

THE STATE
versus
FRANK CHATYOKA

HIGH COURT OF ZIMBABWE
BHUNU J.
HARARE, 3 March 2014

Criminal review

BHUNU J: The record of proceedings in this matter was referred to me for review in terms of part v of the High Court Act [*Cap* 7:06] with a covering letter from the Provincial Magistrate Mashonaland Central. The letter reads:

“May the record be placed before the Reviewing Judge of the High Court with the following comments:

I picked this record during criminal record book checking and the sentence imposed by the trial magistrate is not covered by normal suspension conditions as contemplated by section 358 of the Criminal Procedure and Evidence Act.

The trial Magistrate conceded that the sentence imposed was wrong and its net effect will result in accused person that is the company continue (sic) mining so as to pay wages to its workers thereby perpetuating the conduct complained of. Given the damage to the environment and urgency of the matter may the review judge guide us on the way forward in this matter.

We stand guided by the Lordship’s wisdom and experience.”

Given the exigencies and urgency of the matter on 27 February 2004 I issued a provisional order calculated to avert the perpetuation and continuation of the offence with the magistrate’s blessing. The interim order reads:

- “1. The Magistrate’s order is patently unlawful. It cannot be enforced.
2. Please phone the police at Concession and tell them not to release the excavator pending a court order to follow.
3. If they have already released the excavator they should repossess it.”

I am advised by the Registrar that the order has since been complied with. The brief undisputed facts are that the accused was found by Environmental Management Authorities carrying out illegal mining operations on 19 December 2014 without an environmental assessment certificate in contravention of s 97 of the Environmental Management Act [*Cap* 20:27]

He was fined and ordered to effect reclamation to the damage he had done to the environment. In open defiance of the law and authorities the accused did not pay the fine. He did not reclaim the environmental damage he had caused as ordered. He carried on with his illegal mining as if nothing had happened.

On 14 January 2014 he was again found mining without an environmental assessment certificate in contravention of the law. He was then taken to the Magistrates Court where he was properly convicted on his own plea of guilty to a charge of contravening s 97 (1) (a) as read with s (2) of the Environmental Management Act [*Cap* 20:27].

The trial magistrate then sentenced the accused in the following vein:

“12 months imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving the implementation of a prescribed project without an environmental impact certificate and for which accused is sentenced to imprisonment without the option of a fine.

In addition accused person is given 4 months to work and cover the pits which he crated so as to enable him to pay the workers he had contracted.

Further, the excavator being held at Concession Police Station is to be returned to the accused forthwith.”

Francis Bennion in his book *Statutory Interpretation* at p 24 states that:

“A court can hardly confer jurisdiction on itself; and it certainly cannot do so in disregard of an injunction by Parliament. A court order made without jurisdiction is necessarily a nullity.”

In *Schierhout v Minister of Justice* 1926 AD 99 at 109 INNES CJ had this to say:

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect... And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected.”

Having regard to the above authorities it is clear that the trial magistrate had no power or jurisdiction to authorise the accused to carry on mining operations for 4 months in contravention of an express statutory prohibition under s 97 of the Act. That being the case the sentence passed by the trial magistrate is vitiated by illegality, void in fact, a nullity at law and of no force or effect.

It is accordingly ordered:

1. That the conviction of the accused in this case be and is hereby confirmed.
2. That the sentence passed by the trial magistrate be and is here quashed and set aside.
3. That the matter be and is hereby remitted to the Magistrates Court for sentencing before a different Magistrate.

CHIWESHE JP agrees.....