IN THE SUPREME COURT OF ZAMBIA Appeal No. 53/2018
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E E N:

YOUNGSON SIMBEYE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Muyovwe, Hamaundu and Chinyama, JJS**
on 1st October, 2019 and 3rd December, 2019

For the Appellant: Mrs. S.C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. F. Nyirenda-Tembo, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Gideon Hammond Millard vs. The People (1998) Z.R. 52**
2. **Solomon Chilimba vs. The People (1971) Z.R. 36**
3. **Jutronich and Another vs. The People (1965) Z.R. 9**
4. **Alubisho vs. The People (1976) Z.R. 11**
5. **Adam Berejena vs. The People (1984) Z.R. 20**

Legislation referred to:

1. **The Penal Code, Cap 87 of the Laws of Zambia, Section 329**

2. The Criminal Procedure Code, Cap 88 of the Laws of Zambia, Section 7, Section 217

This is an appeal against sentence only. The appellant was sentenced to 14 years imprisonment by Hon. Madam Justice Chembe sitting at Ndola High Court.

The appellant was convicted by the Subordinate Court of the Second Class of the offence of attempted arson contrary to Section 329(a) of the Penal Code Cap 87 of the laws of Zambia. The particulars of the offence alleged that on the 29th January, 2014 at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, the appellant attempted to unlawfully set fire to the dwelling house of Aubrey Mwenya.

It was established before the trial court that the appellant did set fire to the complainant's dwelling house on the material date. Only part of the grass thatched roof was burnt as it was quickly put out by the complainant's friends. The record shows that after convicting the appellant, the trial magistrate remitted the record to

the High Court for sentencing under Section 217 of the Criminal Procedure Code (CPC).

In the High Court, after considering the mitigation offered on behalf of the appellant by his Counsel, the sentencing judge stated, *inter alia,* that:

> **The minimum sentence for this offence is 14 years imprisonment. I accordingly sentence the convict to 14 years imprisonment with hard labour with effect from 1st February 2014 the date of his arrest.**

Aggrieved by the 14-year sentence by the High Court, the appellant appealed to this court.

At the hearing of this appeal, we granted Mrs. Lukwesa, Counsel for the appellant, leave to file her grounds of appeal and heads of argument out of time. The grounds of appeal are couched in the following terms:

1. **The trial court misdirected itself when it held that 14 years was the minimum sentence for the offence herein and thus sentenced the appellant to 14 years despite the law providing for 14 years imprisonment as the maximum sentence.**
2. **The court erred in law and fact when it sentenced the appellant to a maximum sentence of 14 years imprisonment with hard labour in the absence of aggravating circumstances and without due consideration of the appellant as a first offender.**

In her heads of argument, Mrs. Lukwesa argued the two grounds together. She submitted that Section 329 of the Penal Code clearly sets out 14 years imprisonment as the maximum for the offence of attempted arson. Further, that there were no aggravating circumstances as the fire was put out immediately. Counsel pointed out that there was no evidence that any household goods were burnt or that any person suffered any injury as a result of the fire set by the appellant. That the evidence on record showed that only part of the grass thatched roof was burnt. It was Counsel's submission that in the absence of aggravating circumstances, the sentence of 14 years should come to us with a sense of shock in line with our holding in the case of **Gideon Hammond Millard vs. The People[1].** Counsel also referred us to the case of **Solomon Chilimba vs. The People[2]** where we held that unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence.

We were urged to tamper with the sentence meted out by the lower court and impose a lesser sentence befitting the circumstances of the case.

In her brief response, Mrs. Nyirenda-Tembo the learned Deputy Chief State Advocate, conceded that the sentencing judge misdirected herself when she imposed the 14 years sentence as it is the maximum sentence under the relevant section.

We have considered the arguments raised by Counsel for the appellant in this appeal. In relation to ground one, Mrs. Nyirenda-Tembo has rightly conceded that the learned sentencing judge misdirected herself when she sentenced the appellant to 14 years imprisonment on the understanding that it was the minimum sentence. The appellant was charged with attempting to commit arson contrary to Section 329(a) which provides as follows:

Any person who-

(a) attempts unlawfully to set fire to any such thing as is mentioned in the last preceding section; or

(b) willfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in the last preceding section is likely to catch fire from it;

is guilty of a felony and is liable to imprisonment for fourteen years.

The Section states in very clear terms that the maximum sentence is 14 years. We are at a loss as to how the sentencing judge arrived at the conclusion that 14 years is the minimum sentence under Section 329. We need not say more. Ground one has merit.

Turning to ground two, during the hearing of the appeal, we indicated to Counsel for the parties that it appeared to us that the trial court should not have sent the case to the High Court for sentencing. A perusal of the record of appeal reveals that this appeal raises a question of jurisdiction: whether this was a proper case to be sent for sentencing to the High Court under Section 217 of the CPC. This matter was heard by a Class 2 magistrate. In accordance with Section 7 of the CPC, the trial magistrate could not impose a sentence exceeding 3 years. As indicated earlier, the trial magistrate in her wisdom referred the

matter to the High Court for sentencing purportedly under Section 217 of the CPC. The Section provides that:

> **(1) Where, on the trial by a subordinate court of an offence, a person who is of not less than the apparent age of seventeen years is convicted of the offence, and the court is of opinion that his character and antecedents are such that greater punishment should be inflicted for the offence than that court has power to inflict, or if it appears to the court that the offence is one in respect whereof a mandatory minimum punishment is provided by law which is greater than that court has power to inflict, it may, after recording its reasons in writing on the record of the case, commit such person to the High Court for sentence, instead of dealing with him in any other manner in which it has power to deal with him.**
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> **(2) For the purposes of this section, the aggregate of consecutive sentences which might be imposed by the subordinate court upon any person in respect of convictions for other offences joined in the charge of the offence referred to in subsection (1) shall be deemed to be the sentence which could be imposed for such last-mentioned offence.**

In this case, the trial magistrate did not record her reasons for sending the matter to the High Court for sentencing as provided under Section 217 of the CPC. This was a misdirection. It would appear to us that the trial magistrate focused on the 14 years maximum sentence provided and concluded that it was beyond her jurisdiction and remitted the case to the High Court for sentencing. The trial magistrate should have addressed her mind to the facts of

the case before her and then considered an appropriate sentence within her jurisdiction instead of rushing to send the matter to the High Court for sentencing. Looking at the facts of this case, we agree with Mrs. Lukwesa that there were no aggravating circumstances. The trial magistrate ought to have proceeded to sentence the appellant and the matter should have ended in the Subordinate Court.

Regarding the proceedings before the High Court, we note that the sentencing judge proceeded without satisfying herself that the matter was properly before her. This is an important factor that High Court judges must bear in mind when dealing with cases from the Subordinate Court whether for sentencing, confirmation or otherwise. In an appropriate case, the sentencing judge should have sent the case back to the trial court for sentence with proper sentencing guidelines. However, we note that in this case the appellant had been in custody from 1st February, 2014; convicted by the trial court on 30th April, 2014 and was sentenced by the High Court on 21st May, 2015. Therefore, he was in custody for about 15 months and sending the case back to the Subordinate Court for

sentencing would have caused injustice to the appellant. The sentencing judge should, therefore, have imposed an appropriate sentence bearing in mind the jurisdiction of the trial court.

In this case, quite apart from the fact that there were no aggravating circumstances, we find that the sentence was wrong in principle and it comes to us with a sense of shock and not interfering with it will cause an injustice to the appellant. **See Jutronich and Another vs. The People[3] Alubisho vs. The People[4]** and **Adam Berejena vs. The People[5].**

We, therefore, find merit in ground two as well. We set aside the sentence of 14 years and taking into account the jurisdiction of the trial court, we impose a sentence of 2 years imprisonment with hard labour with effect from the date of arrest.

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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