IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 129/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JERKINGS MULENGA KABOKO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 7th August, 2018 and on 10th December, 2018.

For the Appellant: *Mr H.M. Mweemba, Principal Legal Aid Counsel - Legal Aid Board.*

For the Respondents: *Mrs C.M. Hambayi, Deputy Chief State Advocate - National Prosecutions Authority.*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Alubisho v The People (1976) ZR 11*
2. *Francis Chanda v The People (1981) ZR 27*
3. *Jordan Nkoloma v The People (1978) ZR 278*
4. *Issa Mwasumbe v The People (1978) ZR 354*

Legislation referred to:

1. *The Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia, sections 6 and 44.*
2. *The Penal Code, Chapter 87 of the Laws of Zambia, section 250 (b)*
3. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia, section 217.*

The appeal, in this case is against the sentence of 20 years imprisonment with hard labour imposed by the High Court after the appellant, was convicted in the Kasama Subordinate Court on one count of trafficking in psychotropic substances, namely 400 grammes of marijuana, a herbal product of cannabis sativa, without lawful authority contrary to section 6 of the ***Narcotic Drugs and Psychotropic Substances Act***. Section 44 of the said Act prescribes a minimum sentence of 10 years imprisonment for a second or subsequent offender. The appellant had a record of previous convictions which showed that he was convicted of trafficking in psychotropic substances and unlawful cultivation of psychotropic substances in 2010.

The appellant was also convicted of one count of assault contrary to section 250(b) of the ***Penal Code*** for biting the finger of a Zambia Wildlife Authority officer (ZAWA), named David Muma who, with others, was conveying the appellant to the police station after his apprehension. He was sentenced to 2 months imprisonment for that offence. The appeal has nothing to do with the second offence except only in so far as it was deemed as exemplifying the appellant's misconduct and, therefore,

aggravated the offence in the first count. The offences occurred on 17th October, 2014.

The evidence on which the appellant was convicted in the first count was that a combined team of Drug Enforcement Commission (DEC) and ZAWA officers raided the appellant's home in Musenga Township, Kasama around 04:00hours on the material day and apprehended the appellant who was outside the house having just emerged from the pit latrine from where the odour of marijuana was wafting. A search yielded the 400 grammes of marijuana within the vicinity.

The appellant's defence was that he was falsely implicated by his neighbour, Mr. Tizo, a Community Crime Prevention Unit (CCPU) member, over differences they had when the latter threw mango peels into his yard. The said Mr Tizo had vowed to fix him. He, however, admitted being found outside the house at the stated time on the material day. He also admitted that he used to smoke marijuana but stated that that was a long time ago. His mother, Violet Chanda Kaboko (DW2), testified that the appellant was a marijuana smoker and was troublesome to the family and would at times behave like a mad person.

The magistrate accepted the prosecution's evidence and convicted the appellant, as it were, and committed him to the High Court for sentencing pursuant to section 217 of the ***Criminal Procedure Code***. In imposing the 20 years sentence of imprisonment the judge took into account what he termed the appellant's poor record of illegal drug dealing in reference to the previous convictions. The judge also referred to what he considered to be the large quantity of the marijuana weighing 400grammes.

The sole ground of appeal challenges the sentence of 20 years imprisonment with hard labour imposed on the appellant on the ground that the facts did not reveal any aggravating circumstances.

Mr Mweemba endeavoured to establish, in his submissions, as we understood him, that the sentence in this case should come to us with a sense of shock bearing in mind that where the Legislature has prescribed a minimum sentence of imprisonment, it should be taken that it covers a broad spectrum of offences that come within the ambit of the minimum sentence so that it would be wrong for a Court to draw fine lines to justify departures from the imposition of the minimum sentence provided in the statute. The cases of **Alubisho v The People, Jordan Nkoloma v The**

People and **Issa Mwasumbe v The People** were cited as propagating the foregoing view. It was particularly submitted that the minimum of 10 years of imprisonment stipulated by Parliament is sufficient punishment in itself to deter subsequent offending; in effect that there was no aggravation in the fact that the marijuana weighed 400 grammes because it was merely for the appellant's personal use (smoking) and there was no evidence that he used to sell the substance. It was also submitted, in relation to the allusion by the learned sentencing judge to the previous convictions that in this country a Court cannot impose a sentence heavier than the offence itself merits on the basis of a person's bad record. In this connection, the case of **Francis Chanda v The People** was cited in which this Court held that-

> **(i) Although previous convictions may affect the amount of leniency which may be afforded to an offender, no sentence should be greater than that which is merited by the offence itself.**

We were implored to quash the sentence of 20 years imprisonment with hard labour and substitute it with a lower sentence.

Mrs Hambayi's response to the submissions on behalf of the appellant were centred on the argument that the sentence of 20 years imprisonment was justified as there were aggravating

circumstances, namely, that the appellant was a second offender and that the quantity of (nearly) half a kilogramme of marijuana which was 8 times more than the legal limit of 0.50 grammes permitted under Regulation 2 of the third schedule to the **Narcotics and Psychotropic Substances Act** took the case beyond the scope of personal use as claimed.

It was also argued that this conviction happening for the second time over the same offence revealed the appellant's incorrigible nature of dealing in prohibited drugs with impunity. That the biting of the law enforcement officer's finger who was simply carrying out his duties showed the appellant's impunity and demonstrated that the appellant was above the law and could do as he pleased, to paraphrase the submission. It was argued further, that the appellant's own mother testified that she lived in fear of him as he terrorized the household due to his drug use. It was pointed out that it was because of such behaviour and continued drug use that the legislature created minimum sentences for second (or subsequent) offenders in order to curtail such reckless behaviour and protect families and communities from the consequences of drug abuse. We were urged to uphold the sentence of 20 years imprisonment and dismiss the appeal.

We have considered the appeal and the contending arguments on behalf of the parties. The main issue raised in this appeal is whether there were aggravating circumstances justifying the imposition of a sentence of 20 years imprisonment with hard labour on the appellant.

The starting point are the principles in the case of **Alubisho v The People** decided by this Court which laid down the law expanding on the original formulation of Blagden CJ in the case of **Jutronich, Schutts and Lukin v The People** (1965) Z.R. 9 in the following terms-

> **(i) With the exception of prescribed minimum or mandatory sentences a trial court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate court does not normally have such a discretion.**
>
> **(ii) In dealing with an appeal against sentence the appellate court should ask itself three questions:**
>
> > **(1) Is the sentence wrong in principle?**
> > **(2) Is it manifestly excessive or so totally inadequate that it induces a sense of shock?**
> > **(3) Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced? Only if one or other of these questions can be answered in the affirmative should the appellate court interfere.**
>
> **(iii) An appeal judge should not alter the sentence passed at a trial merely because he thinks he might have passed a different one.**

Ever since that decision the Courts in Zambia have consistently applied these principles and we should say that they remain sound

principles of law even today. We recognise that the sentencing Court had the discretion of choosing a sentence that it felt was appropriate in the circumstances of the case before it. Having done so the question arises whether the lower Court's selection of the sentence of 20 years imprisonment on the facts of this case is: wrong in principle; or, manifestly excessive or so totally inadequate that it induces a sense of shock; or, there are exceptional circumstances which would render it an injustice if the sentence were not reduced. Only an affirmative answer to one or more of these questions will entitle us to interfere with the sentence.

In the case before us the sentencing judge justified the sentence on the basis that the appellant had a poor record of previous convictions and that the large quantity of the substance involved. This is what the Court said at page 35 of the Record of Appeal-

> **After considering his past poor record of illegal drug dealing as well as the circumstances of the present case especially the large quantity of the illegal substance involved, I hereby impose a sentence of TWENTY (20) years imprisonment with hard labour. The sentence shall be with effect from 20th October 2014, the date of his arrest.**

It is clear from this statement that the sentencing judge was in one part influenced by the appellant's record of previous convictions when he imposed the sentence at issue. In accordance with the

principle in the case of **Francis Chanda v The People** that we have referred to above previous convictions only affect the degree of leniency to be afforded to an offender but that the sentence should not be greater than the offence itself merits. In other words it is wrong to determine a sentence to be imposed for an offence based on the number of previous convictions an offender may have. The justification for this view is that a repeat offender is not entitled to be treated as leniently as a first offender and must be sentenced proportionate to the gravity of the offence that he/she has committed. To the extent, therefore, that the sentencing judge relied on the appellant's previous convictions, the sentence handed down was wrong in principle.

The trial judge in another part also relied on the "circumstances of the case" which included the large quantity of the illegal substance to justify the sentence. The learned judge did not specify the circumstances of the case besides the large quantity of the marijuana. Therefore, our consideration will only be limited to the question whether the quantity was so large as to justify the sentence. In doing so we bear in mind the principle stated in the case of **Jordan Nkoloma v The People** that-

> **(iv) Where the legislature has laid down a minimum sentence it would be quite wrong to attempt to draw fine lines; there is a broad**

spectrum of offences which must be regarded as coming within the ambit of the minimum sentence.

The only justification given by the prosecution for the sentence which is far beyond the minimum sentence is that the 400 grammes of the marijuana that the appellant was found with is a large quantity far in excess of the lawfully permitted quantities. We do not agree that this is sufficient justification. As submitted by Mr Mweemba, the marijuana was being used by the appellant personally. The evidence which was accepted in the Subordinate Court established that the appellant had in fact been smoking shortly before the raid. The point that was made that the appellant became unruly after he smoked or that in this case he bit the ZAWA officer's finger does not in our view take the case outside the purview of the mandatory minimum sentence of 10 years imprisonment stipulated in the Act. It is our view that a sentence of 20 years of imprisonment in an offence which attracts a maximum of 25 years imprisonment should be reserved for cases in which properly aggravating circumstances are established such actual involvement in the business of supplying or selling really large quantities of the substance. We, accordingly, reiterate that the circumstances of the offence in this case are sufficiently

covered within the mandatory minimum sentence of 10 years imprisonment. The sentence of 20 years imprisonment imposed in this case comes to us with a sense of shock. We have, accordingly decided to interfere with the sentence of imprisonment of 20 years imprisonment with hard labour which we set aside and in its stead impose the minimum sentence of 10 years imprisonment provided in the Act. The appeal is, therefore, successful.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE