Judgment No. HB 60/10 Case No. HCB 164/09

Xref No. HCA 181/09

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

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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 <u>a quo</u> 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

comission of the offence. Appellant was in the company of his co-accused when they were

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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 Draccula 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.

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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