IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

Appeal No. 122/2018

BETWEEN:

EMMANUEL SIMFUKWE — APPELLANT

AND

THE PEOPLE — RESPONDENT

Coram: Muyovwe, Kaoma and Chinyama, JJS.

On 5th November, 2019 and 2019

For the Appellant: Mr. M. Mankinka, Legal Aid Counsel
For the Respondent: Mrs. M. Chipanta Mwansa, Deputy Chief State Advocate

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JUDGMENT

Kaoma, JS delivered the judgment of the Court.

Cases referred to:

1. **Adam Berejena v The People (1984) Z.R. 19**
2. **Moses Mwiba v The People (1971) Z.R. 131**
3. **Alubisho v The People (1976) Z.R. 11**
4. **Jutronich Schutte and Lukin v The People (1965) Z.R. 9**
5. **R v Ball (1951) 35 Criminal Appeal Reports 164**
6. **Philip Mungala Mwanamubi v The People – Selected Judgment No. 14 of 2013**

Legislation referred to:

1. **Penal Code, Cap 87 of the Laws of Zambia, section 328(1)(a)**

1 Background

1.1 This is an appeal against sentence. The Subordinate Court at Mbala convicted the appellant upon his own

unequivocal plea of guilty of arson contrary to section 328(a) of the Penal Code. It was alleged that he on 26th May, 2015 willfully and unlawfully set fire to the house of Vainess Nachilya and property valued at K3,200 was destroyed. Thereafter, he was committed to the High Court for sentence.

1.2 In sentencing the appellant, aged 33 years, the learned judge treated him as a first offender although he had refused to make any submission in mitigation of sentence in the Subordinate Court. The judge also took into account the seriousness with which the legislature views this type of offence by providing a minimum prison sentence of ten years and maximum of life. The judge further considered that the offence was unprovoked and the value of the property, which he said the poor woman victim may never recover. He sentenced the appellant to twenty years imprisonment with hard labour with effect from his date of arrest.

2 Appeal to this Court and arguments by the parties

2.1 Displeased with that sentence, the appellant filed this appeal on one ground that the trial court erred at law

and fact when it meted out a harsh sentence on him in the absence of aggravating circumstances.

2.2 Learned counsel for the appellant, Mr. Mankinka filed heads of argument on which he relied. The kernel of the arguments is that the sentence of 20 years imprisonment was manifestly excessive for a first offender who had pleaded guilty. Counsel cited the case of **Adam Berejena v The People**[1] where this Court held, inter alia, that:

> **"An appellate Court may interfere with a lower Court's sentence only for good cause. To constitute good cause, the sentence must be wrong in law, in fact or in principle or it must be so manifestly excessive or so totally inadequate that it induces a sense of shock or there must be such exceptional circumstances as to justify an interference."**

2.3 Further, counsel argued that the sentence was inappropriate and should come to us with a sense of shock because the mitigating factors outweighed any aggravating factors and that the intrinsic value of the property was on the lower side of the scale.

2.4 According to counsel, this was an ordinary offence of arson. Hence, the appellant ought to have received the minimum statutory sentence.

2.5 Counsel further contended that although the appellant did not offer any mitigation before the trial court, this must not be taken to mean he was not remorseful because a guilty plea is the offspring of penitence.

2.6 In any event, counsel submitted, the record is silent on whether the judge allowed the appellant through his counsel to mitigate before sentence so that he could show that he was remorseful.

2.7 Counsel further argued that if a guilty plea is taken as a sign of contrition, it was an error in principle for the judge not to take into account such contrition. He quoted the case of **Moses Mwiba v The People**[2] and urged us to set aside the sentence and replace it with one that resonates with the facts of the case.

2.8 In his oral submissions, learned counsel for the appellant conceded that a plea of guilty does not necessarily signify remorse.

2.9 On the undisputed fact that the appellant burnt two houses belonging to the complainant, although the charge related to one count, counsel insisted that the mitigating factors outweighed any aggravating factors.

2.10 Mrs. Chipanta Mwansa, the learned Deputy Chief State Advocate, contended in her oral submissions, on behalf of the respondent, that the judge was on firm ground when he sentenced the appellant to 20 years imprisonment after considering the factors on record. She disputed that the value of the property should be trivialised as falling on the lower side of the scale.

2.11 Counsel argued that the offence on a poor woman in a village in Mbala, who lost two houses in the inferno, was unprovoked, which was aggravating, given that this was also violence against a woman who may not be able to recover her lost property.

2.12 Counsel also submitted that the facts show that even when the children shouted for help, the appellant did not think of leaving the premises but proceeded to set fire to the other house. Therefore, his conduct removes this case out of the category of ordinary cases of arson.

2.13 Learned counsel further argued that the sentence was not wrong in principle or manifestly excessive as to induce a sense of shock and there are no exceptional circumstances that would render it an injustice if the

sentence is not reduced. She cited the case of **Alubisho v The People**[3], which dealt with when the appellate court can interfere with sentence.

2.14 According to counsel, there were no mitigating factors in this case; and the appellant got away with one count. She urged us not to interfere with the sentence.

3 Consideration of the matter by this Court and decision

3.1 We have considered the evidence on record and the arguments by learned counsel. In the case of **Alubisho v The People**[3] cited by Mrs. Chipanta Mwansa, this Court referred to the decision of the then Court of Appeal for Zambia in the case of **Jutronich, Schutts and Lukin v The People**[4], where Bladgen, C.J., (as he then was) stated that:

> **"In dealing with an appeal against sentence the appellate court should ask itself these questions:**
> **1) Is the sentence wrong in principle?**
> **2) Is it manifestly excessive so that it induces a sense of shock?**
> **3) Are there any exceptional circumstances, which would render it an injustice if the sentence were not reduced?**
>
> **Only if one or other of these questions can be answered in the affirmative should the appellate court interfere."**

3.2 Bladgen, C.J., further referred to the case of **R v Ball**[5] where Justice Hilbery stated the principles, which should guide a court in passing sentence as follows:

> **'In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it'."**

3.3 This Court in various other cases such as **Philip Mungala Mwanamubi v The People**[6] has applied the above guiding principles.

3.4 In the present case, the appellant was a first offender who as rightly submitted by his counsel readily admitted the charge, thereby saving the court's time. As such, he was entitled to leniency.

3.5 A question arose at the hearing as to whether the appellant had shown contrition since he had said nothing in mitigation of sentence in the trial court.

3.6 While we do not agree with counsel for the appellant that a plea of guilty is synonymous with remorse, we agree with him that there is nothing on the record to show that the learned judge had invited counsel for the

appellant to mitigate before sentence. Hence, we cannot conclude that the appellant was not repentant.

3.7 As held in **Moses Mwiba v The People**[2], the court must give due allowance to accused persons who plead guilty and show contrition as their action saves the time of the court and investigating officers.

3.8 Since the judge failed to consider that the appellant pleaded guilty to the charge and may well be contrite, we find the sentence of 20 years imprisonment with hard labour to be manifestly excessive as to induce a sense of shock and we set it aside.

3.9 We are aware that the offence was unprovoked and the victim may never replace the lost property as the learned judge said; and that the appellant set fire to two houses even if the charge was only one. Therefore, the minimum sentence of 10 years would be improper. Instead, we impose a sentence of 11 years imprisonment with hard labour from the date of arrest.

4 Conclusion

4.1 This appeal succeeds and we allow it.

E.C. MUYOVWE
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE