PAUL ZULU
v
THE PEOPLE

HIGH COURT
DR. MATIBINI, SC, J.
29th DECEMBER, 2011.
HPA/50/2010.

[1] Criminal law - Sentencing - Principles thereof.

The appellant was charged in the Subordinate Court with the offence of the theft by agent contrary to sections 272 and 280 of the Penal Code. The appellant was convicted and sentenced to a term of 36 months imprisonment. This was an appeal against sentence only.

Held:

1. In deciding the appropriate sentence, a Court should always be guided by two primary considerations. The first and foremost is the public interest. The second, is that criminal law is publicly enforced, not only with the object of punishing crime, but also with preventing it.

2. With the exception of prescribed or mandatory sentences, a trial Court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate Court does not normally have such discretion.

3. An appellate Court will not interfere with a sentence as being too high, unless that sentence comes to the Court with a sense of shock.

4. Equally, an appellate Court will not interfere with a sentence as being too low, unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence.

5. In dealing with an appeal against sentence, the appellate Court should ask itself three questions: Is the sentence wrong in principle; is it manifestly excessive so that it induces a sense of shock; and are there any exceptional circumstances which would render it an injustice if the sentence were not reduced.

6. Thus an appellate Court may only interfere with a lower Court sentence, where the sentence is wrong in principle, or where the sentence is so manifestly excessive, or totally inadequate that it induces a sense of shock.

7. It is perfectly proper to refer to the prevalence of the an offence, and to use the

prevalence as a basis for imposing a deterrent sentence.

8. It is trite law that hardship to families and dependents is inevitable consequence of indulging in criminal activities. Appellants should think of all consequences before they engage in criminal activities.

9. Where health is taken into account, there must be adequate medical evidence, either viva voce or at least by written certificate.

10. Notwithstanding what the appellant considers to be low value of the amount stolen, the trial judge was entitled to take a very serious view of the offence.

11. The trial Magistrate was entitled to take into account the prevalence of the offence, and to use that prevalence as a basis for imposing a deterrent sentence.

12. Whilst it is accepted that an accused person should not be allowed to leave Court with a sense of grievance that he was given a severe sentence, a sentence of three years imprisonment did not come to the Court with a sense of shock. The sentence was proportionate to the seriousness and gravity of the offence.

Cases referred to:

1. R v Ball [1951] 35 Cr. App. R. 164.
2. Jutronich and Others v The People (1965) Z.R. 9.
3. Malichi v The People (1967) Z.R. 137.
4. Anderson v The People (1968) Z.R. 46.
5. Nasilele v The People (1972) Z.R. 197.
6. Zulu v The People (1974) Z.R. 58.
7. Kalunga v The People (1975) Z.R. 72.
8. Alubisho v The People (1976) Z.R. 11.
9. Syakalonga v The People (1977) Z.R. 61.
10. Chilufya v The People (1978) Z.R. 226.
11. Berejena v The People 1984) Z.R. 19.
12. The People v Simolu (1981) Z.R. 318.
13. Mbozi and Another v The People (1987) Z.R. 101.
14. Nyirenda v The People (1980) Z.R.194

Legislation referred to:

1. Penal Code, cap 87, ss. 264 (1); 265 (5); 272, and 280.

M.M. Muyambango (Mrs), of Messrs Ituna and Partners for the appellant.
M.P. Lungu (Mrs), State Advocate Director of Public Prosecutions Chambers for the respondent.

DR. MATIBINI, SC, J.: The appellant was charged in the Court below of the offence of theft by agent contrary to sections 272 and 280 of the Penal code, chapter 87 of the laws of Zambia. The particulars of the offence were that the appellant on unknown date, but sometime in November, 2009, at Lusaka, in the Lusaka District, of the Lusaka Province, of the Republic of Zambia did steal K 2.8 million from one Precious Choolwe Mudenda, which was entrusted to him to buy beer on her behalf.

In a judgment delivered on 29th October, 2010, the Court below observed that sections 272 and 280 of the Penal Code, enact as follows:

"272 Any person who steals anything capable of being stolen is guilty of the felony termed "theft" and unless owing to circumstances of the theft, or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years."

Section 280 of the Penal Code goes on to enact as follows:

a) property which has been received by the offender with a power of attorney for the deposition thereof;

b) property which has been entrusted to the offender either alone, or jointly with any other person for him to retain in safe custody, or to apply, pay, or deliver for any purpose, or to any person the same, or any part thereof, or any proceeds thereof;

c) property which has been received by the offender either alone, or jointly with any other person for, or on account of any other person;

d) the whole, or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose, or paid to any person specified in the direction; and

e) the whole, or part of the proceedings arising from any disposition of any property which has been received by the offender by virtue of a power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose, or paid to any person specified in the direction, the offender is liable to imprisonment for seven years."

The Court below went on to observe that to prove the case of theft by agent, the prosecution must establish the following elements:

a) that the accused took the property complained of in the particulars of offence (see section 265 (5) of the Penal Code);

b) that the thing taken is something capable of being stolen, or movable. (see section 264 (1) of the Penal Code);

c) that the accused took the thing fraudulently (see section 265 (2) of the Penal Code);

d) that the owner did not consent to the thing being taken over, or converted by the accused;

e) that the accused was the complainant's agent, and that the money was entrusted to the accused either alone or jointly to apply, or pay to the other person; and

f) that the thing was property of another.

The Court below concluded that if the prosecution can prove preceding elements beyond all

reasonable doubt, then the offence of theft by agent will have been proved.

The prosecution called two witnesses. After evaluating the evidence of the prosecution witnesses, and the accused, the Court below made the following findings of fact; that it was not in dispute that the accused as agent of the complainant was entrusted with some money to procure beer on behalf of the complainant. The money in question was the property of the complainant. And was capable of being stolen. The complainant did not consent to the use of the money in any other way, other than for the purchase of the beer.

In the course of the judgment, the Court below posed the following question: the question that begs the answer is; whether the accused took that money fraudulently. That is to say, whether he intended to permanently deprive the owner of it. The Court answered this question in the affirmative. And accordingly convicted the appellant of the offence of theft by agent.

After the conviction, the appellant pleaded as follows in mitigation: he is a father to five children; and the youngest is nine months old. The youngest child is ill, and is on ARV treatment. The appellant suffers from epilepsy, and is under medication. He is unemployed. And his children are school going. He is the first born. And his parents are aged. There is no one to take care of his children, and his aged parents. All said and done, the appellant urged the Court below to exercise maximum leniency in meting out the punishment.

In passing the sentence, the Court below observed as follows: it took into account, the fact that the appellant was a first offender. He had committed a serious offence. And was liable to be imprisoned up to a maximum term of seven years. There was need to deter the proliferation of the subject offence by meting out punishments befitting the offence. The Court noted that the fact that the family would suffer if the appellant was imprisoned, was insufficient mitigation, because the appellant ought to have taken into account the welfare of his family before committing the offence.

Ultimately, the Court below held that it took into account the fact that the appellant is a first offender. And as such, deserves some leniency. The Court considered that a sentence of 36 months imprisonment with hard labour would enable the appellant re-fashion his moral values. Accordingly, the appellant was sentenced to a term of 36 months imprisonment. This appeal is therefore against the sentence only.

Only one ground of appeal has been advanced. Namely, that the Court below erred in sentencing the appellant to 36 months imprisonment with hard labour without taking into account the value of the property stolen. In support of this ground of appeal, Mrs. Muyambango of Messrs Ituna partners filed the submissions on 16th May, 2011. In the submissions, Mrs. Muyambango observed that the appellant was convicted of the offence of theft by agent contrary to sections 272 and 280 of the Penal Code. And was later sentenced to 36 months imprisonment with hard labour.

In so far as the sole ground is concerned, Mrs. Muyambango pointed out that there are a line of cases which outline circumstances when an appellate Court may interfere with the sentence of a lower Court. First, my attention was drawn to the case of Berejena v The People (11). It was submitted in this regard that in the Berejena case (supra), it was held that an appellate Court may interfere with a lower Court's sentence, where the sentence is wrong in law, fact, or principle. Or where the sentence is so manifestly excessive, or totally inadequate that it induces a sense of shock.

Second, Mrs. Muyambango brought my attention to the case of Mbozi and Another v The People (13). In the Mbozi case,(supra) the Supreme Court adopted a passage it formulated in the case of Nasilele v The People (5), as follows:

"It is trite that a bad record must not be a basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be what is the proper sentence for the offence, and ignoring at this stage the presence, or absence of mitigating factors; only after deciding what is the proper sentence for the offence itself, does the Court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors.These principles are less applicable when the offence is one which Parliament has prescribed a minimum sentence; by doing so, Parliament has expressed the intention that all offences of the particular type be treated more seriously than previously. The effect is that of the least serious offence of stock theft, or where there are mitigating factors to enable the Court to exercise maximum leniency a more severe penalty should be imposed."

Third, Mrs. Muyambango drew my attention to the case of Chilufya v The People (10). Mr. Muyambango submitted that in the Chilufya case (supra), although the Supreme Court reversed the High Court which had held that the sentence imposed by the trial magistrate was excessive, bearing in mind the value of the property stolen. And consequently the sentence was reduced to 12 months imprisonment with hard labour. Be that as it may, the Supreme Court observed that it is not necessarily the value of the property stolen to which the Court should have regard, but also the nature of the property, and the purpose for which it was stolen. In light of the Chilufya case,(supra) Mrs. Muyambango pressed that the value of the property stolen is also a cardinal element that the trial Court ought to consider when sentencing. Mrs. Muyambngo argued that in this case the value of the property was not taken into account. Ultimately, Mrs. Muyambango submitted that a sentence of 36 months imprisonment with hard labour for theft by agent involving the sum of K 2, 800, 000=00 is excessive. And the sentence should therefore come to me with a sense of shock.

On 24th May, 2011, Mrs. Lungu filed submissions on behalf of the People. Mrs. Lungu submitted as follows: that the trial Court was on firm ground both in law, and fact, when it sentenced the appellant to a term of 36 years imprisonment with hard labour. Mrs. Lungu noted that the offence of theft by agent carries a maximum sentence of seven years imprisonment. Mrs. Lungu also drew my attention to the Chilufya case (supra), she noted that in the Chilufya case (supra), the appellant was convicted for the offence of burglary and theft. And was sentenced to 3 years imprisonment with hard labour.

However, on appeal to the High Court, the sentence was reduced to 1 year imprisonment with hard labour. The ground upon which the appellate Court; the High Court, reduced the sentence was that it appeared to the Court that the sentence was excessive taking into account the value of the property stolen. The High Court decision was on appeal to the Supreme Court reversed. And in so doing, the Supreme Court observed as follows:

"It is not necessarily the value of the property stolen to which the Court should have regard, the Court should have regard also the nature of the property, and the purpose for which it was stolen."

Mrs. Lungu submitted that the Supreme Court went on to observe that:

"In our opinion the learned magistrate was fully entitled notwithstanding that the value of property was K 1.10 to take a very serious view of this offence and to impose the sentence he did."

In the same vein, Mrs. Lungu argued that in this case the trial magistrate was entitled to take a serious view of the offence, and to impose the sentence he did, notwithstanding that the amount involved was K 2, 800, 000=00. At any rate, Mrs. Lungu argued that the trial magistrate rightly took the view that the offence in question was on the increase. And there was therefore need to arrest, and deter the proliferation of such offences by meting out punishment befitting the offence.

To buttress her submissions, Mrs. Lungu also brought to my attention a line of cases relating to sentencing. The first case was Anderson v The People (4), in which it was held that:

"An appeal Court may only override the discretion to sentence vested in the trial Court when that discretion is exercised on a manifestly wrong basis."

The second is the case of Sykalonga v The People (9), where it was held that:

"It is perfectly proper to refer to the prevalence of an offence, and to use that prevalence as a basis for imposing a deterrent sentence."

The third is the case of Alubisho v The People (8), where it was held that:

"With the exception of prescribed, or mandatory sentences, a trial Court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate Court does not normally have such discretion."

The fourth, is the case of Kalunga v The People (7), where it was held that:

"Just as an appellate Court will not interfere with a sentence as being too high unless the sentence comes to the Court with a sense of shock, equally it will not interfere with a sentence as being too low, unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence."

On the basis of the preceding precedents, Mrs. Lungu advanced the following propositions: First, that in light of the fact that the trial Court took into account the mitigating factors when sentencing the appellant, it cannot be rightly stated that the trial Court exercised its discretion on a wrong basis. Second, the trial Court was on firm ground when it took into account the prevalence of the offence, and used it as the basis of arriving at the sentence. Third, that the sentence imposed by the trial Court

should not come to this Court with a sentence of shock, granted the prevalence of the offence, and kindred offence.

I am indebted to counsel for their spirited arguments, and industrious research on the subject of sentencing. In considering the general principles relating to sentencing on appeal, a convenient, and instructive starting pint is the case of Jutronich and Others v The People (2), where the erstwhile Chief Justice Blagden observed at page 10 as follows:

"In dealing with an appeal against sentence, the appellate Court should, I think, ask itself there questions:

1. Is the sentence wrong in principle?
2. Is it manifestly excessive so that it induces a sense of shock; and
3. Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?

Only if one, or other of these questions can be answered in the affirmative, should the appellate Court interfere."

In the same Jutroch case (supra), Blagden C.J., also observed that the principles which should guide a Court in passing sentence have perhaps never been better expressed than by Mr. Justice Hilbery in the case of R v Ball (1), where he observed as follows at page 165;

"In deciding the appropriate sentence a Court should always be guided by certain considerations. The first, and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."

The nub of the appeal in this matter is the complaint by the appellant that the trial magistrate erred in law in sentencing him to a term of 36 months imprisonment with hard labour without taking into account the value of the property stolen. The leading case on this point is the case of Chilufya. (supra) The facts of the case were that a section boss employed by one of the mining companies, stole a stick of gelignite and one detonator together valued at K 1.10 and handed the articles to a friend who, although there was no evidence that the latter put the explosives to use, had been convicted of burglary, and theft. On appeal to the High Court, the judge reduced the sentence on the ground that the value of the property stolen was only K 1.10.

In a judgment delivered by Baron D.C.J. it was observed as follows:

"The appellant was convicted in the Subordinate Court of theft by public servant, the subject of the offence being one of gelignite, and one detonator together valued at K 1.10. The evidence was that the appellant, who was a section boss employed by one of the mining companies, stole these articles, and handed them to a friend. He was sentenced to three years imprisonment with hard labour of which one was suspended. On appeal to the High Court, the learned judge said that the sentence appeared to him to be "rather excessive taking into account the twelve months imprisonment with hard labour. In our opinion the learned magistrate was fully entitled, notwithstanding that the value of the property stolen was only K 1.10, to take a very serious view of this offence, and to impose the sentence he did. It

is not necessarily the value of property stolen to which the Court should have regard; the Court should have regard also to the nature of the property, and the purposes for which it was stolen, and where the property is explosives and the evidence suggests that the property was handed to a man who, although there is no evidence that he put the explosives to use, had been convicted of burglary, and theft, the offence was certainly a serious one, and merited a severe sentence."

It is also noteworthy that in this case the appellant gave a very moving mitigation. He lamented that: he is unemployed; he is afflicted by HIV/AIDS, and is on ARV's; suffers from epilepsy; and is also looking
after his five children, and aged parents.

I must state albeit obiter dicta that, first, hardship to families, dependants, and appellants themselves is the inevitable consequence of indulging in criminal activities. Appellants should therefore think of the consequences before they engage in criminal activities. (See Jutronich v The People (supra), Malichi v The People (3), and Nyirenda v The People (14). Second, in the case of Zulu v The People (6), it was observed by the erstwhile Chief Justice Doyle that in many cases matters raised by a convicted person in mitigation are accepted by the prosecution without objection, where the question turns on exceptional ill-health, the prosecution would be in no position either to dispute or concur. Thus, Doyle C.J. went on to observe that if such submission is to be made, it would be properly supported by either viva voce evidence from some medical authority, or at least by a written certificate. In the Zulu case, (supra) the appellant was allowed to call evidence. And the Supreme Court was prepared to listen to it. The appellant afforded himself of the opportunity offered, and in fact called two medical witnesses. Their evidence went further than that, while the appellant was an ordinary diabetic and could be treated in prison; his treatment would be better performed outside prisons. Ultimately, the Supreme Court held that it was impossible for the Court to lay down a rule that all persons suffering from diabetes, and indeed other diseases which require special treatment, should by reason of that fact alone be immune from serving a custodial sentence.

Following the discussion of the various cases referred to above, the following principles may therefore be distilled. First, in deciding the appropriate sentence, a Court should always be guided by two primary considerations. The first and foremost is the public interest. The second, is that criminal law is publicly enforced, not only with the object of punishing crime, but also with preventing it. Third, with the exception of prescribed, or mandatory sentences, a trial Court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate Court does not normally have such discretion. Fourth, an appellate Court will not interfere with a sentence as being too high, unless that sentence comes to the Court with a sense of shock. Equally, an appellate Court will not interfere with a sentence as being too low, unless it is of the opinion that it is totally inadequate to meet the circumstances of the particulars offence. Fifth, in dealing with an appeal against sentence, the appellate Court should ask itself three questions:

a) is the sentence wrong in principle?;
b) is it manifestly excessive so that it induces a sense of shock; and
c) are there any exceptional circumstances which would render it an injustice if the

sentence were not reduced.

Thus an appellate Court may only interfere with a lower Court sentence, where the sentence is wrong in principle, or where the sentence is so manifestly excessive, or totally inadequate hat it induces a sense of shock. Sixth, it is also perfectly proper to refer to the prevalence of an offence and to use that prevalence as a basis for imposing a deterrent sentence. Seventh, it is trite law that hardship to families and dependants is the inevitable consequence of indulging in criminal activities. Appellants should think of the consequences before they engage in criminal activities.Lastly, where health is taken into account, there must be adequate medical evidence either, vivo voce, or at least by a written certificate.

In this particular case, the sole question that falls to be determined is whether, or not the trial magistrate erred in sentencing the appellant to 36 months imprisonment with hard labour, without taking into account the value of the property stolen. I think not. First, notwithstanding what the appellant considers to be low value of the amount stolen, the trial judge was on the authority of the Chilufya case entitled to take a very serious view of the offence. Second, the offence in question carries a maximum sentence of seven years imprisonment. Whilst it is accepted that an accused person should not be allowed to leave Court with a sense of grievance that he was given a severe sentence, a sentence of three years imprisonment does not come to me with a sense of sense of shock. The sentence was proportionate to the seriousness, and gravity of offence. (See The People v Simolu (12). Third, in any case, the trial magistrate was entitled to take into account the prevalence of the offence, and to use that prevalence as a basis for imposing a deterrent sentence. In view of the foregoing, I uphold the sentence imposed by the trial magistrate, and dismiss this appeal against sentence only.

Appeal dismissed.