WILFORD HOVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 9 December 2011

Bail Application - Ruling

R Chavi, for the applicant
S Fero, for the respondent

DUBE J: The applicant applies for bail pending appeal. The applicant was found in possession of 1,35 grams of gold valued at US$49-69. He was a first offender who pleaded guilty to the offence. The State was not opposed to bail and conceded that the sentence imposed is harsh and did not support it. The court considers that the concession is not proper. The court is not bound by the concession of the State counsel and will only accede to such concession where it is properly made. The applicant was charged of possessing gold without a licence in terms of s 3(1) of the Gold Trade Act, [*Cap 2*:*03*], (here in after referred to as the Act). He was convicted and sentenced to the minimum mandatory sentence provided for in terms of the Act. He was sentenced to five years. After he had given his mitigation, the learned trial magistrate explained the meaning of special circumstances and invited the applicant to make submissions on special circumstances. The applicant explained that he used the remains of some ore stolen by some thieves to extract gold.

The requirement and meaning of special circumstances was fully and properly explained to the applicant and the magistrate properly found that his explanation did not amount to special circumstances. Having found that there were no special circumstances, the trial magistrate was required to impose a sentence of five years or more. The minimum mandatory sentence prescribed by the Act is five years and the trial magistrate had a discretion to impose a sentence of between five years and ten years. The magistrate could not impose any sentence below five years because of the finding that there were no special circumstances.

Where the legislature prescribes a mandatory minimum sentence, that sentence is the least sentence a court can impose. Any lesser penalty of a custodial nature, a fine or community service would not be appropriate.

The trial magistrate exercised his sentencing discretion properly and cannot be faulted for imposing the sentence imposed. This sentence is in line with sentences imposed in cases of a similar nature. In *S* v *Emmanuel Shoko* HH 95/10 the accused possessed 0,62 grams valued at US$20-62. No special circumstances were found and the accused was sentenced to twenty four months, eighteen suspended on conditions. This court on review, set aside the sentence and remitted the matter for the trial court to recall the accused to appear before it and impose the mandatory sentence as required at law.

There is no basis upon which any court may interfere with the sentence imposed. It is therefore unlikely that an appeal court may interfere with this sentence.

There are no prospects of success on appeal and there is an increased risk of abscondment as the applicant has been convicted and faces a lengthy custodial sentence. Five years is indeed a severe sentence and this fact may induce the applicant to abscond and not serve his sentence should the appeal fail. There is a real likelihood that the applicant may abscond as he might find it worthwhile absconding rather than serve his sentence. The interests of justice do not favour the applicant being released on bail at this state.

Bail is denied.

I Murambasvina Legal Practitioners, applicant's legal practitioners
Attorney-General's *Office*, respondent's legal practitioners