

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HPA/62/2013

BETWEEN:

WILLIAM NG'AMBI MUSENGE

Versus

THE PEOPLE

Before the Hon. Mr. Justice Justin Chashi in Open Court on the 10th day of March, 2014.

*For the Appellant: K. Mweemba, Messrs Mushipe and Associates.
For the Respondent: C. Bako, Senior State Advocate.*

J U D G M E N T

Cases referred to:

1. Robertson Kalonga v The People (1888-89) ZR 90.

Legislation Referred to:

2. The Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia.
3. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

The Appellant was on the 24th day of September 2013 convicted by the Subordinate Court of the Second class sitting at Lusaka for one count of possession of Narcotic drugs Contrary to Section 8 of **The Narcotic Drugs and Psychotropic Substances Act²** and sentenced to six months imprisonment with hard labour with effect from the 2nd day of August 2013.

It is against the said conviction and sentence that the Appellant now appeals. The Appellant vide the Notice of Appeal filed on the 6th day of August 2013 advanced nine (9) grounds of appeal as follows:

1. *That the Learned trial Magistrate erred in law and fact when she held that this is not one of the cases where corroboration is required by law or the practice of the Court. That the law of evidence and practice requires that circumstantial evidence must be corroborated or supported by something more.*
2. *That the trial Magistrate erred in law and fact when she held that Section 192 of the Criminal Procedure Code does not make it mandatory for the prosecution to call a public Analyst when in fact that Section contains a proviso segmented into two paragraphs which proviso when invoked and allowed into motion by the Court makes it mandatory for the public analyst to come to Court and give oral evidence to substantiate the contentious affidavit.*
3. *The learned trial Magistrate erred in law and fact when she chose to ignore the Statement of the defence from the Appellant and made adverse comments about him upon which she held that the evidence of the Appellant cannot be believed.*
4. *The learned trial Magistrate erred in law and fact when she convicted the Appellant when the State failed to prove beyond reasonable doubt or at all the aspect of possession*

of the alleged narcotic drugs in issue and ultimately the charge in the case.

- 5. The learned trial Magistrate erred in law and fact when she held that there was no dereliction of duty on the prosecution for failure to take photographs, videos and finger prints as Section 26 (1) of The Narcotic Drugs and Psychotropic Substances Act is not mandatory although the DEC has power to do so.*
- 6. The learned trial Magistrate erred in law and fact when she held that Rule 7 (4) in part III of The Act (Drug Enforcement Commission) (Staff) Rules does not empower the DEC to call evidence of an undercover agent but that it deals with the admissibility of evidence of an undercover agent and that it is not mandatory for such an under cover agent to be called in Court so as to corroborate the evidence of the witnesses.*
- 7. The Learned trial Magistrate, erred, misdirected herself and fell into grave error when she held that the alleged drugs were not planted and that the State's failure to seize the contra band at the scene of the crime did not amount to a dereliction of duty when in actual fact the seizure notice does not support the prosecution's case in terms of inter alia, the principle of contemporaneity.*
- 8. That the learned trial Magistrate erred in law when she held that the evidence of the Public Analyst would not have been favourable to the defence as there was already exhibit P4*

and that she had no doubt that exhibit P4 was 0.3 grammes of cocaine.

9. That the learned trial Magistrate misdirected herself when she sentenced the Appellant to a longer term of imprisonment with hard labour when the Appellant is a first offender who mitigated thoroughly in good faith and also considering the fact that there were no aggravating factors in the purported commission of the offence.

When the matter came up on the 20th day of December 2013 for the hearing of the appeal, Counsel for the Appellant indicated that he would file the Appellants Heads of Arguments by the 20th day of January 2014, whilst the State would file theirs by the 7th day of February 2014. However at the time of writing this Judgment none of the parties had done so.

I was therefore left with no option, but to determine the appeal purely on the grounds of appeal which did not give me much impetus as I was not assisted as to which direction the Appellant intended to move or whether he had abandoned the appeal.

After carefully perusing the record and in particular the proceedings from the Court below and the Judgment, I am of the view that the third, fourth and seventh grounds of appeal relate to the trial Magistrates finding of facts. It is a clear principle of law that an Appellant Court cannot interfere with the findings of fact by the trial Court unless such findings were made perversely and in the absence of any relevant evidence and upon a

misapprehension of facts. As earlier alluded to, the absence of the Appellants Heads of arguments does no justice to these three grounds of appeal. I am therefore left with no option but to decline to interfere with the findings of fact which on the face of it bears reasonableness.

Grounds 3, 4, and 7 of the grounds of appeal are therefore dismissed.

As regards the first ground of appeal, I should say that I am startled by the general assertion that circumstantial evidence needs corroboration. Such an assertion is untenable at law and should instantly be dismissed as I am at a loss as to its origins at law.

The second ground of appeal relates to the interpretation of Section 192 of **The Criminal Procedure Code**³. Having carefully read the said Section, I totally disagree with the contention in the ground of appeal that the Section as read together with the proviso makes it mandatory for the Public Analyst to come to Court and give oral evidence to substantiate the contents of the affidavit. This ground of appeal has no merits as it is misconceived.

The fifth ground of appeal relates to **Section 26 (1) of The Narcotic Drugs and Psychotropic Substances Act**². This provision is there for a proper keeping of the record and in order to eliminate any doubts as regards the identification of the

Accused. However, it is not mandatory as can be seen by the consistent use of the word **may**.

In any case, the Supreme Court was emphatic on this point in the case of **Robertson Kalonga v The People**¹ when it had this to say: on the issue of finger prints:

“failure to lift finger prints is a dereliction of duty by the Police which raised a presumption that such finger prints as there were did not belong to the Accused. The presumption is rebuttable by overwhelming evidence of identification”.

The aforesaid extends to the taking of photographs and footprints. The provision does not make any mention of video footage. The issue of identification does not arise as the Appellant at the time of being apprehended was alone in the car and neither did he raise the issue of identification in the Court below. This ground of appeal also has no merits.

The sixth ground of appeal relates to Rule 7 (4) of **The Narcotic Drug and Psychotropic Substances (Drug Enforcement Commission) (staff) Rules**. This provision deals with the appointment of special agents and goes on to state that they shall have the powers of arrest and that their testimony shall be admissible in evidence in any Court proceedings under the Act.

Nowhere does it talk about making it mandatory to call such agents to come and testify in Court. The trial Magistrate was on

firm ground therefore when she ruled that the provision deals with the admissibility of evidence.

The eighth ground of appeal relates to the calling of the Public Analyst which has partially been dealt with when I dealt with the second ground of appeal.

Looking at exhibit P4, I am at pains trying to imagine what the defence would have achieved even if the Public Analyst had been called as a witness. The affidavit, P4 speaks for itself that the substance which was found was 0.3 grammes of cocaine. In the absence of heads of arguments from the Appellant I am restrained to go any further on the matter.

In my view looking at all the grounds of appeal from ground one to eight, they all have no merits. It is clear that the Appellant was fishing for grounds of appeal. In the view that I have taken, I will dismiss all the aforesaid grounds of appeal and confirm the conviction.

The ninth ground of appeal is against sentence. Section 8 of the Act provides for a sentence of imprisonment not exceeding fifteen years. Taking the nature of the drug the Appellant was found in possession with, I do not think that a term of six months imprisonment with hard labour can be said to be excessive especially in view of the trial Magistrate sentiments after considering the mitigation that the offence is prevalent and hence the need to deter would be offenders.

The appeal against sentence is equally dismissed.

Delivered at Lusaka this 10th day of March 2014.

**JUSTIN CHASHI
HIGH COURT JUDGE**