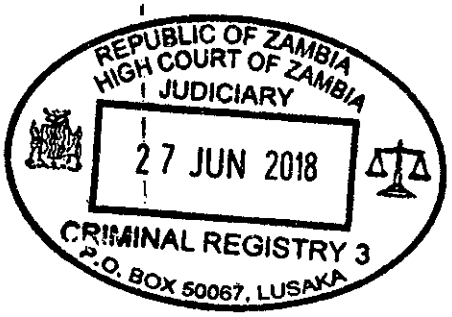
IN THE HIGH COURT FOR ZAMBIA **HPA/15/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

WAN QIAN

HUANG QINGZHON

HE QINGMAO

LOVEMORE KAMWENDO

OBERT SIMWAJATA

VS

THE PEOPLE

Before Hon. Mr. Justice M. Chitabo, SC at Lusaka, the 27th day of June, 2018

For the State: *Ms. R. Malibata – State Advocate*

For the Accused: *Mr. W. Muhanga – Messrs AKM Legal Practitioners*

JUDGMENT ON APPEAL

Cases Referred to:

1. *A.M. Madubula v The People (1994) SJ 63*
2. *Harrison Zimba v The People (1970) ZR 101*
3. *Henry Kapoko v The People 2016/CC/0023*
4. *Humphrey Manyonga and other v The People Appeal No 121/122/123 of 2015*
5. *Isa Yona Sibale v The People (2009) ZR 4*
6. *Joseph Nkole v The People (1977) ZR 351*
7. *Kalebu Banda v The People (1977) ZR 169*
8. *Kenious Sialuzi v The People (2006) ZR 87*
9. *Mapushi v The Queen (1963-1964) N.R.L.R 90*
10. *Mark Herbert Kaunda v The People (1982) ZR 26*
11. *Maseka v The People (1972) ZR 9*
12. *Musonda v the People (1976) ZR 215*
13. *Mutale and Phiri v The People (1995-1997) ZR 277.*
14. *Mutambo and others v The People (1965) ZR 15*
15. *Mwewa Murono v The People (2004) ZR 207*
16. *Phiri v The People (1973) ZR 47*
17. *Phiri v The People SCZ JUDGMENT NO. 53 of 2014*
18. *Shamwana v The People (1985) ZR 41*
19. *Sipalo Chibozu and Chibozu v The People (1981) ZR 28*

Legislation Referred to:

1. *Constitution Amendment Act No 2 of 2016*
2. *Criminal Procedure Code Chapter 88 of the Laws of Zambia*

3. *Penal Code Chapter 87 of the Laws of Zambia.*
4. *The Zambia Wildlife Act No. 14 of 2015*

The Appellants were tried and convicted by the Subordinate Court sitting at Lusaka for Unlawful Possession of Prescribed Trophy Contrary to section 130(2)(a) and 86 of the Zambia Wildlife Act No. 14 of 2015.

The Court below relied on 7 witnesses. The evidence briefly was that on 27th July, 2017PW1 was approached by the 4th Appellant in his car saying he wanted to pick people in Katete District. He was to pay K1800 and left his car as security as he did not have the money. PW1 then gave out a Silver Toyota Prado registration number ALM 2319. Around 17:00hrs that day the 4th Appellant called him that he was in Katete with the vehicle which was expected back within 24:00hrs. An hour and a half later the 4thAppellant called him again and informed him that they had been arrested and the phone went off.

PW1 then informed the Director what had transpired and arrangements were made to go to Chanida Border. When they got to Chanida Border the 4th Appellant told him that they were arrested at Chanida border and the Toyota Prado was found at the Zambia Revenue Authority (ZRA) offices. The station manager at ZRA informed him that the vehicle was impounded and a notice of seizure was served on the driver of the vehicle because they found illegal

stuff inside which were surrendered to the wildlife officers from Chipata.

They were later directed to Chizombo wildlife camp in Mambwe District where the Appellants were being held. He said that on the third day when he was allowed to talk to the 4th Appellant, he did not disclose why the vehicle had been impounded but was shown the seizure note which stated that the vehicle was used as a conduit for trafficking. He further testified that the seizure notice was in the 4th Appellant's name but did not have his signature. The same was admitted in Court as P1.

PW2's evidence was that on 27th July, 2017 he reported for work at around 18:00hrs and twenty minutes later he saw three Chinese nationals enter the border from Mozambique. According to him they passed the small gate and carried bags into Zambia. He stated that they did not pass through the check point and went straight into a Toyota Prado parked on the Zambian side. He informed the Court that the rule was that everyone who passed through the border had to be searched. When he realized that the three Chinese nationals had not been searched he informed PW5 who had just knocked off. PW5 then went to the vehicle and asked that they all come out. He stated that when they came out of the vehicle only the 2nd and 3rd Appellants carried bags but when he first saw them, the 1st Appellant had carried two bags.

They were led to the ZRA offices where they were asked to open their bags. The 1stAppellant opened the brown bag and removed things

wrapped in a yellow plastic. When these were unwrapped they looked like Rhino horns. PW5 asked the witness to wait for the Station Manager PW3. The other bag was black which had seven pieces of rhino horns wrapped in yellow tape.

PW5 then told him to go and search the motor vehicle where he went with Officer Kabaso. They found two more bags and some sweet potatoes at the rear seats. Officer Kabaso took the bags to the office while the witness remained outside. He stated that he did not know what happened to the two people who were seated in the front seats. He said he suspected the horns to be Rhino horns even though he did not know for sure.

The witness denied planting the items in the bags. PW3 testified that on the material day he went back to the office from his fitness exercise when he met officer Ndunda from Immigration and PW5 from Customs with PW2. When he entered the building he found three Chinese nationals and PW5 told him that they found the suspects carrying suspected Rhino horns. The three Chinese nationals, officer Mbewe and PW5went to his office.

When the bags were opened he saw what was suspected to be a Rhino horns from one of the bags. They counted a total of two pieces from the brown bag and seven pieces from the black bag. PW3 told PW5 to seize the items and a seizure notice was issued to show the owner of the items seized. He testified that the 1st Appellant claimed ownership of the items and he informed him that the 2nd and 3rd Appellants did not understand English. He said he heard from PW2

that there was a silver Toyota Prado involved. He later called for the two Zambian Nationals who were in the car. He said when asked the 1stAppellant said the items were his and that he was not forced to do so. It was his further testimony that the other bags later found contained thirteen wrapped pieces and another seizure note was issued by PW5 which the 1st Appellant signed and the officer signed on it as a witness. All the Appellants were taken into custody and the items found and the motor vehicle was seized.

It was his evidence that he handed over 22 Rhino Pieces to Linda Mfune which when unwrapped he counted 25 Rhino pieces weighing 32.2 kilograms. When cross examined he explained that it was his duty to ensure that prohibited items did not pass the border which were his main interest. He stated that the 1st Appellant wrote on the top left side of P9 which was a seizure note reflecting what had been seized.

PW4 was the one who identified and physically examined the specimen that was seized from the Appellants. He collected DNA from the specimen which he identified as Rhino horns. PW5 was Officer Lawrence Chisenga who was on duty at Chanida border on the material day. He stated that he was about to go home that day at around 18:15 when he was stopped by PW2 who told him that he had seen three Chinese men with bags. He told him that the three had entered Zambia from no-man's land and entered a Toyota Prado on the Zambian side. When he went to the vehicle he found the three

Chinese national and two Zambians. He asked the Chinese to follow him to the general office where the searching was carried out.

When one of the items in the bags was unwrapped, it appeared to be an animal horn and PW3 who was his supervisor came in. He explained to him what had transpired and he asked him to speak to the Chinese nationals. PW3 then took them to his office where they opened both the black and brown bags containing the said items. PW5 then issued a seizure notice because the suspects did not produce any supporting documents for being in possession of the items. PW5 was then instructed to search the vehicle they were in where he found two more bags at the rear seats and the two Zambian nationals were asked to follow him. The bags were handed to PW5 and they all proceeded to PW3's office where the 1st Appellant was asked to open the bags. When he opened the bags they found more wrapped pieces which were described as Rhino horns on the seizure notice which was marked exhibit P9.

In cross examination he stated that when the bags were opened, none of the accused persons were allowed to leave. Counsel referred to sections75 and 90 of the Zambia Wildlife Act relating to the procedure when a person had killed and elephant or rhinoceros. The Public Prosecutor stated that in the present case the provisions cited did not arise as nothing disclosed that they killed the animals in question. He submitted that the issue was that the Chinese nationals came into Zambia without passing through immigration. He told the Court below that they had someone who was able to interpret

Chinese to the three. He stated that the 4th and 5th Appellants did not have bags on them and that PW2 said nothing about the two as the interest was to see the contents of the bags. He also confirmed that the 4th and 5th Appellants only joined them when the vehicle was searched. He maintained that the 1st Appellant claimed ownership of the items.

PW6 was Linda Mfune who at 22:30 hours on the material night in the company of three wildlife officers booked out from Chipata city to Chanida border where they arrived at 02:00 hours in the morning of 28th July, 2017. She went to PW3's office who showed her and the other officers the suspected Rhino horns. She said upon identifying the horns she was convinced they were Rhino horns. She inquired from the five suspects their names who were the five Appellants and from there they took the suspects to Katete police cells. She stated that the five suspects had no legal documents to be in possession of the horns neither did they have a certificate of ownership from the Director of Wildlife. She also stated that they were a total of 25 pieces found weighing 32.2kg. The suspects were later detained at Chizombo wildlife offices. On 30th July, 2017 she went to Mfuwe and handed over the 25 horns, seven cell phones, three passports and cash money that was obtained from the suspects to Michael Chipeta.

When cross examined she told the Court that it was the procedure that when suspects were apprehended all the items collected from the suspects are recorded. She however stated that she did not bring the record book as she handed over everything to Chipeta. When

asked about the identification of the Rhino horns, she said she was able to identify them based on her twelve years of experience in her department. She clarified that the items were weighed by the scale belonging to ZRA and did not know when it was last calibrated. According to her the night they arrived at the border at 02:00am she saw 23 pieces and that two pieces were wrapped together. She explained that the document showed that there were thirteen (13) wrapped pieces and sixteen (16) pieces and the total was 29.

When shown Exhibit P9 she explained that she collected 9 wrapped rhino horns which when broken down unwrapped was 13+16+9 and the total was 38 pieces. She stated that only 25 pieces were produced and that's what the seizure note states. She further clarified that people can bring trophies from outside the country and in such cases the Director of Wildlife does not issue a Certificate of ownership. She however stated that the suspects told her that they had no legal documents to show that they were legally bringing them into the country.

In reexamination she told the Court that when one was importing trophies into the country or exporting them outside, they needed to have an import or export permit. She clarified that the seizure note stated that there were 13 wrapped pieces which when unwrapped became 16 and the 9 unwrapped pieces remained the same which total was 25 pieces. She stated that the number changed because after unwrapping the pieces.

PW7 testified that he was working from South Luangwa offices on 30th July, 2017 when he was handed over three Chinese and two Zambian males, four bags, 25 pieces of suspected rhino horns and items confiscated from the suspects. He received them from PW6 and a handover certificate from ZRA was given to him. A veterinary doctor was called and upon examining the pieces received and confirmed that they were genuine rhino horns weighing 32.kg. After weighing the pieces the doctor signed the report and handed it over to PW7. The following day he went with PW6 to Chanida border where he was taken through how the suspects were apprehended and the car that had been seized in the process. He interviewed PW3 who informed him that PW5 prepared seizure notes.

When he returned to Mfuwe he requested for a Chinese interpreter as only one of the Chinese nationals could understand English. An interpreter was provided on 5th August, 2017. With the help of the interpreter he was able to interview the five suspects and he later jointly charged and arrested them for the offence of Unlawful Possession of Prescribed Trophy contrary to section 86 of Act No. 14 of 2015. All five denied the charge.

In cross examination the witness told the Court that he did not look in detail at the entry of the Chinese nationals and did not know if they entered Zambia legally. He said he limited his investigations in line with his duties. He stated that according to their passports they entered the country on 27th July, 2017 which was the day they were apprehended. He stated that he framed his charge based on what he

received. He stated that with regard to exhibit P9 the doctors' report was dated 27th July, 2017 but the analysis was dated 30th July, 2017 and only the author could confirm the issue of the dates. He however stated that he was there when the doctor conducted the examination.

He stated that the offence on P9 stated Rhino horns when in the doctor only made the analysis later.

The evidence of the 1st Appellant was that he was cleared to enter Zambia by the immigrations Department in Mozambique and that he had a licence issued in Mozambique. He narrated that the customs officers took his bags and found rhino horns and they took the back and export permit. He was then detained and was taken to the police. On 28th July, 2017 he was taken back to the customs office where he found two police officers in plain clothes.

They put the rhino horns on the table and when they counted them they were 25 pieces but that the export permit and the licence for the rhino was not there. He stated that he did not know how to read English but saw some numbers on the documents and the date. He stated that he had signed exhibit P9 but that did not know what they were. He also explained that the 4th and 5th Appellants were drivers in Zambia who were sent by his colleague from Zambia to go and pick them from the border. He said he came with the rhino horns from Mozambique with an export permit and licence and his intention was to take them to South Africa. He stated that he saw someone come ant collect samples from the horns and took them.

He stated that when he entered Zambia his passport was stamped on the 27th of July, 2018. He stated that he only saw 25 rhino pieces when he had 38 pieces and did not know where the rest were taken together with the supporting documentation.

When cross examined he explained that he knew the 4th Appellant from his first trip into the country and this was his second trip. He said that his colleague had arranged that he be picked up from the border and that all the four bags and the rhino horns were his. According to him he appeared before the immigration officers in Zambia and denied PW2's testimony that he by passed the entry checkpoint when he entered the country. He stated that this was evidenced by the passports being stamped. He maintained that he went to the immigration offices before he went to the car. According to him, after passing through immigrations offices he was not directed to go to the customs offices. He said that he did not raise the issue of the missing pieces as it was PW6who said that they were 38 pieces.

It was his evidence that he was not given time to fully explain to Counsel what he wanted to explain. He stated that it was hard to communicate with the customs people because his English was not good.

The evidence of the 4th Appellant was that he received a call on 27th July, 2018 from his friend Kennedy Chanda who told him that there were Chinese nationals who wanted him. When he managed to get in touch with the Chinese nationals they asked him to hire a 4x4 to go

to Chanida and pick him up. He went to exact car hire where he left his vehicle in exchange for the 4x4. He picked up the 5th Appellant who was his assistant driver and they reached Chanida border at 17:00hrs. He stated that at around 18:00hrs the 1st Appellant approached the vehicle in the company of two police officers. The 1st Appellant was then taken to the ZRA offices and later the 4th and 5th Appellants were asked to move the vehicle and it was searched. They were then asked to get out of the vehicle but that he did not know what they found. They were then taken to Chanida police cells but because the police cells were very dirty he in the company of the 2nd, 3rd and the 5th Appellants were taken to katete Police station but the 1stAppellant was taken elsewhere.

The following day at 07:30 they were taken back to the border and while there they asked the 1st Appellant to open the bags and when he removed the contents and placed them on the table. The five appellants were asked to stand near the table and they took pictures of them. He stated that the said items were brought from Mozambique. The 4th Appellant was interviewed and was later taken to Chipata at the National Parks office where he was detained for eight days. On the 9th day the owner of the vehicle they had hired engaged a lawyer. He explained that later PW7 called all the appellants one by one to his office where he interviewed them and made them to sign on a paper, took their fingerprints and told them that they would appear in Court.

When cross examined the witness explained that from the time they were detained he did not know why they were detained. He however stated that he signed for the seized motor vehicle at ZRA.

The evidence of the 5th Appellant was that the 4th Appellant called him when he was at home and he met the 4th Appellant on his behalf. He said the 4thAppellantasked him to accompany him to Katete up to Chanida border to pick up Chinese nationals as his assistant driver since he had back pains and he agreed.

They reached the border at around 17:00hrs but found that the people they followed had not come so they proceeded to town and only returned at 18:00hrs. The 4th Appellant asked him to inform the officers that they had come to pick up Chinese national and they were directed to park at the ZRA offices. A few minutes later the 1st Appellant approached the vehicle accompanied by a uniformed officer and the 1st Appellant opened the car door but was called by another uniformed officer whom he went with.

The 1st Appellant was brought back to the vehicle with an officer who asked them to park near the offices. When they got there they were all asked to leave the vehicle and were taken to the offices while the vehicle was searched. He stated that they were taken to Katete Police cells where they spent the night while the 1st Appellant was taken elsewhere.

The following day the 1st Appellant and the rest of the Appellants were taken to Chanida border. When they entered the office he found

the 1st Appellant putting things on the table from the bags. He stated that when they were all asked if they knew what the items were; only the 4th and 5th Appellants said they did not know what they were. Photos were taken of the items and they were asked to leave the office except for the 1st Appellant.

Later that day they were taken to Chizombo where they were detained but did not know the reason they were detained. Seven days later the owner of the vehicle came to see the 4thAppellant who narrated what had happened and the following day he came back with a lawyer.

He narrated that he was later called by PW7 who asked him to sign a paper that had their names on it. He inquired why he was signing and he was told that he would know once the matter went to Court. He signed the said document and days later they were called back to the office and witnessed the doctor extract samples from the pieces of items on the table.

He was then taken to another room where he was asked what he knew about the matter and he said he did not know anything and that he just escorted the 4th Appellant who was not feeling well. He stated that the lawyer was not allowed in the office and that after he was questioned he was told to join the other suspects.

DW4 was called to come and produce a copy of the Daily Nation Newspaper that ran a story of the five people being nabbed for Rhino

horns.DW5 was the person who issued a statement concerning this case and circulated the statement to all media houses.

The Appellants appealed against the decision of the Court below and raised the following grounds of appeal:

1. The learned Trial Magistrate erred in law and facts where he convicted and sentenced the accused persons for the purported offence of Unlawful Possession of Prescribed Trophy contrary to section 130(2)(a) and 86(2) of the Zambia Wildlife Act No 14 of 2015 of the Laws of Zambia which offence did not exist under any such law or other statutes known by law and without determining whether indeed such offence existed.
2. The Learned Trial Magistrate erred in law and facts when he convicted and sentenced the Appellants of the alleged offence in total and complete disregard of the State's own admission that they erred and never intended to charged the Appellants with the offence under section 86(2) and without the Court determining the effect of such admission on the charge sheet preferred.
3. The Learned Trial Magistrate erred in law and facts when he convicted and sentenced the accused persons based on and indictment or charge sheet whose Statement of the Offence did not disclose any offence known by law and thus fatal and without determining whether indeed such particulars were sufficient under the circumstances and as required by law.

4. The Learned Trial Magistrate erred in law and facts when he convicted and sentenced the accused persons based on an indictment or Charge Sheet whose Particulars of the offence were vexatious, perverse and fatally defective.
5. As a result of the above, the entire trial and proceedings were a nullity and a miscarriage of justice and the Trial Magistrate erred and misdirected himself by not quashing the indictment and acquitting the Appellants and thus fell on the other side of the law in convicting the accused persons.
6. That the Trial Magistrate erred and misdirected himself both at law and fact when he convicted the accused persons without any evidence on the record to prove that the Appellants had not committed such an offence, if any.
7. That the Trial Magistrate misdirected himself by glossing over evidence submissions and engaged in an unbalanced evaluation of the same thereby failing to appreciate the matter before him in convicting the accused persons.
8. The Trial Magistrate misdirected himself and grossly misapprehended the law regarded Article 118€ of the Constitution glossing over evidence and submission in convicting the accused persons.
9. The Trial Magistrate misdirected himself at law and facts by making findings of fact unsupported by evidence.
10. The Trial Magistrate made several statements in his judgment that suggested the shift of the Burden of Proof from the

prosecution to the Defence, in disregard of the long standing legal principles of the law.

11. The Learned Trial Magistrate during proceedings made several rulings which did not conform to the law and the entire proceedings were marred with prejudice and a miscarriage of justice on the Appellants and thus must be quashed.

The Appellants filed in their Heads of Arguments on 17th April, 2018.

With respect to grounds one and two, it was Counsel for the Appellant's argument that the Appellants were facing a non-existent offence at law to which no reasonable tribunal, properly directing itself could have convicted the Appellants. It was argued that it was trite law that a person can only be convicted of an offence which is established and defined by law. Counsel cited Article 18(8) which provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law. He also cited the case of ***Mapushi v The Queen (1963-1964) N.R.L.R 90*** where it was held that An accused person has the right to be tried in a manner and form prescribed by law.

It was his submission that the Appellants were charged with purported offences under Sections 130(2)(a) and 86(2) of the Zambia Wildlife Act. It was the Appellants contention that these sections did not disclose any offence. That in view of the fundamental error at law, the charge was defective and incurable and was subject to be quashed by the Court. He stated that this submission was also made by the Appellants at the close of trial.

It was submitted that even the prosecution was magnanimous and conceded in their final submissions in reply tin the Court below, that indeed section 86(2) of that Act did not disclose any offence. It was his contention that the State was even short of acknowledging that the said section 87(4) they were now trying to rely on was brought to the fore by the Defence in their submissions. He stated that this non-existence offence which did not subsist alone but existed as one offence with section 130(2) had caused prejudice and embarrassment to the accused persons. He submitted that it was not possible that a non-existent offence sought to be amended at the time of Judgment.

He argued that since the charge was read as one, the moment the State conceded that section 86(2) did not disclose any offence, it goes without saying that section 130(2) remained orphaned and could not be sustained on its own. He argued that the trial court should have done was to address its mind to what was the effect of the state on the initial charge as it stood after the State withdrew one of the sections alleging to have made up one offence.

It was his submission that the Magistrate surprisingly convicted all the Appellants as initially charged when the State had conceded that no offence was disclosed under section 86(2). It was his argument that the Trial magistrate therefore erred at law and in fact when in his Judgment he stated that the Appellants stood charged with the said offence contrary to section 130(2) only, leaving out subsection (1).

Under grounds three and four it was submitted that the indictment was fatally defective and incurable at law. They maintained that section 130(2) could not remain alone as the other section had been withdrawn.

It was Counsel's submission that it was undisputed by the witnesses from both parties that the prescribed trophy came from another Country. That the requirements of the Act upon which the Appellants were charged from, had provisions allowing importation of prescribed trophy in the country (Zambia) provided the importer meets the requirements as prescribed by law and that a failure to meet those specific sections could raise an offence being committed, not of possession, but of failing to meet the provisions of those specific section.

It was Counsel's arguments that the Trial Court should have considered the provisions of section 88 (1) of the Act which required a person wishing to import a prescribed trophy to apply for an import permit and failing to do so was an offence. He submitted that this section took cognizance of situations such as the one that the Appellants found themselves in. He went further and referred to sections 87(2), and 91 which all required a certificate of ownership with respect to prescribed trophies and requiring the same to be presented and weighed by wildlife police officers or any person authorized to do so.

He maintained that the State acknowledged in their submissions in the Court below that the 1st and 3rd Appellants did not show any

supporting documents for them to be in possession or to import the Rhino horn. He stated that section 105(1)(b) was very clear on this but that the State chose to wrongly charge the three Appellants under section 130(2)(b). He stated that the 1st Appellant should have been charged under section 87(4), 88(2) or 105(2). He argued that the State did not charge the Appellants with the specific afterthought offence and they could not amend.

It was his contention that the Court below could not have invoked section 231 of the Criminal Procedure Code (CPC)because the whole charge sheet was defective and as such all the Appellants be acquitted forthwith.

With regard to grounds five and six it was Counsel's submission that Court below failed to show which section of the Act was contravened to qualify the Appellants to stand charged with and convicted to suffer the penalty under section 130(2)(b) after the State withdrew section 86(2). Counsel again emphasized that the Charge sheet was defective as it did not specify which specific section was contravened because the Charge sheet did not state exactly what had been contravened.

It was Counsel's argument that the defect to the charge sheet was fatal as it prejudiced the Appellants. He contended that section 130(2)(a) did not disclose an offence neither does it state that possession was illegal unless it contravened the Act. He further argued that the Zambia Wildlife Act did not provide for the offence of Unlawful Possession of Prescribed Trophy nor did section 130(2) (a)

provide for it. He strongly argued that for the Appellants to be charged under section 130(2) (b), they should be charged with another supporting section as the section cannot stand alone.

It was his argument that the Appellants had been convicted and incarcerated for a non-existent offence and therefore deserved to be acquitted.

He cited section 134 of the CPC which stipulates what should be contained in an information or charge sheet. He further referred to the cases of ***Joseph Nkole v The People (1977) ZR 351*** *and* ***Shamwana v The People (1985) ZR 41*** where it was held to the effect that where an indictment did not disclose an offence, it was a bad indictment.

Counsel also argued that in addition to not disclosing an offence, the indictment was also defective. He added that no witness lead evidence requiring someone in possession to have a certificate of ownership as stated in the particulars of the offence.

He cited the case of ***Phiri v The People (1973) ZR 47*** where it was held that:

> *"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternate but to acquit the accused, and when such an acquittal takes place because evidence which*

could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the courts but by the investigating officer."

It was his submission that it was a complete misdirection of law by the State to have framed a charge in the manner which they did. Further that by the state withdrawing section 86(2), they agreed that the charge sheet was defective He cited the case of ***Kenious Sialuzi v The People (2006) ZR 87*** where it was held that *where an in an information the Statement of the offence is correct but the particulars omit the necessary words, this does not render the information bad, but simply defective.* He argued that in the present case the statement of offence was wrong and so were the particulars and that the Court below failed to make a determination to alter the charge as is required under section 213 of the CPC.

It was his argument that because the indictment was fatally bad, the conviction must be quashed because the Court below failed in its adjudicative duties. He cited the case of ***Harrison Zimba v The People (1970) ZR 101*** to support the arguments that omitting essential ingredients of the offence meant that the defect was incurable on appeal.

He added that assuming there was an offence disclosed, the Rhino horns in issue did not emanate from Zambia but from a foreign jurisdiction which was undisputed from the prosecution's evidence which all confirmed that the Three Appellants came from Mozambique.

It was Counsels submission that what if the said Rhino horns were in transit for importation, how then could the Director of National Parks and Wildlife have issued a Certificate of Ownership to trophies that emanate or came from a foreign jurisdiction.

With respect to ground seven it was argued that the failure by the trial Court to adjudicate in a balanced manner was a misdirection which called for an appellate court to interfere with the lower court's judgment. Counsel stated that it was not disputed that Rhino horns were imported into Zambia. He stated that the 1st Appellant corroborated the evidence of the State witnesses that he claimed ownership of the Rhino horns in issue and that he came from another country. He stated that the trial magistrate did not mention this fact in his judgment.

He submitted that the law was clear that a person who was authorized to search and inspect for purposes stipulated under the Zambia Wildlife Act was an authorised officer. This authorised officer was defined under the Act as a wildlife police officer, a police officer of the rank of inspector or above, a community scout or an honorary wildlife police officer. He stated that what PW5 did by effecting seizures and issuing seizure notices was illegal as these were undertaken by ZRA officials. He stated that the notices that were admitted as exhibit P9 stated the offence of trafficking in Rhino Horns which was not the offence before Court and that the said notices were issued for purposes of Regulation 114 of the Customs and Excise (General) Regulations, 2000.

It was his arguments that the trial Magistrate substituted who should have conducted the searches and the Judicial Notice. He further submitted that there was no evidence that any of the prosecution witnesses who intercepted the 1st Appellant sought the production of any export or import documentation.

He further submitted that despite having cited section 87(2), it was not completely prohibitive at all to bring in such a trophy as was wrongly insinuated by PW6 and the other prosecution witness. It was his contention that section 87(2) required a person to obtain a certificate of ownership within one month from the date of importation and failure to which the person importing would then be committing an offence under section 130(2)(a).

He submitted that the Defence was magnanimous and brought to the Court's attention section 181 of the CPC which allowed the Court to substitute an offence for a minor offence. He argued that the facts disclosed only showed that the 1st Appellant was answerable to the failure to produce import documents. It +was his argument that the facts disclosed what was envisaged under section 91 (1) of the Act. He stated that the 1st Appellant claimed that he had imported the trophy and under the law he was required to produce the same within 48 hours from entry for purposes of weighing and registration. He contended that the offence that he committed was under section 91(2) not under section 130(2)(a).

It was his contention that possession could only be through importation. He submitted that the offence that the 1st Appellant

should have been answerable to the importation of the Rhino horns into Zambia. He added that should this Court be of a different opinion, the accepted evidence before the Court below was that the 1st Appellant was the only owner who consistently admitted ownership of the bags and rhino horns. That if the evidence revealed that he did not apply for the importation permit, it is possible that an offence under section 88(2) or 87(4) or 105(2) of the Act could have been contravened. He argued that if that were the case, the penalty would be as provided under section 136 of the Act and prayed that the Court would arrive at that opinion.

He cited the case of ***Musonda v the People (1976) ZR 215*** in support of his legal proposition.

Under grounds eight it was submitted that the trial magistrate was not on firm ground when he referred to Article 118(2)(e) of the Constitution in the circumstances of this case to find the accused persons as they were prejudiced by being convicted of a non-existent offence.

With respect to ground nine it was submitted that the first ruling by the lower court where it held that *if a person who is found with a trophy of a protected animal in Zambia in the absence of lawful authority, the person found in possession of the said trophy falls with section 130(1) of the Act notwithstanding where the person got the items and where he was taking them,* was prejudicial to the Appellants and as they had not been heard yet.

It was his contention that the trial magistrate further made statements without any supportive evidence on the record. It was further submitted that the 1st Appellant completely exonerated the 2nd, 3rd, 4th and 5thAppellants stating that he was the sole owner of the rhino horns. He submitted that the mere helping of carrying the bags could not prove that the 2nd and 3rd Appellants could have had knowledge of what was in the bags. Counsel submitted that the 2nd, 3rd, 4th and 5th Appellants should have therefore been acquitted.

He referred to the definition of possession in the penal code which is defined as:

> *"in possession of" or "have in possession"*
>
> *(a) 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;*
>
> *(b) 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;*

He submitted that there was no evidence that the 2nd, 3rd, 4th and 5thAppellants had knowledge of the rhino horns nor consented to carrying Rhino horns.

He submitted that the 2nd and 3rd Appellants were merely visiting and could not be held accountable for the 1st Appellants culpability. He added that their remaining to be silent when they were placed on their defence was within their rights and cited the case of ***Kenious Sialuzi v The People (2006) ZR 87*** which held that an accused person is under no obligation to give evidence.

With regard to the 4th and 5th Appellants the trial Court relied on the case of ***A.M. Madubula v The People (1994) SJ 63*** where it was held that if the driver of a car carried a passenger who to his knowledge is in possession of illegal trophy, the driver by virtue of having the illegal trophy in his car is jointly in possession of it. As a general rule a driver of a car may choose whether or not to carry passengers because of their illegal possession and if he does so with the knowledge of the illegality, he is guilty of the joint possession.

Counsel argued that this case was misapprehended and misapplied to the facts at hand. He argued that the driver must have knowledge that he is carrying the items. He stated that there was no evidence on record to show or suggest that the 4th and 5thAppellants knew that the bags that had been put in the vehicle had Rhino horns belonging to the 1st Appellant. According to Counsel, the evidence of the 1st Appellant gave two inferences and that it was trite law that where two or more inferences can be drawn, the Court must adopt the one more favourable to the accused as stated in the case of ***Mutale and Phiri v The People (1995-1997) ZR 277.***

He cited the case of ***Maseka v The People (1972) ZR 9*** where it was held to the effect that where an explanation of an accused might be reasonably true entitles him of an acquittal even if the Court does not believe it. He submitted that similarly in the present case the 1st Appellant's evidence being unrebutted ought to have put doubt in the mind of the Court.

He argued that there was failure to investigate the matter by the relevant authorities. He submitted that the prosecution stating that it was incumbent upon the 1st Appellant to show that he had supporting documentation for the Rhino horns was equivalent to shifting the burden of proof from the prosecution to 1st Appellant which was a fundamental breach. He cited the case of ***Isa Yona Sibale v The People (2009) ZR4*** to support this proposition. According to the Appellants the there was no any caution statement undertaken with respect to all the Appellants.

It was further submitted that the fact that the 1st Appellant stated that the supporting documents were in the bags confiscated could not be said to be an afterthought because there was no evidence to show that the prosecution had asked for the correct documents from the 1st Appellant.

Counsel submitted that there were contradictions, suppression of and inconsistencies in the evidence of the prosecution. He argued that the 1st Appellant told the prosecution witnesses that the supporting documents were in his bags and therefore there was nothing that would prevent the inference that the said documents

were removed from the bag. He stated that they should have produced the book where they recorded all the items confiscated from the Appellants which was critical. He stated that this raised doubt which should have been resolved in favour of the Appellants.

Further that the law was clear that where evidence was available and not placed before Court, it is assumed that if it was produced, it would have favoured the Appellants and cited the case of ***Kalebu Banda v The People (1977) ZR 169*** to support this proposition.

He further cited the case of ***Sipalo Chibozu and Chibozu v The People (1981) ZR 28*** where the Supreme Court emphasized that a trial Court must observe inconsistencies in the prosecution evidence.

He added that there was no case upon which the Appellants could have been prosecuted and uphold a conviction on the evidence before the Court below.

Under the tenth an eleventh grounds which in my view have been already dealt with counsel cited the case of ***Mwewa Murono v The People (2004) ZR 207*** which states that the burden of proof in criminal matters rests at all times on the prosecution. He stated that the trial Court stated in his judgment that the Appellants had the burden to prove themselves involved and to subpoena witnesses.

Based on all his arguments he prayed that this Court upholds the appeal and quashes the convictions and sentences from the Court below and acquit the Appellants.

I have considered the evidence on record and the lengthy submissions by the Defence. The Appellants have raised twelve grounds of appeal and in my view they can be categorized as follows:

1. That the trial Magistrate erred in law when he convicted on an indictment that did not disclose an offence
2. That the trial Magistrate erred by convicting all the Appellants for the offence when the 1st Appellant claimed complete ownership of the Rhino horns
3. That the trial Magistrate shifted the burden of proof from the State to the Appellants to require them to prove that they had documents to support their possession of the Rhino Horns.
4. That the trial Magistrate did not address its mind to the contradictory evidence of the prosecution.

The Appellants were charged for unlawful possession of prescribed trophy contrary to section 130(2)(a) which provides that:

> *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*

This section was read together with section 86(2) of the same Act which provided that:

(2) Ivory and rhinoceros horn are prescribed trophies for the purposes of this Act

It was conceded by the State that section 86(2) does not disclose an offence and Counsel for the Appellants argued that section 130(2)(a) could not stand on its own as it did not disclose an offence.

The evidence from the Court below is clear that while it was conceded that the indictment was defective, the trial magistrate did not amend the indictment before judgment but did acknowledge the Defence's arguments pertaining to the said indictment.

I have carefully looked at the indictment and as I have already noted the State conceded that section 86(2) did not create an offence and the Appellants Counsel argued that this made the indictment defective. According to Counsel, because the section that was relied on to charge and eventually convict the Appellants did not disclose an offence, the indictment was bad and therefore not curable. He argued that the conviction on this indictment was therefore baseless.

I considered the case of ***Joseph Nkole v The People (1977) ZR 351*** where the Supreme Court in discussing a statement of offence with incorrect the particulars of offence held that:

In our opinion, this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the 'Statement of Offence'. Only the particulars, which merely elaborate the 'Statement of Offence', were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence, but that it described a known offence with incomplete particulars

Further, in the case of ***Mutale v The People (1973) ZR 25*** it was held that

Where in an information the statement of offence is correct but the particulars omit necessary words, this does not render the information bad, but simply defective.

(ii) Where no embarrassment or prejudice to the accused has been occasioned by a defective information it is proper to apply the proviso to section 14 of the Court of Appeal for Zambia Act.

In the case of ***Mark Herbert Kaunda v The People (1982) ZR 26*** it was held that *where the error did not make the charge bad but simply defective and no embarrassment or prejudice was suffered by the*

accused on account of the error, the proviso to s.15 (1) of the Supreme Court Act may be applied.

In the present case, while it may be argued that section 130(2)(a) must be read together with another section such as section 87(4) of the Act in order to create an offence, I hold the firm view that to state that there was no offence at law disclosed by the indictment is a misdirection. The authorities I have referred to are very clear that an indictment is bad if it discloses no offence at law as in the case where the charge was based on a repealed law.

In the present case, section 130 (2)(a) stipulates that any person found in possession of the a prescribed trophy in contravention of the Act is liable on conviction to the stipulated punishments there under. The particulars of the offence go further and stated that the Appellants were found in possession of prescribed trophies without a certificate of ownership. In my view, the particulars clearly outlined what exactly was being leveled against them. Therefore the indictment read as a whole is very clear that the Appellants were found in possession of a prescribed trophy for which they did not have a certificate of ownership.

Therefore, having established that the Appellants were fully aware of what was being leveled against them, the Appellants suffered no prejudice or embarrassment by the omission of section 87(4) from the charge sheet.

In any case Article 118(2)(e) is very clear, as was noted by the trial Magistrate, that justice shall be administered without undue regard to procedural technicalities. In the case of ***Henry Kapoko v The People 2016/CC/0023*** *the Constitutional Court held that this provision was not intended to do away with existing principles, laws and procedures, it is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.*

I am fortified in this provision that in the present case, there was no injustice suffered by Appellants for the reasons I have outlined above. I therefore dismiss all the grounds of appeal that are stipulating that the convictions were wrongly founded solely because the indictment was bad.

With regard to the argument that the 1st Appellant completely exonerated the other Appellants by claiming ownership of all the Rhino horns found in their possession. The undisputed evidence on record is that the 4th and 5thAppellants were from Lusaka and were called to pick up Chinese nationals from Chanida border who turned out to be the 1st, 2nd and 3rd Appellants. In my view there was no evidence linking the 4th and 5th Appellants to the offence as the prosecution's evidence corroborated their evidence that they were just drivers who were booked to pick them up from the border. The evidence of the 1st Appellant even goes further to state that he did not know the car they were driving as he had to consult with his colleague who hired them from Lusaka. The fact that it was his

colleague from Lusaka who hired them shows that the 1st, 2nd and 3rd Appellants had limited interaction with the 4th and 5th Appellants.

There is also evidence that the Chinese nationals were in the vehicle for a very limited time before an officer went to call them from the vehicle. From my analysis, the 1st, 2nd and 3rd Appellants barely entered the vehicle before they were called by PW5 and PW2. There is no evidence of common purpose between these two Appellants and the 1st 2nd and 3rd Appellants. For this reason I find that their conviction was erroneous as it was not supported by evidence to show their involvement in the offence before this Court.

With regard to the 1st, 2nd and 3rdAppellants the evidence is that they entered the border with four bags whose contents the 1st Appellant claimed to be entirely his. Counsel's argument was that the other two Appellants did not know the contents of the bags and he stated that it was incumbent upon the prosecution to prove that they had knowledge of the contents of the bags or that they consented to being possession of the same.

The Penal Code has given guidance on the issue of common purpose in cases where the accused persons are jointly charged for an offence.

Section 22 of the Penal Code is as follows:

> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a*

nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

In interpreting this section in the case of ***Mutambo and others v The People (1965) ZR 15*** it was held that:

The formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participating in that prosecution with the other or others.

Recent Supreme Court judgments have maintained this position as is noted from the case of ***Phiri v The People SCZ JUDGMENT NO. 53 of 2014*** where it was held that:

"each party is deemed to have committed the offence(s) committed in the process of prosecuting the unlawful purpose. The common design need not be expressed or premeditated. The act of joining in the prosecution of an unlawful purpose is sufficient."

Similarly in the case of ***Humphrey Manyonga and other v The People Appeal No 121/122/123 of 2015*** it was held that:

"In the present case, therefore, it did not have to be proved that the three appellants had an agreement to execute common unlawful purpose for the conviction to be safe. It is sufficient if

the evidence adduced showed that they worked together in prosecuting an unlawful purpose".

In the present case it was submitted that the 1st Appellant was the sole owner of the four bags and that he carried all the bags and that the other two Appellants did not know the contents of the bag. I would like to note that the evidence of PW2 was that he saw all three Appellants enter the border carrying a bag each while the 1st Appellant carried two bags. The evidence on record is further that after establishing the pieces in the bags were Rhino horns, they were weighed and they weighed 32.2kgs.

Firstly, I make haste to state that PW2 had no reason to lie against these three Appellants when he said he saw them carrying a bag each as they were unknown to him. Further, I find it difficult that Counsel would expect this Court to believe that the 1st Appellant carried the entire 32.2kg by himself while the other two Appellants moved with him.

There was no evidence from the other two Appellants as they exercised their right to remain silent. However, their Counsel appears to have given evidence on their behalf that they had no knowledge of the contents of the bags. This issue did not come up in the evidence of the 1stAppellant nor was it raised anywhere on record in the Court below. I therefore completely dismiss this line of submissions as Counsel is adducing evidence on his client's behalf.

Even if they had raised that as a defence in the Court below, I find it unbelievable that the other two Appellants had no knowledge of the

contents of the bags they were carrying. The weight of the Rhino horns in my view is not something I can ignore and there is no doubt in my mind that the other two Appellants knew or must have known exactly what was in the bags they were carrying because those bags were the only ones they were all carrying as alluded to earlier. Raising this lack of knowledge in my view is a complete afterthought more so that it was not even raised by the two Appellants. Issues not raised in the lower court cannot be considered on appeal.

I am convinced that there was common purpose by these three Appellants with regard to possessing the items in bags. I therefore find the three Appellants had knowledge of what they were carrying in the bags and as such they were in possession of a prescribed trophy without a certificate of ownership as was stated in the particulars of the offence. The knowledge therefore revealed the common purpose envisaged in the authorities I have referred to.

With regard to the trial Magistrate shifting the burden of proof to the Appellant to prove that they had a Certificate of Ownership it was argued that when the Appellant raised that this certificate was in the bags confiscated, it was for the State to show that in fact the said Certificate was not in the bags. Counsel submitted that they should have produced the book where they recorded everything that was confiscated in order to show that in fact this certificate was not in the bags.

From the evidence on record the 1st Appellants admitted to having brought the Rhino horns into Zambia. He also stated that he had obtained a licence from Mozambique but the evidence of the prosecution is that he did not have any certificate for the same. Counsel contended that there was a possibility that the certificate was confiscated together with the Rhino horns. From the record, it is clear to see that when the bags were confiscated they were taken into PW3's office they removed the contents of the bag. The evidence of PW6was that when she inquired if he had supporting documents for the horns, he told her he did not have any.

Further, there is evidence that the passports of the three Appellants were taken from them. There is no evidence that the credibility of the officers who intercepted and those who investigated the matter in before the lower court were biased or untruthful questions. In my view I find no reason why the officers whose credibility was not questioned could have hidden the Appellants permit. The 1stAppellant's statement that he had the licence for the Rhino Horns was an afterthought as the same was not presented when the horns were being inspected.

Having considered the totality of the evidence from the Court below, while there may be minor discrepancies in the evidence of the prosecution witnesses, I find nothing that was prejudicial to the Appellants case. I therefore find that this argument had no merit. I have also considered section 353 of the Criminal Procedure Code which provides that:

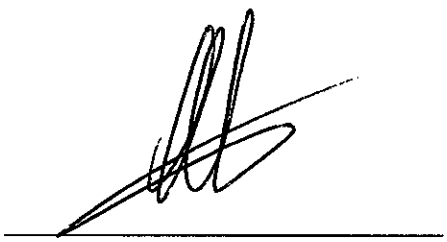
"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on any ground whatsoever unless any matter raised in such ground has, in the opinion of the appellate court, in fact occasioned a substantial miscarriage of justice."

On the strength of this provision and the totality of the evidence on record and the submissions before me, I dismiss the appeal with respect to the 1st, 2nd, and 3rd Appellants and uphold their convictions and sentences.

I however allow the appeal with regard to the 4th and 5th Appellants and quash their convictions and acquit them forthwith.

Leave to Appeal is granted.

Delivered under my hand and seal 27th day of June, 2018



Mwila Chitabo, SC

JUDGE