WELLINGTON ZVAREVASHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 9 March & 26 July 2017

Criminal Appeal

V Mazhetese, for the appellant
E Nyazamba, for the State

MUSHORE J: The appellant was charged with and convicted of having contravened s 368 of the Mines and Minerals Act [*Chapter 21:05*] it having been alleged and proven that he unlawfully prospected for gold without a license. Section 368 of that Act reads:-

> "**368 Prospecting prohibited save in certain circumstances**
> (1) Subject to subsections (2) and (3), no person shall prospect or search for any mineral, mineral oil or natural gas except in the exercise of rights granted under a prospecting license, exclusive prospecting order or special grant or unless he is the duly authorized representative of the holder of such license, order or special grant and acting in the exercise of such rights.
> (2) No person shall prospect or search for any mineral, mineral oil or natural gas unless he is an approved prospector"

The facts were that on the 20th January 2016 at around 1700 hours appellant was seen prospecting for gold by the complainant on complainant's land using a metal detector. When appellant realised that he had been seen by complainant, he ran away and left his metal detector behind, which complainant recovered. Complainant made a report to the Police at ZRP Kirima Base and handed the Police appellant's metal detector. Appellant tried to retrieve the metal detector from the complainant by intimidation before being informed by the complainant that metal detector was in Police custody. On the 29th January 2016 after investigations had been carried out, the Police arrested appellant who tried to resist arrest. At the trial, appellant's defence was that on the date in question he was drinking at a bar. He denied knowledge of the offense.

However at the trial, complainant and the arresting and investigating officer corroborated each other's evidence that on the day in question, appellant was illegally prospecting for gold using a metal detector at the complainant's field. At pages 18 and 19 of the record complainant insisted that he saw the appellant prospecting thus:-

Cross-examination

"A. I told court what I saw
Q You are lying to the court
A I saw you…..
……
……..
……
Q I never met you on that day?
A Why could I lie to you?
Q I don't own any machine?
A You have left the machine
p 19
Q I am not a gold panner I own a bottle store?
A I saw you prospecting for gold at our field
Q You said it was dark and people were using torches and you identify me?
A I saw you going into the field carrying the metal detector"

In our view, the court *a quo* did not fall into error in convicting appellant of having contravened the Act in terms of s 368 (1) and (2). Despite appellant's contention that the court *a quo* convicted the appellant on the basis of hearsay evidence, the State witnesses gave damning eye-witness testimony describing the events as they ensued on the date in question.

Respondent filed Heads of Argument in which it conceded its case on both conviction and sentence. Respondent should have filed a notice in terms of section 35 of the High Court Act [*Chapter 7:06*] instead of filing an argument and consequently Respondent adopted an incorrect procedure. In ascertaining the substance of the concession itself, the position taken by the respondent in supporting appellant's case struck the court as being strange. Respondent came to appellant's defence on two aspects citing doubtful facts not found on the record. *Firstly*, the respondent urged the court to overturn the conviction on the basis that the trial court incorrectly referred to the offense as gold panning. The point taken is not supported in fact. The court *a quo* stated many times in its judgment that its deliberations were centred on the allegations that the appellant was guilty of illegally prospecting for gold. *Secondly*, and again strangely, respondent made the inexplicable submission that the state's case was sullied, owing to the Police officer's failure to specifically request that the appellant produces a prospecting license in terms of s 369. Section 369 makes it peremptory for a person prospecting to produce a licence but **only** *"**if** requested to do so by any official*

authorised by the mining commissioner or at the request of any Police officer or of the owner or occupier of the land" Section 369 does not provide that it is peremptory for the Police to make that request. In any event in the present matter, an arrest was made following the report made by the complainant that appellant was illegally prospecting on complainant's land, thereby discounting the possibility that appellant had such grant, licence or authority.

Regarding the issue of sentence, appellant contended that the court *a quo* erred in finding that there were no special circumstances present, which entitled the appellant to be sentenced less than the minimum mandatory sentence. In his heads of argument, appellant submitted that the trial court did not explain the meaning of special circumstances to the appellant. This submission is not an accurate reflection of the facts as they appear of record. The record shows that the court *a quo* explained to appellant a definition of mandatory sentences and explained what special circumstances are (r page 10); after which the trial court asked the appellant whether or not he understood the explanation and he answered in the affirmative. In our view the trial court exercised the proper degree of care in ensuring that appellant well understood what he needed to establish as special circumstances.

The trial court cannot be criticized for finding that there were no special circumstances shown. Appellant spoke of his dire circumstances which are not regarded as special circumstances. He submitted that:-

> "I take care of my mother who is suffering from B.P. I take care of the person who herds cattle and a maid who cooks for her. My wife have got a problem of a developing growth and I am looking for money for her medication. I have got 3 minor children going to school".

The court then correctly noted that there were no special circumstances and that the appellant's submissions constituted ordinary mitigation.

See *S Takawira* v *The State* HB 59/12.

There is thus no basis to interfere with the minimum mandatory sentence imposed of 2 years.

In the result, appellant has failed to advance proper reasons for finding that the trial court erred in its deliberations and conclusions on the correctness of both conviction and sentence.

Accordingly I order as follows:

"The appeal is dismissed for lack of merit in its entirety"

HUNGWE J agrees……..