

THE STATE
versus
HAPPY SIMBA MANASE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 5 February 2015

Review Judgment

MUREMBA J: The accused prospected for gold without a prospecting licence or a permit in contravention of s 368 (1) as read with s 368 (4) of the Mines and Minerals Act [*Chapter 21:05*].

Although the accused denied the charge he was convicted after a full trial. I find the conviction unassailable and I thus confirm it.

Following his conviction, the accused was sentenced to the minimum mandatory sentence of 2 years imprisonment.

The relevant provisions with which the accused was charged with read as follows:

“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 licence, exclusive prospecting order or special grant or unless he is the duly authorized representative of the holder of such licence, order or special grant and acting in the exercise of such rights.

(2).....

(3)

(4) Any person who contravenes subsections (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.”

Put simply, in terms of s 368 (4) (a) the court is only entitled to sentence an accused to the minimum mandatory sentence if there are no special circumstances in the particular case. In cases where there are special circumstances the court can, in terms of s 368 (4) (b), impose a sentence of a fine not exceeding level ten or imprisonment not exceeding 2 years.

According to s 368 (4) (a) and (b) it is a requirement that the court sentencing the accused should record special circumstances from the accused. The section makes it clear that it is the duty of the accused to satisfy the court that there are special circumstances in the case which warrant the non-imposition of the mandatory sentence. If he or she fails to satisfy the court of their existence the court should impose the mandatory sentence. So the essence of this section is that the court should call upon the accused to address it on special circumstances.

In casu what is notable is that the court did not canvass special circumstances. The record shows that after convicting the accused, the court went on to record mitigation. Thereafter the accused was sentenced. In his reasons for sentence the trial magistrate said that the offence of prospecting for minerals without a licence is a serious offence which the legislature viewed so gravely that it prescribed a minimum sentence of two years imprisonment for it. The magistrate went on to say that he had made a finding that there were no special circumstances in the case. Consequently he sentenced the accused to the minimum mandatory sentence of two years imprisonment.

Thinking that the magistrate had omitted to attach to the record the pages relating to special circumstances I raised a query with him. In his response he said that he had omitted to canvass special circumstances before deciding whether or not to impose the mandatory minimum sentence. He said it was an oversight that he made.

I must say such an oversight is a serious misdirection and dereliction of duty. Minimum mandatory sentences are very heavy and harsh sentences. Judicial officers need to apply their minds fully when sentencing offenders in such cases otherwise a serious miscarriage of justice can result, as what happened in this case.

With minimum mandatory sentences, the sentences are considerably longer than would normally be imposed for the crime in question. To ensure that the mandatory sentence is not imposed in all the cases, the legislature added the rider that the minimum sentence does not have to be imposed if there are special circumstances justifying the non-imposition of the sentence. So it is a procedural irregularity for a magistrate to simply make a finding that there are no special circumstances without exploring them.

The magistrates' court is a court of record: s 5 (1) of the Magistrates court Act [*Chapter 7:10*]. So the record must show that special circumstances were canvassed. Failure to record special circumstances amounts to a misdirection rendering the sentence

incompetent. See *S v Mbewe & Another* 1998 (1) ZLR 7 and *Attorney-General v Jasi and Nharingo* S-2-87.

The critical question is how does the court canvass special circumstances? From the matters involving special circumstances that have been placed before me for review, I have noticed that quite a number of magistrates do not really know the procedure in canvassing special circumstances. In *S v Mbewe & Another* 1998 (1) ZLR 7 it was stated that special circumstances should be canvassed immediately after the court has pronounced the verdict of guilty. This means that this has to be done before mitigation is recorded from the accused.

Cases wherein the accused is legally represented should not pose any problems at all because the defence counsel will address the court on the accused's behalf. The court should simply ask the defence counsel to address it on special circumstances. However, in cases where the accused is not legally represented the court has a duty to explain fully and clearly to the accused in a language that he understands that he or she is in jeopardy of having a heavy minimum sentence imposed upon him and that he or she can avoid this by showing special circumstances. *S v Makawa and Another* S-46-91.

The court has a further duty to explain what is meant by special circumstances. See *S v Chaerera* 1998 (2) ZLR 226 (S), *S v Maharangwe* S-5-90; *S v Kaja* S-129-89. Thereafter the court should invite the accused to address it on special circumstances. The court should also record its explanation in the record. The accused's response should also be recorded in full. It should be explained to the accused that in addressing the court on special circumstances it is his right to lead evidence from witnesses if he or she so wishes. In terms of s 70 (1) (h) of the Constitution of Zimbabwe Amendment (No.20) Act 2013, an accused has a right to adduce evidence. The right is even greater in circumstances where the accused is at the risk of being sentenced to a minimum mandatory sentence upon failure to satisfy the court that there are special circumstances justifying the non-imposition of the mandatory minimum sentence. According the accused such an opportunity is also in line with section 69 of the Constitution which states that an accused has a right to a fair hearing. If the accused leads evidence from witnesses, the State should be given a chance to cross-examine those witnesses.

After the accused's explanation the State should be invited to respond irrespective of whether or not the accused is legally represented. It also has the right to adduce evidence if it so wishes and if it does, the accused or his defence counsel should be given the opportunity to cross examine the State witnesses. It is the accused's right to challenge evidence adduced

against him: see s 70 (1) (h) of the Constitution. Thereafter the court should make a ruling on the existence or otherwise of special circumstances. After that the court should proceed to record mitigation and then sentence the accused.

The accused was sentenced on 10 June 2014. Because of the procedural irregularity I will set aside the sentence that was imposed by the trial magistrate and remit the matter back to the trial magistrate for sentencing afresh. The magistrate should canvass special circumstances in the manner prescribed above. If he makes a finding that there are no special circumstances in the case, he should not sentence the accused to a period of more than two years and the period that the accused has already served should be taken into account so that the accused does not serve for more than two years in prison.

MAWADZE J agrees _____