

THE STATE
versus
TINASHE MASHUNGO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 3 October 2019

Criminal Review

MUZENDA J: The accused, TINASHE MASHUNGO, was convicted of an attempt to contravene s 3 (1) of the Precious Stones Act [*Chapter 21:06*] (the Act) for “unlawful dealing in or possession of precious stones prohibited.” On 27 August 2019 he was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of future good behaviour. The exhibits were forfeited to the State for destruction.

FACTS

On 16 July 2019 the accused and his co-accused Lloyd Maviza (who was subsequently acquitted by the trial court after trial) appeared before the Provincial Magistrate sitting at Mutare facing a charge of contravening s 3 (1) of the Precious Stones Act [*Chapter 21:06*] for unlawful dealing in or possession of precious stones, in that on 22 April 2019 and at Debma 3 Area ZCDC Portal A Diamond Plant, Chiadzwa, Mutare Lloyd Maziva and Tinashe Mashungo (accused) unlawfully dealt in or possessed eleven (11) pieces of diamonds weighing thirty seven comma zero four (37,04) carats and valued at zero dollars without being exempted in terms of the said Act. Alternatively they were charged for contravening s 368 (1) of the Mines and Minerals Act [*Chapter 21:05*] for prospecting for minerals without a permit or licence, in that on the same date as in main charge at the mentioned place therein the two accused or one or both of them unlawfully prospected for diamond without a licence or permit thereby contravening the said Act.

What gave rise to the above charges is that according to the State Outline on 22 April 2019 Gandanhamo Benjamin, a ZCDC security guard at the mine he allegedly came across the two accused persons “prospecting’ for diamonds from a stock pile of ore. He then arrested them and recovered two chubs of suspected diamond ore which were in the green sack and escorted them to the Debma plant where he had two other security details manning that area. Upon arrival they then conducted a search and found accused in possession of 11 pieces of suspected

diamond in his pocket. The two were they escorted to CID Minerals Flora and Fauna Unit in Mutare for further investigations. The eleven pieces were sent to MMCZ for assaying and upon weighing and were established to be of no economic value.

Accused on the day of trial pleaded not guilty and stated in his defence outline that as they were walking with his co-accused, they were called by the security. They were told to pick a sack which contained ore. The security guard took them to the other security details where the guards started searching accused's pockets whilst accused was lying down with his face looking down, a foot was placed on his neck. The guards took his cell phone and money from his pockets. That is when they asked him where he had obtained the diamonds. He did not have any diamonds in his pockets. He did not know where the diamonds had come from.

The State relied on two witnesses. Benjamin Gandanhamo told the court that on the day in question around 0900 hours he spotted the two accused at a stock pile of processed diamond ore. When he arrived at the site he told the two that they were under arrest. Accused had a sack. He escorted the two to where his colleagues were. Lloyd Wareva, his workmate searched accused and asked him what was in accused's pocket. The witness saw accused producing a cell phone and a pouch of eleven stones. Accused was asked about the stones and he stated the stones were for his church. Accused told the guards that he was on his way to Muchena Business Centre.

The second witness was Lloyd Wareva who told the trial court that he instructed accused to take out everything from his pocket, accused produced a cell phone from his right pocket and from his left pocket there were about 11 pieces of suspected diamonds wrapped in a plastic paper. He took the accused to the police.

WHETHER THE COURT PROPERLY CONVICTED ACCUSED FOR UNLAWFUL DEALING OR POSSESSION OF PRECIOUS STONES

It is common cause that the assayer's report clearly shows that the 11 pieces of stones were of no value so they do not fall under the genre of precious stones where their dealing in nor possession can attract the attention of the law enforcement agent. Upon being asked by the security guard on the nature of the stones, the accused stated that they were for his church. It is not clear however what he meant by that, whether the stones belonged to his church or were blessed for a particular purpose, the record is not clear on that. What is however clear and incontrovertible is that accused did not admit to possession of precious diamond for any

purpose, whether for dealing nor prospective selling nor knowingly possessed what he genuinely perceived to be precious stones and in this case diamonds.

Section 3 (1) of the Precious Stones Act [*Chapter 21:06*] exclusively deals with precious stones not what appears to an ordinary person to be a precious stone. For an accused to be convicted of s 3 (1) of the Act he must have the necessary *mens rea* to accompany the *actus reus*, that is the possession of a precious mineral or dealing in, that is offering it for sale to a third party. This element was not proved by the State in this case. The accused in his plea as well as defence totally distanced himself from dealing in precious stones. Assuming the trial court accepted the version of the State again the element of dealing in precious stones was not proved. What will be left out for decision is the possession of the worthless stones whether their possession constituted a contravention of s 3 (1) of the Act.

Section 3 (1) does not deal with fake stones and consequently the section cannot cover issues of attempts. Moreso when there is no evidence of a conduct on the part of the accused where he tendered the worthless stones to a potential buyer believing that he or she was selling precious stones. The accused was passing through a highly secured area and stopped by the security guards. There is dispute as to whether he volunteered the eleven stones or they were planted on him. Obviously there are no independent witnesses as to what happened on the day in question. An examination of the evidence led by the State juxtaposed to the facts on the State outline more importantly on what happened leading to the recovery of the eleven stones is very unclear. The State outline is not clear as to who recovered the stones. The benefit of doubt is given to the accused.

The facts of this matter are distinct from that of *Saul Mapuranga*¹ where the accused was convicted on his own plea of guilty to a count charging him with contravening s 3 (1) of the then Precious Stones Trade Act, No. 8 of 1978 and sentenced to a mandatory term of three years imprisonment in terms of s 3 (2) of the Act. He appealed against both conviction and sentence, *KORSAH JA*², quoting *BEADLE ACJ* (as he then was)³ obiter stated:

“Cases are quite common where the accused believes apatite, a worthless mineral, to be an emerald, and sells it in the *bona fide* belief that it is an emerald. In such a case the accused is convicted of an attempt....”

¹ SC- 33/88

² On page 2 of the cyclostyled judgment

³ In *State v Nkomo and Others* 1976 (4) SA 800 at 802 F

In *S v Mabhena*⁴, the very s 3 (1) of the Precious Stones, fell for consideration in a case where the accused person was found in possession of a stone which he erroneously believed to be an emerald. It was held that the general principle is that “impossibility of attainment” does not prevent an attempt to contravene a statute from being an offence, unless there is something in the language of the particular statute which indicates that the legislature intended to depart from the general rule and that such attempts should not be offences. The legislature’s intention was that persons who deal in stones erroneously believing them to be precious should be punished and the position of persons who possessed stones in similar circumstances are guilty of an attempt to possess the stone. Thus even though there was in transfer of the stones, real or fake to the accused, the accused would nonetheless be found guilty of an attempt to deal in precious stones on the basis of the facts established.

The facts established in this matter *vis-à-vis* the conviction of the accused do not show in my view that accused is guilty of an attempt. As already stated herein above it has not been established by the State that accused believed that he was possessing diamonds nor did he attempt to offer for sale, these stones to anyone on the belief that there were precious stones. Evidence of dealing in precious stones on the part of the accused lacks totally from the perusal of the record. It was not safe to convict the accused.

As already alluded to herein, the conviction of the accused was unsafe, the conviction of the accused of an attempt to contravene s 3 (1) of the Precious Stones Act [*Chapter 21:06*] and the sentence of 3 years imprisonment with a year imprisonment being suspended, is quashed and substituted by a verdict of Not Guilty and the accused is entitled to be immediately released.

MWAYERA J agrees_____

⁴ 1982 (1) ZLR 6