

THE STATE

Versus

- 1. ANGELINE SIBANDA CRB G 440/10**
- 2. KHETI MOYO CRB G 441/10**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 21 APRIL 2011

Review Judgment

KAMOCHA J: The two accused were charged with contravening section 368(2) as read with section 368 (4) of the Mines and Minerals Act [Chapter 21:05]. In that on 20 July 2010 they prospected for minerals on the Mtshabezi River in Gwanda when they were not holders of licences or permits.

They appeared before a Provincial magistrate at Gwanda and tendered pleas of guilty and were accordingly found guilty as pleaded. The convictions were proper and nothing turns on them.

The sentences imposed are, however, a cause for concern and were correctly queried by the learned scrutinizing Regional Magistrate who wrote to the trial magistrate in the following terms.

“The two accused were convicted on their pleas of guilty to contravening section 368(2) as read with 368 (4) of the Mines and Minerals Act [Chapter 21:05] (Prospect for Minerals Without a Licence).

The two were sentenced to 12 months imprisonment of which 8 months imprisonment were suspended for 5 years on condition each accused does not within that period prospect for minerals in contravention of section 368(2) as read with section 368(4) of the Mines and Minerals Act without a licence. The remaining 4 months were suspended on condition each accused performs 140 hours of community service at given institutions.”

However, section 368(4) says:-

“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 than 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 under paragraph (a) should not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding two years or a fine not exceeding level ten.”

In this case the learned trial magistrate found the fact that the persons were widows to constitute special circumstances sic. He said;

“A widow in my view qualifies to be considered as a special reason for not imposing the mandatory sentence of 2 years.”

I beg to differ. In my view being a widow is just a mitigatory factor. I do not think the legislature in its wisdom envisages a situation where widows are allowed to prospect for minerals without permits and get away with the lesser sentence. To me this is not a special circumstance.”

The learned Regional Magistrate held the view that the sentence passed fell foul of the above provisions of the Mines and Minerals Act and concluded that the accused should have been visited with the minimum mandatory sentence of 2 years imprisonment. He was entirely correct.

The learned trial magistrate completely misdirected himself in holding that because the accused persons were widows with minor children their status amounted to special circumstances. There is nothing out of the ordinary about being a widow with minor children to look after. The learned trial magistrate found that they committed the crimes in order to fend for their children. What the learned magistrate is calling for is that widows and widowers with minor children should be excused when they break the law so as to fend for the minor children. This line of reasoning is faulty. It is a recipe for anarchy as there are so many widows and widowers in the country. The correct approach is that a widow or widower who resorts to criminal activities when she or he knows that she/he has minor children to fend for is irresponsible because she/he knows that if caught the law will take its course. The children will have no one to fend for them when she/he is sent to prison.

The law mandates that a term of 2 years imprisonment should be imposed where there are no special circumstances. There are no special circumstances *in casu*. The minimum mandatory sentence should be imposed in terms of the law.

In the result the sentence imposed by the trial magistrate cannot be allowed to stand and is hereby set aside. The matter is hereby remitted to the trial court to recall the two accused persons and impose the sentence of 2 years imprisonment as mandated by law.

Since both accused persons have already served 4 months imprisonment in the form of community service they should serve an effective term of 20 months imprisonment.

Mathonsi J I agree