

LEE SEUGHYUN
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 20 March & 29 June 2017

CRIMINAL APPEAL

T Mporfu & E Jera, for the appellant
E Mavuto, for the respondent

CHATUKUTA J: This is an appeal against the decision of the Magistrates Court dated 3 October 2016. The appellant was charged with contravening section 3 (1) of the Gold Trade Act [*Chapter 21:03*] for unlawful possession of 100.68 grams of gold valued at US \$3 724.00 without a licence or permit. The appellant pleaded guilty and was subsequently convicted and sentenced to 5 years imprisonment. The 100.68g of gold was forfeited to the State.

The facts upon which the conviction was based are as follows. The appellant is a South Korean. On 26 August 2016, the appellant departed from Ghana to Zimbabwe. It is not recorded when he entered into Zimbabwe, but on 31 August 2016, at around 1100 hrs, the appellant was on his way to South Korea when he checked in at Harare International Airport. His hand luggage was scanned by the Civil Aviation Security officials who noticed something reflecting a black colour in the luggage. This prompted a further search upon which suspected gold was found. Detectives from the Minerals and Boarder Control Unit were called in to check on the suspected gold and requested the appellant to produce a permit or license which authorized him to possess the gold. He failed to produce any document authorizing him to possess the gold, leading to his arrest. Upon further tests and weighing, all done in the presence of the appellant, the gold was positively identified as smelted gold button which weighed 100.68g.

At the commencement of the hearing of the matter on 2 September 2016, the appellant was represented by a Mr Mutonono who entered a plea of not guilty on his behalf and advised the court that he had explained the essential elements of the offence to the accused person and he had fully understood the elements. The matter was postponed to enable the engagement of an interpreter. The hearing was resumed on 19 September 2016. The appellant was now represented by a Mr Mhlolo. The appellant again tendered a not guilty plea. It appears soon thereafter, Mr Mhlolo changed the plea to a guilty plea following receipt of certain documents whose contents were not disclosed. He indicated that the appellant was now pleading guilty to the offence. The matter was stood down for 20 minutes to enable the appellant's counsel to take full instructions. The charge was again put to the accused who thereafter pleaded guilty. Counsel submitted that the plea was "unequivocal" and in accordance with the appellant's instructions. The court *a quo* returned a guilty verdict.

A contravention of s 3 of the Act attracts a minimum mandatory sentence of 5 years imprisonment unless special circumstances exist. The appellant's counsel submitted that the appellant genuinely believed that he was not required to have a permit in order to possess the gold. He produced a Goods Movement Certificate, a Generalised System of Preference Certificate of Origin and a Customs Declaration Certificate all issued by Ghanaian Authorities. All three documents stated that the appellant had 106 grams of gold destined for South Korea. The appellant believed that these documents entitled him to possess the gold in Zimbabwe as he was in transit to South Korea and the gold had originated from Ghana. The appellant operated under a *bona fide* mistake of law. The mistake of law amounted to a special circumstance.

The State submitted that the appellant's mistake of the law was not reasonable in view of the fact that the appellant had complied with all the necessary Ghanaian laws on possession and export of gold. It was not reasonable that he would not have expected that Zimbabwe would have its own laws on the possession of gold. His failure to declare the gold upon entry into Zimbabwe was a reflection of his *mala fides*. The prosecutor queried the disparity of 6 grams in the weight of the gold as reflected on the Ghanaian documents and of the gold found in his possession.

The trial magistrate found that the appellant's explanation that he was mistaken as to the law did not amount to a special circumstance. He accepted the State's assertion that the documents produced by the appellant did not relate to the gold that was recovered from him

because of the difference in the weight. He found that had the appellant genuinely believed that his possession of the gold was lawful he would not have tendered a guilty plea. The court thereafter sentenced the appellant to the minimum mandatory sentence of 5 years imprisonment.

Aggrieved by the sentence, the appellant filed on 4 October 2016 his appeal against sentence. On 14 November 2016 the appellant filed a chamber application for condonation for late noting of an amendment of the notice of appeal. The application was granted on 13 December 2016 under case number Con 201/16. The notice of amendment, in terms of which the appellant was introducing grounds of appeal against conviction, was filed on 17 January 2017. After hearing of the appeal, the parties were directed to file supplementary heads of argument on the validity of the notice of amendment. The direction was issued after having noted that the amendment appeared to have been filed out of time. The second issue was that the notice of amendment was purportedly in terms of “High Court of Zimbabwe Criminal Rules”. The third issue was whether or not it was competent for the appellant to amend an appeal against sentence with the introduction of a fresh appeal against conviction. The fourth issue was whether or not, assuming that it was competent to do so, the amendment was filed within the times prescribed in terms of the Supreme Court (Magistrates Court) Criminal Appeals Rules, 1979 (SI 504 of 1979) (hereinafter referred to as “the Rules”).

At the hearing of submissions on these supplementary issues, the appellant was now represented by Mr *Jera*. Mr *Jera* conceded that the citation of the High Court of Zimbabwe Criminal Rules in the Notice of Amendment was a drafting error on the part of the appellant’s legal practitioners. He further submitted that in view of the order granted on 13 December 2016, the notice of amendment had been filed timeously. The appellant had indicated in the application for condonation that he intended to amend the notice of appeal filed on 4 October 2016 with the introduction of a fresh ground of appeal against conviction. The court in granting the application for condonation had also allowed the noting of an appeal against conviction. The appellant conceded that the amendment envisaged in *r* 6 of the Rules relates to the amendment of the grounds of appeal in the notice of appeal properly filed, and in this case grounds of appeal against sentence only. He further conceded that the amendment introduced a fresh appeal against conviction. He however submitted that the judge on granting the application must have condoned the late filing of the appeal against conviction and had consequently allowed a

departure in terms of *r* 5 from the provisions of *r* 22 of the Rules. Further, if the court found that the appeal against conviction was not properly before it, it would still review the matter as urged in the appellant's main heads or argument.

The respondent submitted that the appeal against conviction was a nullity as it was filed out of time.

I shall proceed to determine the issues relating to the notice of amendment first. The notice of amendment filed by the appellant on 17 January 2017 is worded as follows:

“AMENDMENT NOTICE AND GROUNDS OF APPEAL IN TERMS OF THE HIGH COURT OF ZIMBABWE CRIMINAL RULES

TAKE NOTICE THAT the appellant hereby files an amendment to the notice and grounds of appeal filed on the 4th of October 2016 as set out below.

TAKE NOTICE THAT the appellant hereby notes an appeal against both conviction and sentence imposed by the court of the magistrate's sitting at Harare per Mahwe Esquire on the 3rd of October 2016.”

Criminal appeals to the High Court are provided for under the Supreme Court (Magistrates Court) Criminal Appeals Rules, 1979 (SI 504 of 1979) (hereinafter referred to as “the Rules”). (See *r* 3 of the Rules). Rule 3 is consistent with the provisions of *s* 11 (2) of the Magistrates Court Amendment Act No 9 of 1997. The section reads:

“Any rule of court or other statutory instrument and which was made or was deemed to have been made in terms of the Supreme Court Act [*Chapter 7:013*] and which, immediately before the fixed date, regulated changed appeals shall continue in force, *mutatis mutandis*, as if it had been made in terms of the High Court Act [*Chapter 7:06*] for the purpose of regulating such appeals and may be amended or repealed accordingly.”

“Changed appeal” is defined to be an appeal that could be made to the Supreme Court and which after the fixed date (which was the commencement of the Magistrates Court Amendment Act) was to be made to the High Court. Appeals from the Magistrates Court are now made to the High Court in terms of *ss* 40 and 60 of the Magistrates Court Act. (See *s* 5 of the Magistrates Court Amendment Act.) The Supreme Court (Magistrates Court) Criminal Appeals Rules are such rules envisaged under the Magistrates Court Amendment Act.

Rule 6 provides for the amendment of grounds of appeal. It reads:

“6. Amendment of notice of appeal

- (1) The Attorney-General or an appellant as defined in Part V, VI, VII or VIII may amend his notice of appeal by lodging a notice in duplicate with the Registrar setting out clearly and specifically the amendment to the grounds of appeal—
- (a) in the case of an appeal against conviction or conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of the appeal;
 - (b) in the case of an appeal against sentence only, as soon as possible and in any event not later than ten days after the noting of the appeal.

It is my view that r 6, as rightly conceded by the appellant’s counsel, envisages an amendment of the grounds of appeal where the appeal is already before the court either as an appeal against conviction or conviction and sentence or an appeal against sentence only. In order for an appellant to be able to amend any grounds of appeal, the appeal must have been filed within the time set out in r 22 (1) of the Rules. The rule provides that an appeal must be filed within ten days of the passing of sentence or where a request for judgment has been made, within 5 days of receipt of the judgment. The time within which the appeal may be filed may be extended as set out in the proviso to the rule, where a matter is the subject of review proceedings and the appellant has given written notice to the clerk of court that he/she elects to defer noting the appeal. In terms of r 47, the right to file an appeal shall lapse where an appeal is not filed within the prescribed time-limits. The right may only be restored by the court following an application by the appellant in terms of r 48 for leave to appeal out of time.

Judgment in the matter was handed down on 3 October 2016. The appellant timeously filed an appeal against sentence only on 4 October 2016. He did not file an appeal against conviction or an appeal against both conviction and sentence. He filed his notice of amendment of the grounds of appeal on 17 January 2017.

Three issues arise from the purported amendment. The first issue is that an appeal, after the passing of sentence to the High Court is made in terms of the Supreme Court (Magistrates Court) Criminal Appeals Rules and not any High Court Criminal Rules. The concession by the appellant that the citation of the notice of amendment is wrong is therefore proper. The wrong citation is accordingly condoned.

The second but most important issue is that what the appellant termed an amendment was in fact a fresh appeal against conviction and sentence. An amendment entails adding, subtracting

or correcting the grounds which are properly before the court. In *S v Shand* 1994 (2) ZLR (S) GUBBAY CJ (as he then was) observed at 101 B –G:

“I entertain not the slightest doubt that the suggested course would be incompetent. It would amount to substituting a totally different charge rather than merely effecting the type of amendment contemplated by s 191. In this regard reference is made to *S v Moyo* (2) 1978 ZLR 469 (G) where at 471 E – H it was said:

“In *Risley v Gough* [1953] Tas SR 78, the Supreme Court of Tasmania considered the meaning to be assigned to the word “amend” in a section of the Justice Procedure Act of 1919, which made provision for the amending of grounds of appeal. GIBSON J at page 79 said:

‘... I cannot construe the word “amend” other than to mean the perfecting or ameliorating of an existing thing – not supplying a vacuum with something that should be there.’ (Quoted in *Words and Phrases Legally Defined*, 2nd ed, Vol 1 at p 78-79).

I think this is the meaning to be applied to s 191. It amply demonstrates that not every alteration, particularly one that causes the complete destruction of the ‘existing thing’ or its substitution by something else, can properly be deemed an amendment. In *R v Mnyekwa* 1947 (4) SA 433 (E) LEWIS J obviously had this in mind in holding that the substitution of one offence for another was not an amendment within the meaning of the Relevant section of the South African Criminal Procedure and Evidence Act.”

See also *S v Mnadi & Ors* 1986 (1) SA 526 (N) at 530D-G; *S v Kruger en Andere* 1989 (1) SA 789 (A) at 796 D-E; and compare *S v Chitengu* 1979 RLR 228 (G) at 230A-D.”

The appellant could only amend the grounds of appeal against sentence in terms of r 6(1) (b) as there was no appeal against conviction or against both conviction and sentence.

Whilst an order was granted for leave to amend the notice of appeal, it did not necessarily mean that the notice of amendment which was subsequently filed was proper. As rightly submitted by *Mr Mavuto*, all that the judge did was to grant the appellant an opportunity to amend his grounds of appeal. The actual amendment had however, to be in compliance with the rules. As conceded by the appellant, the introduction of a fresh appeal which was not part of the original appeal against sentence could not be considered, by any stretch of imagination, to be an amendment of the grounds of appeal against sentence. Neither can it be said that the judge granting the order must have allowed a departure from filing an appeal against conviction out of time. There is nothing on record to show that such a departure was allowed or that the judge even considered the provisions of r 5. There was nothing precluding the appellant from filing an application for leave to appeal against conviction out of time as opposed to amending the appeal

against sentence. The appellant seemed to have overlooked the fact that even a notice of appeal filed timeously can still be found to be a nullity if it does not comply with the rules as in this case. In fact, the submissions by the appellant's counsel are tantamount to saying that once an application for leave to amend grounds of appeal is granted the appellant must succeed on appeal despite the fatally defective amendment. That cannot be so. The court considers whether or not there are prospects of success on appeal. However, a finding by the court that there are prospects of success does not necessarily mean that the appeal court will agree with the finding, neither is the appeal court which is constituted by two judges bound by the decision of the single judge. The appeal having been filed under the guise of an amendment was incompetent and therefore hopelessly out of the time prescribed under the rules. The appeal is a nullity and we are therefore unable to entertain it. (See *Sammys Brooke (Pvt) Limited v John Butcher Meyburgh N.O. & Ors* SC 45/2015 and *S v Sibanda* 2001 (2) ZLR 514).

What is of great concern to us is that it appears from the heads of argument that the appellant's counsel may well have been or ought to have been aware of the invalidity of the appeal. The appellant had successfully sought condonation for the late filing of what it purported to be a valid appeal against conviction. If he was confident of the validity of the appeal, there was no reason for him to anticipate that the appeal court would rule that the purported appeal against conviction was invalid and consequently urge us to consider exercising our review powers. In paragraph 1.3 of the heads, the appellant referred the court to *S v Jack* 1990 (2) 166 (SC) in which the Supreme Court decided on appeal to exercise its review powers in the face of an invalid appeal against conviction. The appellant further referred us in the Supplementary Heads of Argument to *S v Zvinyenge & Ors* 1987 (2) ZLR 42 (SC). In the first case, the court exercised its review powers having concluded that there was some merit in the appeal. In the second case, the applicant had filed an application for remission of matter to the trial court for change of plea in the absence of an appeal, the time within which to file the appeal having lapsed. The court considered that despite the fact that the applicant had adopted the wrong procedure, there was merit in the application and considered the application to be an application for leave to file an appeal out of time instead. The appellant's counsel urged us to adopt the same approach as adopted in these cases. It appears that appellant's counsel was taking a gamble

that the court would overlook the invalid appeal, failing which he would have a fallback position that the court would instead be urged to exercise its review powers.

The invitation by the appellant is in our view, an invitation to deal with the appeal through the back door as we would be required to address the same issues raised in the invalid amendment. In any event, I am of the view that, unlike in *S v Jack* and *S v Zvinyenge & Ors* (*supra*), there is no merit in the appeal against conviction. We are therefore not inclined to exercise our review powers.

Turning to the appeal against sentence, the appeal, having been filed timeously, is properly before us. The appellant submitted that the appellant's mistaken belief that the Ghanaian documents allowed him to possess the gold whilst in Zimbabwe and that he was not required to hold a permit issued by the Zimbabwean authorities was genuine. It was a mistake of law and amounted to a special circumstance. The appellant was in transit to South Korea and he had in his possession some documents pertaining to the export of the gold. His possession therefore amounted to a technical breaking of the law.

The respondent conceded that the possession was a technical breach and the trial court erred in holding otherwise.

A reasonable mistake of the law constitutes a special circumstance. In *S v Mbewe & Ors* 1988 (1) ZLR 7, EBRAHIM J in defining what constitutes special circumstances remarked that:

"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 *bona fide* ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but 'special circumstances' in the case. The above are offered merely as illustrations and are not intended as a closed list." (See *S v Rawstron* 1982 (2) ZLR 221 at 234, *S v Chisiwa* 1981 ZLR 667 at 671 and *S v Anand* 1988 (2) ZLR 414 at 421).

The question for determination is therefore whether or not the appellant's mistake was reasonable. We believe that the mistake was not *bona fide* and reasonable. The appellant knew that he was required to have documents allowing him to export gold from Ghana to South Korea.

This clearly shows that he was aware of the possible legal ramifications of not obtaining the documents issued by the Ghanaian Authorities. Any reasonable person would therefore have made inquiries as to what was expected of him if he was to get into Zimbabwe, as he did, with the same gold. He surely did not expect Zimbabwe to be a banana republic with no laws governing the possession of gold yet as indicated earlier, he had made the necessary inquiries regarding the export of gold from Ghana to South Korea which inquiry resulted in obtaining the documents that he produced before the court *a quo*.

Further, the appellant failed to declare his gold upon entry into Zimbabwe and no clear explanation was given for this omission. The omission is *mala fide* to say the least. He knew fairly well that upon entry into another country, his gold must be declared hence the procurement of the documents in Ghana to enable him to enter into South Korea with the gold. It is not reasonable that he expected that firstly it was not necessary for him to declare the gold upon entry into Zimbabwe and secondly to inquire into the requirements for him to keep the gold whilst in Zimbabwe. The moral blameworthiness of the appellant is in fact heightened by his conduct. The situation would have been different had the appellant declared the gold and been advised by customs officials that the Ghanaian documents were adequate authority for him to enter into, remain in Zimbabwe and keep the gold without a permit. (See *S v Zemura* 1973 (2) RLR 357, 1974 (1) SA 584 (RA) & *S v Appleton* 1982 (2) ZLR 110 (SC).) It therefore cannot also be said that the appellant's possession was a technical breach of the law.

The court *a quo* was correct in imposing the mandatory sentence as there were no special circumstances in this case. The appeal against sentence cannot succeed.

It would be remiss of us not to commend the trial magistrate for the manner in which he dealt with the matter despite the fact that the appellant was represented. The magistrate exercised due diligence in assisting a represented accused. Mr Mutonono had initially wanted to proceed without the services of an interpreter. He indicated that the appellant, though not fluent in English, was able to "pick some things". The court, after concerns raised by the State, postponed the matter to enable the State to arrange for an interpreter. He stated as follows:

"The accused must understand the proceedings because it is his case not the defence counsel's case. Accordingly the State is directed to provide the interpreter before the proceedings can go ahead."

When the matter resumed on 19 September 2016, the court proceeded to have the charge preferred afresh, now with the services of an interpreter. The appellant pleaded not guilty. When Mr Mhlolo tendered a guilty plea, the trial magistrate did not proceed with the hearing. He stood down the matter *mero motu* to enable Mr Mhlolo to take full instructions from the appellant. When the hearing resumed, the charge was put again to the accused for the third time. The appellant thereafter pleaded guilty to the charge. In fact, when there was a change of legal practitioners from Mr Mutonono to Mr Mhlolo, the trial magistrate queried the change and refused to proceed until Mr Mutonono had filed a notice of renunciation of agency. He only proceeded when Mr Mhlolo submitted that there was no requirement in the Criminal Procedure and Evidence Act requiring Mr Mutonono to file the notice.

The appellant was therefore not only assisted by his legal practitioner but was also assisted by the court.

Having concluded that the appeal against conviction is a nullity, and that the trial magistrate did not err in holding that there were no special circumstances, it is accordingly ordered that:

1. The appeal against conviction be and is hereby declared a nullity.
2. The appeal against sentence be and is hereby dismissed.

MUSAKWA J concurs.....

Chinogwenya & Zhangazha, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners