IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 195/2020
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

VERONICA PHIRI **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula, Muzenga, JJA
On 15th June 2021 and 18th November, 2021

For the Appellant : Mrs. Majory Makai, Legal Aid Counsel—Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate—NPA

JUDGMENT

MAJULA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Adam Berejena vs The People (1984) ZR 19*
2. *Benua vs The People (1976) ZR 13*
3. *Phiri vs The People (1970) S 178*
4. *Jutronich and others vs The People (1965) ZR. 11.*
5. *Patrick Mumba And Others vs The People (2004) ZR. 202 (S.C.)*

Legislation referred to:

The Penal Code Chapter 87 of the Law of Zambia

1.0 INTRODUCTION

1.1 The appellant appeared in the High Court (before Lengalenga J.) on an information containing one charge of attempted *murder* contrary to section 215 of the Penal Code, Chapter 87 of the Laws of Zambia. The charge was subsequently amended with leave of court to one of *acts intended to cause grievous harm* contrary to section 224 (a) of the Penal Code."

1.2 The particulars of the amended offence were that Veronica Phiri, on 12th January, 2016 at Sinda in the Sinda District of the Eastern Province of the Republic of Zambia, with intent to maim, disfigure or disable, unlawfully did cause grievous harm to one Linda Shumba.

2.0 BACKGROUND

2.1 The facts of the case were that on 12th January, 2016 at about 08.30 hours at Sinda in the Sinda District of the Eastern Province of the Republic of Zambia, Mangiwe Banda went to buy some sugar at a market within Katayeni Village. She left Linda Shumba, her 22 months' old baby girl at home playing with her friends. At about the same time, the appellant who held a grudge against Mangiwe Banda was chatting with Rhoda Phiri within close proximity.

2.2 When the appellant saw that the baby was unattended, she quickly took her and went with her in the bush. In a dramatic turn of events, the appellant savagely beat up the baby until

she became unconscious. She thereafter buried the baby in the bush with some leaves and grass and started off for the village.

2.3 When Mangiwe Banda returned home, she noticed the baby was not there and when she asked where the baby was, she was told the appellant had taken her to unknown destination. She informed some colleagues and a search started for the baby in the nearby bush.

2.4 As they were returning from the bush, they encountered the appellant and asked her where the baby was. In response, the appellant told the search party that she had beaten, killed and buried the baby because of the quarrel she had with Mangiwe Banda.

2.5 The search continued and Margaret Banda, one of the people who was searching for the missing baby, heard the sound of a baby crying in the nearby bush. She trailed the sound and discovered that it was actually Linda Shumba crying. When she got to the spot where the sound of crying was coming, she found her buried in grass and leaves. She lifted the baby and saw that she had a swollen forehead, swollen right eye, and was bleeding from the nose and mouth. At that point, the baby lost consciousness. Margaret Banda started wailing. She alerted other villagers who came through to help and they rushed the baby to Kasamba Clinic. This was after reporting the matter to Sinda Police Station. At Kasamba Clinic, they

were referred to Nyanje Mission Hospital where the baby was found to have suffered a fractured skull and right eye ecchymosis.

2.6 On 21st January, 2016 the appellant was arrested and charged for the subject offence awaiting court appearance. She readily pleaded guilty to the amended charged and admitted the facts as read out to her by the prosecution. Before sentencing, the learned Judge considered the seriousness of the offence and also took into account the fact that the appellant was a first offender. The appellant was subsequently sentenced to 40 years with hard labour imprisonment.

3.0 GROUND OF APPEAL

3.1 It is against the 40 year sentence imposed by the court below that the appellant is unhappy with and has approached us with one ground appeal stated as follows:

> *"The lower court erred in law and in fact when it sentenced me to 40 years imprisonment being a first offence and having pleaded guilty."*

4.0 APPELLANT'S ARGUMENTS

4.1 In support of the sole ground of appeal, it was submitted that the court below was supposed to take into account the fact that the appellant was a first offender who readily pleaded guilty to the charge. Counsel argued that while the offence is a serious one which carries a maximum sentence of life

imprisonment, the sentence of 40 years meted out on the appellant was excessive for a person who did not waste the court's time.

4.2 As to when an appellate court can interfere with a sentence on appeal, Counsel referred the court to the case of ***Adam Berejena vs The People***[1] where it was held as follows:

> *"An appellate court can 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 inadequate that it induces a sense of shock or there must be such exceptional circumstances as to justify interference."*

4.3 It was argued that the sentence of 40 years should come to this court with a sense of shock. Learned Counsel went on to submit that the lower court's sentence was an alternative form of life imprisonment as the convict will spend most of her life in prison.

4.4 We were called upon to quash the sentence and replace it with one that affords leniency to a first offender who readily pleaded guilty.

5.0 RESPONDENT'S ARGUMENTS

5.1 On behalf of the respondent, heads of argument were filed on 4th June, 2021. The thrust of the submission in respect of the ground of appeal, was that the sentence of the court below was proper in law and principle. It was argued that the case

does not disclose any exceptional circumstances on which this court can interfere with. It was pointed out that the appellant was unprovoked but proceeded to beat up a 22 months' old baby until the baby became unconscious. The appellant then buried the baby in the bush with leaves and grass. As a result of the beating, the baby suffered a fractured skull and right eye ecchymosis.

5.2 It was contended that with these set of facts, the sentence of 40 years imprisonment was appropriate.

5.3 We were urged to dismiss the appeal for lack of merit.

5.4 When the matter came up for hearing on the 15th of June 2021, both counsel for the appellant and the respondent sought to rely entirely on the heads of arguments that were filed.

6.0 CONSIDERATION AND DECISION OF THE COURT

6.1 We have carefully scrutinized the record as well as the arguments put forward by the parties. At the heart of the appeal is the argument by counsel for the appellant, Mrs. Majory Makai, that the sentence that was imposed was excessive given that the appellant was a first offender who readily pleaded guilty to the charge. On the other hand, counsel for the respondent, Mrs. Chipanta - Mwansa does not agree that the sentence is excessive and contends that the sentence fits the crime.

6.2 We must state from the onset that we are alive to the guidance given by the Supreme Court in the case of ***Benua vs The People***[2] where it was held that:

> *"A plea of guilty must be taken into account in considering a sentence and a failure to do so is an error in principle, thus allowing an appeal court to amend the sentence."*

The apex court has also articulated the sentencing principles for first offenders in the case of ***Phiri vs The People***[3] wherein it was held:

> *"A first offender should not be denied leniency although circumstances may make the application of such leniency minimal. The reason for dealing with a first offender leniently is in the hope that a severe sentence is not necessary and that a lenient sentence will be sufficient to teach a previously honest man a lesson."*

Therefore, counsel for the appellant makes a valid point when she states that as a first offender who readily pleaded guilty entitles her to leniency.

6.3 However, the approach that an appellate court should take in interfering with the discretion of the trial court on the question of sentence has been stipulated in a myriad of cases. The leading case is that of ***Jutronich and others vs The People***[4] where the erstwhile Blagden CJ posited as follows:

> *"In dealing with appeals against sentence, the appellate Court should ask itself these three questions:*
>
> 1. *Is the sentence wrong in principle?*

2. *Is the sentence so manifestly excessive so as to induce a sense of shock?*
3. *Are there exceptional circumstances which would render it unjust if the sentence were not reduced?*

Only if one or more of these questions can be answered in the affirmative should the appellate court interfere."

This case, among others, sets out the criteria for us to follow in order for us to interfere or override the discretion of the trial court.

6.4 We are therefore obliged to ask ourselves the three questions as guided by Blagden CJ. With regards the first question of whether the sentence is wrong in principle, the answer is in the affirmative.

6.5. We find it imperative to reproduce the Judge's observations when sentencing the appellant. She said the following.

"I have considered the mitigation and the fact that the convict is a first offender. However the offence that she committed is a very serious one. She is even fortunate that she was not charged with attempted murder because that is what it actually is. Had the child not been found in the bush it would have died especially since it was covered with grass and sticks. I wonder how the convict could have been so heartless as to harm and torment an innocent baby who had nothing to do with the bitterness of the convict towards the mother. Just to say the least the

convict behaved like a demon possessed person. Once I do recognize that she is a first offender who readily pleaded guilty, her heinous acts cannot go unpunished. Babies and children need to be protected from people like the convict. Even if she was charged with the less offence of acts intended to cause grievous harm, fortunately this offence also carries a maximum of life imprisonment. So instead of giving you the maximum penalty and in exercising leniency in meting out sentence to you as a first offender, I hereby sentence you Veronica Phiri to 40 years imprisonment with hard labour with effect of the date of arrest."

6.6. A reading of the forgoing reveals that when the trial Judge was imposing the sentence she was of the view that the facts disclosed an offence of attempted murder. It would appear that this was the basis upon which the sentence of 40 years was imposed. Since the appellant was charged with and pleaded guilty to acts intended to cause grievous harm the trial Judge ought to have borne that in mind and imposed the appropriate sentence given the circumstances of the case.

6.7. We are thus compelled to interfere with the sentence of 40 years imposed as it was wrong in principle. We further note that this sentence was with hard labour. However, we must be quick to point out that this was a misdirection on the part of the trial court. We are guided on this position by the

holding of the Supreme Court as stated in the case of ***Patrick Mumba And Others vs The People***[5] where it was observed:

> *"...courts should not be passing sentences that cannot be enforced. For female prisoners, therefore, the courts should give simple imprisonment."*

7.0 CONCLUSION

7.1. In sum the appellant has met one of the parameters set out in the **Jutronich** as to warrant or interference with the 40 years imprisonment with hard labour imposed by the trial Judge. The sentence being wrong in principle. We accordingly find merit in the sole ground of appeal and uphold it.

7.2. We set aside the sentence of 40 years imprisonment with hard labour and substitute it with 30 years simple imprisonment effective date of arrest.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
B.M. Majula
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE