

TATENDA MUTANDIRO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 21 DECEMBER 2009 AND 15 JULY 2010

Mr. G. Nyoni for applicant
Mr. T. Hove for respondent

Bail pending appeal

CHEDA J: This is an application for bail pending appeal. This application was argued before me on the 21st December 2009 and I dismissed it.

On the same day I gave my reasons ex tempore, I have, however, been requested to reduce my reasons into writing and these are my reasons:

Applicant is a man aged 31 and is currently serving his sentence of 2 years having been convicted of contravening section 368(2) as read with section 368(4) of the mines and minerals Act [Chapter 21:15] commonly referred to as gold panning.

The facts of the matter as presented by respondent are that applicant and his co-accused one Israel Chihota reside at Mutandiro and Nharira villages respectively, Chivhu and they are not employed. On the 5th November 2009 the Bulawayo City Council rangers were carrying out patrols along Umzingwane river when they observed the two accused at a gold ore

sieving table with applicant pouring water on the sieving table while his co-accused was sieving the gold ore. They were spotted by the rangers from a distance of about 15 metres and they ran away. However, the rangers gave chase and caught up with them resulting in their arrest.

Upon their arrest, police recovered a sample dish and a sieve table. They both pleaded not guilty to the charge. They were, however, tried and convicted. They were subsequently convicted, the court a quo found no special circumstances and passed the mandatory prison term of 2 years imprisonment.

Applicant has appealed both the conviction and sentence. He now applies for bail pending appeal. His argument through his legal practitioners is that:

- (1) the court a quo erred by passing a sentence of 24 months imprisonment and referred me to the case of *S v Majaya* HB 15/03.
- (2) it erred by imposing a prison term when appellant is a first offender, *S v Zavanyika* see HH 41/95 and *S v Shariwa* HB 37/03.
- (3) that appellant has an arguable case as was held at *S v Sibusisiwe Ndlovu* HB 155/07 as per NDOU J.

It is trite now that where an accused has been convicted the approach to bail is different as the question of the presumption of innocence would have been eliminated. The question before me is whether appellant's chances of success on appeal are bright or not. To determine this question, it is imperative that one should understand the circumstances surrounding the commission of the offence. Appellant was in the company of his co-accused when they were

seen going through the motions of gold panning and they had all the necessary equipment or tools of the said trade. They ran away and were apprehended by the rangers. This was the evidence submitted by Tymon Ncube. It was his further evidence that there was no fishing facility where he found them. For that reason it is clear that they were indeed illegally panning gold.

In my view, the trial court accepted the respondent's case and properly convicted them. The court enquired into the existence or otherwise of special circumstances and found none. In the absence of the said circumstances, he had no alternative but to impose a mandatory sentence in terms of the law.

Mr. Nyoni has urged the court to find that there was a misdirection on the part of the trial court as it failed to consider community services. *Mr. Nyoni* has urged me to find that the trial court erred in finding no special circumstances on the basis of that they were not gold panning. The authorities referred to relate any other cases other than those that carry mandatory sentences. Evidence led and accepted by the court is that they had all the equipment necessary for gold panning. Infact to say they were not, is so untenable so as to deny that Dracula was not trying to break into a blood bank when he was found test-opening the blood bank door. Therefore, the magistrates approach was correct.

Secondly, the case of *S v Sibusisiwe Ndlovu* (supra) is not binding as it was a decision by a court of a similar jurisdiction.

In view of the crystal clear evidence which was led and accepted by the court, I am of the view that appellant's chances of success on appeal are bleak.

It is for that reason that I dismissed the appeal.

Cheda J.....

Messrs Moyo & Nyoni, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners