

THE STATE
versus
OSCAR JOTO

HIGH COURT OF ZIMBABWE
NDEWERE & CHITAPI JJ
HARARE, 29 September, 2017 and 30 October, 2017

Review Judgment

CHITAPI J: The accused was convicted of contravening s 368 (1) of the Mines and Minerals Act, [*Chapter 21:05*] on 12 October, 2016 by the Senior Magistrate at Bindura Magistrate's Court. He was sentenced to a mandatory prison term of 2 years. On review, I could not make out the handwriting of the magistrate. I caused the record to be transcribed. I have now gone through the record of proceedings.

The charge to which the accused pleaded not guilty was set out as follows:

“Charged with the crime of “contravening s 368 (1) of the Mines & Minerals Act, Chapter 21:05. Prospecting for minerals without a licence or permit”. In that on the 14th day of September, 2016 at Dzamara Shops, Kitsiyatota; Bindura, Oscar Joto, Chamunorwa Banda and Victor Chiyambiro one or more of them unlawfully prospected or searched for minerals without a permit or licence in contravention of the said Act....”

Although the charge sheet refers to three accused persons, only the accused Oscar Joto is the one who stood trial before the magistrate. This review concerns the proceedings pertaining to him.

The outline of the State case reads as follows:

1. Accused person Oscar Joto is a male adult aged 23 years residing at Chikafu village, Shamva and he is not employed.
2. The complainant in this case is the State.
3. On the 14th day of September 2016 at around 2030hours, a team of MBCU detectives comprising of D/Sergeant Chinyanga, D/Constable Mutero and D/Constable Mabi were on routine patrol at Dzamara shops, Kitsiyatota Bindura.
4. The team noticed the accused person behind Dzamara shops prospecting for gold without licence.

5. The accused person was sieving gold ores using a wooden sided safe and a green plastic dish.
6. The detectives introduced themselves to the accused person and asked for the relevant documents which allowed him to prospect for gold but he failed to produce any leading to his arrest.
7. A wooden sided safe and a green plastic dish were recovered as exhibits and can be produced in court as evidence.
8. The accused person acted unlawfully.

It is apparent from the outline of the case and in particular with reference to paragraphs 4-6 that the State case was based on the following allegations (the underlining is mine for emphasis)

- (i) that a team of policemen noticed the accused person prospecting for gold behind the shops.
- (ii) that the accused was in the process of sieving gold ores with the aid of a sieve and a plastic dish. It was around 2030hours but there was light from electricity source as well as moonlight.
- (iii) that police pounced on the accused and demanded that he produce documents which authorised him at law to prospect for gold. The police arrested him on failure to produce any documents.
- (iv) that the police recovered the sieve and plastic dish.

It is further apparent from the facts and the record of proceedings that the gold ore which the accused was allegedly sieving was not recovered by the police at the time of the arrest of the accused. The absence of the gold ore was not raised as an issue by the court *a quo* even though in the judgment the magistrate made a finding as follows:

“ I find that the accused person was caught red handed sieving gold ore in a sieve which was produced in this court as an exhibit. That is the reason why he could not explain his mission/business behind the shops that night.”

During the trial, only the sieve was produced as an exhibit. I observe here that if the accused person was sieving gold ore, there would have been ore particles inside the sieve and the finer ore and earth whether with gold residue or not would have been collected in the dish. The whereabouts of the dish and especially the ore as I have observed was not interrogated nor did the magistrate make a ruling thereon.

In his defence outline which he adopted as his evidence in chief, the accused admitted that he was seated near the gold panners but was not panning. He outlined that when the police arrested the panners they just bundled him together with them and mistook the accused for a panner. His explanation both to the police and to the court that he had been sent by his uncle to collect some money was dismissed. Under cross examination by the prosecutor, the accused maintained his innocence and testified that his innocence was borne by the fact that whilst his co-accused had absconded court, he continued coming to court because he had nothing to be scared of.

The police evidence that the accused was sieving gold ore was disputed by the accused person. When the prosecutor tendered the exhibits through its first witness Executive Chinyanga, a police officer the transcript shows as follows:

“Q. What are these two

A. They are the exhibits

PP. I beg leave to tender them as exhibits

By accused: Its those I was seated with who used them- no objections though.

Q. The accused is denying the offence

A. He was prospecting.

Q. He said he was not panning.

A. He was panning.”

In cross-examination, the accused asked the following pertinent questions:

“Q. Did I not tell you that I was not panning

A. You said so at office

.....

Q. Where was the gold ore

A. You spilled the contents to the ground.

Q. Why didn't you gather it after arrest.

A. It was at night and it was not easy to accomplish that.”

The evidence of the second state witness, another policeman was more or less the same as that of the first witness. He did not add any more value to the State evidence.

There are two issues to this case which appear not to have been dealt with satisfactorily by the magistrate. The first one concerns the absence of the so called gold ore which the accused was

allegedly sieving. In my view, this would be the material evidence required to be present in order to conclusively ground a charge of panning or sieving for gold, that is, assuming that such conduct amounts to an offence of prospecting for minerals in contravention of s 368 (1) of the Mines and Minerals Act. Without the evidence of the ore being available, it could not be held proved beyond reasonable doubt that the accused was caught sieving or processing gold ore. At best the magistrate should have held that the accused was caught in possession of instruments used in gold panning or sieving for gold or minerals. Such a charge is however not provided for under the Mines & Minerals Act and in any event the accused was not charged with such an offence.

The second issue concerns the propriety of the conviction on the facts even if one was to hold that the accused was arrested whilst in the process of sieving gold ore. In my view such conduct cannot fall within the definition of prospecting for minerals as set out in the charge sheet in this case. Section 368 of the Mines & Minerals Act, reads as follows:-

“368 **Prospecting prohibited save in certain circumstances**

- (1) Subject to subsections (2) and (3), no person shall prospect or search for any mineral, mineral oil or natural gas except in the exercise of rights granted under a prospecting licence, exclusive prospecting order or special grant or unless he is the duly authorised representative of the holder of such licence, order or special grant and acting in the exercise of such rights.
- (2) No person shall prospect or search for any mineral, mineral oil or natural gas unless he is an approved prospector.
- (3) No approved prospector registered for Communal Land only in terms of subparagraph (i) of paragraph (a) of subsection (3) of section fifteen shall prospect or search for any mineral, mineral oil or natural gas elsewhere than in Communal Land.
- (4) Any person who contravenes subsection (1), (2) or (3) 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 two years; or
 - (b) if the person convicted of the offence satisfied 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 two years or a fine not exceeding level ten.
- (5) A court sentencing a person under paragraph (a) of subsection (4) shall not order that the operation of the whole or any part of the sentence be suspended.

The words “prospect” and “search” are not defined in the Mines & Minerals Act. The words must therefore be defined by giving them their ordinary grammatical meaning. I have not readily been able to find decided cases in which the constituent elements of the offences of prospecting or searching for any mineral have been canvassed in the decided cases that I have read through. I am however not handicapped by my failure to find decided cases because the provisions of s 368 (1) are clear.

Prospecting entails a physical search for a mineral, after which exploration and mining then follows. I have sought the definition of the word prospect in the College Dictionary Revised Edition and the definition given is “to search or explore, to work a mine”. I also accessed the website “en.wikipedia.org/wiki/Prospecting” on 26 September, 2017. Prospecting is given a wide definition which includes panning, sifting and outcrop investigation looking for signs of mineralisation. On the basis of the Wikipedia article it can be argued that the accused was properly charged with prospecting or searching for a mineral. The same problem however still arises, that in the absence of the supposed ore which the accused was sifting, the conviction could not be sustained. For example, if a person just puts together soil and sifts it as happens in the building industry where sand is sifted to get fine sand, this activity does not ground an offence. It was therefore important that some evidence be led that what was being sifted or sieved had a connection with a search for a mineral.

In *casu*, the accused was arrested at a shopping centre. He was said to be sieving “gold ore”. He was not arrested at or within a mining location. Section 368 (1) does not define a mineral. In the definition section under the Mines & Minerals Act, the word mineral is defined as follows–

- (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 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.

The accused was convicted in the absence of evidence of any substance envisaged in the definition of mineral. It was necessary for the State to not only produce or lead evidence of the substance which it called “gold ore” but to further prove that the substance was a mineral;

that is to say that, it was a substance occurring naturally in or about the earth formed by or subjected to a geological process.

In conclusion, the production of the instrument(s) used in panning or sieving without further ado did not prove the offence of contravening s 368 (1) of the Mines & Minerals Act. There was need for evidence of the nature of the substance which was being sieved to be led. The conviction was therefore improper and is in terms of s 29 (2) (b) (i) quashed and set aside.

A warrant of liberation for the immediate release of the accused has been issued.

NDEWERE J: agrees