

Judgment No. S.C. 119/83 Crim.
Appeal No. 305/83

ROUND MAKANDA v THE STATE

SUPREME COURT OF ZIMBABWE,
GEORGES, CJ, BECK, JA & GUBBAY, JA,
HARARE, NOVEMBER 1, 1983.

A.P. de Bourbon, for the appellant

P.J. Batty, for the respondent

GEORGES CJ: The appellant was charged with wrongfully and unlawfully possessing 269 grains of concentrates containing gold valued at \$1 896,23 not being the holder of a licence or permit and not being the employee of any permit or licence holder. He was convicted and sentenced to 18 months imprisonment six months of which were suspended for five years on condition that he was not convicted of any contravention of s 3 of the Gold Trade Act committed during that period for which he was sentenced to imprisonment without the option of a fine. The concentrates were forfeited and the appellant was prohibited from entering any precious metals mining location for a period of five years.

The issues to be decided at the trial were purely factual. Detective Constable Chikwamba was one of a party of policemen who, on information received, set out on 9 May 1983 under the command of Chief Inspector Chiwishi to search the appellant's premises in Mutare. When the party arrived at the premises the gate was locked. The Chief Inspector asked people

whom he saw; sitting nearby to open the gate,
A woman in the group said she was going to get the keys but instead of going into the house through an open door went towards the back of the house.

On instructions Detective Constable Chikwamba jumped over the fence and followed her. He testified that as he went towards the back he saw the appellant and another person, later identified as Boaz Manyika who was also charged with an offence under the Gold Trade Act. The appellant seemed aware that there were policemen around. He had a smelting pot in his hand. Detective Constable Chikwamba ordered both men to remain still but the appellant did not. He walked towards Chikwamba holding the pot. Chikwamba suspected he intended to run away and grabbed him. He also noticed a white plastic paper protruding from the appellant's pocket, and tried to seize it. The appellant attempted to prevent that so Chikwamba called for help from the rest of the Police party. Meanwhile Chikwamba succeeded in grabbing the plastic bag.

Having heard Detective Constable Chikwamba call for help the appellant ran through a gate on the west side which Detective Constable Chikwamba said he had NOT previously noticed. As the appellant went through that gate he dropped two gold stones, of which Chikwamba took possession. Chikwamba said his attention was then concentrated on the appellant who ran in a northern direction and then into a sanitary lane where he dropped three gold stones and left his summer shoes. As Chikwamba picked up the shoes and the stones he lost sight of the appellant. Meanwhile other members of the party and some locals were giving chase to the appellant; Chikwamba next saw the appellant crossing the sanitary lane running towards 93 Fourth Street, which was the house next to the appellant's. He received information that the appellant had gone upstairs in that house and followed. He found the appellant standing by the door and arrested him. Asked why he had run away the appellant gave no answer.

On that very day at 4.30 pm the appellant gave a warned and cautioned statement to Detective Inspector Bangamuseve which was confirmed on 12 August 1983 in the presence of the appellant's legal practitioner. In that statement the appellant said that on 6 May 1983 a man, who was known to one George who worked at the Independence Mine, came to him with a bag of gold dust asking to be allowed to use his oxygen to smelt the gold. The appellant

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said he was busy and that the man should return the next day. The man had also brought smelting pots. He left them and the gold with the appellant. The man returned on the next day as agreed. The appellant again put him off to Monday, on which day he came back.

The man set about smelting the gold while the appellant watched. when they had finished and were outside washing their hands his wife informed them that policemen were outside. The appellant went back to the workshop intending to give the pots back to their owner. A policeman shouted to him to stop in a voice which frightened him so he ran away, and was chased by the policemen who arrested him at his neighbour's house.

Although the statement makes it very clear that the appellant knew that gold was being smelted in his workshop his defence was that he was unaware of that fact until the Police were about to come on the scene and the man who was smelting the gold told him the process in which he had been engaging. The words "gold dust" had been used in the statement in error. He had told the Police that the man had told him that he wanted to burn his things and the Police had written "gold dust" because they knew then what it was. This explanation might have raised a modicum of doubt but for the fact that the statement had been confirmed some months later in the presence of the appellant's legal representative.

It seems incredible that such an obvious and important error would not have been drawn to the attention of the confirming magistrate by the appellant on the advice of his legal representative.

Against that background it is not surprising that the appellant's story that it was this other man, Boaz dropped it as he ran away raised no doubt in the magistrate's mind as to the version given by Detective Constable Chikwamba. Indeed the appellant's version was, standing on its own, inherently improbable. It involved his permitting someone, with whom he had no relationship but that of patient and herbalist adviser, to use his cylinder of oxygen at his house without making any arrangement for payment while he himself stood by for the entire period of the operation without being aware of what was being done.

Boaz Manyika gave evidence for the appellant.

His evidence reads badly. He admitted that on his arrest he had denied ever having gone to the appellant's house. His version was that he had bought the gold dust from one James who came from Mozambique, whose whereabouts he did not know, and who had agreed to wait for payment for the gold until after

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it had been smelted. James had instructed him how to do the smelting because he had never smelted gold ore before. He accepted that the substance given him by James was gold and not coal dust which it resembled because in the past he had bought salt fish from him. This story is really almost laughable.

On that state of the evidence it is quite clear that the conviction was fully justified on the facts and the appeal must be dismissed.

No argument has been addressed to us in relation to sentence and on a consideration of previous cases of this nature it appears to fall entirely within the accepted line and accordingly the appeal against sentence must also be dismissed.

BECK JA: I agree.

GUBBAY JA I agree.

Stumbles & Rowe, appellant's legal representatives.