

GILBERT ARNOLD CHIZU v THE PEOPLE (1980) Z.R. 40 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, AG. D.C.J., AND MUWO, A.G. J.S.
16TH JULY, 1980
S.C.Z. JUDGMENT NO. 16 OF 1980

Flynote

Sentence - Statutory minimum sentence prescribed - Previous convictions - Effect on sentence - Considerations for imposing sentence exceeding the prescribed minimum.

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Headnote

The applicant was convicted on a charge of theft of a motor vehicle. Investigations revealed that he had a previous conviction for the same offence, and was therefore subject to a statutory minimum sentence of seven years' imprisonment with hard labour. The trial court imposed a sentence of eight years' imprisonment with hard labour. On appeal:

Held:

- (i) A bad record should not be the basis for imposing a heavier sentence than the offence itself warrants. *Nasilele v The People* (1) followed.
- (ii) While previous convictions must be taken into account when considering entitlement to leniency, the consideration does not arise in a case where the offence itself does not warrant a sentence greater than the statutory minimum.

Case referred to:
(1) Nasilele v The People (1972) Z.R. 197

For the applicant: In person.
For the respondent: A.H. Odora - Obote, State Advocate.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the court.

On the 8th November, 1979, we delivered a judgment in which we refused an application by the applicant for leave to appeal against his conviction on a charge of theft of motor vehicle. At that time we did not deal with the application for leave to appeal against the sentence of eight years' imprisonment with hard labour, because we wished to investigate his record of previous convictions before making any decision.

Investigations have revealed that the applicant has a previous conviction for theft of motor vehicle dated the 6th September, 1976, when he was fined K100 in (default, six months' simple imprisonment). The applicant, having a previous convictions for this offence, is now subject to a statutory minimum sentence of seven years' imprisonment with hard labour. The trial court imposed a sentence of eight years' imprisonment

with hard labour. In the case of *Nasilele v The People* (1), this court, in dealing with an appeal against a mandatory minimum sentence for stock theft, said at p. 198:

"It is trite that a bad record must not be the basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be: what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is a proper sentence for the offence itself does the court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors. These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of the particular type be treated more seriously than previously. The effect is that for the least serious

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offence of stock theft, or where there are mitigating factors enabling the court to exercise maximum leniency, the minimum sentence should be imposed, while for more serious offences, and where there are insufficient mitigating factors to enable the court to exercise maximum leniency, a more severe penalty should be imposed.

The question of mitigation or the absence of it does not therefore arise unless the court regards the offence as one which intrinsically is more serious than 'the least serious offence of stock theft'."

Those remarks apply equally to a case in which for a second offence a minimum mandatory sentence has been prescribed by Parliament. The only difference being, of course, that, in this type of case, there must already have been a previous conviction before the mandatory minimum becomes applicable. For the purpose of considering whether or not the offence is the least serious such offence, a previous conviction will not be taken into account except in so far as it brings the case into the category of offences which attract a minimum sentence.

In addition to his previous conviction for theft of motor vehicle the applicant has three previous convictions for offences involving dishonesty, the most serious one being in 1974 when he was sentenced to three years' imprisonment with hard labour for storebreaking involving goods worth K2,592.67.

In sentencing the applicant to eight years' imprisonment with hard labour the magistrate in this case gave no reasons why the statutory minimum sentence should be exceeded, and, while previous convictions must be taken into account when considering entitlement to leniency the consideration does not arise in this case because, in our view, the offence itself does not warrant a sentence

greater than the statutory minimum and we see no reason for regarding the offence as being more serious than the least serious second offence of theft of motor vehicle.

The application for leave to appeal against sentence is granted and treated as an appeal, which is allowed. The sentence of eight years, imprisonment with hard labour is set aside, and, in its place, we substitute a sentence of seven years' imprisonment with hard labour, with effect from 9th January, 1978.

Appeal against sentence allowed