

TSITSI MUKOME
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKARAU JP and HUNGWE J
HARARE 25 June and 6 August 2008

CRIMINAL APPEAL

Mr C Mukome for appellant
Mr R Chikosha for respondent.

MAKARAU JP: On 15 December 2006, the appellant appeared before the Magistrates' Court at Mutare facing one count of contravening section 3 of the Precious Stones Act [Chapter 21.06]. She was found in possession of 157 diamonds, valued at \$ 1 669 760-00. She pleaded guilty to the charge and was duly convicted and sentenced to 3 years imprisonment with 1 year suspended on conditions. The diamonds were forfeited to the State.

The appellant noted an appeal to this court against both conviction and the sentence. At the hearing of the appeal, *Mr Mukome* for the appellant abandoned the appeal against conviction. We believe that his concession that the appellant was correctly convicted is proper.

Against the conviction, the appellant had sought to argue that she had the authority of the Minister in charge of mines to mine and possess the precious stones. In this regard, reliance was placed on the evidence that she led on special reasons to the effect that while she did not have authority to mine and possess the diamonds, the Minister of Transport and Communication had given her and the other miners the go ahead to dig for the diamonds in the Chiadzwa diamond field but had told them not to take the diamonds out of the area as the Minerals Marketing of Zimbabwe Officials would come onto the diamond field and buy the diamonds.

It is not in dispute that the permission that the appellant allegedly had from the Minister was to mine and possess the diamonds within the confines of the diamond fields. She did not have the government official's permission to possess the diamonds outside the mine fields. The appellant was arrested outside the diamond field and at the time and place she was

arrested, she did not have the alleged protection of the official. In my view, the claim of right that the argument seeks to raise may have been proper had the appellant been found in possession of the diamonds within Chiadzwa.

It is on the basis of the above that we were satisfied that the trial court had not erred in finding the appellant guilty as charged and that in turn the concession by *Mr Mukome* was properly made.

Regarding sentence, it has been argued that the sentence imposed upon the appellant is severe and induces a sense of shock. In sentencing the appellant thus, the trial court viewed the offence as very serious in that it goes to the economy of the nation. Due to what he believed were the effects of the offence on the economy and on inflation, the trial magistrate was of the view that even though the appellant is a first offender, the gravity of the offence was such that she had to be sentenced to a term of imprisonment.

It has been accepted over the years that assessing sentence is one of the most difficult task that faces a judicial officer convicting an accused person. Except where the law has laid out a minimum mandatory sentence, the judicial officer convicting an accused person is called upon to exercise their discretion and punish the accused on behalf of society. As with most judicial functions, a number of competing interests come into play and have to be delicately balanced. On one hand is the need to punish and on the other are the interests of the accused being punished. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. A sentence that is heavily weighed in favour of the needs of society without paying adequate attention to the interests of the offender is invariably harsh and appears draconian while a sentence that underplays the interests of society while overemphasizing the interests of the offender is invariably lenient and ineffectual in curbing crime.

In *casu*, the statute creating the offence did not set out a minimum mandatory sentence for the offence at the time the offence was committed.¹ It provided in section 3 (2) as follows:

“Any person who contravenes subsection (1) shall be guilty of an offence and liable to-

- (a) a fine not exceeding level thirteen or double the value of the precious stones that are the subject-matter of the offence, whichever is the greater; or
- (b) imprisonment for a period not exceeding five years;
or to both such fine and such imprisonment.”

¹ The minimum mandatory sentence was introduced by Act no 10 of 2007.

Thus, the sentencing court had to assess a sentence guided not only by the statutory provision but by the need to balance the interests of society with the interests of the accused person. While it is not practical that in each case a sentencing court should identify and articulate the two competing interests that it seeks to balance, in my view this is a prudent way of approaching the exercise. If this is done, it will assist the sentencing court to view whether it has overplayed any of the interests at the expense of the other. It will also assist any superior court that will be reviewing the sentence to see whether the competing interests have each been fairly considered.

In my view, the trial magistrate overemphasized the interests of society in assessing sentence in this matter. The under-performing economy of Zimbabwe and the runaway inflation were uppermost in his mind when he sentenced the appellant. It is quite clear from his reasoning that he not only wanted to punish the appellant but through her, to send a warning to other like minded citizens that the courts would impose harsh sentences on all those convicted of illegally possessing precious stones.

On the other side of the balance, the trial magistrate scantily paid regard to the appellant's personal circumstances and the need to fit the punishment to her person. He recorded in the opening paragraph of his reasons for judgment that the appellant is a first female offender who pleaded guilty to the charges. He however does not appear to have brought these factors to bear on the sentence that he imposed. In the result, he imposed a sentence that was not in line with the statutory provision and overlooked the need to consider community service as a viable option for sentencing the appellant.

Trial magistrates must not pay lip service to the plea of guilty and to the mitigation that is submitted by accused persons. The sentences they impose after receiving submissions in mitigation must reflect that the mitigatory features of the case have been taken into account.

As indicated above, the trial magistrate misdirected himself by failing to consider other sentencing options in the matter. He overemphasized the gravity of the offence and its impact on the economy of the nation. In this regard, he erred and we are at large to assess a sentence in this matter. Again above, I have indicated the approach that a sentencing court should take in seeking to strike a balance between the interests of society and the personal circumstances of the accused. In my view, the gravity of the offence weighs equally heavy with the mitigatory features in this matter. The appellant was a first offender who pleaded

guilty to the charges. She was in possession of the diamonds which she had mined in a field where a government official had authorised their activities. She committed the offence when she took the diamonds out of the field.

Section 3 (2) of the Act prescribes the penalty for this offence. At the time of the commission of the offence, the level thirteen fine was pegged at \$20 000-00. The precious stones found in the possession of the appellant were valued at \$1 669 760-00.

In my view, a fine of double the value of the stones coupled with a wholly suspended prison term would meet the justice of this case.

In the result we make the following order:

1. the appeal against sentence is allowed.
2. the sentence imposed by the magistrates court is set aside and is substituted by the following:
 - a. a fine of \$ 3 399 520-00 (old value) or 4 days imprisonment in default of payment.
 - b. In addition, six months imprisonment, suspended for 3 years on condition the appellant is not during that period convicted of contravening section 3 of the Precious Stones Act [Chapter] and upon conviction is sentenced to a term of imprisonment without the option of a fine.
 - c. The precious stones are forfeited to the State.

HUNGWE J agrees.....

Mugadza Mazengero & Dhliwayo, appellants' legal practitioners.

Office of the Attorney-General, respondent's legal practitioners.