

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE/LUSAKA
(Criminal Jurisdiction)

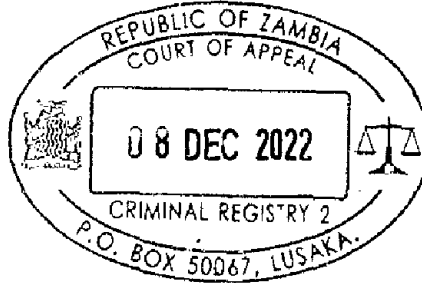
Appeal No 79/2022

BETWEEN:

NOZGANI SIMUTOWE

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga JJA

ON: 16th August 2022 and 8th December 2022

For the Appellant: S.F Bwalya, Legal Aid Counsel, Legal Aid Board

For the Respondent: B. Siafwa, State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. People v. Chotoo Lala [1974] Z.R. 201
2. Tito Manyika Tepula v. The People [1981] Z.R. 304
3. Mwinga and Another v. The People, SCZ Appeal No. 10 and 11 of 2017
4. Sikota Wina and Princess Nakatindi Wina v. The People [1995-1997] Z.R. 137
5. Nachitumbi and Another v. The People [1975] Z.R. 285
6. The People v. Makhokha [1967] Z.R. 173

Legislation referred to:

1. The Zambia Wildlife Act No. 14 Of 2015
2. The Criminal Procedure Code, Chapter 88 of The Laws of Zambia

1. BACKGROUND

- 1.1. The appellant appeared before the Subordinate Court (Honourable B. Malambo), charged with the offence of Possession of a Prescribed Trophy, contrary to **Sections 87(4) and 130(2) of the Zambia Wildlife Act.**
- 1.2. He was unrepresented at the time.
- 1.3. He was convicted following his admission of the charge and acceptance of the statement of facts, which set out the circumstances in which the offence was committed.
- 1.4. The case was then committed to the High Court for sentencing because the trial magistrate lacked the jurisdiction to sentence him.
- 1.5. When the case came up for sentencing, the appellant had retained the services of counsel.

1.6. Counsel informed the sentencing Judge (Limbani, J.), that the appellant wished to recant his plea of guilty.

1.7. The Judge declined the request, and proceeded to impose a sentence of 5 years imprisonment, with hard labour

1.8. He has appealed against the conviction.

2. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

2.1. The sole ground of appeal is that the sentencing Judge did not properly exercise his discretion, when he declined to allow the appellant retract his plea.

2.2. Ms. Bwalya, referred to the cases of **The People v. Chotoo Lala¹** and **Tito Manyika Tepula v. The People²**, and submitted that since an accused person can withdraw a plea of guilty at any stage of the trial before the sentencing, the appellant should have been allowed to retract his plea.

2.3. She pointed out that since the appellant was unrepresented at the time he took the plea, there was a good reason for allowing him to retract the plea following his retention of counsel.

2.4. She prayed that we allow the appeal, and order a retrial.

3. ARGUMENTS AGAINST THE APPEAL

3.1. In response, Mr. Siafwa argued that there is no need to order a retrial, because the plea was unequivocal and there was nothing technically flawed in the proceedings in the Subordinate Court.

3.2. He referred to the cases of **Mwinga and Another v. The People³**, **Sikota Wina and Princess Nakatindi Wina v. The People⁴** and **Nachitumbi and Another v. The People⁵**, in support of his arguments.

4. CONSIDERATION OF APPEAL AND DECISION OF THE COURT

4.1. In the case of **Tito Manyika Tepula v. The People²**, it was held that a trial court has the discretion to allow an accused person to retract his plea, at any time before the sentence is passed.

4.2. Silungwe C.J., delivering the judgment of the court, went on to say the following:

"But the discretion can only be exercised on good and sufficient grounds as, for instance, where it subsequently transpires that a plea of guilty is equivocal; where an unequivocal plea of guilty has

properly been entered but a statement of facts is disputed in a material particular; where there has been a mistake or misapprehension on the part of the accused; or where it would be desirable on any other good and sufficient grounds to allow the plea to be retracted. Before exercising the discretion, it is desirable to ask the accused why, or on what grounds, he wishes to withdraw his plea."

4.3. In this case, counsel who was representing the appellant, informed the sentencing Judge that the appellant wished to retract his plea as he admitted committing the offence, because wildlife officers informed him that he would be treated with leniency if he did so.

4.4. The Judge, was not impressed with the reason and declined to allow the appellant to retract his plea of guilty.

4.5. As was indicated earlier on, at the time the appellant took the plea he was not legally represented. It is our view that the retention of counsel, is, *prima facie*, a "good and sufficient ground" for allowing an accused person to retract his plea.

- 4.6. In this case, even if counsel was not explicit, it is apparent, that his assessment of the case was that the appellant should not have admitted the charge. He thus advised him to retract the plea.
- 4.7. Further, in certain circumstances, even the change in legal representation, can be a good reason for allowing an accused person to retract the plea. This is because a different lawyer, may not view the case in the same way as the previous one. Such a lawyer, may advise the accused person to approach the case differently.
- 4.8. We therefore find that had the sentencing Judge properly assessed the circumstances of this case, he would have found that this was a proper case in which the discretion to allow the retracting of the plea, should have been exercised.
- 4.9. We therefore find merit in the sole ground of appeal and we allow it.
- 4.10. We set aside the conviction and the sentence.

4.11. Further, we order that the case is remitted back to the Subordinate Court, for the retaking of the plea.

4.12. But the matter does not end there.

4.13. The appellant is charged with the offence of possession of a prescribed trophy. The statement of offence and particulars of offence, read as follows:

"STATEMENT OF OFFENCE: Unlawful possession of prescribed trophy contrary to Section 87(4) and 130(2) (A) of the Zambia Wildlife Act Number 14 of 2015 of the Laws of Zambia.

PARTICULARS OF THE OFFENCE: Nozgani Simutowe on the 10th day of August 2021 at Chama in the Chama district of the Muchinga Province of the Republic of Zambia, jointly and whilst acting together with other unknown had in his possession prescribed trophy namely 2 pieces of elephant ivory weighing 5 kilograms without a certificate of ownership as required by law."

4.14. The marginal note to **section 87 of The Zambia Wildlife Act**, reads "Certificate of ownership of trophy and prescribed trophy", while the provision is to the effect that:

(1) The Committee may, upon application by a person and upon being satisfied that the person is in lawful

possession of a trophy, issue to that person, in the prescribed form, a certificate of ownership of that trophy.

(2) Subject to sections eighty-eight, ninety and ninety-one in respect of the import and registration of ivory and rhinoceros horn, a person who imports a prescribed trophy shall, within one month from the date of the import of the prescribed trophy, apply to the Committee for a certificate of ownership in respect of the prescribed trophy under this section.

(3) The Committee may, where satisfied that a certificate of ownership referred to in subsection (1) or (2) was issued through error, or through the misrepresentation or fraud of any person, revoke it and the person to whom the certificate of ownership was issued shall cause the certificate to be returned to the Director for cancellation.

(4) A person who has in that person's possession a trophy or prescribed trophy without the certificate of ownership issued in respect of the trophy or prescribed trophy commits an offence

4.15. In addition to requiring a person to have a certificate of ownership, before possessing a trophy or prescribed trophy, **Section 87 of The Zambia Wildlife Act**, in **subsection 4**, makes it an offence to possess a trophy or prescribed trophy, when one does not have a certificate of ownership.

4.16. On the other hand, the marginal note to **Section 130 of the Zambia Wildlife Act** reads, "Illegal possession, purchase or sale of protected animal, trophy or meat of protected animal or prescribed trophy".

4.17. The provision reads as follows:

- (1) A person who is in possession of, sells, buys, imports or exports or attempts to sell, buy, import or export, a protected animal or trophy or meat of a protected animal in contravention of this Act commits an offence and is liable, upon conviction, to imprisonment, without the option of a fine, for a term of not less than five years but not exceeding ten years.
- (2) A person who is in possession of, sells, buys, imports or exports or attempts to sell, buy, import or export a prescribed trophy in contravention of this Act is liable, upon conviction -
 - (a) for a first offence, to a term of imprisonment, without the option of a fine, of not less than five years but not exceeding ten years; and
 - (b) for a second or subsequent offence, to a term of imprisonment, without the option of a fine, of not less than seven years but not exceeding fifteen years

4.18. This provision, in subsection 2, proscribes the possession, selling, buying, importing or exporting or attempting to sell, buy, import or export, of a prescribed trophy.

4.19. Although the offences in **Section 87(4) and 130(2)(a) of The Zambia Wildlife Act**, do, to some extent, deal with a similar subject matter, they create two distinct offences.

4.20. This being the case, the decision to charge the appellant with the possession of a prescribed trophy under both **Section 87(4) and 130(2)(a) of the Zambia Wildlife Act**, resulted in him being charged with two different offences in one count.

4.21. This is in contravention of **Section 135(2) of the Criminal Procedure Code**, which provides that where more than one offence is charged, each offence shall be set out in a separate paragraph, called a count.


4.22. Further, in the case of **The People v. Makhokha⁶**, it was held that where the charge contains two offences, such charge is bad for duplicity.

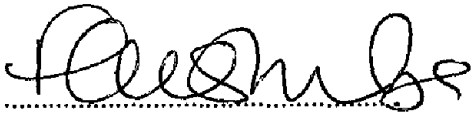
4.23. We hope that before the plea is retaken, the anomaly we have just pointed out, will have been attended to by the prosecutor.

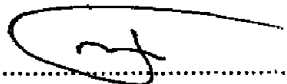
5. VERDICT

5.1. The appeal is allowed and the conviction is set aside.

5.2. The case is sent back to the Subordinate Court for the retaking of the plea.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
F.M Chishimba
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE