

THE STATE
versus
THOMAS GONDO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 November 2014

Review Judgment

MUREMBA J: The accused was charged with and convicted of contravening s 3 (1) as read with s 3 (3) of the Gold Trade Act [*Cap 21:03*] for possession of 0,02g of gold worth US\$0,77. He was convicted on his own plea. I find the conviction proper and I hereby confirm it.

The accused was sentenced to the minimum mandatory five years imprisonment. This was after the court had made a finding that there were no special circumstances warranting the imposition of a non- mandatory sentence.

Section 3(3) which is the penalty provision reads:

“(3) Any person who contravenes subsection (1) shall be guilty of an offence and liable—

(a) if there are no special circumstances in the particular case, to imprisonment for a period of not less than five years or more than ten years; or

(b) if the person convicted of the offence satisfies the court that there are special circumstances in the particular case why the penalty provided under paragraph (a) should not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding five years or a fine not exceeding level nine or twice the value of the gold that is the subject-matter of the offence, whichever is the greater, or to both such fine and such imprisonment” (my emphasis)

In carrying out the enquiry into special circumstances the trial magistrate gave a good explanation of what constitutes special circumstances, but the misdirection that she made was

to ask the accused for special circumstances surrounding the commission of the offence only, yet s 3 (3) (b) does not define special circumstances so as to exclude circumstances peculiar to the offender. The relevant portion which I have underlined above for emphasis simply says, “special circumstances in the particular case.” The way this section is worded means that special circumstances should be defined broadly instead of narrowly. The court should take into account both the circumstances surrounding the commission of the offence and circumstances, facts and conditions affecting and are peculiar to the offender.

The accused is a first offender who admitted to the charge. He is aged 34 years. He is married and has two children. He resides in rural Murehwa and survives on subsistence farming. He has neither savings nor assets of value. In mitigation the accused indicated that he committed the offence out of ignorance. When he was asked for special circumstances which prompted him to commit the offence he stated that he had none.

The facts of this case are that on 16 June 2014 a truck which was travelling along the Harare-Nyamapanda road spilled some gold ore. This vehicle did not stop. It proceeded with its journey. The accused was found picking the gold ore by police officers who had been alerted by some member of the public. The accused had in his possession 10g of gold ore. When the gold ore was assayed it had a gold content of 0,02g of gold.

I am of the view that, considering the circumstances in which this offence was committed, this is a case where the trial court should have made a finding that there were special circumstances warranting the imposition of a non-mandatory sentence. Although the accused had said that there were no special circumstances the court should have considered the circumstances in which the accused committed the offence as outlined in the state outline since the accused was convicted on his own plea of guilty. It means that the facts are not disputed.

The accused is an unsophisticated rural dweller who was ignorant that it is a criminal offence to pick up gold ore which has fallen off a moving truck. To him it was manna from heaven which he simply picked up. He is not a man who went out of his way to look for the gold, but it was a simple case of the gods having smiled on him since it is the gold which came to his village.

This is a clear case where the accused was exposed to the temptation of committing a crime which he would otherwise not have committed. Over and above the temptation, the accused was ignorant that it was a crime to pick the gold ore. A separate factor to consider is that the gold that the accused picked is of a very negligible value, only \$0.77. In the case of

S v Mugangavari 1984 (1) ZLR 80 (SC) it was stated that minimal value does not *per se* constitute a special circumstance, but it is a mitigatory factor which should be weighed together with other mitigating and aggravating factors to see if cumulatively special circumstances exist.

In *S v Chidembo* S-118-89 it was stated that the cumulative effect of a number of factors can constitute special reasons or special circumstances. In *casu* the temptation to the accused to pick up gold ore which had fallen off a moving truck, the accused's ignorance that he was committing an offence and the negligible value of the gold considered cumulatively constitute special circumstances.

The sentence that was imposed by the trial magistrate is set aside and substituted with the following sentence:

“4 months imprisonment.”

The accused was sentenced on 21 July 2014, in a weeks' time he will be completing his fourth month in prison. He has been punished enough and as such he is entitled to his immediate release. I will issue a warrant of his liberation for him to be released immediately.

MUSAKWA J agrees.....