IN THE HIGH COURT FOR ZAMBIA **HTR/01/2017**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

11 SEP 2017

BETWEEN:

DAVID SAMSON SICHINGA

DAVID KENNEDY MWEWA

AND

THE PEOPLE

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Convict: *N/A*

For the State: *N/A*

J U D G M E N T ON REVIEW

Legislation referred to:

1. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*
2. *Penal Code, Chapter 88 of the Laws of Zambia*

Cases referred to:

1. *The People v. Patrick Massissani (1977) ZR 315*
2. *The People v. Mubanga and Makungu (1967) ZR 121*

3. *Jack Chanda v. Kennedy Chanda (SCZ Judgment No. 29 of 2002)*
4. *Stephen James Hardy v. The People (1971) ZR 64*

The genesis of this matter is that on 26th August, 2017 during a visit at the Sesheke Correctional Facility, I received a complaint from **Samson Sichinga** to the effect that **David Kennedy Mwenya** who was a co-accused in **Cause No. 2U/15/2017**

The gist of his complaint was that he was jointly charged of theft with another. Upon conviction he was sentenced to 2 years imprisonment with hard labour whilst the co-accused was sentenced to 1 year.

He attributed the different sentence to allegation that the other accused was given a more favorable treatment because he was a son of an unnamed Magistrate (though the trial was conducted by another Magistrate). It was his further complaint that the co-accused has since been admitted to bail.

I thereupon immediately invoked the provisions of *Section 337 of the Criminal Procedure Code*[1] and subpoened the file of the proceedings **No. 2U/15/2017** so as to satisfy myself as to the correctness, legality or appropriateness of the sentence complained of.

Section 337 provides as follows:-

> *"subject to the provisions herein before contained, no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on any ground*

whatsoever unless any matter raised in such ground has, in the opinion of the appellate Court, infact occasioned a substantial miscarriage of justice.

Provided that in determining whether any such matter has occasioned a substantial miscarriage of justice, the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"

Before reviewing the case I disclosed my mind to the provisions of *Section 339 of the Criminal procedure*, it provides as follows:-

"No party has any right to be heard, either personally or by Advocate before the High Court, when exercising its powers of revision. Provided that the High Court may if it thinks fit when exercising such powers, hear any party either personally or by Advocate"

I did not find it necessary to call the State nor the Accused.

Faced with the exercise before me, I visited the case of the ***The People v. Massissani***[1], this was the case in which an armed paramilitary officer had forced a married couple who he found resting under a tree, forced them to undress and make love. He later took them to a police station where he administered strokes of the cane on them claiming that he had found them making love in the bush, which he found to be wrong and in his view he had authority to punish them.

Upon being arraigned of assault occasioning bodily harm and upon conviction, the Learned trial Magistrate sentenced him to a fine of K100.00 (then) with 2 months imprisonment in default of payment.

The Chief Justice Silungwe, CJ (as he then was) having had his attention drawn to the case, descended to the High Court and called for the record. And having directed that notice be given to the accused pursuant to *Section 338 and 339 of the Criminal Procedure Code* why sentence should not be enhanced, reviewed the case in open Court, set aside the sentence of the lower Court and in place thereof imposed a sentence of 18 months with Hard Labour.

The instructive and authoritative pronouncement appears at page 236 lines 17 – 22. His Lordship put it this way:-

> *"At the commencement of hearing on review it was ascertained that no appeal had been lodged. Care was taken that the hearing did not occur until time within to appeal had expired for the simple reason that a review of a criminal case cannot validly be made where an appeal has been lodged within the prescribed period"*

Upon combing the record of the Court below, it was revealed that the 2 accused were jointly charged of the offence of theft *Contrary to Section 272 of the Penal Code*[2].

The first accused **Samson Sichinga** in respect of which this review is pleaded guilty to the charge on 7th March, 2017 and was found

guilty and convicted accordingly whereupon he mitigated as follows:-

> *"I will not commit this offence again. I am a serving convict. I am a first offender and pleaded guilty to the charge"*

Whereupon the learned trial Magistrate pronounce as follows:-

> *"The convict is a first offender as stated by the state. He pleaded guilty to the charge. It is the practice as courts to give due allowance to first offenders who plead guilty. I will be lenient to the convict in this matter.*
>
> ***Sentence***
>
> > *I sentence the convict to 24 months imprisonment with hard labour effective 10/02/2017. The sentence will run concurrently with any sentence that the convict is currently serving. Informed of Right of Appeal"*

By the 26th August, 2017 at the time of the Sesheke Correctional visit the convict had not appealed the sentence, (since no appeal lies against an unequivocal plea of guilty). It was thence safe for me to exercise my revisionary powers under Section 337 of the Criminal Procedure Code.

As regards the 2nd accused (David Kennedy Mwewa), the record reveals that the accused pleaded not guilty, was tried found guilty and convicted on 13th April, 2017. He then said the following in mitigation:-

"I am a student who is currently on holiday. If I am sent to prison my school will be disturbed"

The Learned trial Magistrate then pronounced himself as follows:-

"I have taken into account what the convict has said. I have taken into account the fact that the convict is a first offender. To deter would be offenders, I will send the convict to prison. The convict is a young man who looks to be remorseful to me as such I will be lenient on him"

Sentence

I sentence the convict to 19 months imprisonment with hard labour effective today 19th April, 2017. Informed of the Right of Appeal"

Following the aforesaid conviction and sentence, the convict on even date filed a notice of appeal to the High Court.

I therefore have no jurisdiction to subject his case to review in the face of the appeal. I will only refer to the mitigation in so far as it relates to the complaint brought to the attention of the Court and in so doing is not an indication or meant to affect the High Court in its appellate jurisdiction.

It is trite law that an appellate Court exercising its appellate or revisionary powers can only interfere with the sentence of the lower court if it can be demonstrated that

(1) The lower Courts sentence was either so severed or so lenient as to instill a sense of shock in the High Court; or

(2) That the lower Courts sentence went against the principles of sentences, or

(3) That the sentence was illegal in that it was not supported or went against legislative provisions.

Sentencing entails use of judicious discretion. Some of the factors upon which the sentencing principles are anchored on interalia include

(i) That a convict who is a first offender is entitled to leniency;

(ii) A convict who pleads guilty is entitled to further credit of clemency unless there are aggravating factors that may tend to deprive the convict of this favorable treatment;

(iii) Prevalence of the particular crime in the community;

(iv) Mitigating factors also abound but the following do not constitute mitigation

(a) Plight or financial distress of the convict. The rationale for this is that a convict ought to have disclosed his mind to the plight of his family before embarking on a criminal errand.

(b) Youth

The Court of last resort had occasion to pronounce itself on the subject in the case of ***Jack Chanda and Kennedy Chanda v. the People***[3] they put it this way:-

"It was argued on behalf of the appellants that the Learned trial Judge misdirected himself when he held that there were no extenuating circumstances in the youthful age of the appellants and as his authority for this proposition he referred us to recent decisions which he attributed to us where we have held that youthful age is an extenuating circumstance. We are bound to say that we found this submission startling. We have never decided any appeal in which we have laid down the principle that the young age, or for that matter old age is an extenuating circumstance. What we have said is that failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances"

In the case in casu, the convicts complaint is that he was given a severe sentence whilst his co-accused was given a light sentence on account of being a son of the Magistrate. There is no evidence to that effect.

The only issue to consider is whether in a joint enterprise venture there can be differentiation in sentencing.

Evans, J (as he then was) had occasion to pronounce himself on the subject in the case of ***The People v. Mubanga and Makungu***[2]. He put it this way:-

"The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner who was convicted of the same crime received a light sentence or non at all has neither

validity nor force. Consideration of character such as age and number of prior convictions may well justify different treatment"

In my view, that is what should have happened in the case. The co-convict was said to be a pupil and if sent to jail would affect his education. Whereas the complaint or applicant herein informed the Court that he was a serving convict.

Granted that he was a first offender who had pleaded guilty to the charge and as such deserving of leniency, a sentence of 2 years IHL as compared to 1 year suspended for 1 year in respect of the other confederate (**David Kennedy Mwenya)** in crime who had pleaded not guilty may seem to suggest that due regard was not given to the Applicants (Samson Sichinga) mitigation and as such was a misdirection.

In the case of ***Stephen James Hardy v. the People***[4], it was held as follows:-

"(i) Even if it could be said that the Magistrate erred in his assessment of the Appellants position, this was not such an error as to entitle the Appellate Court to interfere. The Appellate Court will not interfere unless the sentence is manifestly excessive or wrong in principle.

(ii) The Appellate Court will not interfere with the sentence if the Magistrate was influenced by proper considerations in arriving at a sentence even if there was some misdirection from which the injustice resulted"

The above legal pronouncements are in concert and consonance and in concert with *Section 353 of of the Criminal Procedure Code*[1] it provides as follows:-

> *"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on any ground whatsoever unless any matter raised in such ground has in the opinion of the appellate Court infact occasioned substantial distance.*
>
> *Provided that in determining whether any such matter has occasioned substantial miscarriage of justice, there shall have regard to the question whether the objection could and should have been raised at an early stage of the proceedings"*

I find that there was no demonstrable injustice suffered by the Applicant / Complainant in respect of the measure of sentence administered by the Learned trial Magistrate of 2 years imprisonment with hard labour and I confirm it.

Leave to appeal to the Court of Appeal granted.

Delivered under my hand and seal this 11th day of September, 2017

Mwila Chitabo, SC
Judge