DONALD TAPUWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 11 & 20 December 2019

Bail Pending Appeal

J. Ndomene, for the applicant
A. Muziwi, for the respondent

MUSITHU J: The applicant seeks bail pending appeal against sentence for contravening s 128(b) of the Parks and Wildlife Act[1] (the Act), that is unlawful possession of raw marked ivory. The appellant was sentenced to the minimum effective nine years permitted by the Act. At the hearing of the bail application, the applicant abandoned his grounds of appeal against conviction through his counsel. The appeal stands against sentence alone.

The ground of appeal against sentence is couched as follows:

> "The court *a quo* fatally erred in settling for the statutory sentence without adequately considering special circumstances proffered by the appellant to assess whether they did not justify interference with the said mandatory sentence"

The application arises from the following factual background. The applicant is employed by the Ministry of Defence and attached to Infantry Manyame Airbase. On 10 September 2018, police officers from the Minerals and Border Control Unit at the Police General Headquarters received information that the applicant was in possession of ivory which he intended to sell. A constable Gonzo teamed up with one Amon Pazvakavambwa and posed as buyers. They proceeded to the agreed rendezvous in the suburb of Hatfield where the transaction was to be carried out. The applicant showed the police officer and Pazvakavambwa six pieces of ivory, while inside Pazvakavambwa's vehicle. The police officer produced his

[1] [*Chapter 20:14*]

police identity card and pronounced the arrest of the applicant after he failed to produce a licence authorising him to possess or deal in ivory.

Following his conviction, and before his sentencing the applicant was invited to address the court on special circumstances. In his address to the court on behalf of the applicant, the defence counsel told the court that the applicant was employed by the Airforce of Zimbabwe under the Central Intelligence unit, which also dealt with what the defence counsel termed "wanton destruction of animals."[2] The defence counsel also expressed the following:

> "There was an operation going on within the defence force and accused was one of the officers in Central Intelligence. It is unfortunate that he was used as a sacrificial lamb by his superiors who then withdrew after arrest of accused to the extent accused was not in a position to go against anything that happened during implementation of duty"

The defence counsel further submitted that as a member of the army, the applicant could not divulge information on covert military operations as he was sworn to secrecy. He urged the lower court to consider that had the applicant not been entrapped, he would not have committed the offence. He referred the court to the case of *S* v *Kamtande*[3], as authority for the proposition that where an accused is trapped into committing an offence by the police, then the fact that the trap promoted the commission of an offence that would otherwise not have been committed may be regarded as a special circumstance. He further submitted that the effect of cumulative mitigatory factors would amount to special circumstances that warranted the departure from the mandatory custodial sentence.

For the State it was submitted that not all police traps amounted to special circumstances. In any case, the applicant had not put forward evidence explaining how he was entrapped into committing an offence that he would not have committed. The prosecutor urged the court to dismiss the story of the alleged operation referred to by the defence on the basis that no proof of such operation had been tendered. It was also argued on behalf of the State that the applicant should have requested that his address be held in camera if he feared that military secrets would be compromised by having the address in open court. In any case the operation itself was an afterthought seeing it was never alluded during the trial. Section 128(b) of the Act provides as follows:

"128 Special penalty for certain offences

[2] Page 13 of the record of proceedings.
[3] 1983 (1) ZLR 302 (HB)

(1) Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving—
(*a*) ……; or
(*b*) the unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by statutory instrument;
shall be liable—
(i) on a first conviction, to imprisonment for a period of not less than nine years;
(ii) on a second or subsequent conviction, to imprisonment for a period of not less than eleven years:

Provided that where on conviction the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.
(2) Where no special circumstances are found by a court as mentioned in the proviso to subsection (1), no portion of a sentence imposed in terms of subsection (1) shall be suspended by the court if the effect of such suspension is that the convicted person will serve—
(*a*) in the case of a first conviction, less than nine years imprisonment;
(*b*) in the case of a second or subsequent conviction, less than eleven years" (underlining for emphasis)

It was submitted for the applicant in the present application that the lower court ought to have interrogated whether or not special circumstances existed as pointed out on behalf of the applicant. Mr *Ndomene* for the applicant submitted that there was a special operation underway which necessitated that the applicant be found in possession of the ivory. He referred the court to p 13 of the record of proceedings where counsel in the lower court was addressing the court on special circumstances. Mr *Ndomene* also submitted that the applicant had reasonable prospects of success against sentence on appeal. He urged the court to consider delays in the disposal of appeals as an incentive to grant bail pending appeal. Mr *Muziwi* for the respondent drew the court's attention to submissions made for the State in response to the applicant's address on special circumstances. He argued that the lower court did not misdirect itself in finding that no special circumstances had been established to warrant the intervention of this court.

Special reasons or special circumstances are reasons or circumstances which are extraordinary, either in their nature or extent. Not all factors which would be mitigatory in ordinary criminal cases will be "special" in this context. Determining which factors are special in any given case where such an enquiry is required is a value judgment which will differ from

case to case.[4] In *S* v *Mbewe & Ors*[5] it was held that mitigating factors, such as good character or hardships emanating from the sentence, cannot be construed as special circumstances, nor can contrition or co-operation on the part of the offender. In *S* v *Siziba*[6], the court observed that special circumstances must mean more than the natural consequences which flow from the imposition of the punishment prescribed. In the *Kamtande* matter, SQUIRES J opined as follows:

> "The finding as to whether there are special reasons in the case, including in this respect the use of a trap, is left by the lawmaker to the opinion of the trial court. Where that is done the power of an appeal court to overrule that opinion is limited in the absence of a misdirection on the facts upon which such conclusion is reached….."[7]

In *Centre for Justice Child Law* v *Minister of Justice and Constitutional Development*[8], CAMERON J expressed his views on prescribed minimum sentences as follows:

> "First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent 'truly convincing reasons' for departure, the scheduled offences are 'required to elicit a severe, standardized and consistent response from our courts through imposition of ordained sentences. Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences."

As aptly submitted on behalf of the respondent, the applicant did not proffer any evidence to show that he would not have committed the offence, but for the trap. The police acted on the basis of a tip off that the applicant was in possession of ivory and intending to sell it. Before he was approached by the police officer and his companion, the applicant was already in unlawful possession of ivory that he intended to sell. He did not have the requisite licence which would not only permit him to sell, but to be in possession of that ivory. In the *Kamtande* matter, SQUIRES J had the following to say of an accused who claimed to have been approached by a police informer to offer for sale to an interested buyer a parcel of rough diamonds and a bar of gold:

> "However, notwithstanding that, and notwithstanding the sometimes confused thinking and the alleged misdirections of the magistrate, I am not persuaded that he was wrong in his eventual conclusion that there were no special reasons here to justify the imposition of a lesser sentence than the mandatory one. For, despite the fact that temptation was placed in the way of the appellant it does not seem to me that he is the sort of person "who would normally avoid crime and….resist ordinary temptations".

[4] Sv Moyo 1988 (2) ZLR 1 (S)
[5] 1988 (1) ZLR 7 (HC)
[6] 1990 (2) ZLR 87 (H)
[7] Page 307 E-F
[8] 2009 (6) SA 632 (CC) at paragraphs 16-21

> See *R v Clever and Another* supra at p 2471. On his version he was asked at about 10am if he would be party to the sale of the quantity of emeralds alleged. Though it is not clear when he was first asked to also sell the gold it seems that by the time he first met the trap at 1pm he knew that this was also to be part of the transaction. Yet knowing both these would be illegal and enticed by a vague promise of a reward, so that this was really no more than a possibility, and the assurance that the informer knew the purchaser so that nothing would really go wrong, he committed himself to the venture. Again, notwithstanding the rest of the afternoon to reflect and to reconsider this proposed breaking of the law, at 5pm he remained still committed. Thereafter, and despite knowing that the gold bar was a fake, and that he was also being asked to perpetrate a substantial fraud on the would be purchaser, he still prepared to ally himself with the commission of the offences…"[9]

The learned judge refused to accept entrapment as a special reason to persuade the court not to impose the minimum mandatory sentence.

The applicant also alluded to a military operation which left him exposed and used as a scapegoat by his superiors. He could not disclose the details for fear of divulging military intelligence since he was sworn to secrecy. As correctly submitted on behalf of the respondent, the applicant should have requested that evidence on this point be heard in camera. He did not choose that avenue leaving the lower court uncertain as to how the military operation constituted a special circumstance.

In the premises, I find no reason to fault the conclusion by the lower court that no special circumstances existed to persuade the court not to impose the minimum mandatory sentence of 9 years. The application is without merit and it is hereby dismissed.

Maposa & Ndomene, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[9] Page 308 B-E