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

APPEAL No. 192, 193/2018

BETWEEN:

MATAA MATAA — **1ST APPELLANT**
RICHARD MUTALE — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram: Muyovwe, Malila and Chinyama, JJS.

On the 5th February, 2019 and on the 26th May, 2020

For the Appellant: *Mrs M. Makayi, Legal Aid Counsel, Legal Aid Board.*

For the Respondents: *Mr C. Ng'onga, Acting Senior State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. ***Simon Munsaka v The People (1977) Z.R. 442***
2. ***Kenneth Chisanga v The People (2004) Z.R. 93***
3. ***Alex Mwewa v The People (1970) ZR 84 (Reprint)***

Statutes referred to:

1. ***Penal Code, Chapter 87, Laws of Zambia, sections 134, 292***
2. ***Criminal Procedure Code, Chapter 88, Laws of Zambia, sections 7, 9, 81, 217, 220, 224, 228, 338***
3. ***Constitution of Zambia, Chapter 1, Laws of Zambia as Amended by Act No. 2 of 2016, article 180***

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1. ***Penal Code, Chapter 87, Laws of Zambia, sections 134, 292***
2. ***Criminal Procedure Code, Chapter 88, Laws of Zambia, sections 7, 9, 81, 217, 220, 224, 228, 338***
3. ***Constitution of Zambia, Chapter 1, Laws of Zambia as Amended by Act No. 2 of 2016, article 180***

At the hearing of the appeal on 5th February, 2019 in this matter, we set aside the sentence of 15 years imprisonment with hard labour imposed on each appellant by the High Court at Mongu for the offence of attempted rape contrary to section 134 of the Penal Code. We immediately set the appellants at liberty. They had been in incarceration since their arrest on 24th June, 2013. We indicated that we shall give reasons later in a detailed judgment which we now do.

The appellants had been charged with the said offence of attempted rape in count one for allegedly trying to have carnal knowledge of Ms Florence Lubinda, the complainant, without her consent. They had also been charged with the offence of robbery contrary to section 292 of the Penal Code in count two for allegedly using violence to steal a Samsung phone, K100 in cash, a purse, a chitenge material and a baby blanket altogether valued at K2,000 from Ms Lubinda. They were tried for the two offences in the

subordinate court presided over by a Magistrate of the Second Class at Sesheke.

In the judgment, the trial Magistrate convicted the appellants for the offence of attempted rape and imposed the sentence of 36 months imprisonment with hard labour on each appellant. Regarding the robbery, the magistrate found that because the appellants were together when they violently stole from PW1, the offence that was committed was aggravated robbery which the court had no jurisdiction to deal with. The Magistrate then purported to commit the two appellants to the High Court for trial for that offence.

At the High Court, the learned judge who dealt with the matter was of the view that the trial Magistrate's decision to commit the two appellants to the High Court to be tried for aggravated robbery was not supported by the law. She noted, that section 220 of the Criminal Procedure Code takes care of instances where it is not apparent in the initial stages, that a case is one which should be tried by the High Court by converting the proceedings into a preliminary inquiry. Based on this consideration, the learned judge took the position that the decision by the trial Magistrate to commit the appellants for trial

at judgment stage was wrong. She, however, stated that the only way to cure the mistake by the Magistrate was for the State to enter a ***nolle prosequi*** pursuant to section 81 of the Criminal Procedure Code.

With regard to the sentences of 36 months imprisonment imposed on each appellant by the trial Magistrate, the learned judge, in exercise of her revisory powers under section 338 (1) (a) (ii) of the Criminal Procedure Code, decided to vary the sentences. She "quashed" the sentences and substituted them with sentences of 15 years imprisonment with hard labour with effect from the date of arrest which was 24th June, 2013.

In relation to the decision by the High Court to vary the sentences imposed by the trial Magistrate, it is settled law that just as an appellate Court will not interfere with a sentence as being too high unless the sentence comes to the appellate Court with a sense of shock, it will equally not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence. However, the ability to increase the sentence is tempered by the restriction that the appellate

court cannot vary the sentence by imposing a sentence higher than the trial court had jurisdiction to impose unless the matter has been committed for sentence under section 217 of the Criminal Procedure Code. Two cases, among several others, which speak to these principles are that of **Simon Munsaka v The People**[1] and **Kenneth Chisanga v The People**[2]**.**

In the case before us, the Magistrate of the second class who dealt with the matter had power, in terms of section 7 (iv) of the Criminal Procedure Code, to impose a sentence of imprisonment, with or without hard labour, of up to three years (subject to confirmation by the High Court for any sentence in excess of one year as required under section 9 (iii) of the Criminal Procedure Code). Therefore, the learned judge in exercising her power of revision had no power to increase the sentence beyond the maximum which the Magistrate could have imposed.

The order varying the sentence was clearly a misdirection and we set it aside. In its place we restored the sentence of 36 months imprisonment with hard labour imposed on each appellant by the trial Magistrate. The appellants having been in custody since the date

of their arrest on 24th June, 2013 means that by the 5th February, 2019 when we heard the appeal, the appellants had long completed serving their sentence.

Turning to the issue relating to the trial Magistrate's decision to commit the two appellants to the High Court to be tried for the offence of aggravated robbery, based on the facts of the case, we agree with the learned judge that the procedure that should have been followed is provided under **section 220** of the **Criminal Procedure Code.** The section states, citing only the portions relevant to this case –

> **"220. (1) If, before or during the course of a trial before a subordinate court, it appears to the magistrate that the case is one which ought to be tried by the High Court ... the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained ....**
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> **(2) Where, in the course of a trial, the magistrate has stopped the proceedings under the provisions of subsection (1), it shall, in the case of any witness whose statement has already been taken, be sufficient compliance with the provisions of section two hundred and twenty-four if the statement is read over to the witness and is signed by him and by the magistrate:**
>
> **Provided that the accused person shall, if he so wishes, be entitled to a further opportunity for cross-examining such witness."**

The procedure adopted by the Magistrate in this case, is not in line with the section. Having decided that the evidence supported the more serious offence of aggravated robbery, the trial magistrate should have converted the trial proceedings into committal proceedings in the manner provided in section 220 of the Criminal Procedure Code. This not having been done and the proceeding relating to the aggravated robbery having been left hanging, the only option for the learned judge was to send the matter back to the Subordinate Court to comply with section 220 of the Criminal Procedure Code. Therefore, the suggestion by the learned judge that the state should have entered a nolle prosequi was ill-advised because courts have no place giving advice to the DPP who has the freedom of decision when, whether and how to conduct a prosecution under Article 180(7) of the Constitution of Zambia.

Having said so however, we wish to reiterate what was observed by the Court of Appeal, forerunner to this court, in relation to the offences of robbery and aggravated robbery, in the case of **Alex Mwewa v The People (1970) ZR 84**[3] (reprint) that-

> **"It is improper of the police to lay the lesser charge in order to give jurisdiction to a subordinate court."**

And that-

> **"Where a crime is plainly aggravated robbery, the Magistrate also should transform the trial into committal proceedings and the summary proceedings should not continue."**

The police, in this case, should have in the first place preferred the offence of aggravated robbery against the appellants on the facts of the case. More importantly, a preliminary inquiry should have been held from the outset. Failing that and upon realisation by the trial Magistrate, he should have transformed the trial into a preliminary inquiry with a view to committing the appellants for trial by the High Court.

We are, however, disinclined to sending the matter back to the Subordinate Court to deal with the committal proceedings on the account that at the time the appellants were being set at liberty, they had been in custody for much longer than the term of imprisonment they were sentenced to serve for the offence of attempted rape.

It is for the reasons given above that we set aside the 15 years sentences imposed on the appellants and ordered that they be set at liberty immediately.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE