THE STATE

VERSUS

SARAH NGOMA

AND

LILLIAN NYONI

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 8 SEPTEMBER 2011

Review Judgment

MATHONSI J: The two accused persons were convicted on their own pleas of guilty to contravening section 368 of the Mines and Minerals Act [Chapter 21:05] by the provincial magistrate at Shurugwi. Having found special circumstances as would entitle the trial court to impose a sentence other than the mandatory one provided in the Act, the magistrate sentenced each of the accused persons to 24 months imprisonment of which 12 months imprisonment was suspended for 5 years on condition of good future behaviour.

The remaining 12 months was suspended on condition they each complete 420 hours of community service. While nothing turns on the conviction, it is the sentence which cannot be allowed to stand. Section 368(1) of the Act prohibits the prospecting or search for any mineral except if one is the holder of a licence. The penalty provision for contravening that section is contained in subsection (4) of section 368 which provides:

> "(4) Any person who contravenes subsection (1); (2) or (3) shall be guilty of an offence and liable-
> (a) if there are no special circumstances in the particular case, to imprisonment for a period of not less two years; or
> (b) if the person convicted of the offence satisfies the court that there are special circumstances in the particular case why the penalty provided in paragraph (a) should not be imposed, which circumstances shall be recorded by the court, to

> imprisonment for a period on exceeding two years or to a fine not exceeding level ten."

The legislature has, in its wisdom, seen it fit to interfere with the usual sentencing discretion of the courts by prescribing a minimum sentence of 2 years for offenders under the Act. This, it has done obviously to suppress what has now become a prevalent offence. It is only where "special circumstances" exist that the court is entitled to impose a sentence other than the mandatory one.

Special reasons or circumstances are factors arising either out of the commission of the offence or peculiar to the offender which are out of the ordinary either in their degree or their nature. *S v Moyo* 1988 (2) ZLR 79(H). Indeed, special circumstances certainly mean more than the general consequences flowing from the imposition of the prescribed punishment. *S v Siziba* 1990 (2) ZLR 87(H).

I am in total agreement with the pronouncement made by Ebrahim J (as he then was) in *S v Mbewe and others* 1988 (1) ZLR 7 (H) at 12H- 13A-D where he said:-

> "I conclude, therefore that where the legislature has not placed a restrictive application on the meaning of special reasons or circumstances any extra ordinary factor arising out of the commission of the offence or which is peculiar to the offender may constitute special reasons or circumstances. It ought however to be borne in mind that a distinction must be drawn between mitigating factors of a general nature and 'special reasons'. Dumbutshena J (as he then was) in *S v Rawstron* 1982(2) ZLR 221 pointed out at 234 that:
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> > 'A clear distinction must be drawn between special reasons or special circumstances and mitigating features which go to the determination of the quantum of sentence.'
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> It is apparent that mitigating factors such as 'good character' or 'particular hardship', which are of general application, cannot be taken as 'special circumstances'. Neither, it would seem, would contrition as evidenced by a plea of guilty to the offence or co-operation on the part of the accused constitute special reasons. However, where for example the accused was out of necessity compelled by circumstances to commit an offence, e.g. forced to drive whilst drunk because of urgent medical necessity, or was <u>bona fide</u> ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but 'special circumstances' in the case."

In the present case, after the court explained special circumstances to the two accused persons this is how the first accused responded;

> "I am the sole breadwinner, my husband is terminally ill. I have to send the children to school and pay the rentals."

The second accused stated:

> "I do not have parents. I am looking after my siblings and my own children. ---. I am the only one looking after that family."

After that the court concluded that these factors amounted to special circumstances. In my view the court fell into error because these are mitigating factors of general application which clearly do not amount to special circumstances at all.

I agree with what Kamocha J said in *S v Moyo* HB 98/11 at page 2 that:

> " I reiterate that resorting to criminal activities because someone believes he has problems or challenges in life does not amount to special circumstances as envisaged by the legislature."

There are no special circumstances in this matter and as such the sentence cannot stand.

In the result, it is ordered that:

(1) The conviction of the two accused persons stands.

(2) The finding of the trial magistrate that there are special circumstances is set aside.

(3) The sentence is set aside.

(4) The matter is remitted to the trial court for it to recall the accused persons and impose the appropriate sentence according to law and in so doing to deduct from it 53 days which is the equivalent of 420 hours community service already served.

Kamocha J agrees.....