IN THE HIGH COURT OF ZAMBIA **HJA/03/2011**
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

BETWEEN:

GOLDEN DAKA **APPELLANT**

v

THE PEOPLE **RESPONDENT**

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25th day of February, 2011.

For the People: *Ms. C. C. Soko, State Advocate in the Director of Public Prosecutions Chambers.*

For the respondent: *Mr. F. M. Jere, of Messrs Ferd Jere and Company.*

RULING

Cases referred to:

1. *Jutronich and Others v The People (1965) Z.R. 11.*
2. *Zulu v The People (1974) Z.R. 58.*
3. *Mwanza v The People (1976) Z.R. 154.*
4. *Sykalonga v The People (1977) Z.R. 61.*
5. *Gasanalieu v The People (SCZ No. 17 of 2010) (unreported).*

Legislation referred to:

1. *Penal Code, Cap 87, ss 139 (1) and 229.*
2. *Criminal Procedure Code, Cap 88, ss. 9(3), 217, 321, 337, 338, and 341.*

The facts of this case are that Golden Daka, and I will continue to refer to him as the appellant, appeared before the Subordinate Court of the First class of Chipata District

on 21st September, 2010, charged for the offence of causing grievous harm contrary to section 229 of the Penal Code, Chapter 87 of the laws of Zambia.

The particulars of the offence are that on 11th May, 2009, at Chipata, in the Chipata District of the Eastern Province of the Republic of Zambia, the appellant did cause grievous harm to Albert Phiri; I will continue to refer to him as the complainant. After the trial, the appellant was convicted of the subject offence and sentenced to three years imprisonment with hard labour. The appellant appealed against the conviction and sentence.

This matter was therefore originally before me by way of an appeal. However, the appeal was withdrawn because Mr. Jere realized that the conviction and the sentence that was subject of the appeal had not in the first place been confirmed by the High Court. Thus Mr. Jere pressed that the conviction, and sentence should now be confirmed, following the withdrawal of the appeal.

I invited counsel to address me on the course of action proposed by Mr. Jere. On 24th February, 2011, Mr. Jere filed written submissions. In his submissions, Mr. Jere argued that the Class II Magistrate in the Court below did not comply with the provisions of section 9 (3) of the Criminal Procedure Code, Chapter 88 of the laws of Zambia. Section 9 (3) enacts that:

"No sentence imposed by a Subordinate Court of the Second Class exceeding one year's imprisonment with or without hard labour shall be carried into effect in respect of the excess until the record of the case or a certified copy thereof and the sentence has been confirmed by the High Court."

Mr. Jere argued that the Court below (Class II Magistrate) should therefore have forwarded the record to the High Court for confirmation of the three years sentence imposed on the appellant. Further, Mr. Jere argued that I am empowered by section 338 of the Criminal Procedure Code to review the matter in order to confirm the sentence. In support of this submission, Mr. Jere relied on the case of *Mwanza v The*

People (1976) Z.R. 154. Thus, Mr. Jere urged me to reduce the sentence imposed on the appellant because, firstly, the appellant is a first offender who should have been treated more leniently. Secondly, Mr. Jere recalled that the appellant informed the lower Court in mitigation that he was suffering from peptic ulcers, and meningitis. Notwithstanding the mitigation referred to above, Mr. Jere submitted that the lower Court went ahead to impose a sentence of three years imprisonment with hard labour. Lastly, Mr. Jere argued that the prosecution evidence was full of contradictions, especially the evidence of the complainant and his witnesses.

On 25th February, 2011, Ms. Soko filed the submissions on behalf of the People. Ms. Soko contends that this record is wrongly before me. To reinforce her contention, Ms. Soko also drew my attention to the case of *Mwanza v The People (1976) Z.R. 154.* Ms. Soko argued that the *Mwanza case* considered the jurisdiction of the Court to review a matter under section 338 of the Criminal Procedure Code. Ms. Soko strenuously argued that the sentence passed by the Court below should not be confirmed at this juncture because there is an irregularity on record. Namely, that there is no endorsement on the record by the Court below that this matter has been referred to this Court; the High Court for confirmation of the sentence. Ms. Soko therefore urged that the record should be remitted to the Court below to cure the procedural defect. Ms. Soko pressed that if the matter is remitted to the Court below, there is no injustice or prejudice that would work against the appellant.

Ms. Soko argued in the alternative that if I am however inclined to proceed with the confirmation, her contention is that there is nothing on record that justifies setting aside the conviction or indeed reducing the sentence. On the contrary, Ms. Soko argued that the record shows that there are aggravating circumstances surrounding the assault in question. Namely, that as a result of the assault, the complainant lost his left eye, and is thus permanently maimed. Ms. Soko submitted that the offence of causing grievous harm contrary to section 229 of the Penal Code attracts a maximum sentence of seven years. Thus a sentence of three years imprisonment imposed by the Court below does not come to her with a sense of shock.

I am indebted to counsel for the submissions and arguments. Both Mr. Jere and Ms. Soko have relied on the case of *Mwanza v The People (1976) Z.R. 154,* to support their respective positions. I will therefore begin by reviewing the *Mwanza case*. The facts in the *Mwanza case* were that the accused was charged before the Subordinate Court in Kitwe with indecent assault on a female contrary to section 139 (1) of the Penal Code Act, chapter 146 of the laws of Zambia, (now chapter 87). The accused was sentenced to twenty months imprisonment with hard labour. Care, J, observed in the course of delivering the judgment that the record came before the High Court for the purpose of confirmation of sentence by virtue of section 9 (3) of the Criminal Code Chapter 160 of the laws of Zambia, (now chapter 88). This was so because the Magistrate being of Class II, a sentence in excess of one years imprisonment with hard labour could not be carried into effect without confirmation by the High Court.

Care, J, also observed that the revisional powers are provided for under section 338 of the Criminal Procedure Code. S. 338 enacts as follows:

"338 (1) In the case of any proceedings in a Subordinate Court, the record of which has been called or otherwise comes to its knowledge, the High Court may:-

(a) In the case of a conviction

(i) Confirm, vary, or reverse the decision of the Subordinate Court, or order that the person convicted be retried by a Subordinate Court of competent jurisdiction or by the High Court, or in the matter as to it may seem just and may by such order exercise any power which the Subordinate Court might have exercised;

(ii) If it thinks a different sentence should have been passed, quash the sentence passed by the Subordinate Court and pass such other sentence warranted in law, whether in substitution therefore as it thinks ought to have been passed;

(iii) If it thinks additional evidence is necessary, either take such additional evidence itself or direct that it be taken by the Subordinate Court.

(iv) Direct the Subordinate Court to impose such sentence or make such order as may be specified.

(b) In the case of any other order, other than an order of acquittal, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of making representations in writing on his own behalf.

(3) The High Court shall not exercise any powers under this section in respect of any convicted person who has appealed, unless such appeal is withdrawn or who has made application for a case to be stated, unless the Subordinate Court concerned refuses to state a case under the provisions of section 343.

(4) Nothing in this section shall be to the prejudice of the exercise of any right of appeal given under this Code or under any other law.

(5) The provisions of subsection (2), (3) and (4) of section 333 shall apply mutatis mutandis in respect of any additional evidence.

(6) When the High Court gives a direction under subparagraph (iv) of paragraph (a) of subsection (i), the record of the proceedings shall be returned to the Subordinate Court and that Court shall comply with the said direction.

In the *Mwanza case,* Care, J, went on to observe that there are four ways in which the decision of a Magistrate's Court can be supervised by the High Court. The first way, which is initiated at the option of one of the parties, is that of appeal. This is a right given to a convicted person by statute. (See section 321 of the Criminal Procedure Code). It may also be by way of case stated (see section 341 of the Criminal Procedure Code). The second option, Care, J, observed is at the option of a Subordinate Court where it commits a person for sentence by the High Court (see section 217 of the Criminal Procedure Code). The third method is known as review. In this respect, the High Court may call for, and examine the record of any criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by a Subordinate Court. (See section 337 of the Criminal Procedure Code). Lastly, the fourth method is under section 9 of the Criminal Procedure Code. This is the path which is proposed that the instant matter should take.

To recapitulate, s 9 (3) enacts that:

"*No sentence imposed by a Subordinate Court of the second class exceeding one year imprisonment with or without hard labour, shall be carried into effect in respect of the excess, until the record of the case or a certificate copy thereof has been transmitted to and the sentence has been confirmed by the High Court."*

I have indicated above that there are four ways in which the decision of a Magistrate's Court can be supervised. Namely, by appeal or case stated; committal to the High

Court for sentence; review; and confirmation of sentence. In construing section 338 of the Criminal Procedure Code, Care J, observed at page 156 that:

"The record in this case has "otherwise come to my knowledge" (section 338 supra) since it came for confirmation; I did not call for the record under section 337: I consider nonetheless that I have the powers referred to in section 338."

I am persuaded by preceding dictum in the *Mwanza case*; a High Court decision. Thus, following the decision in the *Mwanza case*, the record in this case has also in terms of section 338 (1), "*otherwise come to my knowledge*". Therefore, although the record was not formally referred to me for confirmation under section 9 (3) of the Criminal Procedure Code, I still retain the powers conferred on me by section 338 to review the matter. The convict in this case was charged and convicted of the offence of causing grievous contrary to section 229 of the Penal Code. Section 229 enacts that:

"*Any person who unlawfully does grievous harm to another is guilty of felony and is liable to imprisonment for seven years*."

I have reviewed the record, and I do not accept the argument that the prosecution evidence was full of contradictions. I did also not discern any finding which could be said not to be reasonably supported by evidence.

Further, it will be recalled that, Mr. Jere in pressing for a reduction in the sentence of three years imposed by the Court below pressed that: the convict is a first offender; and is suffering from peptic ulcers and meningitis. Conversely, Ms. Soko contends that in the instant case that there are aggravating circumstances surrounding the assault. Namely, the complainant has lost his left eye in the process.

In dealing with the question of sentence on review, I propose to adopt the approach taken by an appellate Court in dealing with an appeal against sentence. Namely, that the following questions ought to be asked:

(a) Is the sentence wrong in principle;
(b) Is it manifestly excessive so that it induces a sense of shock; and

(c) Are there any exceptional circumstances that would render it an injustice if the sentence were not reduced. (See *Jutronich and other v The People (1965) Z.R. 11).*

A central question that therefore arises is whether I would be on firm ground if took into account the health condition of the appellant in the instant matter. The case of *Zulu v The People (1974) Z.R. 58*, is instructive on this point. The facts of the case were that the appellant, a legal practitioner, was convicted in the Subordinate Court of the theft of K 480, the property of a client. He was sentenced to four months imprisonment with hard labour, suspended for one year. In deciding to suspend the sentence, the Magistrate appears to have been influenced by the serious consequences to a professional man and by the health of the appellant who was a diabetic.

In delivering the judgment of the Supreme Court Doyle C.J as he was then made the following observation at pate 59:*"Where it is clear that the Courts cannot ordinarily determine a sentence by reason of the ill health of a convicted person, there may be exceptional cases where the Court would be merciful because of the exceptional results which might ensue from a prison sentence by reason of the convicts state of health. Where this is to be taken into account there must, of course be adequate medical evidence. In the instant case there was none."*

Doyle C.J. continued:

"While in many cases matters raised by a convicted person in mitigation are accepted by the prosecution without objection, clearly where the question turns on exceptional ill health, the prosecution would be in no position either to dispute or concur, and we consider that if such submission is to be made it should be properly supported either by viva voce evidence from some medical authority, or at least by a written certificate."

In the *Zulu case,* the appellant afforded himself of the opportunity offered, and called two medical witnesses. Their evidence in substance went no further than that, while the appellant was an ordinary diabetic, and could be treated in prison, ideally his treatment would be better performed outside prison. It is instructive to note that in the *Zulu case*, the Supreme Court was unable to lay down a rule that all persons suffering from diabetic, and indeed persons suffering from other diseases which require special treatment should by reason of that fact alone be immune from a custodial sentence. The Supreme Court however hastened to point out that there is of course a duty on the prison authorities to provide proper treatment to prisoners suffering from disease. On the facts of this case, the submission by Mr. Jere that the appellant is suffering from peptic ulcers, and meningitis is not supported by either *viva voce* evidence or

indeed documentary evidence. And as such it would be improper for me to reduce or set aside the sentence in the absence of such evidence.

As regards the plea for reduction of the sentence, Mr. Jere argued that the appellant is a first offender and therefore urged me to exercise leniency. Ms. Soko, however contends that in the instant case there are aggravating circumstances, which I ought take into account. Firstly, it is trite law that a first offender deserves leniency when it comes to the imposition of a sentence. *(See Gasanalieu v The People (SCZ Number 17 of 2010*). And in the instant case I have credited the appellant for being a first offender. Secondly, it is also trite law that while mitigating factors are taken into account, it is also essential that the sentencing Court takes into account the aggravating factors of the crime committed. (see the *Gasanalieu case* supra). In this particular case there is an aggravating circumstance. Namely, that the complainant lost an eye as a result of the assault.

Thirdly, the Courts have in the past given notice that they will deal severely with cases in which people perhaps having taken a few drinks, use lethal weapons and in particular knives for the purposes of settling trivial quarrels. (see *Sykalonga v The People (1977) Z.R. 61)*. In my opinion cases of stabbing are still prevalent, and therefore it is necessary to impose deterrent sentences. In the instant case, granted that the offence of causing grievous harm contrary to section 229 of the Penal Code attracts a maximum sentence of seven years; a sentence of three years imprisonment with hard labour does not come to me with a sense of shock.

In the premises, I therefore confirm both the conviction and sentence imposed by the Court below, in accordance with section 9 (3) of the Criminal Procedure Code.

Dr. P. Matibini, SC
HIGH COURT JUDGE