR 86 (H).
4. We consider that there was overwhelming evidence that the appellant had constructive possession of the ivory in question. Banhu, a plain clothes police office deployed to

the Minerals Flora and Fauna Unit received certain information. Acting on that intelligence, he called the appellant's mobile number posing as an ivory buyer. The appellant said such a deal could not be carried out over the phone, hence he requested that Banhu meet with him near David Livingstone Primary School in Harare. Banhu mobilized other plain clothes police officers who then drove behind the former. The appellant met Banhu as agreed whereupon the former stated that the ivory was in Budiriro but that they needed to pick up another person, who turned out to be the fourth accused, because that person knew the exact location where the ivory was being kept in Budiriro. The appellant led Banhu to Mbare Post Office where they collected the fourth accused.

5. The appellant had disembarked from Banhu's car at Mbare Post Office, conversed privately with the fourth accused, before the two boarded the vehicle for Budiriro. The appellant resumed his position in the vehicle, namely the front passenger's seat.
6. On arrival at a certain house in Budiriro, the appellant instructed Banhu to park the vehicle. This witness (Banhu) remained in his car as the appellant and fourth accused proceeded into the house.
7. About five minutes later, the appellant, second, third and fourth accused returned to the vehicle. The second accused was holding a sack. All four boarded the witness' car. The witness enquired where the ivory was. The second accused opened the sack whereupon the witness saw the ivory. The appellant stated that he wanted US$60 per kilogram. At this, the witness signalled his companions to pounce.
8. Indeed, they surrounded their colleagues' vehicle, opened the doors, announced that they were police officers and demanded the production of licences authorizing the quartet to possess the ivory. Realizing that the game was up, so to speak, the appellant bolted out of the vehicle. Tafadzwa Chimunya, who testified as the prosecution's second witness, would have none of it. He fired a warning shot. The appellant abandoned his attempt to evade arrest. The police then arrested all four.
9. The above rendition of events was not really in dispute at the trial. The appellant said he led Banhu to Budiriro to enable the latter to consult a traditional healer. This was rejected by the trial court on two bases. First, it found that Banhu was a credible

witness. He gave clear evidence of receipt of certain intelligence which caused him to call the appellant posing as an ivory buyer. All that happened thereafter was about being led by the appellant to where the ivory was being kept for the professed purpose of purchasing the same. Second, Banhu, a stranger to the appellant, had remained seated in the car at Budiriro. He did not, as was common cause, enter the house to consult the supposed traditional healer. Indeed, what was brought out of the house was not a traditional healer but raw unmarked ivory, the subject of the charge.

10. The appellant communicated with Banhu about ivory sale. He did not end there. He took the witness to Mbare to collect the fourth accused who was said to be familiar with the exact location of the ivory in Budiriro. Again, he did not end there. Once the ivory had been exhibited to the witness, it was none other than the appellant who made it crystal clear that he was selling the ivory at US$60 per kilogramme. To cap it all, the person who had to be deterred by a warning shot so as not to make good his escape from the long arm of the law was the appellant.
11. Whether the appellant knew not some of the persons tried together with him was immaterial. Similarly, his protestations that he did not "own" the ivory was of no consequence. That ivory belonged to the State.
12. The appellant could not have been communicating with Banhu about the sale of the ivory, leading the witness to where the ivory was, naming the selling price and thereafter attempting to evade arrest if he did not know of the presence of that contraband and was without the power and intention to exercise control over it. That the appellant did not have the ivory on his person does not mean that he did not possess it. It was not necessary for the appellant and his accomplices to all lay their hands on the ivory and for all four to physically bring it to Banhu's car. If there was among the accused a person whose criminal liability was manifest for all to behold, it was the appellant.
13. Chimunya was correctly found to have corroborated Banhu. His evidence, too, remained intact after cross-examination.
14. The appeal against the conviction is without merit.

15. Having understood the meaning of special circumstances, the appellant told the trial magistrate that:

    "I have no special circumstances"

    Indeed he had none. The appeal against sentence, premised on the contention, that the trial court misdirected itself in not finding that there existed special circumstances, is completely misconceived.

16. In the result, the appeal be and is dismissed in its entirety.

CHIKOWERO J:…….

ZHOU J: Agrees……

Dube –Tachiona and Tsvangirai, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners