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IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 57a and b OF 2007

HOLDEN AT NDOLA

(Criminal Jurisdiction)

B E T W E E N:

HEYARD SILUNGWE APPELLANT
KENNY KALYAMBA

-VS-

THE PEOPLE RESPONDENT

CORAM: **LEWANIKA, DCJ, SILOMBA, JS AND KABALATA, ACTING JS,**

On the 5th and 7th June, 2007

For the Appellants: Mr. E.M. Sikazwe, Acting Director, Legal Aid

For the Respondent: Mrs. J.C. Kaumba, Deputy Chief State Advocate

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J U D G M E N T

SILOMBA, JS, delivered the Judgment of the Court.

Case referred to:

1. **Phiri -VS- The People (1990) ZR, 178.**

This is an appeal against the judgment of the High Court dated the 14th day of November, 2006. In that judgment, the Appellants were found guilty on a charge of espionage contrary to Section 3 (d) of the State Security Act, Chapter 111 of the Laws of Zambia.

The particulars of the offence were that Heyard Silungwe and Kenny Kalyamba, on dates unknown but between the month of February and the month of June, 2005 at Mpika in Mpika District of Zambia, jointly and while acting together with other persons unknown for purposes prejudicial to the interest of Zambia did, without lawful excuse cut iron bars supporting Lwitikila Railway Line Bridge along the Tanzania Zambia Railway Authority Line, an act that was likely to interfere with the carrying out of a necessary service.

At the trial of the case, the learned trial Judge heard evidence from six prosecution witnesses and two defence witnesses. Briefly, the facts of the case were that the iron bars were removed from the bridges along the Tanzania Zambia Railway Line. The bridges that were affected were identified as Nos. 297, 298 and 301. The iron bars were used to provide crossing for pedestrians. They also gave support to the bridges so that each bridge kept constant weight of 85 tons in order to maintain balance.

The 1st appellant was apprehended when he attempted to sale 30 iron bars to PW3, an auto electrician and community security worker, who went and collected them and later handed the appellant to the police. The 2nd appellant was apprehended when he sold 15 iron bars to PW5 who was later cornered by the police.

At the conclusion of the trial the learned trial Judge convicted the two appellants and sentenced each appellant to 23 years imprisonment with hard labour.

At the hearing of the appeal, Counsel representing the appellants told the court that the appellants were appealing against sentence only. The only ground of appeal was that the learned trial Judge erred in principle when he sentenced the appellant to 23 years imprisonment with hard labour without

taking into account that they were first offenders. The learned Acting Director of Legal Aid relied on the case of ***Phiri -Vs- The People***. [1] We were urged to interfere with the sentence.

In opposition to the appeal against sentence, the learned Deputy Chief State Advocate drew our attention to the reasons the learned trial Judge gave for imposing the sentence of 23 years imprisonment with hard labour. She submitted that the learned trial Judge considered the fact that the appellants were first offenders but also observed that the offence they had committed was serious and prevalent. We were urged to uphold the sentence.

In response, the learned Acting Director of Legal Aid submitted that the court had principles to follow when sentencing first offenders.

We have carefully considered the proceedings in the court below and the oral submissions made before us by Counsel. At page 66 of the record of appeal, the learned trial Judge, in sentencing the appellants, stated that **"the convicts committed an offence that is not only serious but prevalent."**

Having read the evidence before the trial court, we note that the 1st and 2nd appellants had between them a total of 45 iron bars, which were removed from bridges along TAZARA line, thereby interfering with the provision of necessary services.

We also note that the minimum sentence for this kind of offence is 20 years imprisonment with hard labour. Due to the prevalence of the offence of espionage in the nation, the 23 years imposed on each of the appellants does not come to us with any sense of shock. We affirm the sentence as the learned trial Judge was certainly on firm ground. The only ground of appeal is accordingly dismissed.

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D. M. Lewanika,
DEPUTY CHIEF JUSTICE.

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S. S. Silomba,
SUPREME COURT JUDGE.

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T. A. Kabalata,
ACTING SUPREME COURT JUDGE.

THE SUPREME COURT OF ZAMBIA
AT NDOLA

SCZ Appeal No. 58/07

(Appellate jurisdiction)

BETWEEN:

RICHARD FRANK — Appellant
And
THE PEOPLE — Respondent

Coram: Lewanika DCJ; Silomba JS and Kabalata AJS on 5th and 7th June, 2007.

Kabalata, AJS, delivered the judgment of the Court.

JUDGMENT

Cases referred to:

(1) Mwiba vs. The People (1971) ZR 131

Legislation referred to:

(1) S44, Narcotic Drugs and Psychotropic substances Act, Cap. 96

The Appellant Richard Frank was convicted by the Subordnate Court of the Third class for Nakonde District of trafficking in narcotic or psychotropic substances contrary to section 6 of Cap. 96 of the Laws of Zambia.

The particulars of offence were that he and two others, on 26th October 2005 at Nakonde in the Nakonde District of the Northern Province of the Republic of Zambia jointly and whilst acting together did traffic in narcotic or psychotropic substances namely Miraa or Khat containing the active ingredient cathine weighing 31.4 kilogrammes without authority.

The charge against the second and third accused persons was subsequently withdrawn by the Public Prosecutor under Section 88(a) of the Criminal Procedure Code, and they were accordingly discharged.

When the trial commenced in respect of the first accused, now the appellant in this appeal, and after one prosecution witness had given evidence, the appellant informed the trial magistrate that he wished to change his plea from one of not guilty to guilty. A fresh plea was then taken by the court and the appellant admitted the charge.

When the statement of facts was read out to the appellant, he admitted that they were correct and the court then found him guilty and convicted him accordingly.

The Public Prosecutor then informed the Court that the appellant was a first offender..

In mitigation, the appellant asked for forgiveness from the Court and that if given a custodial sentence, he would fail to look after his brothers. He pledged not to repeat what he had done.

The Court then proceeded to commit the Appellant to the High Court for sentence on the grounds that the offence he had committed was a very serious one.

When the case came up for sentence at the High Court, the presiding judge told the appellant that the offence he had committed was not only serious but prevalent. He then imposed a sentence of 20 years imprisonment with hard labour to deter other Tanzanian nationals who will deal in these drugs.

The appellant now appeals to this court against sentence on the ground that it is excessive.

On behalf of the appellant, Mr. E.M. Sikazwe, the learned acting Director of Legal Aid, submits that the sentence imposed by the lower court was excessive taking into account the fact that the appellant was a first offender who had pleaded guilty and who had also shown contrition. In support of his submission, Mr. Sikazwe referred us to ***Mwiba vs. The People***[1] where we said that a first offender who pleads guilty to a charge deserves to be treated with leniency. In reply, Ms. J. Kaumba, the learned Deputy chief State Advocate, left everything to the court to decide.

We have considered the facts of this case and the submissions of Counsel. We entirely concur with Mr. Sikazwe's submission that as a first offender who had pleaded guilty to the charge and had not wasted the court's time, and had shown contrition, the Appellant deserved to be treated with leniency with regard to sentence.

We also wish to observe that under section 44 of the Narcotic Drugs and Psychotropic Substances Act Cap. 96 of the Laws of Zambia:-

> ***"Any person convicted on a second or subsequent offence for trafficking shall be liable to imprisonment for a term of not less that ten years"***

Since, the appellant is a first offender and not a subsequent offender, and for what we have said in the **Mwiba case**[1], supra this appeal is allowed.

We therefore set aside the sentence of 20 years imprisonment with hard labour imposed upon the appellant by the lower Court and in its place we substitute a sentence of 5 years imprisonment with hard labour. The sentence is to run from the date of arrest.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

S.S. Silomba
JUDGE SUPREME COURT

T.A. Kabalata
ACTING SUPREME CORT JUDGE