

RAPHAEL HACHINGABALALA v THE PEOPLE (1990) S.J. (S.C.)

SUPREME COURT
NGULUBE, D.C.J., SAKALA AND CHAILA, JJ.S.
22ND MAY, 1990
(S.C.Z. JUDGMENT NO 6 OF 1990)

Flynote

Appeal - Manslaughter - Sentence - Suspension of Sentences - Section 16 of the Criminal Procedure Code

Headnote

The deceased was the appellant's wife and that she was in the habit of committing adultery with one known as Spencer Mwango. There was evidence that on the material day the appellant caught the deceased with Spencer Mwango in very suspicious circumstances, indicating very clearly that they had been committing adultery. A fight ensued in the first place between the appellant and the offender and thereafter the appellant assaulted his wife. In the course of the fight, the deceased fell down striking her head on the floor and it was that fall which led to her death which was caused by brain hemorrhage and sundry injuries due to the beating. The appellant was sentenced to receive six years imprisonment with hard labour, one of which suspended for five years. This was imposed allegedly to deter other wife beaters and on the basis that the learned trial judge did not believe that the wife was committing adultery.

Held:

- (i) The order suspending one year of the six year sentence for five years was unlawful and contrary to Section 16 of the Criminal Procedure Code

For the appellant: Mr M S Banda of Martin Banda and Co.

For the respondent: Mr M Mukelabai, State Advocate

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

The appellant pleaded guilty to a charge of manslaughter. The particulars alleged that on 25th September, 1987, at Lusaka the appellant unlawfully caused the death of Monica Cheelo. The statement of facts read out by the learned State Advocate showed that the deceased was the appellant's wife and that she was in the habit of committing adultery with one known as Spencer Mwango. There was evidence that on the material day the appellant caught the deceased with Spencer Mwango in very suspicious circumstances, indicating very clearly that they had been committing adultery. A fight ensued in the first place between the appellant and the offender and thereafter the appellant assaulted his wife. In the course of the fight, the deceased fell down striking her head on the floor and it was that fall which led to her death which was caused by brain hemorrhage and sundry injuries due to the beating.

The appellant was sentenced to receive six years imprisonment with hard labour, one of which suspended for five years. This was imposed allegedly to deter other wife beaters and on the

basis that the learned trial judge did not believe that the wife was committing adultery.

On behalf of the appellant, Mr Banda in his written submissions advanced a number of arguments against the severity of the sentence. One of them was that the learned trial judge erred in not backdating the effective date for the sentence. We are in agreement with such submission since, unless a good reason is advanced, it is customary to give credit for the time already spent in custody. Mr Banda also argued that the sentence should induce a sense of shock because as a first offender who pleaded guilty, the sentence did not reflect any credit. Once again, we agree with that submission.

We wish to say something about the order suspending one year of the six year sentence for five years. The order in this respect was unlawful and contrary to Section 16 of the Criminal Procedure Code. Suspension of sentences should not be for more than three years and normally on conditions such as on good behaviour, payment of compensation and so on. We have also said in the past that it is wrong to suspend a small portion at the end of a lengthy sentence. In this respect, we refer to the case of *Mbanga v The People* (1) where we explained that it was wrong to suspend a small portion at the end of a long sentence. As we said in *Munangwa v The People* (2), a case which Mr Banda has cited in his arguments, the power to suspend the sentence given to the court is for the purpose of enabling the Court keep a person out of prison or in prison for a shorter time by providing him with an incentive or an additional incentive not to repeat the offence, or, put another way, to behave himself in future and none of these objectives can be achieved by the type of order made in this case. We also wish to observe that it is improper for a trial court when sentencing an offender to reject the facts recited by the prosecution which is what happened in this case when the learned trial judge said she rejected the allegation that there was adultery. It is wrong to accept the facts for the purpose of recording a conviction and then to reject the same facts when it comes to sentencing.

The appeal against sentence in this case is allowed. The effective sentence of five years imposed by the learned trial judge and the entire six years total sentence is set aside and in its place we impose a sentence of three years imprisonment with hard labour with effect from 26th September, 1987, when the appellant was taken into custody. The appeal succeeds.

Appeal allowed
