(287)

IN THE SUPREME COURT OF ZAMBIA S.C.Z. Appeal No. 55/07
HOLDEN AT NDOLA
(Criminal Jurisdiction)

IN THE MATTER BETWEEN:

BENAI SILUNGWE	**APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

Coram: Sakala CJ, Chitengi and Mushabati, JJS
4th March 2008 and 8th March 2008

For the Appellant: Mr M Chitabo of Chitabo Chiinga Associates.
For the Respondent: Mrs J C Kaumba, Deputy Chief State Advocate.

JUDGEMENT

Chitengi JS, Delivered the Judgement of Court

Cases referred to:
1. **Solomon Chilimba v. The People (1971) ZR 36**

The Appellant was convicted by the High Court of the offence of espionage contrary to Section 3(d) of the State Security Act Chapter 111 of the Laws of Zambia. The particulars of offence alleged that Benai Silungwe, Davies Chewe Mwape and Lewis Malama, on 5th May, 2005, at Mpika in the Mpika District of the Northern Province of the Republic of Zambia, jointly and whilst acting together and for purposes prejudicial to the interests of the Republic of Zambia, did without lawful excuse, cut and remove Tanzanian Zambia Railways Authority Telecommunication cables an act which was likely to interfere with the provision of telecommunication services, a necessary service.

At the close of the Prosecution case, the Appellant's co-accused were found with no case to answer and acquitted. But, as we have

(288)

said, the Appellant was convicted. The Appellant was sentenced to 30 years imprisonment with hard labour with effect from 12th May 2006, the day he was arrested.

The Appellant, who was at the time of his trial aged 21 years, had originally appealed against both conviction and sentence. But when we heard the appeal, the Appellant abandoned his appeal against conviction. The appeal is, therefore, against sentence only. No specific ground of appeal was framed. But from what we glean from the submissions by Mr Chitabo, learned Counsel for the Appellant, the ground of appeal is that the learned trial Judge misdirected himself by not crediting the Appellant with the lenience due to a first offender.

Mr Chitabo made oral submissions, the gist of which is that from the remarks made by the learned trial Judge when passing sentence on the Appellant, it is clear that, although the learned trial Judge was aware that the Appellant was a first offender, the learned trial Judge did not treat the Appellant with the lenience due to a first offender. Further, Mr Chitabo submitted that, by abandoning his appeal against conviction, the Appellant was showing that he was remorseful for this deeply regrettable incident. For these reasons, Mr Chitabo urged us to interfere with the sentence and impose the minimum mandatory sentence.

Mrs Kaumba, the learned Deputy Chief State Advocate, did make a reply.

We have carefully considered the evidence upon which the Appellant was convicted and the submissions by Mr Chitabo. The substance of the evidence was that the Appellant cut and removed

(289)

communication wires from the Complainant's telecommunications system.

From the learned trial Judge's comments, we agree with Mr Chitabo's submissions that the learned trial Judge did not credit the Appellant with the leniency due to a first offender. The offence for which the Appellant was convicted carries a severe minimum mandatory sentence of 20 years imprisonment and a maximum sentence of 30 years imprisonment. This means that, unless there are aggravating circumstances, a first offender should get the minimum mandatory sentence of 20 years. In this case, the learned trial Judge imposed a sentence of 30 years imprisonment with hard labour. The question arises whether there were aggravating circumstances in this case justifying the imposition of the maximum penalty of 30 years imprisonment.

What weighed with the learned trial Judge as aggravating circumstances were the seriousness and prevalence of the offence and the likely danger to the lives of the passengers who use the railway line and to the property of the Complainant. Seriousness of the offence in this particular case is not an aggravating circumstance because by prescribing a minimum mandatory sentence of 20 years imprisonment, the Legislature has already indicated the seriousness of the offence. The anticipated danger to the lives of those who use the railway line and the property of the Complainant, without any injuries and damage actually having happened is, not an aggravating circumstance as such. The only factor that may justify a sentence higher than the minimum mandatory sentence is, therefore, the prevalence of this offence. But having regard to the minimum mandatory sentence of 20 years imprisonment, we do not think that

(300)

the prevalence of the offence alone can justify the increase of the sentence from the minimum mandatory 20 years imprisonment.

As the Court of Appeal, (the forerunner of this Court) said in ***Solomon Chilimba v. The People***(1) unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence. In **Chilimba**(1), like in this case, the Court of Appeal was dealing with an appeal involving an offence for which the Legislature had prescribed a minimum mandatory sentence. In this case, we do not find any extraordinary features which aggravate the seriousness of the offence to justify the imposition of a sentence above the 20 years imprisonment minimum mandatory sentence, let alone the maximum sentence of 30 years imprisonment. In the event, we must interfere with the sentence. We quash the sentence of 30 years imprisonment imposed by the learned trial Judge and substitute it with one of 20 years imprisonment with hard labour from 12th May 2006, date of arrest.

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E. L. Sakala
CHIEF JUSTICE

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P. Chitengi
SUPREME COURT JUDGE

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C. S. Mushabati
SUPREME COURT JUDGE