

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO 140/2008

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

ISA YONA SIBALE

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Chirwa, Silomba and Mwanamwambwa, J.J.S.

On 2nd December 2008 and 5th March 2009

For The Appellant: Mr. L.E. Eya, Deputy Director of Legal Aid

For the People: Mr. P. Mutale – Principal State Advocate

JUDGMENT

Mwanamwamba, JS, delivered the Judgment of the Court.

Case referred to:

- 1. Sikota v The People [1968] Z.R. 42**

Legislation referred to:

The Constitution of Zambia Article 18 (1), (2) (c) and (d).

The Appellant was convicted of trafficking in Psychotropic substances, contrary to Section 6 of the Narcotic Drugs and Psychotropic Substances Act, CAP 96 of the Laws of Zambia. Particulars of the offence

were that on 19th August 2006, at Nakonde, the Appellant did traffic in Psychotropic Substances, namely **Miraa**, weighing 8.770 kilogrammes, without authority.

After trial by the Subordinate Court of the second class, Nakonde, he was convicted and committed to the High Court, Kasama, for sentencing. After perusing the trial record of proceedings, the learned Judge found that the Appellant's conviction was supported by evidence and that the conviction was correct. Thereupon, he sentenced the Appellant to 15 years imprisonment with hard labour, **with effect from 20th August 2006** and ordered that he be deported after serving the sentence. He is appealing against sentence only.

The case for the State rested on the evidence of **P.W.1, Chanda Mulenga**, a Drug Enforcement Commission Officer. His testimony was that on 19th August 2006, he received information from a source that the Appellant, a Tanzanian, was suspected of carrying Miraa, on his way to Lusaka, using Germans Bus. So, he stopped and searched the bus at a road block. That in the process, he found the Appellant on the bus. That a blue bag was found on the Appellant and that the bag contained bundles of suspected Miraa. That he had the Appellant apprehended and took the suspected Miraa to U.T.H, Lusaka, for testing. That the report from U.T.H. verified the suspected drug to be 8.770 kilograms of Miraa.

The Appellant denied being the owner of the bag containing Miraa. He testified that on searching the bus, P.W.1 found the bag at the back of the bus. That P.W.1 opened the bag containing the drug but that nobody claimed ownership of the bag. That in the bus there was a passenger who had no seat and said that he had no luggage. That DEC officers beat up that passenger and told him to show them his bag but in vain. That, the passenger in question was detained together with the Appellant at the Police Station. That there, after two of them were questioned in Bemba, the other suspect was released. He testified that he was unable to express himself in Bemba during the questioning; whereas the other released suspect was able to do so.

The record shows that the Appellant tried to call, as a witness, a suspect with a similar charge. He was not allowed to do so. The trial Magistrate said: **"We cannot have the witness who has heard the accused speak in Court"**. At page 10 of the Appeal Record, the trial Magistrate said this in the Judgment: **"The accused elected to give sworn statement and to call an accused person with a similar charge as his witness. The Court ruled that the witness was not going to testify because it was not possible to have an accused wait for his turn to testify in Court"**.

After evaluating the evidence, the trial Magistrate found that the accused had not offered independent evidence to show that the bag which contained the drug was found with the man who had no seat on

the bus, even though that other man said that he had no bag, even after being beaten by D.E.C. officers. She also found that the accused had not given other independent evidence to show that the D.E.C. officers arrested him for not speaking fluent Bemba.

The record shows that the Appellant was denied a chance to engage a defence lawyer. At page 13 of the appeal record, the trial Magistrate said:

“The accused simply refused to cross-examine the witness, because he wanted a lawyer. To the Court, this kind of behavior borders on contempt of Court.

Even if the accused was allowed by the Court to look for a lawyer, who would find the case at defence, the accused would not manage to get a lawyer. Initially he wanted a lawyer from Tanzania.”

The trial Magistrate then said:

“The accused therefore failed to cross examine P.W.1 on the point that P.W.1 had prior knowledge about the accused carrying Miraa to Lusaka on a Germins bus. The accused, in the light of this evidence, has failed to prove that the bag containing Miraa was not his. The accused also has failed to prove that the bag containing Miraa was for the person in that bus who had no seat.”

She finally said that she was satisfied that the accused was trafficking in psychotropic substances, namely Miraa, weighing 8.770 kilograms on 19th August 2006.

Although the appeal is against sentence only, we wish to make comments on the conviction.

One is that the Appellant was not allowed to call a defence witness. **Sikota v The People (1)** dealt with this issue. That case decided that the trial Magistrate's refusal to call a witness desired by the accused and present in Court was erroneous even though the witness had previously failed to comply with an order that all witnesses withdraw from the Court room. Judge Evans observed that a miscarriage of justice was thereby occasioned, the Appellant being deprived of a fundamental right in a criminal trial. That the fact that a witness was in court, even after making an order for all witnesses to withdraw, was no ground for depriving a prisoner of the witness and the Court had no right to reject his testimony.

We agree with these observations. The reason given by the trial Magistrate for not allowing the Appellant to call a defence witness was totally unsatisfactory and wrong.

Second is that the Appellant was not afforded a chance to engage a lawyer, to defend him. A person charged with a criminal offence shall:-

- (a) be given adequate time and facilities for the preparation of his defence.**
- (b) be permitted to engage a legal representative of his own choice: See Article 18 (2) (c) and (d) of The Constitution.**

By not being allowed to call a witness and engage a lawyer, we find that the Appellant was not afforded a fair hearing, as required by Article 18 (1) of the Constitution.

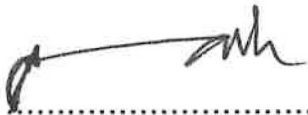
Third is that the trial Magistrate actually shifted the burden of proof on the accused; notwithstanding that at the beginning of the judgment, she said that the burden of proof was on the prosecution. Talk by the trial Magistrate that the Appellant had failed to adduce independent evidence that the bag was not his but for the passenger who had no seat; and on the Bemba language, amounted to shifting the burden of proof from the prosecution to the Appellant. That was a misdirection on law.

In our view, the combined effect of these three misdirections is that the Appellant was not afforded a fair trial. There was miscarriage of justice. **Therefore, the conviction cannot stand. It is hereby quashed and the Appellant is acquitted. The order of deportation is hereby set aside.**

Having quashed the conviction, we do not find it necessary to consider arguments relating to the sentence.



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D. K. CHIRWA
SUPREME COURT JUDGE



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S. S. SILOMBA
SUPREME COURT JUDGE



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M. S. MWANAMWAMBWA
SUPREME COURT JUDGE