

ROBERT MAPHOSA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 11 July 2013

CRIMINAL APPEAL

G C. Manyurureni, for the appellant
R. Chikosha, for the respondent

HUNGWE J: The appeal in the matter is against the minimum mandatory sentence imposed on the appellant for illegal possession of gold in contravention of s 3 (1) as read with s 36 of the Gold Trade Act, [*Cap 21:03*]. (“the Gold Trade Act,”) (“the Act”).

Three grounds of appeal against sentence are advanced;

- (a) That the court misdirected itself in imposing the minimum mandatory sentence without carrying out an exhaustive enquiry into the existence of special circumstances;
- (b) That the court *a quo* did not help an unrepresented accused in the development of his submissions on special circumstances;
- (c) That the court adopted a narrow interpretation of special circumstances and unduly limited appellants’ scope of submissions as the inquiry was conducted in vernacular.

It will be seen from the above that none of the grounds advanced by the appellant attack the correctness of imposing the minimum mandatory sentence. What is under attack is the procedure by which the court arrived at the sentence.

The question to ask is whether an appeal was the procedure to adopt. It happens so very often that grounds of appeal and review do sometimes appear inextricably linked to each other that the decision regarding what route to take becomes a vexed one.

I will assume that the appellant adopted the correct approach, which I doubt, for reasons I will give later.

The facts show that the appellant admitted being in possession of gold in contravention of the law. He was duly convicted on his own plea. The Gold Trade Act provides for a minimum mandatory sentence unless the person so convicted can show that there are special circumstances in his case, which special circumstances shall be recorded. If the court makes a finding that special circumstances existed in a particular case, then it may impose other punishment than the minimum mandatory sentence.

The record shows that the trial court explained the concept of special circumstances and invited the appellant to make submissions. In his submissions the appellant indicated that a person whom he could not identify had deposited the gold in his pocket as the commuter omnibus was taking off and left.

This explanation of how he came to possess gold was predictably and correctly, rejected by the court *a quo*. It therefore found that there were no special circumstances in the case. Upon this finding the court was duty bound to impose the mandatory sentence.

This is what happened.

The appellant who was a self-actor, was unhappy. He engaged counsel.

Upon being engaged, counsel presumably used the record and oral instructions to draw the relevant notice and grounds of appeal, as he was duty bound to do.

The choice made by counsel was indicated first by the record of proceedings and second by oral brief from client.

An election to appeal confines the legal practitioner to matters reflected in the record of proceedings. On the other hand were he to proceed by way of notice of motion seeking a review of the proceedings then counsel would have brought under review other matters which do not appear *ex facie* the record by way of affidavit.

Had he chosen this course, the appellant would probably have been able to demonstrate that there was no exhaustive enquiry into the existence or otherwise of special circumstances.

The appellant would have been able to show that the magistrate did not adequately help the unrepresented accused in understanding and presenting his defence or make submissions regarding special circumstances.

The appellant would have been able to demonstrate why he believes that the court *a quo* adopted a narrow interpretation of special circumstances and how it unduly limited the appellant's scope of submissions by conducting the inquiry in the vernacular.

The essential difference between review procedure and appeal procedure indicates that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal. See *R v Stephens* 1969 (2) RLR 143 (AD).

However an appeal against sentence, on the ground of irregularity in the proceedings of the Magistrates' Court, cannot be entertained unless the irregularity appears on the face of the record. See *R v Chitruui* 1915 SR 169.

When an applicant desires leave of court to refer back to the magistrate in order to lead further evidence which was not led at the trial, the correct procedure is to make an application on notice of motion to the Attorney General in the course of prosecution of the appeal. The application will be granted only in exceptional circumstances, as where, if the conviction is left undisturbed, there is a possibility amounting to a probability, that a miscarriage of justice will take place. See *Belchem v Jarvis NO & Garnett NO* 1952 SR 140.

To lay a proper foundation for the exercise of the courts' discretion in an application to remit the matter for the hearing of further evidence, the court should be acquainted with the nature of the evidence proposed to be led and the reasons for the failure to lead it at the proper time. See *R v Ngombe* 1964 RLR 231 AD.

As I indicated, in my view the appellant ought to have adopted the review procedure in order to be able to ventilate the grounds he had put forward on appeal. These grounds do point, or amount, to gross procedural irregularity regarding how special circumstances were canvassed. I am fortified in my conclusion that the appellant would have enjoyed better prospects of success if he had adopted the review procedure since by his own admission, he does not seek to quash the sentence imposed but seeks a remittal of the matter back to the court *quo* for leading of further evidence on special circumstances.

Without demonstrating that a miscarriage of justice will occur if the conviction is not disturbed, the appeal court will be very slow to accede to such a request. In any event, the appellant does not seek to attack the conviction but only a review of the sentence.

In *S v Machona & Ors* 1982 (1) ZLR 87 it was held that where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the face of the record proceedings should be by way of review (at p 90).

From the facts recorded by the magistrate, regarding special circumstances, this court has no basis to interfere with the finding that there were no special circumstances found to be existing. An appeal is determined within the four corners of the record.

I do not find any merit in the appeal. It is therefore dismissed.

MAVANGIRA J agrees -----

Manyurureni & Company, appellants' legal practitioners
Attorney General's Office, respondent's legal practitioners