

1. STATE
versus
JAMES MATIKI
2. STATE
versus
PHAISON MUDENGA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 8 March 2006

Criminal Review

KUDYA J: It is convenient to deal with these two matters under cover of one review judgment because not only were they dealt with by the same magistrate but they also raise the same issues.

James Matiki was found in possession of 11,13 grammes of gold valued at \$10 158 030.00 on 20 October 2005. He was arraigned before the Provincial Magistrate Kadoma on 5 December 2005 and charged with the contravention of section 3(1) of the Gold Trade Act [*Chapter 21:03*]. He pleaded guilty and was duly convicted. The conviction is confirmed.

In mitigation he stated that he was 27 years old, single with no dependants and was not in formal employment. He was engaged in gold panning earning \$100 000.00 per day. He had \$20 million in savings.

He was sentenced on 5 December 2005 to as follows:

- a) \$20 316 060.00 or in default of payment 3 years imprisonment.
- b) Accused is prohibited from entering any precious metals location for a period of 5 years.
- c) The gold is forfeited to the State.

Phaison Mudenda was also arrested while in possession of 10.65 grammes of gold valued at \$11 115 000.00 on 2 December 2005. He was arraigned before the trial magistrate sitting at Kadoma on 13 December 2005. He pleaded guilty and was duly convicted. The conviction is proper.

In mitigation he stated that he was 28 years old, was married with 2 children. Though not in formal employment he was a gold panner who realised \$3 million per week.

He too was sentenced to pay a fine of \$22 230 000.00 or in default of payment 3 years imprisonment. He was prohibited from entering any precious mineral location for a period of 5 years and the gold he had was forfeited to the State.

In each of these two matters, the trial magistrate imposed a financial penalty which was twice the value of the gold that each accused person had in his custody. He however did not have the jurisdiction to do so and so misdirected himself.

The penalty provision, subsection 3 of section 3 of the Gold Trade Act reads as follows:

“(3) Any person who contravenes subsection (1) shall be guilty of an offence and liable to –
(a) a fine not exceeding level nine or twice the value of the gold that is the subject matter of the offence, whichever is the greater or
(b) imprisonment for a period not exceeding five years or both such fine and such imprisonment.”

Paragraph (a) of subsection (3) of section 3 of the Gold Trade Act, supra provides for a financial penalty that does not surpass level 9 (then \$750 000.00) or twice the value of the gold found in possession of the accused person. The phrase whichever is the greater should be read subject to the phrase not exceeding. In simple terms, it simply means that the sentencer has the authority to impose a sentence as low as one cent and as high as \$750 000.00 where \$750 000.00 is greater than twice the value of the gold found in the accused person’s custody, or a sentence as low as one cent and as high as twice the value of the gold found in the accused person’s custody where the value is greater than \$750 000.00.

The ordinary monetary jurisdiction of the trial magistrate as provided for in subsection 3 of section 50 of the Magistrates Court Act [*Chapter 7:10*]

is level 10 (then \$1 million). The Gold Trade Act, *supra*, does not provide special jurisdiction to any grade of magistrate. Every magistrate therefore can only impose a financial penalty under the Gold Trade Act subject to his ordinary jurisdiction as provided for in the Magistrates Court Act.

In each of these matters, *in casu*, the trial magistrate had no power to impose a financial penalty exceeding \$1 million dollars. He did so and thus misdirected himself.

Gold plays a pivotal role in our economy. It is a major foreign currency earning metal. In his Fourth Quarter Monetary Policy for 2005 delivered on 24 January 2006, the central bank governor bemoaned the leakages that were endemic in the gold mining subsector of the economy and highlighted the deleterious effects these leakages had in the wider economy. In short, the loss of foreign currency contributed to the hyperinflation as the local currency lost value against the currencies of our major trading partners. We therefore needed more of our own currency to purchase foreign currency which was in short supply. For the good of the wider economy it is important that the courts play their role in safeguarding our gold stocks by ensuring that those who deal in this precious commodity outside the official channels are adequately punished.

While forfeiture of the gold involved in the commission of the offence is one such method, where a fine is appropriate it must be high enough to serve as a deterrent, both in the individual and general sense. The legislature has already signposted the direction in which the courts should take by empowering the sentencer to impose up to twice the value of the gold involved in the illegal transaction or possession.

The present cases highlight the gap left by the law in failing to provide magistrates with adequate teeth to bite those who fall foul of the provisions of section 3 of the Gold Trade Act. There is need for the legislature to consider empowering magistrates by giving them special jurisdiction to impose financial penalties that are equivalent to twice the value of the gold

involved where that value is greater than level 9, at any given time. This will go a long way in discouraging the leakages that are presently part of our gold mining subsector.

The second error which the trial magistrate fell into was in making the prohibition to enter any precious minerals location as part of his sentence. That order was superfluous as subsection 3 of section 30 makes the prohibition automatic on conviction. All the trial magistrate needed to do was to advise the accused persons respectively of the consequence of the conviction. In the result the prohibition order will be deleted from the sentence in each matter respectively. See *S v Mwanyara* HH 105/91.

Accordingly, the sentences that were imposed by the trial magistrate are set aside and are substituted by the following:

JAMES MATIKI

\$1 000 000.00 or in default of payment 2 weeks imprisonment. The gold in question is forfeited to the State.

PHAISON MUDENDA

\$1 000 000.00 or in default of payment 2 weeks imprisonment. The gold in question is forfeited to the State.

It follows that if each accused person paid the fines that were imposed, they must be refunded the amount in excess of \$1 000 000.00.

MAKARAU J, I agree:.....