

**THE STATE**

**Versus**

**LOVEMORE MOYO**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 7 JULY 2011

Review Judgment

**KAMOCHA J:** The accused in this matter was charged with possessing gold without a licence or permit in contravention of section 3(1) (a) of the Gold Trade Act [Chapter 21:03] – “the Act”. He tendered a plea of guilty and was accordingly found guilty as pleaded. The conviction is proper and nothing turns on it.

The sentence imposed by the trial court is, however, a cause for concern. The accused was sentenced to undergo 24 months imprisonment of which 12 months imprisonment was suspended for 4 years on the customary conditions of future good behaviour. The remaining 12 months imprisonment was suspended on condition that the accused performed community service at Zvishavane Secondary School.

The Act provides in section 3(3) (a) that:-

“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.”

When the accused was invited by the court to advance special circumstances, if any, why the mandatory minimum sentence of 5 years should not be imposed on him, he said this.

He told the court that the reason why he committed the offence was that his wife was pregnant with twins. One of fetuses was positions outside the womb. A doctor told him that that posed a serious risk to the mother’s life. The doctor then recommended that she should undergo a surgical operation. The accused had no money for the operation as he was not employed. He then decided to get the gold he was found in possession of leading to his arrest before he could sell it. The gold weighed 0.19 grams with a value of \$7,69.

What the accused did, did not assist his situation in any way. He was arrested before the operation on his wife was done. The value of the gold would not have covered the medical expenses. It was like a drop in the ocean.

The trial court concluded that what the accused told it amounted to special circumstances and imposed a sentence other than the one mandated by law. The court fell into error.

The accused's behavior is not acceptable and is irresponsible. When faced with such a situation he should have tried to borrow money from relatives and friends. That way he would have been able to raise the amount required for the operation instead of resorting to criminal activities which yielded a paltry \$7,69. He knew that if arrested he would be sentenced to prison resulting in him leaving the problem unresolved. He was arrested before the operation was done.

It is wrong for anyone to resort to criminal activities because he has a problem. That would be recipe for anarchy if it were to be countenanced by society in general and by the courts in particular since so many people have countless different problems in life.

The trial court opined that the accused was forced by circumstances to commit the offence. That reasoning is faulty. If the accused had believed that the matter deserved urgent attention he would not have resorted to go panning for gold as he would not know when he was going to realize sufficient quantities of gold for the surgical operation. It would have taken him a long time to do so thereby exposing his wife to danger.

I reiterate that resorting to criminal activities because someone believes he has problems or challenges in life does not amount to special circumstances as envisaged by the legislature. Consequently, the finding of special circumstances by the trial court *in casu* was erroneous. The finding is accordingly set aside.

Similarly the sentence imposed by the trial court was contrary to law and is hereby set aside. The matter is remitted to the same court for it to recall the accused and impose the correct sentence in terms of the law.

In doing so the sentence shall be minus the 420 hours served by the accused as community service. 420 hours is equal to approximately to 52 ½ days imprisonment which can be round off to 53 full days.

Judgment No. HB 98/11  
Case No. HC 441/11  
CRB ZVI 1012/10

The trial court should forward the record for review after imposing the mandatory sentence on the accused.

Ndou J ..... I agree