VHAU JAMARI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA J & MANGOTA J
HARARE, 18 May 2015 and 16 February 2016

Criminal Appeal

D. Halimani, for the applicant
T. Mapfuwa, for the respondent

MANGOTA J: The appellant, a 24 year old, first offender was convicted, on his own guilty plea, of contravening section 3(1) (a) of the Gold Trade Act [*Chapter 21:03*] ["the Act"] as read with s 45 of the Finance Act [No. 2] 2006.

After convicting the appellant, the court *a quo* inquired into the existence or otherwise of special circumstances. It found none. It, therefore, sentenced him to a mandatory minimum sentence of five years imprisonment.

The state allegations were that, on 25 October 2008 and at Dindi Business Centre, Chief Chitsungo's area, Pfungwe, the appellant was found to have had in his possession 0.15 grams of gold. He had neither a licence nor a permit which authorised him to possess the gold.

The appellant's appeal was against sentence. He criticised the manner in which the trial magistrate went about to establish the existence or otherwise of special circumstances. He submitted that the magistrate did not explain to him in full what the words "special circumstances" meant. He said the inadequate explanation prejudiced him. He stated that the explanation disabled him from avoiding the mandatory minimum sentence of five years imprisonment. He moved the court to set the sentence aside and remit the case to the court *a quo*

for a proper explanation of "special circumstances", a recording of the same and passing of a fresh sentence.

The respondent agreed with the appellant. Mr *Mapfuwa*, for the respondent, submitted that the explanation which the magistrate gave was incorrect and inadequate. He said it was couched in, and confined to, the words "special or extraordinary mitigating factors". He stated that the explanation should have made reference to special circumstances which related to the commission of the offence or which were peculiar to the offender. He, like the appellant, prayed that the sentence be set aside and the case be remitted to the court *a quo* for an inquiry into the existence or otherwise of special circumstances.

The Act under which the appellant was convicted does not define the words "special circumstances". It simply states that such must be in the particular case. They must, once a court is satisfied of their existence, justify the imposition of a lesser penalty.

Special circumstances as provided for in the Act fall within the spectrum of what Ebrahim J (as he then was) made reference to in *S* v *Mbewe & Ors*, 1988 (1) ZLR 7 wherein he stated at p12, para H that:

> "……. where the Legislature has not placed a restrictive application on the meaning of special reasons or circumstances, any extraordinary factor arising out of the commission of the offence or which is peculiar to the offender may constitute special reasons or circumstances."

The record showed that, after the appellant's conviction, the court *a quo* took down his mitigation. The record showed, further, that after the appellant's mitigatory matters had been recorded, the trial magistrate proceeded to deal with the appellant's case in terms of s 3 (3) (b) of the Act. It, in short, instituted an inquiry. The inquiry appears at p 13 of the record. It reads:

> "INQUIRY INTO SPECIAL CIRCUMSTANCES:-
> Court: The offence you have been convicted of carries a mandatory minimum penalty of 5 years imprisonment. This mandatory minimum can only be avoided if are (*sic*) able to show this court that there are special circumstances in this case. Do you understand?
> Accused: Yes
> Court: Special circumstances are basically special or extra – ordinary mitigatory factors in regards their nature and extent. Do you understand?
> Accused: Yes
> Court: Are there any special mitigatory factors you would like this court to know about?
> Accused: Besides the obvious that I am the only breadwinner.
> Ruling: There are no special circumstances in this case".

It is evident, from the foregoing, that the court *a quo* took all necessary steps to explain to the appellant the meaning and import of special circumstances. The explanation was given in a clear and unambiguous language. The court *a quo* advised the appellant of:

(a) what sentence he was likely to endure;

(b) how he could avoid the mandatory sentence - and

(c) what was constituted by the words special reasons or circumstances

The explanation which the trial magistrate made put the appellant on notice. He knew that the inquiry had a bearing on the sentence which would be imposed. He was asked if he understood what sentence he would receive and how he could avoid that mandatory sentence. He answered in the affirmative. The issue of what special circumstances entailed was explained to him. He was asked if he understood the explanation. He said he did. He was invited to state whether or not there were any special circumstances in his case. The import of his answer was that there were none.

The appellant was not an illiterate person. He was a school teacher at Mutata Secondary School. He, therefore, appreciated what was taking place at each stage of the inquiry. If any matter was not clear to him as he suggested in his appeal, he would most certainly have asked the court a *quo* to clarify such for his benefit. He did not state, in his appeal, that someone prevented him from seeking clarification. There was nothing, in our view, which prevented him from asking the trial magistrate to clarify any matter(s) which was or were not clear to him during the inquiry.

The explanation which the trial magistrate made was compliant with what Dumbutshena CJ [as he then was] stated in *S* v *Dube & Anor*, 1988 (2) ZLR, 385. He remarked at p 386 B – C as follows:

> "In cases where the law provides a minimum penalty unless special circumstances exist, the accused should be told what the penalty is and the meaning of special circumstances".

The magistrate went out of his way to explain to the appellant the meaning of special reasons or circumstances. The law does not require him to explain the phrase by way of examples. All he is required to do is to show, as he did, that such circumstances are extraordinary and are separate from ordinary mitigatory factors. The fact that he went into the inquiry after he had recorded the appellant's mitigation says it all.

Whether or not the explanation which the magistrate gave related to special circumstances which arose out of the appellant's commission of the offence or to circumstances which were peculiar to him as an offender would have changed nothing.

The conduct of the appellant at the mere sight of the police ruled out of his case the existence of special circumstances. The guilty state of mind which he exhibited to the police was pertinent. That state of mind was captured in para(s) 3 and 4 of the prosecution's state outline. The para(s) read:

> "3. On the 25th October, 2008 and around 1200 hours Justice Magodo who is a Police District Reaction Commander and in (sic) company of some other police details proceeded to Dindi Business Centre, Mutawatawa.
> 4. On arrival at Dindi Business Centre (sic) the accused person ran away from the police vehicle. The police were then suspicious to his reaction and they then chased him (*sic*) and caught him (sic). Justice Magodo caught the accused person and searched him in the company of Constable Chimuta (sic). The accused was found in possession of 0.15 grams of gold ore".

What special circumstances, we ask, could the appellant have advanced to the court *a quo's* satisfaction in the face of the guilty state of mind which he exhibited to the police. It is our view that, when he uttered the words "besides the obvious that I am the only breadwinner" to the last question which the trial magistrate raised with him during the inquiry, that was an honest answer which he gave. The answer was not accidental. It did not arise out of the fact that the words "special circumstances" had not been adequately explained to him. It did not, in our view, arise out of the fact that he did not understand what was taking place when the inquiry was in progress. He gave that answer with a clear appreciation of what the magistrate's question called upon him to address his mind to. He realised that no special circumstances arising out of his commission of the offence or were peculiar to him as an offender existed in his case. He, with full understanding of the meaning and import of the explanation, responded as he did. The answer which he proffered was an honest response to an honest question which the court *a quo* raised with him. The appeal which he mounted was, in our view, an afterthought. His criticism of the inquiry which the court *a quo* instituted was unwarranted. Case authorities which the appellant cited in support of his argument either supported what the magistrate did during the inquiry or were distinguishable from the facts of this case. He cited the case of *S* v

Nziradzepatsva, 1999 (1) ZLR 568 the headnote of which spells out the duties of a magistrate towards an unrepresented accused. Paragraph D of the headnote reads:

> "The magistrate has a duty to ensure that the accused's case is put fairly, to assist the accused in his defense, where necessary, and to see that the prosecutor does not take advantage of the accused. To ensure that the accused has the necessary knowledge to conduct his defence, the magistrate himself (not the court interpreter) should give careful and detailed explanations of what is expected of him. Such explanations should be recorded. In particular the court should ensure that technical or specialized expressions are carefully explained in simple and understandable terms".

The trial magistrate remained alive to the fact that the appellant was not legally represented. He separated the appellant's mitigatory factors from the inquiry. He conducted the inquiry in clearly defined stages making sure that the appellant understood the subject matter of the stage he was dealing with before he proceeded to the next stage. He, in our view, discharged his duties towards the appellant satisfactorily as was stated in *S* v *Nzaradzepatsva*.

The case of *S* v *Zaranyika*, 1997(1) ZLR 539 to which the appellant referred us enunciated the same principle as was stated in *S* v *Nzaradzepatsva* (*supra*).

S v *Chaerera* 1988(2) ZLR 226(S) was the other case authority which the appellant cited. We had the occasion to read that case. We noted that the circumstances of *S* v *Chaerera* were distinguishable from those of the present case. In *S* v *Chaerera* the court *a quo* lumped together the appellant's mitigating factors and the inquiry which pertained to the existence or otherwise of special circumstances. In the case before us, a clear distinction was made between those two important aspects of a criminal trial.

We were, on the basis of the foregoing, satisfied that the appeal had no merit. We held and still hold the view that the explanation which the trial magistrate gave during the inquiry was not only adequate but was also proper.

The appeal is, in the result, dismissed.

CHATUKUTA J: agrees…….

Wintertons, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners