ADAM BEREJENA v THE PEOPLE (1984) Z.R. 19 (S.C.)

SUPREME COURT
SILUNGWE, C.J., MUWO, J.S., AND BWEUPE, A.J.S.
13TH AND 16TH JULY, 1982
(S.C.Z. JUDGMENT NO. 33 OF 1982)

(Editor's note: Through inadvertence we omitted this case in our 1982 reports, hence its inclusion in this volume).

Flynote
Sentence -When appellate Court can interfere.
Sentence - Corporal punishment - When called for.

Headnote
The accused was convicted of theft of motor vehicle and sentenced to five years imprisonment, plus ten strokes with a cane. When he appealed to the High Court the custodial term was reduced. The learned appellate judge mistakenly thinking that the sentence was six years imprisonment, reduced it to four years; the corporal punishment was left intact. He appealed to the Supreme Court.

Held:
(i) An appellate Court may interfere with a lower court's sentence only for good cause. To constitute good cause, the sentence must be wrong in law, in fact or in principle or it must be so manifestly excessive or so totally inadequate that it induces a sense of shock or there must be such exceptional circumstances as to justify an interference.
(ii) Corporal punishment should be imposed very sparingly and only in the most serious circumstances such as grave brutality or a serious outbreak of crime; mere prevalence of crime is not enough.
(iii) Corporal punishment is uncalled for when a long sentence has been imposed.

Cases cited:
(1) Alubisho v The People(1976) Z.R. 11.
(2) Kaambo v The People (1976) Z.R. 122.
(3) Nsondo v The People (1974) Z.R. 110.
(4) R. v Subulwa v N.R.L.R. 61.
(5) Alakazamu v The People (1973) Z.R. 236.

For the appellant: N. L. Patel, Legal Aid Counsel.
For the respondent: K. C. Chanda, State Advocate.

Judgment
SILUNGWE, C.J., delivered the judgment of the Court.

The appellant pleaded guilty to, and was convicted of stealing

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a Fiat motor vehicle. The trial magistrate observed that although the appellant had pleaded guilty and was a first offender, the prevalence of the offence, coupled with the burning (by the appellant) of the body of the motor vehicle, a deterrent sentence was called for. He then sentenced the appellant to imprisonment for five years, plus ten strokes of a cane. On appeal to the High Court, the entire sentence was set aside, the court erroneously thinking that the custodial sentence was six years when, in point of fact, it was five years. A four-year sentence was then substituted. As the substituted sentence has brought no satisfaction to the appellant, he now appeals to us for redress.

It seems to us that had the High Court appreciated what the actual sentence was, it is unlikely that the custodial part of the sentence, in particular, would have been disturbed. In any event, any such disturbance would have been wrong in principle since it would have amounted to the appellate court's substitution of its own discretion, as to sentence, for the discretion of the trial court-an approach that would have run counter to such decisions of this court as *Alubisho v The People* (1), and *Kaambo v The People* (2) - since a sentence of five years, as compared to one of four years, can hardly be said to be "manifestly excessive", although a sentence of, for example, six years as opposed to that of four years, might. An appellate court may interfere with a lower court's sentence only for good cause. To constitute good cause, the sentence must be wrong in law, in fact, or in principle; or, it must be manifestly excessive or so totally inadequate that it induces a sense of shock or, there must be such exceptional circumstances as to justify an interference.

In this case, as we have already said, the interference was erroneous and, therefore, wrong in fact. We have repeatedly said in this court that an imposition of a five-year term, even for a first offender who is convicted of stealing a motor vehicle does not come to us with a sense of shock as being manifestly excessive. However, as the trial magistrate failed to give credit for the fact that the appellant had pleaded guilty to the charge, we consider that, apart from the custodial sentence being wrong in fact it is equally wrong in principle and, as such, it must be set aside in its place, we impose a sentence of imprisonment with hard labour for four years.

This now leaves us with the trial court's order for corporal punishment. It is acknowledged that adult are amenable to this form of punishment under section 27(3) of the Penal Code.

In *Nsondo v The People* (3), following *R v Subulwa* (4), this court held that adults should not be subjected to corporal punishment for sexual crimes and other crimes of violence, under the first schedule to section 27(3) of the Code, unless the offence is committed in circumstances of brutality as distinct from brutishness. In cases of burglary, housebreaking, and theft, it was held in *Alakazamu v The People* (5), and in *Malaya v The People* (6), that caning can only be justified on the ground that it is expedient in the interests of the community, for instance, where the crime has almost reached epidemic proportions.

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We would like to say that whether an order for caning relates to sexual offences and other crimes of

violence, or to burglary, house breaking, or theft, the overriding consideration is that the order should be expedient in the interests of the community, be it at a local or national level.

As corporal punishment is a form of inhuman or degrading punishment, it Is our considered view that it should be imposed very sparingly; but even then, this should be done only in the most serious circumstances, such as grave brutality or a most serious outbreak of crime; mere prevalence of crime is not enough. We think that in this modern day and age, this form of punishment should be discouraged in Zambia. Indeed, the legislature itself has moved towards this direction by its recent repeal of mandatory caning in stock theft cases. In any event, corporal punishment should be regarded as uncalled for when a long custodial sentence is passed.

In the circumstances, the imposition of corporal punishment in this case was most inappropriate and wrong in principle. It is accordingly set aside.

Appeal allowed
