IN THE HIGH COURT OF ZAMBIA **HJA/03/2011**
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

BETWEEN:

GOLDEN DAKA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25th day of February, 2011.

For the People: *Ms. C. C. Soko, State Advocate in the Director of Public Prosecutions* *Chambers.*

For the respondent: *Mr. F. M. Jere, of Messrs Ferd Jere and Company.*

RULING

Cases referred to:

1. *Mwanza v The People (1976) Z.R. 154.*
2. *Jutronich and Others v The People (1965) Z.R. 11.*
3. *Zulu v The People (1974) Z.R. 58.*

Legislation referred to:

1. *Penal code, Cap 87, ss 139(1) and 229.*
2. *Criminal Procedure Code Caps 88, ss. 9(3), 217, 321, 337, 338, and 341.*

The facts of the case are that Golden Daka appeared before the Subordinate Court of the first class of Chipata District on 21st September, 2010, for the offence of

causing grievous harm contrary to section 229 of the Penal Code Chapter 87 of the laws of Zambia.

The particulars of the offence are that on 11th May, 2009, at Chipata, in the Chipata District of the Eastern Province of the Republic of Zambia, did cause grievous harm to Albert Phiri. After the trial, Golden Daka was convicted of the subject offence and sentenced to three years imprisonment with hard labour. This matter originally before me by way of an appeal. However, the appeal was withdrawn because Mr. Jere realized that the sentence that was subject of the appeal had not in the first place been confirmed by the High Court. Thus Mr. Jere pressed that the sent3ence should now be confirmed.

On 24th February, 2011, Mr. Jere filed written submissions. In his submissions, Mr. Jere argued that the class II Magistrate in the Court below did not comply with the provisions of section 9 (3) of the Criminal Procedure Code. Section 9 (3) is in the following terms:

"no sentence imposed by a Subordinate Court of the second class exceedingly one year's imprisonment with or without hard labour shall be carried into effect in respect of the excess until the record of the case or a certified copy thereof and the sentence has been confirmed by the High Court."

Mr. Jere argued that the Court below (Class II Magistrate) should have forwarded the record to the High Court for confirmation of his three years sentence. Further, Mr. Jere argued that I am empowered by section 338 of the Criminal Procedure Code to review the matter. In support of this submission, Mr. Jere relied on the case of Mwanza v The People (1976) Z.R. 154.

Furthermore, Mr. Jere argued that the appellant is a first offender who should have been treated more leniently. Mr. Jere recalled that Golden Daka told the lower Court in mitigation that he was suffering from peptic ulcers, and meningitis. Notwithstanding the mitigation referred to above, the prosecution went ahead to impose a sentence of three years imprisonment with hard labour. Lastly, Mr. Jere

argued that the prosecution evidence was full of contradictions especially the evidence of the complainant and his witnesses.

On 25th February, 2011, Ms. Soko filed submissions on behalf of the people. Ms. Soko contends that this record is wrongly before me to reinforce her contention, Ms. Soko also drew my attention to the case of *Mwanza v The People (1976) Z.R. 154.* Ms. Soko argued that the *Mwanza case* considered the jurisdiction of the court to review matter under section 338 of the Criminal Procedure Code, Chapter 88 of the laws of Zambia.

Ms. Soko strenuously argued that the sentence passed by the Court below should not be confirmed at this juncture because there is an irregularity on record. Namely, there is no endorsement on the record by the Court below that this matter has been referred to this Court; the High Court for confirmation of the sentence. Ms. Soko urged that the record should be remitted to the Court below to care the procedural defect. Ms. Soko pressed that if the matter is remitted to the Court below there is not injustice or prejudice that would work against the convict. Ms. Soko argued in the alternative that if I am inclined to proceed with the confirmation, her contention is that there is nothing on record that justifies setting aside the conviction or reducing the sentence. On the contrary, Ms. Soko argued that the record shows that there are aggravating circumstances surrounding the assault question. Namely, as a result of the assault the complainant lost his left eye and is thus permanently moiled. Ms. Soko submitted that the offence of causing grievous harm contrary to section 229 of the penal code attracts a maximum sentence of life imprisonment. Thus a sentence of three years imprisonment imposed by the Court below does not come to her with a sense of shock.

Ms. Soko also argued to uphold the convection because the convict with the assistance of his friend pierced the complainant’s eye with a sharp object resulting in the loss of his left eye. I am indebted to counsel for the submissions and

arguments. Both Mr. Jere and Ms. Soko have relied on the case of *Mwanza v The People (1976) Z.R. 154* to support their respective positions. I will therefore review the *Mwanza case*. The facts in the *Mwanza case* were that the accused was charged before the Subordinate Court in Kitwe with indecent assault on a female contrary to section 139 (1) of the Penal Code Act, Chapter 146 of the laws of Zambia. (Now Chapter 87). The accused was sentenced to twenty months imprisonment with hard labour. Care, J, observed that the record came before the High Court for the purpose of confirmation of sentence by virtue of section 9 (3) of the Criminal Code Chapter 160 of the laws of Zambia, (now chapter 88). This was so because the magistrate being of class II, a sentence in excess of one years imprisonment with hard labour could not be carried into effect without confirmation by the High Court.

Core, J, also observed that the revisional powers are provided for under section 338 of the Criminal Procedure Code. S. 338 enacts as follows:

“338 (1) in the case of any proceedings in a Subordinate Court, the record of which has been called or otherwise comes to its knowledge, the High Cou8rt may:-

(a) In the case of a conviction

(i) Confirm, vary, or reverse the decision of the Subordinate Court, or order that the person convicted be retried by a Subordinate Court of competent jurisdiction or by the High Court, or in the matter as to it may seem just and may by such order exercise any power which the Subordinate Court might have exercised;

(ii) If it thinks a different sentence should have been passed, quash the sentence passed by the subordinate court and pass such other sentence warranted in law, whether in substitution therefore as it thinks ought to have been passed;

(iii) If it thinks additional evidence is necessary, either take such additional evidence itself or direct that it be taken by the Subordinate Court.

(iv) Direct the Subordinate Court to impose such sentence or make such order as may be specified.

(b) In the case of any other order, other than an order of acquittal, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of making representations in writing on his own behalf.

(3) The High Court shall not exercise any powers under this section in respect of any convicted person who has appealed, unless such appeal is withdrawn or who has made application for a case to be stated, unless the Subordinate Court concerned refuses to state a case under the provisions of s 343.

(4) Nothing in this section shall be the prejudice of the exercise of any right of appeal given under this code or under any other law.

(5) The provisions of subsection (2), (3) and (4) of s 333 shall in respect of any additional evidence.

(6) When the High court gives a direction under subparagraph (iv) of paragraph (a) of subsection (i), the record of the proceedings shall be returned to the Subordinate Court and that Court shall comply with the said direction.

In the *Mwanza case* Core, J, went on to observe that there are four ways in which the decisions of a Magistrate's Court can be supervised b y the High Court. The first way, which is initiated at the option of one of the parties, is that of appeal. This is a right given to a convicted person by statute. (See section 321 of the Criminal Procedure Code). It may also be by way of case stated (see section 341 of the Criminal Procedure Code).

The second option, Care, J, observed is at the option of a Subordinate Court where it commits a person for sentence by the High Court (see section 217 of the Criminal Procedure Code).

The third method is known as review. In this respect, the High Court may call for an examine the record of any Criminal Proceedings before any Subordinate Court for

the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by a Subordinate Court. (See section 337 of the Criminal Procedure Code). Lastly, the fourth method is under section 9 of the Criminal Procedure Code. This is the path which is proposed that the instant matter should take. To recapitulate, s 9 (3) enacts that:

"No sentence imposed by a Subordinate Court of the second class exceeding one year imprisonment with or without hard labour, shall be carried into effect in respect of the excess, until the record of the case or a certificate copy thereof has been transmitted to and the sentence has been confirmed by the High Court."

Following the decision in the *Mwanza case*, the record in this case has also in terms of s. 338 (1), "otherwise come to my knowledge". Thus although the record was not formally referred to me for confirmation under section 9 (3) of the Criminal Procedure Code, I still retain the powers confer on me by section 338 (1) (a) (ii) of the Criminal Procedure Code to pass a sentence warranted in law.

The convict in this case was charged and convicted of the offence of causing grievous contrary to section 229 of the Penal Code. Section 229 enacts that:

"*Any person who unlawfully does grievous harm to another is guilty of felony and is liable to imprisonment for seven years*."

It will be recalled that, Mr. Jere in pressing for a reduction in the sentence of three years imposed by the Court below pressed that:

The convict is a first offender; and is suffering from peptic ulcers and meningitis. Conversely, Ms. Soko contends that in the instant case, there are aggravating circumstances surrounding the assault. Namely, the complainant has lost his left eye in the process. In dealing with the question of sentence on review, I propose to adopt the approach taken by an appellate in dealing with an appeal against sentence. Namely the following question should be asked:

(a) Is the sentence wrong in principle;

(b) Is it manifestly excusive so that it induces a sense of shock; and

(c) Are there any exceptional circumstances that would render it an injustice of a sentence were not reduced. (See *Jutronich and other v The people (1965) Z.R. 11).*

Mr. Jere urged me to reduce the sentence because Golden Daka in mitigation told the Court below that he was suffering from peptic ulcers and meningitis. A question that therefore arises is whether I would be on firm ground in taking into account the health condition of Golden Daka.

The case of *Zulu v The People (1974) Z.R. 58*, is instructive on this point. The facts of the case were that the appellant, a legal practitioner, was convicted in the Subordinate Court of the theft of K 480, the property of a client. He was sentenced to four months imprisonment with hard labour, suspended or one year. In deciding to suspend the sentence the magistrate appears to have been influenced by the serious consequences to a professional man and by the health of the appellant who was a diabetic. In delivering the judgment of the Supreme Court Double C.J as he was then made the following observation at pate 59:

“Where it is clear that the Courts cannot ordinarily determine a sentence by reason of the ill health of a convicted person, there may be exceptional cases where the Court would be merciful because of the exceptional results which might ensure from a prison sentence by reason of the convicts state of health. Where this is to be taken into account there must, of court be adequate medical evidence in the instant case there was none.

Doyle C.J. continued:

“While in many cases matter raised by a convicted person in mitigation are accepted by the prosecution without objection, clearly where the question turns an exceptional ill health the prosecution would be in no position either to dispute or concur, and we consider that if such submission is to be made it should be properly supported either by viva voce evidence from some medical authority, or at least by a written certificate.”

In the Zulu case the appellant afforded himself of the opportunity offered, and called two medical witnesses. Their evidence in substance went no further than that, while the appellant was an ordinary diabetic, and could be treated in prison, ideally his treatment would be better performed outside prison.

In the Zulu case, the Supreme Court was unable to lay down a rule that all persons suffering from diabetic, and indeed persons suffering from other diseases which require special treatment should by reason of that fact alone be immune from a custodial sentence. The Supreme Court however hastened to point out that there is of course a duty on the prison authorities to provide proper treatment to prisoners suffering from disease. On the facts of this case the submission by Mr. Jere that Golden Daka is suffering from peptic ulcers, and meningitis is not supported by either *vica voca* evidence or indeed documentary evidence. The circumstances highlighted Mr. Jere is in my opinion not exceptional. At any rate the prison authorities will be of course under a duty to ensure that golden Daka receives medical treatment whilst he is proper in custody.

I must also mention that Golden Daka caused serious grievous harm to Albert Phiri, which merits a custodial sentence. I therefore confirm both the conviction and the sentence to three years imprisonment with hard labour as required by section 9 (3) of the Criminal Procedure Code.

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Dr. P. Matibini, SC
HIGH COURT JUDGE