TAURAI MAUSA
And
MAXWELL MUISA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 16 & 25 February 2022

Criminal Appeal

V. Ruombwa for both appellants
E. Mbavarira for the respondent

MAWADZE J: In this appeal the appellants have literally thrown the proverbial kitchen sink at the court as it were. All manner of issues have been raised.

The appeal is against both the conviction and the sentence. Both appellants were convicted on their pleas of guilty at Masvingo Magistrates Court on 6 March, 2021 for contravening section 368(2) of the Mines and Minerals, Act [*Cap 21:05*]. In the street parlance this offence is sometimes referred to as "*gold panning*".

Each appellant was sentenced to 2 years imprisonment after a finding was made that there were no special circumstances in the case.

Aggrieved by both the conviction and sentence the appellants couched their grounds of appeal as follows;

"*GROUNDS OF APPEAL*

1. *The charge was fatally defective, incompetent and unconstitutional and should therefore be set aside in its entirety.*

2. *The convictions though by pleas of guilty were not knowingly and genuinely made because the procedure adopted by the court a quo was hurried and mechanical.*

3. *Special circumstances were not specifically canvassed by the court a quo thus leading to an uninformed failure to explain away the special circumstances.*

4. *Important mitigatory features were not properly solicited or canvassed otherwise the court would have come to a different conclusion.*

WHEREFORE TWO APPLICANTS pray that;

The convictions and sentences be set aside and they be released from custody forthwith." (sic)

In view of how the grounds of appeal and the heads of argument are crafted it becomes necessary to refer in detail to the contents of the record of proceedings in the court *a quo*. The charge which the appellants allege is fatally defective, incompetent and unconstitutional is couched as follows;

> "*In that on 5th day of March, 2021 at Clipsham Farm, Masvingo, Taurai Mausa and Maxwell Muisa, one or both of them unlawfully prospected for gold or any other mineral without a licence contrary to the provisions of the said Act."*

It is unclear as to what the appellants challenge about the charge. Is it that they allege the charge is improperly or badly drafted OR they seek to impugn s 368(2) of the Mines and Minerals Act [*Cap 21:05*] as unconstitutional?

What really is unconstitutional about unlawfully prospecting or searching for gold without a licence or for any mineral? This argument was feebly made in the heads of argument and abandoned or forgotten in the oral submissions by *Mr Ruombwa* for the appellants. To my mind the charge is as clear as daylight. The prohibited conduct is to prospect or search for gold or any mineral without a licence as provided for in the said Act, [*Cap 21:05*]. Surely the word search or to look for need no further elaboration. No reasonable person can genuinely fail to understand this. The proscribed conduct by the Legislature is clear. Needless to say there are a plethora of decided

cases specifically dealing with this offence. Thus this ground of appeal is just being routinely made without merit.

The 1st appellant was 46 years old and the 2nd appellant was 19 years old. They are both residents of Muza Village, Chief Mugabe, Masvingo. The material agreed facts as per the State Outline are as follows;

"*3. On 5th day of March 2021 and around 1000 hrs accused persons proceeded to a river in Clipsham Farm, Masvingo where they prospected for gold or any other mineral without a licence.*

4. Accused persons used a pick, a shovel and crow bar to dig and heap some gold ore so that they can load the gold ore into 2 x 20 litre empty plastic buckets and take the ore for processing.

5. Detectives from CID MFFU Masvingo who were on patrol at Clipsham Farm, a well known site for illegal gold panning noticed the accused persons prospecting for the gold in the farm, whereby accused number 2 was in a dug out loading the ore into the buckets and accused number 1 was assisting in taking the bucket out of the dug out heaping it on bare ground.

6. The Police officer requested the accused persons to produce a licence or permit for prospecting for gold or any mineral and they failed to produce any of the requested documents.

7. The accused persons were subsequently arrested and were escorted to CID MFF, Masvingo.

8. One mattock, one crow bar, one shovel and two empty 20l buckets were recovered from the accused persons.

9. Evidence in court can be led from arresting details from CID MFFU (Minerals Flora Fauna Unit) Masvingo.

10. *Accused persons acted unlawfully*."

These are the facts which were read to the appellants and they understood them.

It may be necessary to point out that when the appellants were arraigned in the court a quo they waived their right to legal representation and had not complaints against the police. During the proceedings they used Shona language. Further before the charge was put to them they were

advised that if convicted of the charge and in the absence of special circumstances they would each be sentenced to the minimum mandatory 2 years imprisonment.

The record of proceedings in the court *a quo* shows that having understood all this explanation the appellants nonetheless opted to plead guilty to the charge. The said facts were then read out to them in a language they understood and they indicated that they understood the facts.

The court a quo proceeded in terms of s 271(2) (b) of the Criminal Procedure and Evidence, Act [*Cap 9:07*]. The following exchange took place between the court *a quo* and the appellants;

"*Facts read to the accused persons and understood.*

Q. *Do you agree with the facts?*

A1. *Yes*

A2. *Yes*

Q. *Do you wish to add anything or to subtract anything from the facts?*

A1. *No*

A2. *No*

State Outline noted and marked Annexure 'A'

Essential Elements

Q. *Correct that on 5 March, 2021 at Clipsham Farm, Masvingo you were found <u>prospecting</u> for gold* (my emphasis)

A1. *Yes*

A2. *Yes*

Q. *Do you agree that you did so intentionally whilst knowing that you needed a permit to prospect such?*

A1. *Yes*

A2. *Yes*

Q. *Any defence to offer?*

A1. *None*

A2. *None*

Q. *Is your plea a genuine admission of the charge, facts and elements as put to you?*

A1. *Yes*

A2. *Yes*

Verdict – A1 Guilty as charged

A2 Guilty as charged

PP No known record in respect of both offenders

1st offenders."

The mind boggles as to why in ground number 2 of the appeal the appellants allege that "the convictions though by pleas of guilty were not knowingly and genuinely made because the procedure adopted by the court *a quo* was hurried and mechanical". What exactly is meant by this?

I find no better way as to how the court *a quo* should have put the essential elements of the offence to the appellants pursuant to the provisions of s 271(1)(2)(b) of the Criminal Procedure and Evidence, Act [*Cap 9:07]*. Reference is made to the judgment by CHITAPI J in *S* v *Oscar Joto* HH 741/17. I believe the appellants clearly misunderstood that judgment.

It would appear that the appellants take issue with the use of the word prospecting in putting the essential elements of the offence to them. Again this simply becomes a question semantics and that word was put to them in Shona in language they understood. As per the charge and the facts one cannot seriously argue that the appellants did not appreciate or understand what was said to be the prohibited conduct. It clear that the gravamen of the offence, which they understood, is that they were illegally looking for or searching for gold or any other mineral in the manner clearly explained to them using the implements they had. The role of each appellant is explicitly clear in the execution of the offence.

The appellants seem to miss a simple fact. It matters not that they did not find any gold or any mineral *per se.* What is prohibited is to search for gold or any mineral without a licence or permit. Thus the attempt by *Mr Ruombwa* for the appellants to try and analyse the various provisions of the Mines and Minerals, Act [*Cap 21:05*] is akin to whistling in the dark. It is an exercise in futility if not a sheer waste of time. In fact the court *a quo* should be applauded for having lucidly put the essential elements of the offence to the accused. The record of proceedings speaks for itself.

The conviction of the appellants cannot be impugned or reasonably challenged on any discernible legal basis.

The appellants in the third ground of appeal took issue with how the question of special circumstances was explained to the appellants in the court *a quo*. They allege that this constituted a fatal misdirection.

In broad terms an inquiry into special circumstances should immediately be made immediately after a verdict of guilty before the inquiry into mitigation. The trial court should endeavour to explain what entails or is meant by special circumstances. These may be relevant to the offender and or to factors surrounding the commission of the offence depending on how the particular statute or provision is couched. Where an accused is not represented the consequences of the absence of the special circumstances should be explained to him or her, which is that a minimum mandatory specific sentence would be imposed. Where necessary the trial court may assist an unrepresented accused person to lead relevance evidence on special circumstances and the State is entitled to challenge such evidence. Thereafter the court should make a finding on the existence or otherwise of special circumstances giving brief reasons for such finding see *S* v *Manase* 2015 (1) ZLR 160 (H) per MUREMBA J.

At page 8 of the original record the court *a quo* addressed the question of special circumstances. It explained in material terms the following;

i. What the special circumstances entail, that is, that they are related to the appellant's actions or situation in the context of how the offence was committed and;
ii. That there is a mandatory sentence of 2 years imprisonment to be imposed in the absence of the special circumstances

Both appellants indicated that they understood the explanation given and proceeded to give their responses.

The first appellant indicated that he or she believed there were special circumstances because she or he wanted to raise money [presumably from the sale of the illegally obtained gold] to take a sick child for treatment.

The second appellant conceded that he had no special circumstances to advance.

The court *a quo* proceeded to make a finding that what the first appellant was saying was merely mitigatory and did not constitute special circumstances. The second appellant advanced none.

I find no misdirection at all in how the court *a quo* dealt with the question of special circumstances. The meaning and effect of special circumstances was explained at the appropriate stage. The appellants were able to give their responses. A proper finding was made that what the first appellant said constituted ordinary mitigatory factors. Indeed even in his submissions *Mr Ruombwa* for the appellants could not advance any possible special circumstances in this case. I find none.

Having made that finding the hands of the court *a quo* are tied. The court was enjoined to impose the minimum mandatory sentence of 2 years imprisonment.

The second appellant's youthfulness at most is a mitigatory factor rather than constituting special circumstances. He was 19 years and as per his mitigation he was trying to earn a living through illegal means.

The last ground of appeal on how the mitigation was canvassed or solicited in my view is inconsequential. As already said in the absence of special circumstances the court *a quo* was enjoined to impose the sentence provided for in the Act. Further this assertion totally lacks merit. An inquiry into mitigation was made on page 7 of the record. The following is recorded;

The first appellant is 46 years old with three children. He or she is not employed and survives as a vendor earning about US$100 per month. He or she has no savings but owns 3 goats as assets. The first appellant said the reasons for committing the offence were twofold, firstly to earn a living (through illegal means) and to raise money for treatment of his or her child.

The second appellant gave his age as 19 years and is still single. He has no savings nor assets but is self-employed realising about US$100 per month. His reason for committing the offence was to earn a living.

Any attempt was made by *Mr Ruombwa* to lead further mitigatory factors in respect of the first appellant from the bar. Needless to say that would be improper. No good reason is advanced as to why the first appellant did not put such information before the court *a quo*. As already said this is simply academic as it would not change the sentence to be imposed.

Lastly I would wish to comment on the prayer by the appellants. Assuming the appellants succeeded in this appeal it would be improper for them to simply seek to be released from custody forthwith whatever that means. If the conviction of each appellant was quashed and the sentence

set aside the most which could happen would be to remit the matter for a trial *de novo* in light of the issues raised by the appellants.

In conclusion, my respectful view is that it is quite strenuous to appreciate let alone to understand the grounds of appeal in this matter. All the grounds of appeal totally lack merit. This is just a fishing expedition. It seeks to simply delay the obvious.

Accordingly, it is ordered that the appeal both in respect of conviction and sentence AND in respect of both appellants be and is hereby dismissed for lack of merit.

ZISENGWE J. I agree .....

Great Zimbabwe University Law Clinic, counsel for both appellants
National Prosecuting Authority, counsel for the respondent