

STATE

Versus

PRAISE NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 11 JANUARY 2024

Criminal Review

DUBE-BANDA J:

[1] This matter was placed before me on automatic review in terms of section 57 (1) of the Magistrates Court Act [Chapter 7:10]. The accused appeared before the Magistrates Court sitting in Filabusi. He was charged and convicted with one count of contravening s 3(1) as read with s 3(3) of the Gold Trade Act [Chapter 21:03] i.e., possession of gold without a licence. It being alleged that on 9 January 2023 and at Britain Gold mine, Filabusi, the accused possessed 0.229g of gold without a licence as required by the Act.

[2] The accused pleaded guilty to the charge and was duly convicted and sentenced to 5 years imprisonment. Nothing turns on the conviction as it is in accordance with real and substantial justice. It is the sentence that is irregular and not in accordance with the law.

[3] The accused appeared before an ordinary magistrate whose sentencing jurisdiction in terms of s 50 of the Magistrate Court Act on summary trial is two years imprisonment or a fine up to level seven, and on remittal by the Prosecutor General, she can impose a sentence of four years or a fine up to level nine. Noting that the magistrate sentenced the accused to a five-year prison term, I queried whether the learned magistrate had the jurisdiction to impose a sentence of five years in this matter. In reply the magistrate said her view was that she possessed extended or special jurisdiction by virtue of the fact that s 3(a) of the Gold Trade Act provides for a mandatory minimum sentence. She was further persuaded by the fact that in the case of *The State v Loveness Moyo* CRB FIL 09/23, HCAR 477/23 relating to the same charge the High Court confirmed the proceedings. The magistrate attached the record in the *Loveness Moyo* case, and the facts are similar to this case.

[4] It is trite the magistrates court is a creature of statute and it cannot possess jurisdiction beyond what the Magistrates Court Act and other statutes give to it. In this jurisdiction many offences are codified in the Criminal Law [Codification and Reform] Act and other statutes. Several statutes contain provisions prescribing the minimum or maximum sentences that may be imposed for certain offences. In various statutes ordinary magistrates are given special sentencing jurisdiction. Section 51(1) of the Magistrates Court Act increases the sentencing jurisdiction of ordinary, senior and provincial magistrates in cases public violence; arson; malicious injury to property; whether on summary trial or remittal by the Prosecutor-General to imprisonment for a period not exceeding seven years; or a fine not exceeding level eleven. Again s 51 (3) of the Magistrates Court Act gives every magistrate special jurisdiction to impose the penalties prescribed in sections 113 (“Theft”), 114 (“Stock theft”) and 131 (“Unlawful entry into premises”) of the Criminal Law Code. A magistrate can only depart from the statutory sentencing jurisdiction provided in s 50 of the Magistrate Court Act on condition her jurisdiction has been increased by the legislature.

[5] In this case the accused was convicted with the offence of contravening s 3(1) of the Gold Trade Act, i.e., possession of gold without a licence or permit. The penalty provision of contravening s 3(1) is found in s 3(3) of the Act which provides thus:

“Any person who contravenes subsection (1) 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 five years or more than ten 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 five years or a fine not exceeding level nine or twice the value of the gold that is the subject-matter of the offence, whichever is the greater, or to both such fine and such imprisonment.”

[6] Neither in the Magistrates Court Act nor the Gold Trade Act is an ordinary magistrate given special or increased sentencing jurisdiction in relation to contravening s 3(1) of the Act. There are, indeed, other statutory enactments that give ordinary magistrates special sentencing jurisdiction, but the Gold Trade Act is not one of them. The fact that s 3(3) of the Act prescribes a minimum mandatory sentence of five years does not automatically give an ordinary magistrate sentencing jurisdiction that she does not possess. Her sentencing jurisdiction can only be increased or extended by legislation. It is so because the magistrates court is a creature of statute and therefore special or increased sentencing jurisdiction is given by the legislature. In *casu* the learned magistrate exceeded the sentencing limits of her jurisdiction.

[7] Before disposing of this matter, there is one issue that I must advert to. As alluded above, a judge of this court and of parallel jurisdiction with me confirmed proceedings in the matter of *The State v Loveness Moyo* CRB FIL 09/23, HCAR 477/23. It is not competent for me to say the judge who confirmed the proceedings was wrong. I have no power to say so. That is the prerogative of the Supreme Court. See *Unitrack (Private) Limited v Telone (Private) Limited* SC 10/18. All I can record is that I have sufficient disagreements with this confirmation to agree with it.

[8] In the circumstances the sentence imposed in this case cannot stand. It is not in accordance with real and substantial justice as required by the law. The learned trial magistrate should have stopped the matter in terms of section 54 of the Magistrates Court Act and sought the directions of the Prosecutor General in terms of section 225 of the Criminal Procedure and Evidence Act [Chapter 9:07] rather than assume jurisdiction that she did not have. See *The State v Mpofu* HB 126/09. Accordingly, I confirm the conviction and set aside the sentence and refer the matter to the magistrate to proceed in terms of the law.

In the circumstances, I order as follows:

- i. The conviction be and is hereby confirmed.
- ii. The sentence is reviewed and set aside.
- iii. The matter is remitted to the trial magistrate to proceed in terms of section 225 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Dube-Banda J

Kabasa J agrees