ZULU v THE PEOPLE (1974) ZR 58 (SC)
SUPREME COURT
DOYLE CJ, BARON DCJ AND HUGHES JS
22nd JANUARY and 12th MARCH 1974
(Appeal No. 155 of 1973)

Flynote

Criminal law - Evidence - Statement from bar put forward by counsel as fact - Whether proper.

Criminal law - Sentence - Mitigation on ground of illness - Proper procedure to prove medical condition of accused.

Criminal law - Sentence - Suspension on ground of medical condition of accused.

Headnote

The appellant, a legal practitioner, was convicted in the Subordinate Court of the theft of K480, the property of a client. He was sentenced to four months' imprisonment with hard labour, suspended for 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 the course of the trial counsel for the appellant made certain statements from the bar as to what were regarded in the legal profession as reasonable fees for the kind of work done by the appellant in this case.

Held:

(i) Counsel is not entitled to give what is in effect unsworn evidence.

If he wished what he was saying to be accepted as proven fact he should either have ceased to act as counsel and become a witness, or have called other evidence on the issue.

(ii) The courts cannot ordinarily determine a sentence by reason of the ill health of a convicted person, but there may be exceptional cases where the court would be merciful because of the exceptional results which might ensue from a prison sentence by reason of the convict's state of health.

(iii) Where health is to be taken into account there must be adequate medical evidence, either *viva voce* or at least by a written certificate.

Appellant in person.
R M M Mwape, State Advocate, for the respondent.

Judgment

Doyle CJ delivering the judgment of the court, dealt with the merits and dismissed the appeal against conviction, and continued: Before leaving this aspect of the case, we would like to make a brief comment on the procedure adopted by counsel for the defence. In effect counsel was giving unsworn evidence. This he is not entitled to do. If he wished he could have made submissions that this was the sort

of consideration which solicitors should give to these matters. If, however, he was asking the magistrate to accept his statement as proven fact, he should either have ceased to act as counsel and become a witness, or have called other evidence on this issue. In addition his personal statement that a fee of K480 was a proper fee could only have been a matter of submission and should not have been put forward in the manner that it was. We would add that it is somewhat surprising to us that a fee of K600, or even K480, in this case should be alleged to be a reasonable one. It is clear that a mere glance at the Exchange Control Regulations would have shown any moderately competent counsel that the first count contained no offence known to the law and that the second count turned on a single matter of fact. Did or did not Sisoho import or cause to be imported these 500 Zaires? His story, which was contained in his statement to the police that they had been brought by a friend to him from the Republic of Zaire, showed the clear issue to be determined by the

magistrate. It is an unfortunate reflection upon the administration of justice that this very simple case should require a matter of five appearances in court, and it is an even more unfortunate reflection, if it is correct, that a normal fee for such a simple case should be in the range of K480 to K600.

We now turn to the question of sentence. The appellant is a legal practitioner and he has been convicted of stealing K480 from a client. For this the learned magistrate gave him a suspended sentence of four months' imprisonment with hard labour. In this country peculation is unfortunately rife, and for it the courts are imposing mandatory custodial sentences. Whilst it is true that the results for a professional man are more serious than for others, it is also true that a professional man is in a better position to appreciate the consequences. We cannot accept that to be a professional man places one in a more favourable position for the purposes of sentence than that of other persons. We do not consider that the sentence of four months' imprisonment with hard labour was an adequate one, and we propose to increase that sentence to a sentence of one year's imprisonment with hard labour.

On the question of suspension, the learned magistrate appears to have done so by reason of the serious consequences to a professional man and by reason of the health of the appellant. While 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 ensue from a prison sentence by reason of the convict's state of health. Where this is to be taken into account there must, of course, be adequate medical evidence. In the instant case there was none. The appellant himself made the statement, his counsel apparently having ceased to take part in the case. While in many cases matters raised by a convicted person in mitigation are accepted by the prosecution without objection, clearly where the question turns on exceptional ill health the prosecution would be in no position either to dispute or concur, and we consider that if

such a 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 result if the appellant wishes to call such evidence, we are prepared to listen to it. The appellant afforded himself of the opportunity offered and called two medical witnesses. Their evidence in substance went no further than that, while appellant was an ordinary diabetic and could be treated in prison, ideally his treatment would be better performed outside prison.

It may be that there are rare cases where the particular circumstances relating to an illness would justify a court in suspending a custodial sentence. It would, however, be impossible for this court to lay down a rule that all persons suffering from diabetes, and indeed persons suffering from other diseases which require special treatment, should by reason of that fact alone be immune from serving a custodial sentence. The circumstances of this case are clearly not exceptional. The appellant has been found guilty of a serious offence which does not in itself merit a suspensory order. No such order will therefore be made by the court.

There is, of course, a duty on the prison authorities to provide proper treatment to prisoners suffering from disease. We have, however, no reason to doubt that this will in fact be provided.

Appeal against conviction dismissed; sentence increased to one year's imprisonment with hard labour