

THE STATE**Versus****FANDISON MOMBE**IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 9 NOVEMBER 2017**Review Judgment**

KAMOCHA J: On 16 January 2013 a review minute with which CHEDA AJ agreed was issued in these terms:

“The 65 years old accused pleaded guilty to contravening section 368 (1) of the Mines and Minerals Act [Chapter 21:05] he was found prospecting for gold without a licence or permit and was found guilty as pleaded. The conviction was proper and needs no more attention. The sentence, however, is a cause for concern.

The accused was sentenced to 14 months imprisonment which was all suspended for 5 years on the customary conditions of future good behaviour. The learned trial magistrate was quite aware of the fact that the offence that the accused was convicted of attracted a minimum mandatory sentence unless the court found special circumstances for not imposing the sentence mandated by law.

Consequently the court invited the accused to advance any special circumstances if he had any, after explaining to him what those were. In his response the accused stated that he had lived in the rural areas all his life. He said he was not aware he was committing an offence by doing what he had done. He alleged that rural folks in the Gwayi area around the Gwayi River near Kamativi, had descended into the Gwayi River unhindered.

He went on to complain that no one had warned him against doing what he did, for instance, the village head or the police. Hence he just joined the other gold panners. He went on to tell the court that he had 11 children. His wife would be stressed if both of them were to be convicted and sentenced to terms of imprisonment. He and his wife were found prospecting for gold along the Gwayi River illegally and were arrested.

Finally, the accused told the court that he was an old man who had never been to prison in his life time. Sending him to prison at this stage may result in him dying there. He concluded that he was a poor illiterate rural dweller.

The trial magistrate held the above to constitute special circumstances as contemplated by the law. He misdirected himself. There is nothing out of the ordinary about what the accused told the court in this case. These are ordinary mitigating features. At 65 even illiterate rural dwellers know that one cannot just go and start prospecting for gold. There was no evidence to suggest that people in the Gwayi and Kamativi areas have been prospecting for gold illegally since time immemorial. That had not been happening before. It was a new phenomenon in that area. A law abiding citizen would have made inquiries from the village head or better still from the police. The accused did not do that. He and his wife just decided to join the bandwagon. It was his fault and that of his wife that they never sought clarification from the authorities before joining other illegal prospectors who will face the same consequences if caught.

What is extra ordinary about being a poor illiterate rural dweller when the majority of the people in this country belong to that class? And what is extra ordinary about being 65 years with strong rural back ground and being a first offender when the law provides a mandatory minimum sentence for anyone caught prospecting for gold illegally irrespective of whether or not one is recidivist or first offender?

There were no special circumstances in this case and the accused ought to have been sentenced as stipulated by law. The trial magistrate had no discretion in the matter. The sentence he imposed was incompetent and cannot be allowed to stand. It is, in the result, hereby set aside.

The matter is remitted to the same court for the magistrate to pass the minimum mandatory sentence of 2 years imprisonment as required by law.

The trial magistrate should recall the accused and sentence him in terms of the law. Thereafter, the record of proceedings should be re submitted to this court for review without any culpable delay.”

The matter is only receiving attention after a period of 4 years 10 months. The delay is inordinate and culpable.

The trial magistrate explained that he had been transferred from Hwange to Bulawayo as acting Regional Magistrate when the record of proceedings returned from automatic review. He had not had the opportunity to go back to deal with his partly heard matters back in Hwange. Further, before authority was granted for him to go back to Hwange for unfinished business he was transferred to Masvingo as a substantive Regional Magistrate. No authority had been

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granted by the Chief Magistrate’s Office until he was fortuitously transferred back to Hwange as a Regional Magistrate after 4 years in March, 2017.

Through no fault of his the accused was waiting all that long for the 2 years imprisonment mandatory sentence to be imposed on him. This in my view, would result in a failure of justice if it where to happen. I hold that this grossly inordinate delay amounts to a special circumstance militating against the imposition of a minimum mandatory sentence of 2 years imprisonment. In the light of this finding the magistrate is at liberty to impose a sentence he sees appropriate in the circumstances.

The matter is therefore remitted to the trial magistrate to proceed accordingly.

Takuva J I agree