

**THE STATE**

**Versus**

**MARTIN MUGUNZVA**

**And**

**GILBERT HOVE**

**And**

**PAUL ZVENYIKA**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 2 SEPTEMBER 2010

Criminal Review

**KAMOCHA J:** The three accused were found prospecting for gold without a permit or licence at Fambai gold claim in Shurugwi on 10 June 2010 in contravention of section 368 of the Mines and Minerals Act [Chapter 21:05]. They were arrested and arraigned in the magistrates' court at Shurugwi. They all pleaded guilty and were found guilty in accordance with their pleas. The convictions were proper and nothing turns on them.

The sentence imposed on them is, however, a cause for concern. They were each sentenced to undergo 24 months imprisonment of which 12 months imprisonment was suspended on condition of future good behavior and the remaining 12 months imprisonment was suspended on condition that each accused performed community service.

Section 368(4)(a) of the Act provides that a person who prospects or searches for any mineral without a licence or special grant shall be guilty of an offence and liable, if there are no special circumstances in the particular case, to imprisonment for a period of not less than two years.

When the magistrate sought to establish whether or not there were special circumstances in this particular case he invited each accused to address him on that. The first accused stated that he had committed the offence because of poverty. He had no other means of survival. He was HIV positive and was the bread winner for the family.

The second accused told the court that he had committed the offence as a means of survival and to sustain his family.

The third accused similarly said that he committed the offence as a means of survival for his family and siblings since he was an orphan.

The learned trial magistrate concluded that the above amounted to special circumstances. He either did not apply his mind to the case before him or did not know what is meant by special circumstances. What all the accused told the court were ordinary mitigating features. The majority of people in this country are very poor and find it very difficult to maintain their families but do not resort to crime. A family man who resorts to crime is irresponsible because if arrested he runs the risk of being sent to prison leaving his family without anyone to fend for it.

Similarly, there are so many people who are HIV positive in this country but they do not resort to crime.

Special circumstances envisaged by the law are circumstances that are out of the ordinary. There is nothing extraordinary about being a poor family man. If all poverty stricken family people were to resort to crime there would be anarchy in the country.

There was no reason in this case why all the accused did not serve the minimum mandatory sentence as required by law. The trial magistrate is, therefore, directed and ordered to recall all the accused and impose the mandatory sentence on each of them in terms of the law. In doing so the court should take into account the period served by each accused by way of community service.

Ndou J ..... I agree