

**THE STATE**

**Versus**

**HANDSOME GWAYI**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 6 SEPTEMBER 2012

Criminal Review

**MAKONESE J:** This matter was referred for review by the Provincial magistrate, Gwanda.

The record was forwarded very late. The accused was convicted and sentenced on 9<sup>th</sup> December 2010 for a contravention of section 3(1) (a) as read with section 3(3) of the Gold Trade Act [Chapter 21:03], that is to say, possessing gold without a permit. The accused pleaded not guilty but was nonetheless convicted and sentenced to 18 months imprisonment wholly suspended for 5 years on the usual conditions.

The trial magistrate tragically died in a motor vehicle accident.

The record was sent for review with a memorandum in the following terms:

“All the above matters were dealt with by the late Mr D. Zvenyika. They were discovered while clearing his office.

We apologise for the delay in submitting the records for review. I have failed to locate reasons for judgment in all the matters.”

The background to this matter as detailed in the outline of the state case is that on the 23<sup>rd</sup> November 2010 detectives from the Minerals Unit, Gwanda received a tip off that accused was at Purpose Mine and intending to go to the mine compound to sell the gold which was in his possession. The detectives proceeded to the mine where they laid an ambush for the accused and as he went in the direction of the mine compound they arrested the accused. The accused was subjected to a body search and a piece of toasted gold was recovered from his right trousers pocket wrapped in a white piece of paper. The accused failed to produce a

permit authorising him to possess the gold and was arrested and taken to the police station. The recovered gold was assayed and valued at US\$3.42. The piece of gold contained 0.09 grammes of pure gold.

In this matter nothing turns on the conviction which I am satisfied was proper as the accused's defence was patently false and was accordingly rejected by the trial magistrate.

It is the sentencing aspect of this case which presents some difficulty. Upon conviction, the magistrate invited the accused to address the court in mitigation. This is what the accused had to say:

"I am 23 years old. I am married with 2 children. I am employed earning R200-00 per month. I have no savings. I have no assets of value."

The magistrate then properly advised the accused to address him on special circumstances and that in the absence of special circumstances he was obliged to impose a mandatory sentence of 5 years. The accused then made submissions which appear to contradict the mitigation as follows:

"I am not employed. I have no money and I was starving. Poverty led me into committing this offence. I needed to sustain myself. I am sorry that I found myself with no choice. I have a young child to look after."

After the submissions by the accused the learned magistrate simply wrote the word "Ruling" and there is then a blank space. There are no reasons for sentence. The magistrate then endorsed the sentence at the back of the charge sheet.

The magistrate went on to pronounce a sentence of 18 months imprisonment wholly suspended for 5 years on the usual conditions. It is apparent, therefore, that the magistrate came to the conclusion that there existed special circumstances warranting the imposition of a sentence other than the mandatory 5 years. The magistrate does not provide reasons for sentence and hence it can only be a matter of conjecture how the magistrate arrived at his conclusion.

In view of this glaring irregularity in the failure by the trial magistrate to provide reasons for the sentence this court is at large as regards sentence. See the cases of *S v Mpofo* HB 73/03 and *S v Agnes Ndhlovu* HB 87/07.

I will have to examine the facts as gleaned from the record and the reasons advanced by the accused in mitigation to consider whether the sentence was appropriate. On the face of it there are no special circumstances if one has regard to the submissions made by the accused.

I have examined the submissions made by the accused person and clearly the circumstances surrounding the commission of the case indicate that there is no basis for coming to the conclusion that there are any special circumstances. It is only the trial magistrate who would know why he concluded that there are special circumstances. In the absence of written reasons for sentence one cannot even start speculating the reasoning process that went on inside the mind of the magistrate.

In the circumstances I decline to certify the proceedings as being in accordance with real and substantial justice and withhold my certificate.

Makonese J.....