IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 108/2011**

HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

JAMES SIMBEYE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Malila, JJS

On 6th March, 2018 and 13th March, 2018

For the Appellant: Mr. A. Ngulube, Director, Legal Aid Board

For the Respondent: Mr. C. Bako, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Noah Kambobe vs. The People (SCZ Judgment No. 13 of 2002)**
2. **Jutronich, Schutte and Lukin vs. The People (1965) Z.R. 9**
3. **Alubisho vs. The People (1976) Z.R. 11**
4. **Ives Mukonde vs. The People SCZ judgment No. 11 of 2011**

This is an appeal against sentence only. The appellant was convicted of the offence of trafficking in psychotropic substances contrary to Section 6 of the Narcotic Drugs and Psychotropic Substances Act, Cap 96 of the laws of Zambia (hereinafter referred to as "the Act"). It was alleged that on the 10th October, 2006 he trafficked in a psychotropic substance, namely, miraa weighing 44.204 kg without authority.

The brief facts are that the appellant was travelling by bus from Nakonde to Lusaka. He was the last passenger on the bus and the driver took note of his luggage as it was large and room had to be created for it. After the bus left for Lusaka, it was intercepted by officers from the Drug Enforcement Commission who were apparently searching for the appellant as they had information that he was on the bus and was carrying drugs. When the officers started searching the bus, the appellant went into hiding. All the passengers were asked to identify their luggage and it took the driver of the bus to identify the appellant and his luggage.

The appellant's explanation was that the luggage was packed in his absence and as far as he knew he was carrying jeans for sale.

The trial magistrate convicted the appellant and remitted the matter to the High Court at Kasama for sentence. In mitigation, the appellant, who appeared in person, stated that he was an orphan and had a young brother who was mentally challenged. In sentencing the appellant, the learned sentencing judge noted the quantity of the drugs and that the offence of trafficking in psychotropic substances was prevalent especially in Nakonde which was a transit town. He sentenced the appellant to 20 years imprisonment with hard labour.

On behalf of the appellant, Mr. Ngulube, learned Counsel for the appellant, has advanced one ground of appeal namely that the sentence of 20 years was harsh for a first offender. In the filed heads of argument we were referred to the case of **Noah Kambobe vs. The People**[1] in which we set aside a sentence of 32 years for manslaughter imposed on a first offender who had pleaded guilty. It was submitted that the sentence of 20 years be set aside in view of the fact that the law has not set a minimum mandatory sentence for the offence and we were urged to impose a more reasonable sentence.

In his brief augmentation, Mr. Ngulube submitted that Section 44 of the Act prescribes a minimum sentence of 10 years for a second offender. Counsel took the view that since the minimum sentence for a second offender is 10 years, the sentence of 20 years imposed on the appellant a first offender was excessive and should come to us with a sense of shock. Counsel argued that the sentence of 20 years is five (5) years short of the maximum sentence for drug trafficking.

In response, Mr. Bako learned Counsel for the State submitted, *inter alia*, that the sentence of 20 years should not be looked at with a sense of shock. This is in view of the fact that although the appellant was a first offender, the sentencing judge took into account the fact that the appellant was found in possession of a high quantity of miraa and the offence was prevalent in the area hence the deterrent sentence.

We have considered the submissions by learned Counsel for the parties.

The issue for our consideration in this appeal, which is against sentence only, is whether the sentence was appropriate under the

circumstances. In the case of **Jutronich, Schutte and Lukin vs. The People**[2] the Court of Appeal, the forerunner of this court, held that the following questions should be addressed by an appellate court in an appeal against sentence:

(1) Is the sentence wrong in principle?

(2) Is the sentence so manifestly excessive as to induce a state of shock?

(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?

We reaffirmed this position in the latter case of **Alubisho vs. The People**.[3] And in the case of **Ives Mukonde vs. The People**[4] the appellant was convicted and sentenced to 25 years imprisonment for committing two counts of defilement. On appeal against sentence, we declined to reduce the sentence on the ground that there were aggravating circumstances in that the victims were aged 11 and 8 years and the appellant was father and uncle respectively. We also took into account the prevalence of the offence of defilement in this country. We, therefore, found that the sentence was not wrong in principle.

In the case in *casu,* the appellant was a first offender. In passing sentence, the learned judge had this to say:

> **I have considered what the convict submitted before the lower court in mitigation. However, the convict committed an offence that is not only serious but prevalent particularly in Nakonde. I have taken serious view of the circumstances under which the offence was committed including the quantity and the fact that Nakonde is becoming a transit town for drugs. If not checked the situation is likely to get out of hand. The convict however being a first offender deserves leniency.....The convict is sentenced to 20 years imprisonment with hard labour with effect from 20th October, 2006 the date the convict was arrested. This will send signals to others."**

Under Section 6 of the Act, any person found guilty is liable to imprisonment for a term not exceeding twenty-five years. Counsel has strongly argued that the sentence of 20 years is excessive.

In this appeal, while we agree that the quantity of miraa was high, we take the view that the sentence imposed was wrong in principle. Although the learned judge stated that the appellant deserved leniency, clearly the sentence did not reflect the leniency which should be accorded to a first offender in line with our holding in **Noah Kambobe**[1] case. There were no aggravating circumstances in this case save for the fact that the quantity of miraa was high.

Further, the fact that the offence was becoming prevalent in Nakonde did not justify the imposition of a harsh sentence. We agree with Mr. Ngulube that if a subsequent offender is liable to a minimum sentence of 10 years, the sentence of 20 years imposed on the appellant was excessive and comes to us with a sense of shock. All things considered, we are of the view that it will be an injustice for us to uphold the sentence imposed by the lower court.

For reasons stated herein, we set aside the sentence of 20 years and instead we impose a sentence of 5 years imprisonment with hard labour with effect from the date of arrest.

Appeal against sentence allowed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE