THE PEOPLE v KANGAI NDUMBA (1990) S.J. (H.C.)

HIGH COURT
MUSHABATI, C.S., J IN CHAMBERS
12TH DAY OF JULY, 1990

Flynote
Dangerous Drugs Act - Conviction and Sentence - Review of
Sentence - Fine and custodial sentence - Cases where the law provides for both

Headnote
The accused was convicted of one count of being possession of dangerous drugs or dagga contrary to section 19(a) and regulation 6 of the Dangerous Drugs Act Cap, 549 on his own plea of guilty. He was sentenced to a fine of K200 I.D. 2 months S.I. and in addition to this he was given a custodial sentence of six months imprisonment with hard labour. The High Court called the case for review in terms section 337 and 338 of the Criminal Procedure Code on grounds that the sentence was excessive and because the offence-creating regulation was wrongly quoted.

Held:

(i) Where the statement of offence and the particulars of the offence are clear but there is an inaccurate reference to the section of the enactment that created the offence, the charge is simply defective, and in the absence of embarrassment or prejudice to the accused, the court shall amend the charge accordingly.

(ii) Where the legislature has seen fit to prescribe a sentence of a fine or imprisonment or both, a first offender in a case where there are no aggravating circumstances which would render a fine inappropriate should be sentenced to pay a fine with imprisonment only in default.

Cases referred to:

1. Nkole v The People (1977) Z.R. 315
2. Musonda v The People (1976) Z.R. 215

Legislation referred to:

(1) Dangerous Drugs Act, Cap. 549 - S.19 (1)
(2) Dangerous Drugs Regulations, Cap 549 - R.5 and 6

JUDGMENT ON REVIEW
MUSHABATI C.S.: J in Chambers.

The accused was convicted of one count of being in possession of dangerous drugs or dagga contrary to section 19(a) and regulation 6 of the Dangerous Drugs Act Cap, 549 on his own plea of guilty.

He was sentenced to a fine of K200 I.D. 2 months S.I. and in addition to this he was given a custodial sentence of six months imprisonment with hard labour.

I called it for review, having come to my knowledge through the monthly statistical criminal returns, in terms section 337 and 338 of the Criminal Procedure Code.

I called it for review because I felt that the sentence was excessive and because the offence-creating regulation was wrongly quoted.

I shall first deal with the question of the wrong reference to the enactment. Looking at Regulation 6 of the Dangerous Drugs Act I find that no offence of possessions is created under it. The offence-creating regulation is Regulation 5 of the Dangerous Drugs Act.

This regulation reads as follows:

> A person shall not be in possession of a drug unless he is generally so authorised or, under this regulation, so licenced or authorised as a member of a group, nor otherwise than in accordance with the provisions of these regulations, and, in the case of a person licenced or authorised as a member or a group, with the terms and conditions of his licence or group authority.

The reference by the prosecution to Regulation 6 was wrong. Did this render the charge defective or bad? The statement of offence was correct. So were the particulars of offence.

In the case of *Nkole v The People* (1) where an identical situation arose the Supreme Court of Zambia said:

(i) The statement of offence was clear and so were the particulars of the offence; what was wrong was the inaccurate reference to the section of the enactment that created the offence.

(ii) This error did not make the charge bad but simply defective, and in the absence of embarrassment or prejudice to the accused the proviso to section 15(1) of the Supreme Court of Zambia Act will be applied.

I find no prejudice occasioned to the accused in this case. The charge was just defective and not bad in law. The charge shall stand amended to the extent that where it reads Regulation 6 it shall read Regulation 5.

On the question of sentence the offence itself carries a maximum sentence of K500 fine or 3 years imprisonment or both. I feel the sentence imposed on the accused was excessive. The quantity of the drug was not given either in the particulars of offence or in the statement of facts read out to the Court. I find no aggravating circumstances that made it necessary for the learned trial magistrate to impose both a fine and a custodial sentence.

The learned trial magistrate's attention is drawn to the case of *Musonda v The People* (2) where the Supreme Court of Zambia said:

(i) Where the legislature has seen fit to prescribe a sentence of a fine or imprisonment or both a first offender in a case where there are no aggravating circumstances which would render a fine inappropriate should be sentenced to pay a fine with imprisonment only in default.

Since the accused is already serving a custodial sentence I propose to revise the whole sentence imposed by the learned trial Magistrate.

The sentences imposed on the accused by the lower Court are set aside. The accused is sentenced to 4 months S.I. with effect from the 11th May, 1990 the date of his arrest.

The fine of K200 paid by the accused shall be refunded to him.

Sentences set aside and substituted,
Fine refunded to accused