

THE PEOPLE  
v  
MAYBIN CHISEMBE

HIGH COURT.  
DR. MATIBINI, SC, J.  
30th DECEMBER, 2011.  
HPS/47/2011.

[1] Criminal procedure - Sentencing - Previous convictions - Whether previous convictions are taken into account when sentencing.

The convict was charged with the offence of trafficking in psychotropic substances contrary to section 6 of the Narcotics Drugs and Psychotropic Substances Act.

When called upon to plead, the convict confirmed that he understood the charge, and admitted the charge. Accordingly, the Subordinate Court recorded a plea of guilty. The matter was referred to the High Court for sentencing in terms of section 9(1) of the Criminal Procedure Code.

Held:

1. When a person is arrested, and detained for a criminal offence, the finger prints ought to be immediately taken, and sent to the criminal record office. The fingerprints should be checked against criminal records, a certificate of no previous convictions, or a certificate setting out all previously recorded convictions.

2. A prosecutor is required at the time of rendering the verdict to have received the appropriate certificate from the criminal record office and when asked if the accused has a record, he will either say there are no previous convictions recorded; say the accused has a record of previous convictions, and produce it to the Court for attachment to the case record; or if has not received a reply from the criminal record office, ask for an adjournment to allow him to obtain the result of the finger print search.

3. Once information concerning a previous conviction has been brought to the notice of the Court when sentence is being considered, then the Court is duty bound to hear evidence concerning the previous conviction in order to make a finding as to whether or not the accused person has a previous conviction in respect of a relevant offence.

Cases referred to:

1. R v South Shields Licensing Justices [1911] 2 K.B. 11.
2. Situmbeko v The People (1977) Z.R. 133.
3. Mweene v The People (1977) Z.R. 349.

4. The People v Kalonda (1981 Z.R. 308).

Legislation referred to:

1. Narcotic Drugs and Psychotropic Substances Act, cap. 96, 6. 44.
2. Criminal Procedure Code, cap. 88, ss. 9(1), 142, and 204 (1) and (2)
3. Penal Code, cap. 87, ss. 272, and 275.

Work referred to:

1. E.J. Swarbick, Ed, Magistrates Handbook, sixth edition, (Lusaka, National Institute of Public Administration, 1991).

M.P. Lungu (Mrs), State Advocate in the Director of Public Prosecutions chambers for the People.  
No appearance for the convict.

DR. MATIBINI, SC, J.: The convict was charged with the offence of trafficking in psychotropic substances contrary to section 6 of the Narcotics Drugs, and Psychotropic Substances Act, chapter 96 of the laws of Zambia. The particulars of the offence are that the convict on 25th February, 2010, at Lusaka, in the Lusaka District of the Lusaka Province of the republic of Zambia did traffic in psychotropic substances. Namely, 6.2 grams of marijuana, a herbal product of cannabis without lawful authority.

When called upon to plead, the convict confirmed that he understood the charge, and admitted the charge. Accordingly, the Court below recorded a plea of guilty.

The statement of facts were read to the convict. He confirmed that the statement was true, and correctly recorded. The convict is a second offender. The matter has been referred to me for sentencing in terms of section 9(1) of the Criminal Procedure Code.

I invited counsel to file written submissions in this matter. I only received submissions from Mrs. Lungu on behalf of the People. Mrs. Lungu submitted as follows: first, that the convict was convicted on his own plea of guilty. This was in keeping with section 204 (1) and (2) of the Criminal Procedure Code. Section 204 is couched in the following terms:

“204 (1) The substances of the charge or complaint shall be stated to the accused person by the Court, and shall be asked whether he admits, or denies the truth, of the charge.

Provided that where the charge, or complaint contains a count charging the accused person with having been previously convicted of any offence, the procedure prescribed by section two hundred and seventy-five, shall *mutatis matandis*, be applied.”

(2) If the accused person admits the truth of the charge, his admission shall be recorded, as nearly as possible, in the words used by him, and the Court shall convict him, and pass sentence upon, or make an order against him, unless there shall appear to it sufficient cause to the contrary.

Second, that the convict is a second offender. The record of the previous conviction was

tendered before the Court below in accordance with section 142 of the Criminal Procedure Code. Section 142 enacts as follows:

“142(1) in any inquiry, trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force \_\_\_\_\_

a) by an extract certificate under the hand of the officer having the custody of the records of the Court which such conviction had to be a copy of the sentence, or order, or;

b) by a certificate signed by the officer in charge of the prison in which the punishment, or any part thereof was suffered, or by production of the warrant of commitment under which the punishment was suffered.; together with in each of such cases, evidence as to the identity of the accused person with the person so convicted.

2) A certificate in the form prescribed given under the hand of an officer authorized by the President in that behalf, who shall have compared fingerprints of an accused person with the fingerprints of a person previously convicted shall be sufficient evidence of all the facts therein set forth provided it is produced by the person who took the fingerprints of the accused.

3) A previous conviction in any place outside Zambia may be proved by the production of a certificate purporting to be given under the hand of a Police officer in the country where the conviction was containing a copy of the sentence, or order, and the fingerprints, or photographs of the fingerprints of the person so convicted, together with evidence that the fingerprints of the person so convicted are those of the accused person; such a certificate shall be sufficient evidence of all the facts therein set forth without proof that the officer purporting to sign it did in fact sign it, and was empowered so to do.

4) Where a person is convicted by a Subordinate Court, other than a Juvenile Court, and it is proved to the satisfaction of the Court on Oath, or in the manner prescribed that, not less than seven days previously, a notice was served on the accused in the prescribed form. And manner specifying any alleged previous convictions of the accused of an offence proposed to be brought to the notice of the Court in the event of his conviction of the offence charged, and the accused is not present in person before the Court may take account of any such previous conviction so specified as if the accused has appeared, and admitted it.

5) In this section “prescribed” means prescribed by rules made by the Chief Justice .

Thus in practice when a person is arrested, and detained for a criminal offence, the finger prints ought to be immediately taken, and sent to the Criminal Record Office. There they should be checked against criminal records, and a certificate of no previous convictions issued. or a certificate setting out all previously recorded convictions. Therefore, a prosecutor is required at the time of rendering the verdict to have received the appropriate certificate from the Criminal Office. As a result, when asked if the accused has a record, he will either:

a) say there are no previous convictions recorded; or  
b) say the accused has a record of previous convictions, and produce it to the Court for attachment to the case record; and

c) if he has not yet received a reply from the Criminal Record Office, ask for an adjournment to allow him to obtain the result of the finger print search. (see E.J. Swarbrick, Ed. Magistrates Handbook, sixth edition, (Lusaka, National Institute of Public Administration, 1991).

It is instructive to note that once information concerning a previous conviction has been brought to the notice of the Court when sentence is being considered, then the Court is duty bound to hear evidence concerning the previous conviction in order to make a finding as to whether, or not the accused person had a previous conviction in respect of a relevant offence.

Mrs. Lungu further submitted that the record of proceedings indicates that the convict was earlier on convicted for trafficking in psychotropic substances on 2nd September, 2009. And the convict committed the offence which is now the subject of sentencing on 25th February, 2010. Thus Mrs. Lungu pressed that the convict had a prior conviction.

In urging me to take into account the previous convictions in sentencing the convict, Mrs. Lungu drew my attention to the case of *Mweene v The People* (3). The facts in the *Mweene* case (*supra*) were that the appellant was convicted of stock theft contrary to sections 272, and 275 of the Penal Code, the allegation being that on a date unknown, but between 1st and 31st August, 1975, he stole five head of cattle. He pleaded guilty to the charge, save that he admitted to taking only three beasts. The prosecution accepted the appellant's version of the facts, and the Court convicted him to stealing three beasts. Thereafter, the record was produced, from which it emerged that he had three convictions, two in 1972 for house breaking and theft, and one on 7th May, 1976, for stock theft. The learned magistrate, without giving any reasons for his conclusions, said that on the basis of the conviction in May, 1976, for stock theft, he was bound by the law to impose a minimum sentence of seven years imprisonment with hard labour. It is against that sentence that the appeal was lodged.

In the course of the judgment, Baron D.C.J, observed as follows: that before an offence can be a previous offence for the purposes of section 275, there must be a conviction in respect before the date of the commission of the offence which the Court is considering for the purposes of sentence. If the position were otherwise, certain absurd results would follow. For instance, a person charged on the same charge with a number of offences committed at intervals, say one month, would of necessity have to be sentenced in respect of all the offences after the first in point of time on the basis that they were second, or subsequent offences. Baron D.C.J, went on to observe that again it would be difficult to imagine any convicted person asking the Court to take other offences into consideration, because if any of them was committed prior to the offence with which he had been charged, that latter offence would be a subsequent offence for the purposes of sentence.

Baron D.C.J, observed that this very point was considered by the Court of Criminal Appeal in England in the case of *R v South Shields Licensing Justices* (1) there in relation to a provision worded for the present purposes in similar fashion to section 275, of the Penal Code. It was held that the expression "second or any subsequent offence," means a second or subsequent offence committed after a previous conviction or previous convictions as the case may be for any offence under the section. Ultimately, Baron D.C.J, set aside the sentence of seven years imprisonment because it was imposed as a result of an error of principle.

In this particular case, the convict was previously on 2nd September, 2009, convicted for the offence of trafficking in psychotropic substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act. The convict was sentenced to three months imprisonment with effect from 11th August, 2009. In view of the foregoing, I am obliged to invoke section 44 of the Narcotic Drugs and Psychotropic Substances Act. Section 44 enacts as follows:

“44 Any person convicted on a second, or subsequent offence for trafficking shall be liable to imprisonment of a term of not less than ten years.”

Accordingly, I sentence the convict to a term of 10 years imprisonment with hard labour with effect from the date of the arrest.

Convict sentenced.