IN THE HIGH COURT OF ZAMBIA **HPS/08/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

THE PEOPLE

V

ILACK KALICHELE

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF JANUARY, 2018

For the State : *Ms R. Malibata, State Advocate, NPA*

For the Convict : *Mrs M. K. Liswaniso, Legal Aid Counsel, Legal Aid Board*

RULING

CASES REFERRED TO:

1. ***Nathan Hakagolo V The People SCZ No 7 of 2016***
2. ***Bright Kaweme V The People Appeal No 140/2015***

LEGISLATION REFERRED TO:

1. ***The Penal Code, Chapter 87 of the Laws of Zambia***
2. ***The Criminal Procedure Code, Chapter 88 of the Laws of Zambia***

The convict in this matter stood charged with the offence of defilement of an imbecile, contrary to Section 139 of the Penal Code, Chapter 87 of the Laws of Zambia before the Subordinate Court at Chongwe. The particulars of the offence alleged that the convict on 7th March, 2017 at

Chongwe in the Chongwe district of the Lusaka Province of the Republic of Zambia had unlawful carnal knowledge of Lusekelo Kandulu, who to his knowledge was an imbecile. He was convicted of the offence and committed to the High Court for sentencing.

When the matter came before on 29th January, 2018 for sentencing, the State indicated that they supported the conviction and asked the court to take into account the prosecutrix's age as well as that of the convict, when sentencing the convict. Counsel for the convict on the other hand indicated that the convict was charged and convicted of the offence of defilement, but the record of proceedings showed that the court noted that the prosecutrix was mentally unfit. However the court went ahead and conducted a voire dire and ruled that she was possessed of sufficient intelligence to receive her evidence and understood the duty to tell the truth.

That the court in arriving at its finding relied on the evidence of the prosecutrix, and it was their submission that based on this, the conviction was erroneous. The court was invited to review the matter.

The State submitted that they restated the position given earlier in the matters that had come up, that this court can only review a case on its own motion, and not at the instance of a party.

I have considered the application. This matter has come before me for sentencing after the Subordinate Court committed the convict for sentencing pursuant to Section 217 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, after it convicted him of the offence of defilement of an imbecile. Section 139 of the Penal Code, Chapter 87 of the Laws of Zambia prescribes a minimum mandatory sentence of fifteen

years imprisonment for any person convicted of the offence of defilement of an imbecile, which is beyond the jurisdiction of the Subordinate Court to pass. Section 217 of the Criminal Procedure Code provides that;

> ***"217. (1) Where, on the trial by a subordinate court of an offence, a person who is of not less than the apparent age of seventeen years is convicted of the offence, and the court is of opinion that his character and antecedents are such that greater punishment should be inflicted for the offence than that court has power to inflict, or if it appears to the court that the offence is one in respect whereof a mandatory minimum punishment is provided by law which is greater than that court has power to inflict, it may, after recording its reasons in writing on the record of the case, commit such person to the High Court for sentence, instead of dealing with him in any other manner in which it has power to deal with him."***

Section 218 of the Criminal Procedure Code stipulates the procedure to be followed by the High Court when dealing with persons committed for sentence before it pursuant to the provisions of Section 217 of the said Criminal Procedure Code. It states that;

> ***"218. (1) In any case where a subordinate court commits a person for sentence under the provisions of section two hundred and seventeen, the subordinate court shall forthwith send a copy of the record of the case to the High Court.***

(2) Any person committed to the High Court for sentence shall be brought before the High Court at the first convenient opportunity.

(3) When any person is brought before the High Court in accordance with the provisions of subsection (2), the High Court shall proceed as if he had been convicted on trial by the High Court."

The Defence has invited me to review the matter. The powers of the High Court to review any record of the Subordinate Court is enshrined in Section 337 of the Criminal Procedure Code, which states that;

"The High Court may call for and 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; and as to the regularity of any proceedings of any such subordinate court".

A reading of this provision establishes that powers of review are exercised when the High Court calls for a record. However when one peruses the Criminal Procedure Code further, they will note that there are other provisions relating to the powers of review such as Section 338, which empowers the High Court to exercise powers of revision under the umbrella *"which otherwise comes to its knowledge"*, such as when confirming sentences, as well as approved school and reformatory school orders passed in respect of juveniles that are ordered by the Subordinate Court,. Section 338 states that;

"338. (1) In the case of any proceedings in a subordinate court, the record of which has been called for, or which otherwise comes to its knowledge, the High Court 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 make such other order 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 more or less severe, in substitution therefor 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".

In my view there is a difference between a matter coming up for sentencing and one coming up for review. In the case of ***NATHAN HAKAGOLO V THE PEOPLE SCZ No 7 of 2016*** the Supreme Court

agreed that the learned sentencing Judge was on firm ground when he refused the application for review and noted that when a matter comes up before the High court for sentencing, the High Court is in the same position as the trial court, as provided in Section 218 of the Criminal Procedure Code.

It however went further to state that when sentencing, the High court had to satisfy itself as to the propriety of the conviction, but that Counsel's invitation to the Judge to review the matter was misconceived.

In the case of ***BRIGHT KAWEME V THE PEOPLE APPEAL No 140/2015,*** the Supreme Court stated that their understanding of Section 218 of the Criminal Procedure Code is that the High Court as a sentencing court should proceed in terms of subsection (3) of that section to sentence the convict as if the court had been tried by the High Court itself. The court went further to note that the High Court has revisionary powers under Section 337 of the Criminal Procedure under which it can call for, and examine the record of any criminal proceedings before any Subordinate Court, for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded and as to the regularity of any proceedings of any such Subordinate Court.

That in that case the High Court was by referral requested to exercise specified powers of sentencing the convict, and there was no indication that the learned Judge had exercised her revisionary powers when the matter was referred to her for sentencing.

It is clear from these two authorities that when matters are referred to the High Court for sentencing by the subordinate courts, the High Court as a sentencing court has to satisfy itself as to the propriety of the

conviction, and in doing so may exercise its powers of revision. No party has a right to invite the court to invoke its powers of revision in such cases, the court moves itself, and that a party affected by the exercise of the powers of revision has a right to be heard if the order passed on review will have a prejudicial effect on them as provided in Section 338 (2) of the Criminal Procedure Code. Therefore the application by Counsel for the convict inviting me to review the matter is misconceived, and it is dismissed.

I have perused the record in order to satisfy myself as to the propriety of the conviction, and there is nothing in the record warranting me to exercise my powers of review in this matter, and I accordingly direct that Counsel proceeds to mitigate before the convict is sentenced.

Delivered in open court this 31st day of January, 2018

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE