**THE PEOPLE v SILVA AND FREITAS (1969) ZR 121 (HC)**

HIGH COURT 40

EVANS J

3rd JULY 1969

**Flynote and Headnote**

[1]   **Criminal procedure - Sentence - Maximum sentence in default of fine - Section 28 of Penal Code construed.**

   Pursuant to section 28 of the Penal Code, unless a statutory 45 exception is in force, a sentence of nine months imprisonment is the

**1969 ZR p122**

EVANS J

   maximum that can be imposed in default of payment of any fine exceeding K100.

[2]   **Criminal procedure - Sentencing - Mitigating factors - Magistrate's duty to consider.**

    5 When, at the determination of sentence, the accused advances a mitigating factor which is not disputed by the prosecution and is consistent with other facts presented, the magistrate should take this factor into account.

[3]   **Criminal procedure - Review of sentence - Excessiveness leading to**10 **conclusion that trial court used wrong principles.**

   In reviewing a sentence, a High Court judge can determine that it was based on wrong principles simply from its excessiveness.

Accused in Person.

*Williams, State Advocate*, for the People  15

**Judgment**

**Evans J:** I am reviewing this case in open court because I wish, under section 310 of the Criminal Procedure Code, to hear the State on one aspect of it and because the case has attracted considerable publicity in the press and is apparently of much public interest. I called for this case yesterday when I read in the *Times of Zambia* that the two prisoners 20 had not paid their fines of K2,000 each and were serving sentences in default of payment of two years' imprisonment. The record had not been sent to the High Court for confirmation of the sentences, as required by section 8 (2) of the Criminal Procedure Code under which it should have been sent "immediately", and regulation 29 (3) of the Preservation of 25 Public Security Regulations expressly states that the provisions of the Criminal Procedure Code relating to the confirmation of sentences and fines shall apply to any sentence or fine imposed for an offence under the Regulations.

[1] I therefore called for the record to ascertain if in fact the lower 30 court had imposed sentences of two years S.I. in default of payment of the fines because such sentences appeared to be unlawful in view of the provisions of section 28 of the Penal Code which provides for a maximum sentence of nine months' imprisonment in default of payment of any fine exceeding K100. I can find nothing in the Preservation of Public Security 35 Regulations, under regulation 10 (1) of which these prisoners were convicted, to provide for any special term of imprisonment in default of payment of fines, so section 28 of the Penal Code applies in my view. Does the State agree?

State Advocate: Yes, I agree.

Court: Then the SRM had no power to order imprisonment for longer than nine months, and the sentences of imprisonment he imposed were unlawful.

I have, in the exercise of the powers of the High Court on revision, perused the whole record of the proceedings in the lower court, and I 45 must say that, in view of the facts of the case, I am deeply shocked by

**1969 ZR p123**

EVANS J

the severity of the sentences of K2,000 fines, which I regard as manifestly excessive. It is therefore my plain duty to interfere.

The facts put before the lower court by the PP (who is an experienced Superintendent of Police) and admitted by both prisoners were as follows (Court here reads out the statement of facts). 5

That statement of facts refers to statements made on the 19th June to a police inspector at Lusaka. Silva's statement read (Court here reads out the statement). Freitas' statement read (Court here reads out the statement). When the prisoners admitted the truth of the facts presented by the PP, they were convicted. Each then spoke in mitigation of 10 punishment. Silva said: "A Zambian called me and I crossed the border to find out why he was calling me." Freitas said: "I also crossed the border because I was called by a Zambian man and I wanted to find out why he was calling me."

Then, before passing sentence, the SRM said (Court here reads from 15 record of lower court).

[2] When, in mitigation, the prisoners said, as Freitas had earlier told the police, that they crossed the border merely to find out why a Zambian man, presumably the immigration officer, had called them, the PP did not dispute that fact, and it is consistent with the facts presented 20 by him, and it should therefore have been accepted and taken into consideration by the SRM when assessing sentence. However, the severity of the fines imposed, coupled with his remarks about the seriousness of the offence, leads me to conclude that the SRM did not have in mind that very weighty mitigating factor. 25

[3] In my considered opinion, the fines were so excessive in the circumstances as to force me to the conclusion that they were based on entirely wrong principles. There was nothing sinister on the part of the prisoners; they divested themselves of their weapons before entering Zambia, and they came openly across the border in daylight after an 30 exchange of non-abusive words with a Zambian immigration officer who called them across. Perhaps, although courteous, they were foolish or indiscreet in so doing, but their immediate arrest and subsequent detention and charging in the circumstances did not redound to the credit of the Zambian authorities. 35

The prisoners have been held in custody now for eighteen days. In view of that and of what I regard as the trivial and virtually merely technical breach of the said Regulations, I quash the sentences imposed by the lower court and discharge the prisoners absolutely under section 41B of the Penal Code. 40

It is, of course, open to the immigration authorities now to take such lawful action in respect of the prisoners as such authorities deem fit.

*Order accordingly*

**1969 ZR p124**