

STATE
versus
NAISON MOYO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 May 2015

Criminal Review

TSANGA J: The 56 year old accused was sentenced to a mandatory two year imprisonment term for contravening s 368 (1) I of the Mines and Minerals Act [*Chapter 20:05*] which deals with illegal mining of gold. The offence occurred in Mudzi.

As required by the law, before the imposition of mandatory sentence for the offence, the accused was asked if there were any special circumstances relating to his commission of the offence which would result in the requisite sentence not being imposed. His explanation of what he regarded as the special circumstances of his case are captured in the record as follows:

“My sister’s husband died and I was asked by her relatives to take her back to Masvingo where I stay. When I came here I did not have enough bus fare. My nephew then told me that we could pan for gold to raise the \$10.00 I needed.”

The court’s response was that these were not special circumstances because poverty desperation could never be used as an excuse for any crime.

In discussing special circumstances in *R v Da Silva* 156 (2) 173 (SR) at p 185 Beadle J (as he then was) explained as follows:

“The court here is dealing with quantum of punishment, and in making a decision on this I think that any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as a circumstance of the case. Even though it might not be a circumstance of the offence..... The legislature seems to have wished to draw a distinction between general and opposed to “special “circumstances, and not between circumstances special to the offence and those special to the offender. If therefore there is a relevant circumstances which is special only to the offender, I can see no logical reason why it should be excluded from consideration”

At p 188 E-F he went further to add as follows:

“To my mind ,the only consideration which should weigh with the Court in deciding whether a particular circumstance should be taken into account is whether the circumstance is a

special one or not . I do not think the court's discretion should be fettered by any rule compelling it to disregard any circumstance simply because it is not related to the offence".

In light of the above reasoning, I cannot see how the accused's explanation of the circumstances leading to the offence could have been simply brushed aside. In *S v Hennings* 1976(1) SA 814 (R) at p 815 *H* it was also explained that "the nature of circumstances which would constitute a special circumstance are not capable of any hard and fast definition or guidance". It was again emphasised that the court should not be fettered by any rule regarding whether circumstances in any case constitute a special reason relating to the offence or offender or both. In *S v Bain* 1977 (3) SA 494 (R) special circumstances were also taken to mean any extenuating circumstance in the commission of the offence or any special factor relating to the accused personally. Granted in *S v Vera* 1976 (2) ZLR (A) at 232 it was emphasised that not every mitigating circumstance amounts to a special circumstance.

In *S v Telecel (Pvt Ltd)* 2006 (1) ZLR 467 (H) the operating economic environment which had led the accused to purchase foreign currency on the black market was said to show the existence of abnormal , unusual , peculiar and extraordinary circumstances which drove the appellant to break the law.

The courts have to ensure that economic situations leading to commission of crimes under the current desperate economic circumstances do not operate differently for the rich as compared to the poor. It is the duty of the court to enquire rigorously into any facts that have been put forth as special circumstances before arriving at a conclusion that what has been stated does not constitute such. For instance in this case, a thorough examination of the accused's version of special circumstances would have necessitated an enquiry into the truthfulness of his claim that he had indeed come to Mudzi to pick up his sister after her husband died. In the interests of doing justice to the case, this may have necessitated bringing in his sister to verify his claim. The state outline indicates that the accused indeed ordinarily resides in Masvingo in Sandidza Village under Chief Maranda. It appears to at least confirm his claim that he was in Mudzi where he committed the offence for some reason. The quest for justice should be meticulously allowed to take its course as opposed to the all too frequently hurried endeavours to bring a case to its conclusion without delving fully into the circumstances surrounding the offence and the offender.

I do not think that in the absence of such a thorough enquiry, the magistrate's conclusion that what was said by the accused did not amount to special circumstances, has any justification in the facts. The accused can be given the benefit of the doubt. Accordingly,

the imposition of a mandatory minimum sentence is set aside and substituted with the following sentence:

“12 months imprisonment of which 8 months is set aside for five years on condition that the accused does not during that time commit any crime involving illegal mining of gold for which he is sentenced to imprisonment without the option of a fine.

The gold ore is forfeited to the State”

The altered sentence is to be brought to the attention of the relevant authorities and the accused.

TSANGA J _____

MAWADZE J agrees _____