HIGH COURT
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IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CRIMINAL APPEAL NO. 98 OF 2017

Being Criminal Case No. 32 of 2017 in the CRM's Court Sitting at Mzuzu

OBRIEN CHARIE

VERSUS

THE STATE

CORAM: HON. JUSTICE T.R. LIGOWE
W. Nkosi of Counsel for the State
C. Mwale of Counsel for the Appellant
C. Chawinga, Official Interpreter
R. Luhanga, Court Reporter

JUDGMENT

Ligowe J

1 In the Chief Resident Magistrate's Court, Obrien Charie was convicted of being found in possession of specimen of protected species without permit or licence contrary to section 110(b) and (d) of the National Parks and Wildlife Act and sentenced to four years imprisonment. The Chief Resident Magistrate found that the appellant on 15th January 2017 at Katoto location in the city of Mzuzu was found in possession of four pieces of raw ivory weighing 16.5 Kg and two hippo teeth weighing 0.895 Kg of the total value of K23 210

012. He appealed on the grounds that the totality of the evidence in the lower court left reasonable doubts as to his guilt and that the sentence was manifestly excessive.

2 The facts as transpired in the lower court are that the Wildlife Section of the Police in Lilongwe made an undercover operation to arrest the accused following a tip that certain people were offering raw ivory for sale in Mzuzu. They used a motor vehicle driven by an undercover police officer from Chibanja to Katoto. They ambushed it and arrested the appellant in the vehicle with a bag containing the ivory and the hippo teeth.

3 On the first ground of appeal the appellant argued that there are reasonable doubts in the evidence that was before the lower court as to the possession of the ivory and hippo teeth by the appellant. "Possession", "be in possession of" or "have in possession" as defined in section 4 of the Penal Code, "includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them." So, knowledge, counsel argued, is an important element for possession.

4 Counsel for the appellant argued in particular that there were inconsistencies in the evidence of the witnesses for the State. For instance PW1 stated that the appellant was in the ambushed vehicle with the bag while PW2 stated that the he was boarding the vehicle. PW2 states that the appellant was arrested at a certain lodge in Katoto while PW1 suggests it was at a place other than the lodge. PW1 stated that upon arrest the appellant said he got the ivory from Gerald but PW2 said he did not reveal the name. PW1 talks of the police searching for Gerald at the lodge, PW2 says nothing about it. PW2 talks of the appellant getting the ivory and hippo teeth from Mpherembe and Chiputula, but PW1 says nothing about it.

5 Counsel further pointed that no witness mentioned how the bag of the ivory and hippo teeth found its way on to the undercover vehicle. The driver or Gerald, the undercover police officers were crucial witnesses for this point but they were not called. He argued that there is reasonable doubt such that the appellant should have been acquitted following section 188 (b) of the Criminal Procedure and Evidence Code. That provision states that "the accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence."

6 Counsel for the State contended that there are no inconsistencies between the witnesses as seen by counsel for the appellant. In supporting the conviction he argued that if the appellant was not in possession of the ivory and hippo teeth he could not have squeezed himself to the bag in the car signifying a sense of security. After being refused to use the front passenger seat he could have sat away from the bag in the rear seat.

7 Counsel rightly submitted that appeals in this court are by way of rehearing and as such the court has to review the evidence before the lower court.

8 I have read through the record of the lower court and have found no inconsistencies mentioned by counsel for the appellant as would affect the material facts of the case.

9 The material facts are that the Wildlife Section of the Police in Lilongwe made an undercover operation to arrest the accused following a tip that some certain people were offering raw ivory for sale in Mzuzu. They used a motor vehicle driven by an undercover police officer from Chibanja to Katoto. They ambushed it and arrested the appellant in the vehicle with a bag containing the ivory and the hippo teeth at the entrance to Tang Lodge at Katoto. There were four pieces of ivory and two hippo teeth which an expert from the Department of Parks and Wildlife examined and confirmed. None of the witnesses for the state was there at the time the appellant boarded the undercover vehicle and did not know

how the ivory and hippo teeth found their way on to the vehicle. Assistant Superintendent Mdala gave evidence that in the course of interviews at the CID office the appellant said he got the ivory from someone at Chiputula and the hippo teeth from another at Mpherembe. There is no such information however in the appellant's caution statement. What is recorded is that he opted to speak at court.

10 The appellant who lives in Kasungu and plies in supplying rice to schools and shops was called on the phone by a man who introduced himself as Gerald on 12th January 2017 asking to be joined in supplying rice to Dzaleka. They agreed and left Kasungu for Mzuzu together on 13th January 2017 but late. Gerald slept at a lodge and the appellant at his sister's house at Chibanja. They were proceeding to Uliwa but stopped in Mzuzu because Gerald had to get money to purchase the rice from his bosses in Mzuzu. At some point on 14th January, Gerald borrowed K480 000 from the appellant to send to his wife and promised to pay it back after collecting the money expected from his bosses. He did not manage to communicate with his bosses this day because his phone went off in the mid of the call. The next day they waited for the bosses at a bus stage up to 11 am. The appellant went back to his sister's house and then Gerald called that he had sent a taxi driver to pick him to town to meet the bosses to collect the money. He met the taxi, a Toyota Corolla, on the road. He wanted to sit in front but the driver directed him to the rear because he was going to pick a girl on the way. He sat in the left rear seat. He saw sacks at the back and asked the driver if they had been purchased in advance for the trip to Uliwa. His response did not directly address the question because he just said he knew they were leaving for Uliwa the same day. The driver took the appellant to Katoto and just as they got to a certain gate and hooted for it to be opened, the police arrived on a car and opened the door of the car the appellant was. They pulled the sacks and told the appellant that he had been found with the sacks containing ivory. He tried to explain that the car had been sent to him by Gerald who was at the lodge. It was the appellant's evidence that he was asked by the police if he knew that Gerald was a policeman and his response was negative. He disputed having said he got the items from Mpherembe.

11 In finding the appellant guilty the Chief Resident Magistrate held that he should not have sat on the rear seat squeezing himself with the sack or he should have shifted the sacks away if the sack of ivory and hippo teeth did not belong to him. The Magistrate did not believe the appellant that he found the sacks in the car because it was a personal hire. The court queried why the appellant did not call Gerald or the taxi driver to "testify his innocence."

12 This court's view is that the approach the learned Chief Resident Magistrate took was erroneous. The law regarding the burden of proof is very clear. Section 187(1) of the Criminal Procedure and Evidence Code provides that:-

> "The burden of proving any particular fact lies on the person who wishes the court or jury, as the case may be, to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person:
> Provided that subject to any express provision to the contrary in any written law the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution."

It was therefore for the State to prove that the appellant was indeed found in possession of the ivory and the hippo teeth and not the other way round.

13 Possession is indeed as defined in section 4 of the Penal Code and this court concurs with counsel for the appellant that knowledge is important.

14 In *Rep v. Mataya* [1971-72] 6 ALR Mal 389 Edwards J applied what Lord Parker CJ had said in Lockyer v Gibb [1967] 2 QB 243 on an identical provision regarding possession. He had said:-

> "In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realize is, for example, in her handbag, in her room, or in some other place over which she has no control. That I should have thought is elementary; if something were slipped into your basket and you had not

the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

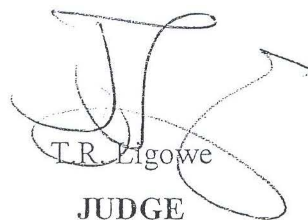
15 This passage had also been approved in *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256 and Lord Morris of Borth-y-Gest commented at p. 289 that:-

> "[I]n order to establish possession the prosecution must prove that the accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it ..."

16 This being an undercover operation, it is surprising that the undercover officers were not called by the state to prove knowledge and control of the sack by the appellant. The vehicle used belonged to the police, the driver was a policeman and it appears Gerald was a policeman. They should have testified how the sack got onto their car and how the appellant was connected to it.

17 The state did not prove one crucial element of the offence and for this reason the appeal succeeds. The conviction is quashed and the sentence set aside. There is therefore no point discussing the second ground of appeal.

18 Made in open court this 14th day of March 2018.



T.R. Ligowe

JUDGE