NAFUTALI PHIRI v THE PEOPLE (1980) Z.R. 196 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE, J.S. AND MUWO AG. J.S.
22ND JANUARY,1980
S.C.Z. JUDGMENT NO. 2 OF 1980

Flynote
Sentence - Comments by court on possibility of accused having committed offence other than one charged - Impropriety of.
Criminal law anal procedure - Sentencing - Comments by sentencing court - whether proper.
Sentence - Receiving stolen property - Seriousness of offence.

Headnote
The appellant was originally charged with aggravated robbery but the charge was amended to receiving stolen property. He pleaded guilty and was sentenced to six years' imprisonment with hard labour.

On appeal, the court's attention was drawn to the comments made by the trial commissioner to the effect that the accused could have been a member of the gang which committed the offence. It was also argued that the court failed to take into account the appellant's plea of guilty when assessing the sentence.

Held:
(i) It is the duty of the sentencing court to impose a sentence in respect of the offence which the accused has been convicted, and it is improper for such court to speculate and comment on the possible result of a convicted person's having been charged with a more serious offence, unless, the admitted facts disclose such an offence.
(ii) The legislature considers receiving stolen property more serious than ordinary theft. The appropriate sentence in this case would be five years' imprisonment with hard labour.

For the appellant: I.Chali, Mwanawasa & Co.
For the respondent: K.C.V. Kamalanathan, Senior State Advocate.

Judgment
GARDNER, AG.D.C.J.: delivered the judgment of the court.

1980 ZR p197
GARDNER, Ag. D.C.J.

The appellant was connoted, on his own plea of guilty, of receiving stolen property, namely a motor vehicle valued at over K4,000, together with the keys and other accessories thereto.

The history of the case is that the appellant was originally charged with aggravated robbery in that he, together with persons unknown, whilst armed with a firearm robbed Jason Kamenye of one radio, one casette, two record players, one tape recorder, one ash tray and one motor vehicle. One prosecution witness had been called and gave evidence that he was the complainant in the case from whom the goods mentioned in the charge sheet were stolen by way of robbery by armed men whom he could not identify. The State Advocate sought and was granted leave to amend the charge to one of receiving stolen property, namely one vehicle. The appellant pleaded guilty to this charge. He was sentenced to six years' imprisonment with hard labour and he now appeals against that sentence.

It was argued by Mr Chali, on behalf of the appellant, that the learned trial commissioner, in

sentencing the appellant, who had pleaded guilty to the amended charge as soon as it was put to him, erred by failing to take into account the plea of guilty when assessing the sentence. The court's attention was also drawn to some of the comments of the learned trial commissioner. After reciting the fact that the charge had been reduced from one of armed robbery the learned commissioner said:

> "It may well be that the accused could have been a member of the gang who committed the offence but there is no direct evidence as to his identity. Nevertheless if the case has proceeded and concluded the court would not have been wrong in finding the accused guilty of armed robbery on the principle of recent possession. However, as the State has reduced the charge I would say that the accused was well advised to plead guilty which in any event could have been the result."

This court has had occasion to comment on such remarks made by sentencing courts. We have said that it is the duty of the sentencing court to impose a sentence in respect of the offence of which the accused has been convicted, and that it is improper for such court to speculate and comment on the possible result of a convicted person's having been charged with a more serious offence, unless, of course, the admitted facts disclose such an offence. As Mr Chali, on behalf of the appellant, has correctly pointed out the learned commissioner erred in principle when he imposed the sentence in this case. Because of that error in principle we allow the appeal against sentence and the sentence of six years' imprisonment with hard labour is set aside. This court is now at large to impose such sentence as it considers appropriate in the circumstances.

We have also said in the past that theft of a motor vehicle is one of the most serious examples of theft. When the maximum sentence for theft of a motor vehicle was three years' imprisonment with hard labour this court held that the maximum sentence was an appropriate one despite mitigating factors. Since the maximum sentence for theft of a

motor vehicle has increased to fifteen years this court has upheld sentences of five years which have been imposed for theft of motor vehicle by first offenders who pleaded guilty. The maximum sentence of seven years for receiving stolen property is higher than the maximum sentence for ordinary theft and this indicates that the legislature considers that a receiver's crime is more serious than that of the actual thief. Bearing this in mind we consider that the appropriate sentence in this case is five years' imprisonment with hard labour. We therefore substitute a sentence of five years' imprisonment with hard labour with effect from the 2nd August, 1978.

Sentence substituted