THE STATE
versus
JOSIAH CHINENGEYI
and
ALOIS CHAPU
and
DAVID TEMBA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 28 JULY 2017

Criminal Review

MUSAKWA J: The accused persons were convicted of contravening s 368 (1) as read with s 368 (4) of the Mines and Minerals Act [*Chapter 21:05*]. They were sentenced to 18 months' imprisonment which was wholly suspended for 3 years on condition of good behavior.

The agreed facts were that the first and second accused persons reside in Kamutora village whilst the third accused resides in Tambudze village, Mudzi. On 7 July 2017 the accused persons entered Radnor mine whilst equipped with hammers, chisels and sacks. They entered into a shaft and started to extract gold ore. Mine security personnel detected the illegal activities and way-laid the accused persons. The third accused person was arrested as he attempted to leave the mine and he had in his possession a sack of gold ore. The third accused led the guards into the shaft where the co-accused were arrested.

In canvassing special circumstances, it emerged that the accused persons claimed to be employed and that their employer has a licence to prospect for gold. Then the following rather absurd exchanges took place-

"Q- So you were at work when you were arrested?

A-1. Yes 2. Yes 3. Yes

Q- How far from your place of work is the place you were arrested?

A-1. It's the same mining area.

2. It's the same we just walk.

3. It's the same."

From this very cursory exchange the trial court somehow was satisfied that the accused persons were gainfully employed by someone with a licence to prospect for gold. It further reasoned that the accused persons strayed onto another person's claim but they had the authority to prospect on behalf of their employer. This technicality was held to be a special circumstance.

I did refer to the exchanges between the trial court and the accused persons as absurd. This is because the trial magistrate appeared very willing to accept the accused's explanations as true without seeking further particulars about their employer and the location of this would- be mine. This is particularly so if one considers that the outline of state case indicates that the accused persons are unemployed. It only emerged during mitigation that the accused persons claimed to be employed by one Japhet Manungo as "panners". In all the exchanges the prosecutor played no role as he remained supine in the background, refraining from seeking to cross-examine the accused persons, as was expected of him in such a situation.

A court sentencing an accused person has some considerable latitude regarding receiving further evidence. Section 334 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that:

> "The court may, before passing sentence and for the purpose of informing itself as to proper sentence to be passed, receive—
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> (*a*) evidence on oath, including hearsay evidence;
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> (*b*) affidavits and written reports which may be tendered by the prosecutor, the accused or his legal representative;
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> (*c*) written statements made by the prosecutor, the accused or his legal representative;
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> (*d*) statements not on oath made by the accused:
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> Provided that—
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> (i) no hearsay evidence, other than evidence of a statistical nature, and no affidavit, written report or written statement shall be called or tendered by the prosecutor unless the accused or his legal representative consents thereto;
>
> (ii) no hearsay evidence, other than evidence of a statistical nature, and no affidavit, written report or written statement shall be called or tendered by the accused or his legal representative unless the prosecutor consents thereto;
>
> (iii) the court in which any affidavit or written report is tendered may cause the person making it to be summoned to give oral evidence in the proceedings;
>
> (iv) no hearsay evidence, other than evidence of a statistical nature, shall be given by a witness called by the court pursuant to its powers conferred by section *two hundred*

> *and thirty-two* unless both the prosecutor and the accused or his legal representative consent thereto."

The trial court did not invite the prosecutor to make submissions, which is an irregularity. On his part, the prosecutor did not seek to make any submissions. Both the magistrate and prosecutor abdicated their responsibilities of ensuring that justice must be seen to be done.

In *S* v *Chakanetsa* 1981 ZLR 48 an accused person charged with unlawful possession of precious stones gave a fanciful explanation surrounding the circumstances under which he claimed to have found the stones. LEWIS JP referred to the remarks of BEADLE CJ in the unreported judgment of *Mutambandini Chiromo* v *S* A.D. 143-76 where the learned chief justice said the following:

"I draw attention to these unsatisfactory features in the hope that from now on prosecutors will not, simply in the interests of expeditiously getting rid of cases, willy-nilly make admissions of fact which are not only wrong but also unjustified."

More poignant remarks were to be made in *S* v *Fusirayi* 1981 ZLR 56. The case involved the unlawful possession of gold and the accused person gave an equally unconvincing explanation of how he got to possess the gold. FIELDSEND CJ made the following remarks at 58:

> "The inter-relationship between the prosecution and the court is a very important one. Both are concerned with the impartial administration of justice. There is a danger of at least a suspicion of favouritism if prosecutors agree with the defence on improbable version of the facts which greatly what might otherwise be a serious offence, and like Caesar's wife, the prosecution must be above any trace of suspicion. It is not enough that the prosecutor has no evidence to refute an improbable version put forward by the defence: unless he has evidence or information on which he believes that version may well be true-in which case he should explain his position openly to the court-he should not just accept the defence story. It is always open to him to lead his evidence of what occurred and leave it to the court to draw the proper inferences, in the light of what the accused may or may not say; and if the accused does give an improbable version in evidence he always has the weapon of cross-examination. I do not want to be understood to be saying that there is necessarily anything wrong in an agreed statement of facts. That procedure is essential in the normal run of cases to the smooth and speedy operation of the court's business. All I am saying is that prosecutors should not readily agree to accept facts which are inherently improbable, unless they have good reason for believing that they are in fact the truth."

Although the criticism in the above excerpt was aimed at the prosecution, it should equally apply to the court. This is because in the present case the court did not invite the prosecution to make any submissions or to rebut what the accused persons had submitted.

Despite the bungling that occurred during mitigation, there is also a wholly unrelated issue affecting the conviction.

Section 379 of the Mines and Minerals Act provides that-

> "Any person who breaks, severs or removes any mineral from any mining location, reef or deposit, or who takes, removes or conceals any mineral, slags, slimes, amalgam, residues, tailings or concentrates, the product of any mining location, reef or deposit, with intent to deprive the lawful owner or holder thereof, shall be guilty of theft and liable to be prosecuted and punished accordingly."

The same Act defines mineral as follows:

> "mineral" means—
> (*a*) any substance occurring naturally in or on the earth, which has been formed by or subjected to a geological process; and
> (*b*) any substance declared to be a mineral in terms of paragraph (*a*) of subsection (3), to the extent of such declaration; but does not include—
> (i) except for the purposes of Part XX, mineral oils and natural gases; or
> (ii) any substance declared not to be a mineral in terms of paragraph (*b*) of subsection (3), to the extent of such declaration;"

Notwithstanding the accused persons' pleas of guilty, their conduct does not amount to prospecting if we go by the elements of the offence as provided in s 379. Essentially the accused persons were removing mineral ore from a mine. Thus they were committing theft and should have been charged with contravening s 113 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

It follows that the accused persons did not understandingly plead to the charge that was preferred against them. In addition, they should not have been charged with unlawful prospecting. Accordingly, the conviction and sentence is hereby set aside.

MWAYERA J agrees……..