

Judgment No. SC.99/84 Crim.Appeal No.
355/84

VICTOR VISITOR MCCARTHY v THE STATE

SUPREME COURT OF ZIMBABWE,
HARARE, OCTOBER 10. 1984.

Before: BECK, JA in Chambers in terms of s. 10(3) of the Supreme Court of Zimbabwe Act.

This matter came before me by way of an application for leave to prosecute in person an appeal against both conviction and sentence.

The applicant was convicted under the Precious Stones Trade Act of 1978 of wrongfully and unlawfully possessing two rough and uncut emeralds. No special reasons being found he was sentenced to the mandatory minimum sentence of 3 years' imprisonment with labour.

The Attorney-General has reported that the State does not wish to support the conviction because it must be held that the applicant lacked the necessary *mens rea*. The Public Prosecutor expressly accepted that the emeralds were handed to the applicant by a man who produced a licence and led the applicant to believe that it would be lawful for the applicant to sell the emeralds on this person's behalf. The Public Prosecutor expressly accepted further that the applicant acted throughout in perfect good faith. This concession; the Attorney-General says, may have been hasty and ill-considered, but it was deliberately made and it was adhered to, and in the face of it the Attorney-General is unable to support the conviction.

The record certainly indicates that the State that the applicant laboured throughout under a bona fide mistake of fact. Had that concession not been made the applicant may well have led further evidence on that issue. Under those circumstances the

Attorney- General is very fairly of the view that the State cannot resile from that concession and that the trial court was not entitled to disbelieve the applicant's assertion that he was deceived into believing that valid authority existed for his possession of the emeralds.

Accordingly in terms of s. 10(3) of the Supreme Court of Zimbabwe Act the appeal is allowed, the conviction is quashed and the sentence is set aside. The release of the applicant from prison has already been ordered.