

THE STATE

versus

JEPHIUS FUMISE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 5 April, 2017

Criminal Review

MAWADZE J: The accused was arraigned before the Magistrate sitting at Chiredzi facing 4 counts.

In count 1 the charge is contravention section 114(2)(a) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] which relates to stock theft, count 2 is contravention section 157(1)(a) of (Codification and Reform) Act [*Cap 9:23*] which relates to possession of dangerous drugs specifically dagga, count 3 is contravention section 39(3) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] relating to possession of prohibited knives and count 4 is contravention section 45(1)(b) as read with s 128 of the Parks and Wild Life, Act [*Cap 20:14*] relating to possession of a specially protected animal or trophy.

The accused pleaded guilty to count 2 to 4 and denied the charge of stock theft in count 1. After a trial the accused was found not guilty and acquitted in respect of the charge of stock theft in count 1. Since he pleaded guilty to counts 2 to 4 the accused was duly convicted.

The brief facts are that on 28 January the accused was arrested in connection with the offence of stock theft in count 1. Upon his arrest he was searched and found in possession of a sachet of dagga weighing 0.02g in count 2 and an okapi knife in count 3. A further search in accused's bedroom led to the recovery of two python skins in count 4.

Nothing turns on the conviction in counts 2 to 4 and they are confirmed.

In both count 2 and 3 the accused was sentenced to 60 days imprisonment in each count which were both wholly suspended for 5 years on the usual conditions of good behaviour.

The only notable omission by the trial Magistrate in count 2 was to order the forfeiture of the dagga for destruction and in count 3 the forfeiture of the okapi knife as is provided for in s 39(4) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The sentences in count 2 and 3 are otherwise confirmed.

What exercised my mind in these proceedings is the sentence in count 4 in which the accused was sentenced to the minimum mandatory 9 years imprisonment. The python skins were properly forfeited to the State.

Before imposing the mandatory sentence of 9 years imprisonment the trial Magistrate was enjoined to inquire into the question of special circumstances.

In my view the issue of special circumstances was not fully and properly canvassed. In the case of *S v Manase* 2015 (1) ZLR 160 (H) MUREMBA J in a review judgment, with my concurrence gave very useful insights on how the court should inquire into the question of special circumstances especially where the accused person is not legally represented.

The accused's right to a fair hearing as is enshrined in s 69 of our Constitution is paramount.

In this case the accused explained to the Court that the python skins were given to him for safekeeping after the death of his father who was the one who possessed the python skins. According to the accused they were awaiting the traditional redistribution of his father's assets which is preceded by a traditional beer ceremony. They were still waiting for the rapoko to brew the traditional beer.

The accused is a rural unsophisticated peasant who stays in Village Gwachara, Chief Tshovani in Chiredzi. He is 59 years old. His belief in such traditional beliefs had not been disputed.

After recording the accused's explanation, the trial Magistrate did not invite the State to respond to this explanation. The accused's explanation therefore remained uncontroverted.

A further misdirection is that after the accused's explanation the trial Magistrate did not make a ruling on the existence or otherwise of special circumstances. It was only in the reasons for sentence that the trial Magistrate stated that there are no special circumstances in this case. The question which arises is whether the accused's uncontroverted explanation amounts to special circumstances. It is not clear from the record how the trial Magistrate arrived at the conclusion that there are no special circumstances.

In my view the accused proffered a reasonable explanation which was not controverted. He explained his possession of the two python skins which he apparently held in trust pending a traditional ceremony and redistribution of his late father's assets. In my view that would prima facie constitute a special circumstances when it is considered with the accused's background and ignorance of the law.

I am of the firm view that justice was not done in this case. It is clearly not the accused's fault. I am not persuaded that it is fair and just to remit this matter back to the trial Magistrate in order to continue with the botched up inquiry into special circumstances.

In view of the procedural irregularities outline above this Court is at large to interfere with the sentence imposed by the *court aquo* in count 4.

The penalty provision for contravening s 45(1)(b) of the Parks and Wildlife Act is a fine not exceeding level 8 or imprisonment for a period not exceeding 3 years or both.

The conviction in respect of count 4 is confirmed.

The sentence of 9 years imprisonment in count 4 is set aside and substituted with the following;

"The accused is sentenced to pay a fine of US\$500 or in default of payment 3 months imprisonment".

For the avoidance of doubt the convictions and sentences in count 2 and 3 are confirmed. In addition, the dagga in count 2 is forfeited to the State for destruction and the okapi knife in count 3 is also forfeited to the State.

The accused should be called and advised of the altered sentence in count 4 and the forfeiture orders in count 2 and 3.

Mafusire J. agrees