

ARNOLD BVUTO

versus

THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 3 August 2017

Criminal Appeal

J Makiseni, for the appellants
Mrs F Kachidza, for the respondent

HUNGWE J: The nine appellants were convicted on their own plea of guilty to contravening section 368 (2) as read with s 368 (4) of the Mines and Minerals Act, [Chapter 21:05] (“the Act”). They were each sentenced to the mandatory 2 years imprisonment. They appealed against conviction on the basis that they were convicted on a charge which was not supported by the facts admitted between them and the State.

The facts agreed at trial are as follows. Police received information about the eight appellant’s activities at Lennox Gold Mine, Mashava, during the night of the previous day. That information indicated that the accused had illegally entered the gold mine and manually removed gold ore from an underground shaft. Acting on that information, the police proceeded to Lennox Gold Mine. They did not find the accused at the mine as, by then, they had removed their loot and loaded it into a hired private motor vehicle. Police intercepted the accused and stopped their motor vehicle at a tollgate on the Mashava-Zvishavane road. A search of the vehicle yielded three sacks of gold ore, a chisel and a hammer. The accused failed to produce any documentation permitting them to remove or possess gold ore. The police arrested the eight accused and charged them with contravening s 368 (2) of the Act. That section provides:

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) No person shall prospect or search for any mineral, mineral oil or natural gas unless he is an approved prospector.

(3).....

(4).....

(5).....”

The accused pleaded guilty to the charge preferred by the State. Trial proceeded in terms of s 271(2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. In canvassing the essential elements of that offence, the question was put:

“Correct that on 26 /02/15 and at Lennox Mine you were searching or prospecting for gold.”

The answer was in the positive for each accused. The next relevant question put was:

“At the time of prospecting, were you holders of permit or licence authorizing you to prospect for the said mineral?”

The answer was predictably in the negative. A conviction for each accused followed. They were each sentenced to the minimum mandatory two years imprisonment. The accused were unrepresented both at the time of arrest and at the trial until after the mandatory minimum sentence was imposed. The law imposes a positive duty on the presiding magistrate when recording a plea of guilty to ensure that the rights of such a person are carefully protected, respected and upheld.

In *S v Dube & Anor* 1988 (2) ZLR 385 (SC) the court cautioned:

“Where there is a plea of guilty, judicial officers must be careful not to regard every fact as proved just because it is admitted. Where the accused admits "possession" of a prohibited article, the court must establish just what the accused is admitting, possession being a difficult legal concept. A similar caution applies to the explanation of the charge and the elements of the offence. Section 255(3) of the Criminal Procedure and Evidence Act [Chapter 59] requires that the court's explanation, any statements by the prosecutor and the reply and statement by the accused be recorded. This record should be full. Where there is more than one accused person, each should be dealt with separately.

In cases where the law provides a minimum penalty unless special circumstances exist, the accused should be told what the penalty is and the meaning of special circumstances. This should be done early in the trial. Allied to this enquiry is the broader one of whether the accused will have a fair trial. The court should consider whether the case is a complex one, from the point of view of such matters as -

- (a) whether the ascertainment of the facts includes difficult legal concepts such as "possession", "consent" or "knowledge";
- (b) whether the facts themselves are complex or difficult;

(c) whether there is a need to prove "special reasons" or "special circumstances" to avoid a minimum sentence;

(d) whether a long prison sentence is likely to follow conviction.

In such cases, the court should ask itself:

(1) even if the accused has pleaded guilty, whether it would nonetheless be appropriate to enter a plea of not guilty in terms of s 255A of the Criminal Procedure and Evidence Act;

(2) if the accused is unrepresented, whether it would be fair and appropriate to advise him of the complexities of the matter and to ask him if he has considered obtaining legal representation; and

(3) if satisfied that the accused should have legal representation but cannot afford it, whether the court should certify that legal representation be provided under the Legal Assistance and Representation Act [*Chapter 66*]."

Similarly, in *S v Magore* 1996 (2) ZLR 88 (SC), the court held, that where an accused is not legally represented, and particularly where that person is uneducated and unintelligent, the court must be very careful to ensure that the accused fully understands the charge and all its essential elements and that he genuinely and unequivocally admits to the charge and its essential elements and to the facts alleged by the prosecution. *S v Chidawu* 1998 (2) ZLR 76 (HC).

When a trial court decides to proceed in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], where the accused is unrepresented, the duty of the court in safeguarding the rights of the suspects cannot be overemphasised. The reasons for this are manifold; first, the vast majority of criminal prosecutions in the magistrates' court are against first offenders. Secondly, they appear in most cases on their own without legal representation. Thirdly, these suspects, in the majority of cases, are ignorant of the law as well as their rights. Fourthly, the overwhelming atmosphere of court proceedings induces in first time offenders a sense that an admission of the allegations will draw sympathy of the courts. In these circumstances, the magistrate becomes the primary bulwark defending the ignorant or the impoverished against the potential injustices that could visit the process through an excess of zeal or pressure of work. See *S v Tau* 1997 (1) ZLR 93 (H) @ p 99.

In *S v Machokoto* 1996 (2) ZLR 190 (HC) this court went further and observed that the essential elements must be explained in such a way as is calculated to inform the accused, if he is unrepresented, of the nature of the charge in sufficient clarity and detail as will suggest to him, in his knowledge of the matter, whether he has a defence to offer. This does not imply that the magistrate should suggest defences to the accused, but it should not be forgotten that, where the accused is unrepresented the magistrate is the only source of independent assistance towards an understanding of the nature of his predicament. The fact that the accused wishes to plead guilty is not a reason to adopt a cursory approach in explaining the essential elements of

the offence charged. On the contrary, it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that nothing he may wish to say could constitute a defence.

The caution sounded in these cases is especially relevant where the crime charged impacts some technical terms such as possession or similar concepts which a person lacking legal training would generally be aware of or familiar with. Where a crime merely involves possession or prospecting, the dangers of an incorrect plea of guilty are greater than usual because the accused person may not realise that his state of mind is very relevant. In such cases it is undesirable to charge the accused simply for prospecting or possession but reference should also be made to the penalty section of the relevant Act so as to alert the accused of the gravity of his or her predicament. See *S v Zvinyenge & Other* 1987 (2) ZLR 42 (SC).

The court, being the ultimate bulwark in defending the ignorant and or impoverished, must always recall the exhortation of s 70 (1) of the Constitution of Zimbabwe which provides:

70 Rights of accused persons

- (1) Any person accused of an offence has the following rights—
- (a) to be presumed innocent until proved guilty;
 - (b) to be informed promptly of the charge, in sufficient detail to enable them to answer it;
 - (c) to be given adequate time and facilities to prepare a defence;
 - (d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;
 - (e) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result;
 - (f) to be informed promptly of the rights conferred by paragraphs (d) and (e).
 - (g) to be present when being tried;
 - (h) to adduce and challenge evidence;
 - (i) to remain silent and not to testify or be compelled to give self-incriminating evidence;
 - (j) to have the proceedings of the trial interpreted into a language that they understand;
 - (k) not to be convicted of an act or omission that was not an offence when it took place;
 - (l) not to be convicted of an act or omission that is no longer an offence;
 - (m) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits;
 - (n) to be sentenced to the lesser of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.”

Clearly, the appellants' right to a fair hearing were prejudiced by the approach trial court adopted. The presumption of innocence was ignored as the court disregarded the fact that the charge was not proved by the facts relied upon by the State. In all offences for which a minimum mandatory sentence is prescribed, it is an infringement for a trial court to fail to

advise an unrepresented accused person of his or her right to legal representation, at his own expense, by a legal practitioner of his choice; or, if he cannot afford one, to be represented by a legal practitioner assigned by the State and at the State's expense, if substantial injustice would otherwise occur: s 70 (1) (d) and (e) of the Constitution of Zimbabwe. These rights are entrenched for the obvious reason; to protect, to promote; to uphold and to ensure the realisation of the accused's fair trial rights.

In my respectful view, it is high time that our legal system give effect to the constitutional right to a fair trial by enacting appropriate legislation that would entitle every suspect standing trial who faces a minimum mandatory sentence to legal representation at the expense of the State. Besides being a positive fulfilment of the right to a fair hearing, such a step would ensure that the wheels of justice turn more swiftly and efficaciously. The Law Development Commission should consider the suggestion seriously.

Finally, in response to the notice and grounds of appeal, the learned trial magistrate stated thus:

"I convicted the appellants on the charge preferred as I was in no doubt that the appellants were looking for minerals regardless of where they were doing it."

This attitude reflects a failure of appreciation of the true nature of the grounds of appeal. The grounds of appeal attacked the very foundation of the conviction. The learned magistrate clearly proceeded with the trial on the baseless and unfounded assumption that a person who possess gold ore without a permit must have necessarily "looked for it". He erroneously assumed that "prospecting" and "possession" are synonymous terms. This was an error of law. Section 271(2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] provides for a summary trial procedure. It permits a criminal trial court to proceed to convict a suspect where he pleads guilty to any offence without requiring the leading of evidence to prove the State's case. Whilst it facilitates the prompt dispatch in straightforward cases, this procedure is open to abuse by overzealous police and court officials who are under pressure to achieve set statistical data when unrepresented accused are subject of judicial processes. The temptation to clear such suspects by manipulating the provisions of this procedure are all too obvious to the seasoned practitioner of the law. In the present case, had the police not short-circuited their investigational skills and presented the facts to court, it is highly unlikely that the appellants would have tendered guilty pleas. I make this observation in light of the following. The appellants went to a gold mining location, Lennox Mine, Mashava, where they proceeded into

an underground tunnel. There, they removed gold ore. They were not prospecting for a mineral. They knew that there was ore from which they would get gold if they processed it. They removed it with the full knowledge that this was gold ore. The location had long been established as a gold mine. The issue of “looking for” or “prospecting” did not arise. They simply stole gold ore. The facts supported a contravention of s 379 of the Mines and Minerals Act, [*Chapter 21:05*]. In the exercise of this court’s review powers in s 27 of the High Court Act, [*Chapter 7:06*], I proceed to substitute the charge preferred with s 379 of the Mines and Minerals Act, [*Chapter 21:05*].

As pointed out above, but for the admission of a contravention of s 379 (1) of the Act, an appropriate order would have been to set aside the conviction and order a trial de novo. In light of the fact that the appellants’ counsel conceded that the facts disclosed an offence, it is only fair that this court substitute the conviction on prospecting with that of possession of ore without a permit issued by the proprietor of Lennox Gold Mine. Following upon the alteration of the conviction, the sentence must necessarily be quashed and in its place, the following is imposed:

“Each Accused: US\$200 or in default of payment 3months imprisonment.”

MUSHORE J: agrees.....

H Tafa & Associates, appellants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners