GIDEON HAMMOND MILLARD v THE PEOPLE (1998) S.J. 34 (S.C.)

SUPREME COURT
NGULUBE C.J., SAKALA, AG. D.C.J., AND LEWANIKA, J.S.
14TH JULY, AND 26TH AUGUST, 1998
(S.C.Z. JUDGMENT NO. 10 OF 1998)

Flynote
Appeal - Sentence from a lower court - When an appellate court should interfere .
Plea of guilty - When it should be withdrawn.

Headnote
The appellant was charged with three counts of trafficking hashis cakes and marijuana. He was convicted on all counts and sentenced to 5 years, 2 years and 5 years respectively. He appealed against both convictions and sentence. The Supreme Court dismissed the appeals against convictions on both counts. It also dismissed the appeal against sentence on count two but allowed the appeal against a sentence of five year imprisonment with hard labour on the first count, set aside that sentence and substituted it with a sentence of two years imprisonment with hard labour to run concurrently with the sentence of two years on the second count.

Held:
(i) An appellate court should not lightly interfere with the discretion of the trial court on question of sentence but that for the appellate court to decide to interfere with the sentence, it must come to it with a sense of shock.

Cases referred to:
1. Vafeen Fofana Alias Mutombo wa Mutombo v The People S.C.Z. Judgment No. 8 of 1992
2. Kalunga v The People (1975) Z.R. 72
3. Josepei Masiye Phiri v The People S.C.Z. Judgment No. 38 of 1977
4. R v Cole (1965) 2 Q.B. 388
5. R v Durham Quarter Session, Exp. Virgo (1952) ALL E.R. 466
6. R v Turner (1970) 2 Q.B. 321

For the Appellant: Mr L P Mwanawasa of Mwanawasa and Company
For the Respondent: Mr J K Mwanakatwe, Principal State Advocate

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Judgment
SAKALA, AG.DCJ.: delivered the judgment of the court.

On the 14th July, 1998, when we heard this appeal, we dismissed the appeals against convictions on both counts. We also dismissed the appeal against sentence on count two but allowed the appeal against a sentence of five years imprisonment with hard labour on the first count, set aside that sentence and substituted it with a sentence of two years imprisonment with hard labour to run concurrently with the sentence of two years on the second count. We said then that we shall give our reasons later. We now give those reasons.

The appellant pleaded guilty before the Principal Resident Magistrate at Lusaka to three counts

of contravening the Narcotic Drugs and Psychotropic Substances Act, Cap. 96 of the Laws of Zambia. The statement of offence on the first count was Trafficking in Psychotropic Substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act, Cap. 96 as read together with Statutory Instrument No. 119 of 1995.

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The particulars of the offence were that the appellant and a co-accused, on 20th June, 1997 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did traffic in Psychotropic Substances namely 9.37 kg of Hashish Cakes, a herbal product of Cannbis Sativa without lawful authority.

On the second count the statement of offence was attempting to export Psychotropic Substances contrary to Section 7 of Cap 96. The particulars of the offence were that the appellant and the co-accused, on 24th June, 1997, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did attempt to export Psychotropic Substances namely 9.37 kg of Hashish Cakes, a herbal product of Cannabis Sativa to London without lawful authority.

On the third count the statement of offence was trafficking in 50 grammes of Marijuana contrary to Section 6 of Cap 96 as read with Statutory Instrument number 119 of 1995. The particulars alleged that the appellant and the co-accused, on the 25th June, 1997, did traffic 50 grammes of Marijuana without lawful authority.

The appellant was sentenced to 5 years, 2 years and 5 years imprisonment with hard labour respectively. On appeal to the High Court, the appellant was successful on count three. But the appeals on counts one and two were dismissed. He has appealed to this court against both convictions and sentences on counts one and two.

The brief history of the appeal as can be ascertained from the record is that the appellant and the co-accused were arrested on 27th June, 1997. On 30th June, 1997, they appeared before the Principal Resident Magistrate at Lusaka. They were both represented by counsel, not the counsel in this court. They both pleaded not guilty to all the three counts. The case was adjourned. It came up again on 17th July, 1997. On that day the appellant and his co-accused were again represented. The appellant changed his pleas and pleaded guilty to all the three counts. His co-accused pleaded not guilty. The facts were read. The appellant admitted them to be correct. He was convicted and sentenced accordingly.

On appeal to the High Court, the appellant was now represented by Mr Mwanawasa, the State Counsel, who also represented him before this court.

In the High Court the State Counsel advanced arguments based on four grounds namely; the severity of the punishment for a first offender who readily admitted the charges, the quantity and value of drugs, pleas of guilty being equivocal, ingredients of offence having not been explained to the appellant and facts read to court having not disclosed any offence. The learned appellate High Court Judge considered the arguments and submissions based on these grounds. The appellate court accepted that trafficking in drugs and possession of drugs are different and that they carry different punishments. The court noted that there is aggravation in the offence of trafficking but rejected the assertion that there must be evidence of buying or selling to prove the offence of trafficking in drugs. The court held that the word trafficking carries the meaning assigned to it under section 2(b) of the Act and

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the aggravation prescribed under Section 6 and Statutory Instrument No. 119 of 1995. Citing the case of Vafeen Fofana alias Mutombo wa Mutombo v The People_(1) in which the Supreme Court made the point that the aggravation need not be stated in the particulars of the offence, the appellate judge held that the fact of trafficking should be established by the quantities and the manner in which the drugs were carried out or found. The Court however, acquitted the appellant on count three because the facts did not connect the appellant to the possession of the 50 grammes of drugs found in the car which was in the car park, searched a day later after the apprehension of the appellant.

The appellate judge rejected the submissions of the pleas being equivocal as untenable on the basis of the authority of Fofana case and pointed out that the trial court has no burden of explaining any charge further than the statement of offence. The court observed that in this particular case the appellant was legally represented by counsel throughout the proceedings and no objection was raised against the indictment.

Turning to grounds of appeal against sentence the court noted after citing the cases of Kalunga v The People (2) and Phiri v The People (3) that an appellate court should not lightly interfere with the discretion of the trial court on question of sentence but that for the appellate court to decide to interfere with the sentence, it must come to it with a sense of shock. After observing that the court below made what appeared to be adverse comments when passing sentences, the appellate court found nothing suggesting that the lower court ignored the mitigatory factors and consequently the appeals against sentence on courts on counts one and two failed.

In arguing the appeal in this court Mr Mwanawasa expanded on his submissions in the court below and filed detailed heads of arguments in which he attacked the findings by the appellate court. Counsel first informed the court that the thrust of the appeal was that in dealing with the offence of trafficking the court must not only follow the definition but that there must be some aggravation for possession to amount to the offence of trafficking and it would be absurd to hold that possession of 50 grammes for purposes of smoking only amounted to trafficking, contending that trafficking was a term of art, the court must specifically explain it to the accused and an accused must be made to understand it

Turning to the first ground in the heads of argument counsel contended that it was a misdirection to hold that a trial court had no burden of explaining any charge than the statement of the offence. Mr Mwanawasa submitted that when a court is taking a plea it is essential that the elements of the charge are sufficiently explained to an accused. He further submitted that in addition to the reading of the charge the particulars of the offence must be read to the accused.

Mr Mwanawasa contended that the pleas of guilty in the instant case were as a result of ignorance on the part of the appellant since the facts as read did not disclose any aggravation contending that the quantity of the drugs on its own should not have been construed to have established the offence of trafficking. According to Mr Mwanawasa the quantity of 9.37 kg of the drugs was within the realm of consumption. In his written heads sof arguments counsel cited a number of authorities in support of the first ground starting with Vol. II of Halsbury's Laws of England para. 977, 4th Edition (Reissue) where in connection

with a plea of guilty the learned author points out that an accused must have a free choice of plea, R v Cole (4) where it is stated that a trial court ought to refuse to accept a plea of guilty if the court is of opinion that it proceeds from ignorance and R v Durham Quarter Sessions, ex P. Virgo where it was also pointed out that when a recorded plea of guilty is seen from the facts to

have been entered in error should be withdrawn and a plea of not guilty entered.

The other give grounds of appeal were argued together. Briefly these grounds were that the appellate court having found the appellant not guilty of trafficking in 50 grammes of the drugs found in the boot of the car on the third count, though the appellant pleaded guilty to it and represented by counsel, it showed that the appellate court was conscious that a plea of guilty was not enough in itself, and the facts should have revealed an offence and therefore same considerations should have been extended to the other counts; that it was wrong to hold that aggravation was established by mere quantities of drugs; that the appellate court was wrong in considering only the issue of sentence coming to it with a sense of shock without considering the issue of sentence being wrong in principle, that the holding of the appellate court that the lower court made what appeared to be adverse comments when passing sentence was in itself a finding that the sentence was wrong in principle; and that the sentence was harsh in view of the fact that the appellant was acquitted on appeal on one count of trafficking, the court, should, as a matter of principle, have reduced the sentence on the other counts as well.

Mr Mwanawasa pointed out that if his arguments failed on the first ground relating to the offence of trafficking, the court should consider a sentence of five years to be too harsh.

In support of this contention counsel advanced a number of mitigating circumstances namely, that appellant pleaded guilty, that his co-accused was given suspended sentences, that the trial Magistrate merely gave lip service to the mitigating factors, that appellant was aged 24 years and was in college, that the appellate judge agreed that the trial court made unnecessary adverse comments, that the appellate court was guided only by a "sense of shock" and not "wrong in principle" and that the trial Magistrate erred in imposing different sentences for offences committed in the course of the same transaction.

Mr Mwanakatwe on behalf of the State supported the convictions. He argued that the appellant was found in possession of the drugs in quantities which were above those prescribed in Statutory Instrument No. 119 of 1995. He submitted that the ingredients of the offence of trafficking were established and that it was not a defence to argue that he was not found selling or buying the drugs.

On the pleas of guilty the Principal State Advocate submitted that the pleas were unequivocal. He contended that the facts were read and admitted to be correct. The appellant was represented by counsel who did not raise any objection.

We have very carefully examined the record of proceedings before the learned trial Magistrate. We take note that from the first day the appellant appeared before court with his co-accused, he was represented by counsel. On that day the charges were explained to both of them in English. They both informed the court that they understood the charges and denied them. Counsel representing them then informed the court as follows: "Those are my instructions". The court

thereafter recorded pleas of not guilty on all the counts for both accused. The matter was adjourned and came up before the same court seventeen days later. On that day the appellant and a co-accused were this time represented by two defence counsel.

After a brief explanation and amendment of the counts, fresh pleas were taken. When called upon to plead, the record reveals the following:

"Accused 1:
I understand the charge. I admit the charge. It is true I was found with the drug. I had no authority to have drug nor traffic them.

Accused 2:
I understand the charge. I deny the charge.

Count 2
Accused 1:
I understand the charge. I admit the charge. It is true I was attempting to export the Marijuana. I did not have lawful authority to export the said drugs.

Accused 2:
I understand the charge. I deny the charge.

Count 3
Accused 1
I understand the charge. I admit the charge. It is true I trafficked 50 grammes of Marijuana. I did not have lawful authority to traffick in the said drugs.

Count 4
Accused 2:
I understand the charge. I deny the charge

Count 5
Accused 2:
I understand the charge. I deny the charge.

Count 6
Accused 2:
I understand the charge. I deny the charge"

The defence counsel then informed the court "These are my instructions." The facts were then dictated in English in open court. The appellant then informed the court: I understand the facts. The facts are correct nothing to add or subtract from the facts." The court then convicted and sentenced the appellant accordingly.

Mr Mwanawasa urges this court to find that from the proceedings before the trial Magistrate the pleas of guilty were entered out of ignorance and that the facts dictated did not disclose the commission of the offence. We agree with all the authorities cited by

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Mr Mwanawasa in relation to accused having a free choice of plea, a trial court refusing to accpet a plea of guilty and where a plea of guilty is withdrawn and one of guilty entered if it is seen from the facts that the plea was entered in error. But none of those are circumstances obtained here. We are satisfied that this was not a case of an un represented accused where care had to be taken to ensure that he fully understood the elements of the offence to which he was pleading guilty. The court in our view was entitled in accordance with some of the

guildelines laid down in R v Turner (6) to proceed with the case on the basis that the two defence counsel, representing the appellant, had given him the best advice they could which must be included a plea of guilty. Indeed if it had appeared to the learned defence counsel that the pleas had been entered in error or that the appellant was ignorant they would have been entitled to withdraw them. This they did not do. We are satisfied that the pleas were unequivocal. The facts admitted as correct fully disclosed the commission of the offences. We cannot accept that possession of 9.37 kg of drugs can genuinely be said to be in the realm of consumption. We take note that the legislature deliverately defined what quantities constitute trafficking in drugs. The appellant was found with quantities above those prescribed. The appellant was therefore properly convicted of trafficking even accepting that 9.37 kg was for consumption.

As to the sentence of five years we agree that the learned trial Magistrate merely recited the mitigating factors without reflecting them in the sentence imposed. Above all we take note that the offences were committed in the course of one transaction. In the circumstances a sentence of five years on the first count taking into account the mitigating factors came to us with a sense of shock and was wrong in principle.

For the foregoing reasons we dismissed the appeal against convictions on both counts, dismissed the appeal against sentence on count two but allowed appeal against sentence on count one, set aside that sentence and substituted it with a sentence of two years imprisonment with hard labour. We ordered both sentences to run concurrently.

Appeal partly dismissed, partly allowed
Sentence substituted.
