VEFEEN FOFANA ALIAS MUTOMBO WA MUTOMBO v THE PEOPLE (1992) S.J.

SUPREME COURT
NGULUBE, A.C.J., CHAILA AND LAWRENCE, JJ.S.
S.C.Z. JUDGMENT NO. 8 OF 1992

Flynote

Sentence - Appeal against severity of sentence - Six years' imprisonment - Unlawful possession of dangerous drugs

Headnote

The appellant was sentenced to six years' imprisonment with hard labor for being in possession of a large number of mandrax tablets. In sentencing him, the trial court took into account the fact that the amount of drugs found with the appellant was too large and that he was a drug-trafficker. The appellant unsuccessfully appealed against the sentence. He then appealed to the Supreme Court against the severity of the sentence passed on him by the trial court.

Held:
(i) The sentence of 6 years does not induce any shock given the fact that this was an obvious case of trafficking which fact was established by the quantities and the manner in which the drugs were transported across the border.

Cases referred to:

(1) Lungu v The People (1977) Z.R. 208.
(2) Jutronich v The People (1965) Z.R. 9. (3) Musonda v The People (1976) Z.R. 215.

For the appellant: Mr. J. Chashi of Muponda Chashi and partners.
For the respondent: Mr. E. Sewanyana, Assistant Senior State Advocate.

Judgment

NGULUBE, A.C.J.: Read the judgment of the court.

The appellant pleaded guilty to one charge of unlawful possession of dangerous drugs and he was sentenced to 6 years imprisonment with hard labor. The particulars alleged that, he, on 2nd January, 1990, at Chambeshi was found in unlawful possession of 258 packets of mandrax tablets. When the facts were read out the appellant asked for an amendment to read that the packets were in fact 295 in number and not 258. The facts showed that the appellant, who is a Zairean but residing in Kenya, entered Zambia in a vehicle which had secret compartments in which he had hidden the packets. The drugs found on him had a street value of K30.9 million. In sentencing the appellant to a term of imprisonment without the option of a fine, the learned trial magistrate considered the quantities involved and was of the view that the appellant was involved in trafficking. An appeal to the High court was unsuccessful and the appellant has now appealed to this court against the severity of the sentence. On behalf of the appellant Mr. Chashi has advanced two grounds of appeal and he has made eloquent submissions on the propriety or otherwise of the sentence. The first ground of appeal alleged that the sentence was wrong in principle and he bases the

arguments on this ground on a number of decisions by this court and other courts to the effect that, where the legislature has provided for a fine as well as imprisonment, it is traditional to impose a fine on a first offender rather than to inflict a custodial term especially where the offender has come to the court for the first time and he has pleaded guilty. Mr. Chashi has cited the case of Lungu v The People (1) which was to this effect and he has also argued, citing Jutronich v The People (2), that there is a basis for us to interfere in this case since the sentence was wrong in principle. Mr. Chashi has also argued that the court below was in error in construing the facts before the court as indicative of trafficking and in construing the same facts as showing that the appellant was using our country as a transit for his drug trafficking. It has also been argued that the sentence appears to have been made severe on account of the trafficking when such aggravation was not specified in the charge.

We have taken account of Mr. Chashi's eloquent arguments and we must state immediately that we are aware of the principle that first offenders who have pleaded guilty should be fined where such an option is available. However, as we stated in the case of Musonda v The People (3) the sentence of fine must be preferred unless there are aggravating circumstances which would render a fine inappropriate. We must perhaps say, at this point in time, that, while the level of fines under the various statutes would seem to be in urgent need of review and indeed the sentence in default of payment of a fine would also seem to require urgent attention, we cannot lose sight of the case now in hand and the question was whether the learned trial magistrate can be faulted, as suggested by Mr.Chashi. We note that the history of this legislation has been to make the penalties more and more severe as we go along. The appellant proposes that a fine would have been appropriate, in default the usual term of simple imprisonment which would normally not exceed nine months.

We do not agree with Mr. Chashi that this would have been a suitable case for the imposition of a fine. As we said in Musonda and The people as Mr. Chashi quite properly acknowledges, aggravating circumstances will normally justify the imposition of a custodial term, even on a first offender, even on the one who has pleaded guilty. It is not correct that the law in question requires that such aggravation must be stated in the particulars. If it was necessary to do so we are satisfied that the statement of offence in this case had given adequate warning to the appellant that the case would attract a consideration and application of Section 19A of the Dangerous Drugs Act. This Section, which was introduced by Act No. 19 of 1985, reads as follows:

"Notwithstanding the penalties provided for in Section 19, where a person is convicted of an offence under this Act and the Court is satisfied that the offence related to trafficking in any drug to which part II, III or IV of the Act applies the offender shall be liable to a fine of not less than K2, 000.00 (which was subsequently amended to not less than K50, 000.00) or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment.''

(The words in brackets are ours.)

It is a also indisputable that the appellant imported those drugs into Zambia. As the facts showed the appellant secreted the drugs in compartments in his vehicle clearly showing, not only guilty knowledge, but elaborate preparations on his part. Although it would be tempting to impose a very hefty fine, we cannot lose sight of the fact that the appellant was transient in this country and it would clearly be impossible for an effective and deterrent fine to be imposed. In our considered view, the factors which we have mentioned were aggravating and fully justified the learned trial magistrate in departing from the general principle of imposing a fine where that is permitted. In our considered opinion, the sentence of 6 years does not induce any shock given the fact that this was an obvious case of

trafficking which fact was established by the quantities and the manner in which the drugs were brought into this country. Six years imprisonment with hard labor was condign; it is not one day too long. It is obviously the duty of the courts to discourage trans-border trafficking. Indeed the court cannot lose sight, as the learned trial magistrate said, of the fact that drug trafficking is no longer a matter for domestic interest only but has assumed international proportions and the whole international community is concerned about this cancer. We do have to agree with the learned trial magistrate that this country to should be seen to be playing its part in eradicating trafficking, especially that across borders.

The appeal against sentence cannot be successful and we dismiss it. It is also our hope that the press in the country will give wide publicity to this very suitable sentence.

Appeal dismissed