TALENT MTUNZI

And

SHELLY NCUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & TAKUVA JJ
BULAWAYO 7 JULY 2014 & 12 MARCH 2015

G. Nyoni for the appellants
T. Makoni for the respondent

Criminal Appeal

TAKUVA J: This is an appeal against conviction and sentence.

Appellants were charged with contravening section 3(1) of the Gold Trade Act [Chapter 21:03] (the Act) "Possession of gold without a licence or permit." It was alleged that on the 26th day of June 2013 at around 23:00 hours and at Mukombe Complex, Tsholotsho business centre the two were unlawfully found in possession of gold without a licence or permit contrary to the Act.

The facts are that the two appellants were at Mukombe business centre when the 1st appellant was searched and found in possession of a gold nugget which he intended to sell. The 1st appellant was arrested and he implicated the second appellant as the owner of the gold. The 2nd appellant was arrested and admitted ownership of the gold. The gold was assayed and found with gold concentrate of 0.0291g valued at $1,11.

Both appellants pleaded guilty and were found guilty as charged. No special circumstances were found and they were sentenced to the mandatory five years imprisonment.

Aggrieved, appellants appealed against both conviction and sentence. In their notice of appeal they indicated the following to be grounds of appeal.

"Ad conviction: 2nd appellant

(1) The learned magistrate erred in finding the 2nd appellant guilty of the crime of possession of gold when 2nd appellant was in fact not in possession thereof and when a claim of ownership thereof did not and does not amount to possession.
(2) The learned magistrate erred in holding that there was common purpose in a crime of possession *stricto*.

Ad sentence 1st and 2nd appellant (*sic*)

(3) The learned magistrate erred in holding that there were no special circumstances to warrant imposing (*sic)* a lesser sentence than the statutory 5 years in that:
    3.1 The value involved being that of US$1.00 ought to have been considered as a special circumstance.
    3.2 The 1st appellant was clearly a youthful offender and this element of youthfulness being a special circumstance.
    3.3 The appellants stated that they were looking for money for food a clear sign that albeit working they were not being paid and, if they were paid, they were not being paid enough to sustain themselves. The appellants committed the crime out of starvation and necessity to sustain their lives and produced it to buy food with it.
    3.4 The cumulative effect of the mitigating factors amounts to a special circumstance sufficient to influence the court not to impose the mandatory minimum penalty.
(4) The learned magistrate erred, further in failing to ask the appellants why they committed the offence and the circumstances surrounding the commission of the offence as this would have armed the court with enough knowledge to whether special circumstances did exist or not or alternatively understood whether or not there were compelling reasons not to impose a minimum mandatory sentence.
(5) The learned magistrate erred in failing to enquire after he summoned the appellant's employer to court specifically to find out if there were any special reasons or not, if the employer was paying the appellants their salaries or not.

Wherefore the appellants pray that:-

(a) The conviction in respect of 2nd appellant be set aside. In the event that it is sustained;
(b) That the court finds that there were special circumstances in this case sufficient to warrant the setting aside of the sentence of 5 years and substituting it with that of a wholly suspended 5 year sentence or alternatively community service or the payment of a fine." (my emphasis)

Let me deal first with the two grounds of appeal against conviction. The synthesis of the 1st ground is that since the 2nd appellant was not in physical possession of the gold he cannot be guilty of the crime. Counsel relied on two cases on his proposition that section 3 (1) of the Gold Trade Act penalizes only an individual who is found in possession of the gold and that "common purpose on a statutory crime of possession *stricto* does not arise."

The two cases relied on are:

(i) *S* v *Anand* 1988 (2) ZLR 414 (S)
(ii) *S* v *Moyo* 1988 (2) ZLR 79 (H)

I must hasten to point out that both cases do not support the submissions by counsel. I am of the view that they were cited for purposes of either misleading the court or as a result of thorough misunderstanding of the principles stated therein. In *Anand's* case the issue was whether a mandatory minimum sentence for possession of uncut emeralds unless special circumstances exist could be imposed on a wife who had taken blame for offence of a husband. It was held that the fact that the appellant probably possessed the emeralds on behalf of her husband and that his moral blameworthiness was far higher than hers constituted special reasons for not imposing the mandatory minimum sentence.

In fact on page 417B-C it was stated that:

> "What it all means is this. The appellant and her husband had knowledge of the presence of the gold and the emeralds in the doll with a sewn button. They had physical control and possession of the gold and the emeralds. See *R* v *He Kawter* [1986] LRC (Crim) 552 at 607; (1985) 157 CLR 523 at 589 per BRENNAN J. With the aid of the envelope the state proved beyond reasonable doubt the necessary element of possession. The husband's reluctance to have the doll opened in the absence of his wife established that he knew what was hidden in it." (my emphasis)

In *S* v *Moyo supra* the accused was convicted of an offence under the Precious Stones Trade Act 1978, the section under which he was convicted being one which carried a mandatory minimum sentence of three years' imprisonment unless special reasons were found to exist. There was a four year delay in finalizing the appellant's matter. On appeal it was held that "special reasons" under the Precious Stones Trade Act, are factors arising either out of the

commission of the offence or peculiar to the offender, which are out of the ordinary either in their degree or their nature. The excessive delay in bringing the accused to trial was a factor peculiar to him which was out of the ordinary in its degree. Had he been tried within a reasonable time as is required by the Constitution, it was likely that the total punishment would have been reduced because a court will always have regard to the cumulative effect of punishment.

I have deliberately gone to some length in outlining the facts and legal principles in these two cases in order to demonstrate their apparent irrelevancy in the matter before the court. These two cases therefore do not take the 2nd appellant's argument any further.

Equally untenable is 2nd appellant's argument that "possession should only attach to the holder not the owner." The clear answer to this rather surprising submission is to be gleaned from section 3 (1) of the Act which states:

> "No person shall, either as principle or agent, deal in or possess gold unless –
> (a) he is the holder of a licence or permit; or
> (b) he is a holder or tributor; or
> (c) he is the holder of an authority, grant or permit issued under the Mines and Minerals Act Chapter 21:05. Authorizing him to work an alluvial gold deposit; or
> he is the employee or agent of any of the persons mentioned in paragraphs (a), (b) and (c) and is authorized by his employer or principal to deal in or possess gold in the lawful possession of such employer or principal; and deals in or possess gold in accordance with this Act and the licence, permit, authority or grant, if any held by him." (my emphasis)

By employing the phrase "either as principal or agent" the legislature intended to exclude the requirement that the possessor must have physical custody of the gold. The meaning of the word "possess" in the Act would have been substantially different if the legislature had simply said, "no person shall possess gold …" *In casu*, the 2nd appellant admitted not only that the gold belonged to him but more significantly that he had given the 1st appellant the full mandate to possess and sell it for and on his behalf. This obviously makes him 1st appellant's principal. The 1st appellant was the agent. Both had knowledge of the presence of gold in 1st appellant's custody. Both knew that neither of them had a licence or permit to possess gold. In these circumstances, it would be absurd and illogical to punish the 1st appellant and let the 2nd

appellant go scot free. The legislature plugged this loophole by encompasing "principals" or "agents" in the essentials of the crime.

Assuming that this is insufficient a reason to dismiss these grounds, I now turn to common law principles. This will also cover the 2nd appellant's ground of appeal against conviction relating to absence of common purpose.

The concept of possession is discussed in Volume II *Common Law Crimes: South African Criminal Law and Procedure* by P.M. A. Hunt.

It is said at 733 that –

> "1. Physical Aspect
> X does not need to handle the property physically in order to assume custody and control. If on his orders it is locked in his cellar or car or in his minnows cellar or car it makes no difference that he has not even seen it, let alone touched it. Moreover, control maybe assumed by one of the modes of constructive delivery, and it may also be exercised mediately.
>
> It is often largely a common sense matter of degree to determine whether X's *actus* amounts to an assumption of custody and control when the thief (Z) retains control to a greater or lesser extent or hands over control for a limited period." (my emphasis)

In casu, the following is what transpired when essential elements were put:-

> "Q Correct that on 26 June 2013 and at around 23:00 hours and at Mukombe Complex Tsholotsho Business Centre you had 0.0298 grammes of gold?
> A Accused 1 Yes
> Accused 2 Yes
> Q Did you know that you had such gold in your possession?
> A Accused 1 Yes
> Accused 2 Yes. I knew that accused 1 had gold because it was mine." (my emphasis)

Later, during the inquiry into whether or not special circumstances exist, the following exchange occurred:-

> "Q Accused 2 any special circumstances in your case?

A I am the one who gave accused 1 the gold to sell. I was once employed and my employer left without giving me my salary. I then went on to sell the gold so that I could raise money for food." (my emphasis)

Quite clearly this exchange shows that the gold was on accused 2's orders placed on accused 1's person. It makes no difference that it was not in accused 2's pockets. The two were together at the time of arrest. They admitted possession of the gold and that the purpose was to sell it. Physical handling of the gold is not necessary before criminal liability is ascribed. At law, accused 2 had custody and control of the gold. Consequently this ground of appeal is dismissed.

Both appellants appealed against sentence. The first criticism is that the value of the gold being $1,00 is negligible and should have amounted to special circumstances. In *S* v *Gumbo* HB-48-89 the accused was in possession of an uncut emerald worth $3,00. He was an hotelier who had been given the stone as a keepsake by a guest many years ago. The cumulative effect of the following factors constituted special circumstances: the negligible value of the stone, that it was acquired as a gift before the Act provided for the minimum penalty, that it had been kept for ten years and that there was no question of financial gain for the accused.

In casu, while it is accepted that the value is negligible, this factor standing alone cannot amount to special reasons. The appellants were looking for a buyer and they were ignorant of the value of the gold. Obviously they were not going to sell it for less than US$1,00. The gold had been stolen from their employer in Bulawayo and they believed it was valuable. For these reasons this ground is dismissed.

Secondly, it was argued that 1st appellant is a youthful offender aged 22 years at the time of the offence. It is our law that the age of an accused is a relevant factor when assessing an appropriate sentence. However, for purposes of a finding of special circumstances, youthfulness on its own, especially where the accused is above the age of 18 years cannot amount to special reasons. See *S* v *Mutowo* HH-458-88 where an 18 year old in form one who found an automatic pistol while visiting Mozambique and intended using it for shooting birds escaped the mandatory

penalty after the court found that his age coupled with the purpose of possession of the gun amount to special reasons. *In casu* although accused was 22 years old at the time the offence was committed, he is married with two children and employed at Hope Fountain. He also admitted that he had been a gold panner for many years and that was "his way of life." He was fully aware of the consequences of possessing gold without a licence. I do not find any evidence of immaturity in his conduct. Consequently this ground is also dismissed.

Thirdly, it was contended that applicants acted out of necessity in that they were not being paid their salaries by their employer or that if they were ever paid it was insufficient to sustain themselves. Therefore, so that argument went, they acted out of starvation and necessity.

In my view, the defence of necessity must be confined within the strictest and narrowest limits because of the danger attendant upon allowing a plea of necessity to excuse criminal conduct. In *S* v *Beaule* 1984 (2) ZLR 146 (S) it was held that for an act to be justified on the ground of necessity (a) a legal interest of the accused must have been endangered, (b) by a threat which had commenced or was imminent but which was (c) not caused by the accused's fault; and in addition it must have been (d) necessary for the accused to avert the danger and (e) the means used for this purpose must have been reasonable in the circumstances.

In the present case, the appellants had other means open to them which they should have pursued before resorting to the final drastic step of stealing from their employer and possessing gold without a licence or permit. They should have sued the employer for non-payment of wages. I should point out that necessity has not been established on the facts of this case in that it has not been explained by the appellants why and how they travelled a distance in excess of one hundred kilometers i.e. Bulawayo to Tsholotsho. If they found themselves without food in Tsholotsho was this not their fault? What were they doing in Tsholotsho when they were employed in Bulawayo?

The magistrate was also criticized for not asking the reason why they committed the offence. However, this criticism is unwarranted and unjustified in that the record shows that

they gave a full explanation namely that they wanted to buy food. There is therefore no merit in this argument.

The final ground of appeal is that the magistrate should have asked the appellants' employer whether or not he had paid their salaries. As I pointed out above assuming the question had been put and the answer was in the negative this would not have amounted to special circumstances in this case. The reason is simply that other lawful options exist for remedying such non-payment of wages. In any case the appellants failed to put this question to their employer when he was in the witness stand despite earlier on having raised that issue.

For these reasons, I would dismiss the appeal in its entirety.

Kamocha J ……I agree