

(150)

SCZ NO. 10 OF 2004

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL NO. 20 OF 2004

HOLDEN AT KABWE

(CRIMINAL JURISDICTION)

KENNETH CHISANGA

APPELLANT

VS

THE PEOPLE

RESPONDENT

Coram: Sakala, CJ., Mambilima and Silomba, JJS
6th April, 2004.

For the Appellant: Captain F. M. Nanguzyambo, Director of Legal Aid
For the Respondent: Mr. L.E. EYAA Principal State Advocate

J U D G M E N T

Sakala, CJ., delivered the Judgment of the Court.

Case referred to:

- 1. Kalunga Vs The People (1975 ZLR 72)***

The Appellant pleaded guilty before the Subordinate Court of the First Class, holden at Ndola, to the offence of rape contrary to Section 133 of the Penal Code, Cap 87 of the Laws of Zambia.

: J2 :

The particulars of the offence were that, on 21st March, 2003, at Ndola, in the Ndola District of the Copperbelt Province of the Republic of Zambia, unlawfully had carnal knowledge of a woman namely, Annastazia Mbatu Chipeta without her consent. The trial Magistrate sentenced the Appellant to 60 months Imprisonment with Hard labour.

The case record came up before the Ndola High Court for review. How and why the record was called for review is not clear on the record. What is clear, however, is that the trial Magistrate never committed the case to the High Court for sentence. On review, the High Court sentenced the Appellant to 15 years Imprisonment with Hard Labour. The reasons given by the High Court for enhancing the sentence were that the offence was very serious; that as of late the offence of rape had become prevalent, and that women needed protection from such people as the Appellant. The court felt that it had a duty to impose a deterrent sentence.

On behalf of the Appellant, one ground of appeal was filed namely; that the learned Judge, upon review of the case, erred in law by enhancing the sentence simply because the court felt that had it tried the case, it would have imposed a greater sentence than that imposed by the trial Magistrate

The gist of the submissions on behalf of the Appellant by the learned Director of Legal Aid was that the sentence of 60 months imposed by the trial court was neither wrong in principle nor was it totally inadequate to meet the charge of rape.

We have addressed our minds to the written heads of argument by the learned Director of Legal Aid. In the case of ***Kalunga Vs The People(1)***, the case referred to us by the learned Director of Legal Aid, this court stated:

"It is not proper to enhance a sentence simply because the appellate court, had it tried the case, would have imposed a somewhat greater

sentence. Just as the appellate court will not interfere with a sentence as being too high unless the sentence comes to the court with a sense of shock. Equally, it will not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence."

The learned Director of Legal Aid pointed out that 300 percent sentence enhancement should come to this court with a sense of shock.

The Appellant was tried before a Magistrate of the First Class whose sentencing power according to the provisions of Section 7 of the Criminal Procedure Code is limited. In this case, it is limited to 5 years. Where a court has imposed a sentence within its power, it cannot be said to be wrong in principle. In other words, it is not proper to enhance a sentence simply because the appellate court had it tried the case would have imposed a somewhat greater sentence.

In the instant case, it is the Judge, on review, who was wrong in principle by imposing a sentence which was above the jurisdiction of the trial court. The scenario could have been different if the trial court had committed the case for sentence, then the High Court could have been at large to impose any sentence.

The sentence of 15 years imprisonment imposed by the Judge was not only wrong in principle but was also too high that it comes to us with a sense of shock. We set aside that sentence. In its place, we restore the original sentence of 60 months imprisonment with hard labour imposed by the trial Magistrate. To that extent the appeal is allowed.

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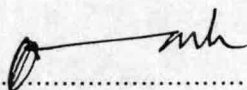
E. L. Sakala

CHIEF JUSTICE



I. C. Mambilima

SUPREME COURT JUDGE



S. S. Silomba

SUPREME COURT JUDGE

/rmc