

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE AND NDOLA
(Criminal Jurisdiction)

APPEAL 208/2020

BETWEEN:

STANLEY MALIPA

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Majula and Muzenga, JJA

On 26th August 2021 and 18th November 2021

For the Appellant: H. M. Mweemba, Acting Director with
C. Lukwesa, Acting Deputy Director -
Legal Aid Board

For the Respondent: S. Mwamba-Besa, Principal State
Advocate, National Prosecution
Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the Court.

CASES REFERRED TO:

1. Wilson Masauso Zulu v Avondale Housing Project Limited [1982] Z.R. 172
2. Attorney General v Marcus Kampumba Achiume [1983] Z.R. 1
3. Chizonde v The People [1975] Z.R. 66
4. Guardice Kameya Kavwana v The People Appeal No. 84 of 2015

5. Kasuba v The People [1975] Z.R. 41
6. Hamfuti v The People [1972] Z.R. 420
7. Augustine Kapembwa v Danny Maimbolwa And Attorney-General [1981] Z.R. 127,
8. David Zulu v The People [1977] Z.R. 151

LEGISLATION REFERRED TO:

1. The Narcotic and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia.

1.0. INTRODUCTION

- 1.1. The appellant, appeared before the Subordinate Court sitting at Kabwe (Hon. D. Musonda), on a charge containing one count of the offence of Trafficking in Psychotropic Substances, contrary to **section 6 of The Narcotic and Psychotropic Substances Act.**
- 1.2. The allegation was that on 27th March 2020, in Kabwe, without lawful authority he trafficked 2.3 kilograms of marijuana, a herbal product of *marijuanasativa*.
- 1.3. He admitted the charge, but the trial magistrate retained a plea of not guilty, when he disputed material parts of the statement of facts.
- 1.4. The case then proceeded to trial and at the end of that trial, he was convicted for committing the offence.

- 1.5. He was then committed to the High Court for sentencing following the receipt of information that he had previously been convicted of the same offence.
- 1.6. In the High Court (Limbani, J.), sentenced him to 10 years imprisonment, the mandatory minimum sentence for second offenders.
- 1.7. He has appealed against the conviction on the ground that the charge Trafficking in Psychotropic Substances, was not proved because the evidence incriminating him was contradictory.
- 1.8. In the alternative, he contends that the fact that he was a second offender, was not established satisfactorily.

2.0. CASE BEFORE THE TRIAL COURT

- 2.1. The evidence before the trial magistrate was that on 27th March 2020, officers from the Drug Enforcement Commission, received information that the appellant was dealing in drugs.

- 2.2. Eight officers set out for a house in Kabwe's Katondo Compound, where the appellant was said to be keeping the drugs, at his mother's house.
- 2.3. They did not find him at the house, but they found his mother. She allowed them to search the house.
- 2.4. In one of the rooms, they found prepacks of the drugs that are the subject of this appeal.
- 2.5. Four of the officers who participated in the search testified. According to three of them, 258 prepacks of the drugs were found in the bedroom, while 2 were found on the appellant, when he was apprehended near his mother's house.
- 2.6. One of the officers, told the trial magistrate that all the 260 prepacks were found in the house and no prepacks were found on the appellant when they apprehended him near the railway station.
- 2.7. The 260 prepacks were all taken to a public analyst, who examined them and confirmed that they were *marijuanasativa*.
- 2.8. There was also evidence from the officers that when the appellant was apprehended, he admitted that the drugs were his.

2.9. In his defence, the appellant denied admitting that the drugs found in his mother's house where his or staying at that house. He also denied being found with any drugs on his person.

3.0. FINDINGS BY TRIAL MAGISTRATE

3.1. The trial magistrate considered the conflicting evidence on how many prepacks were recovered from the house and on the person of the appellant, when he was apprehended.

3.2. He accepted the evidence of the three officers who said 258 prepacks were found in the house, and 2, on the appellant.

3.3. He also found that when the appellant was apprehended, he admitted that the drugs were his.

4.0. CONSIDERATION OF THE APPEAL AND COURT'S DECISION

4.1. We accept Mrs. Mwamba-Besa's argument that Mr. Mweemba's proposition, that the evidence incriminating the appellant is inconclusive, is not tenable, because it attacks a finding of fact that

was based on the trial magistrate accepting testimony, he found to be credible.

4.2. The judgment, shows that the trial magistrate resolved the conflicting evidence of where the 260 prepacks of marijuana were recovered from, by accepting the evidence of witnesses who said 2 prepacks were found on the appellant, and 258 were recovered from his mother's house.

4.3. As pointed out by Mrs. Mwamba-Besa, the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited¹**, **Attorney General v Achiume²**, **Chizonde v The People³** and **Guardice Kameya Kavwana v The People⁴**, have settled the law that findings of fact, by trial courts, can only be set aside in exceptional circumstances.

4.4. Mr. Mweemba has not demonstrated that this case falls within those exceptions.

4.5. However, the matter does not end there.

4.6. There remains the issue whether the appellant trafficked the 258 prepacks of marijuana that were found in his mother's house.

- 4.7. The trial magistrate accepted the evidence of police officers that the appellant admitted being the owner of the marijuana that was at his mother's house when he was apprehended. It is on this evidence, that he made the finding that he trafficked the drugs.
- 4.8. In the celebrated cases of **Kasuba v The People**⁵ and **Hamfuti v The People**⁶, it was held that during a trial, where a police officer is about to be referred to incriminating evidence (a confession) given by an accused person, the accused person must be asked if he objects to the production of that evidence.
- 4.9. The evidence should only be admitted if there is no objection or the reasons for objecting do not point at the confession being involuntarily made.
- 4.10. In this case, the trial magistrate did not ask the appellant whether he had any objection to the admission that the drugs were his.
- 4.11. In the case of **Augustine Kapembwa v Danny Maimbolwa and Attorney-General**⁷, the Supreme Court held that:

'The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing

the witnesses but in discounting such evidence the following principles should be followed: That:

- (a) by reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he did accept; or
- (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
- (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
- (d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.'

4.12. Since the trial magistrate erroneously accepted the evidence that the appellant admitted being the owner of the 258 prepacks found at his mother's house, we are at liberty to set aside the finding that he admitted being the 'owner' of the prepacks. This is because the finding was anchored on evidence that should not have been admitted.

4.13. In the premises, the case against the appellant, must be determined without considering the admission that the drugs were his.

4.14. Mrs. Mwamba-Besa argued that the appellant can still be linked to the 258 prepacks because the 2 prepacks found on him were in similar packaging. That evidence, be it circumstantial, leads to an inference that he was trafficking the drugs.

4.15. In the case of **David Zulu v The People**⁸, it was held that it is competent for a court to convict on circumstantial evidence. The Supreme Court went on to point out as follows:

'It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.'

4.16. In this case, although there was evidence that the 258 prepacks were in packaging that was 'similar' to the 2 prepacks found on the appellant, the trial magistrate did not consider the similarity in his

judgment. As a result, he made no finding on the issue.

4.17. We have examined the record of proceedings and note that only one of the four officers, who apprehended the appellant, mentioned the similarity in the packaging. However, he gave no details of what made the packaging similar.

4.18. In the absence of evidence of what was similar in the packaging of the 2 prepacks found on the appellant and that of the 258 prepacks found at his mother's house, there is insufficient evidence before us to determine and make a finding that it was the case.

4.19. Consequently, it cannot be said there is circumstantial evidence that can lead to the conclusion that the appellant was the owner of the 258 prepacks found in his mother's house, and therefore guilty of trafficking.

4.20. The only conclusive evidence before us is that the appellant was found with 2 prepacks of marijuana.

4.21. For the possession of marijuana to amount to trafficking, one must have in his possession more than 0.5 grams.

4.22. In this case, the total weight of the 2 prepacks found on the appellant is unknown. This is because although their contents were identified as marijuana, they were not weighed separately. They were weighed together with the 258 prepacks.

4.23. The weight of the drugs the appellant was found with, being unknown, a charge of Trafficking in Psychotropic Substances, cannot stand.

4.24. We set aside the appellant's conviction for the offence of Trafficking in Psychotropic Substances and quash the 10 years sentence imposed on him.


4.25. However, since there is no doubt that he was found with marijuana, we convict him for the lesser offence of Unlawful Possession of Psychotropic Substances contrary to **section 8 of The Narcotic and Psychotropic Substances Act.**


4.26. Having set aside the appellant's conviction for the offence of Trafficking in Psychotropic Substances, we find no need for considering whether he was a

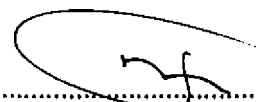
first offender or not. This is because the issue related to the question whether the appellant was amenable to the mandatory minimum sentence of 10 years, for being a second offender, following his conviction for the offence of Trafficking in Psychotropic Substances.

5.0. VERDICT

5.1. Having convicted the appellant for the offence of Unlawful Possession of Psychotropic Substances contrary to **section 8 of The Narcotic and Psychotropic Substances Act**, we sentence him to 2 months simple imprisonment. The sentence shall run from the 30th of March 2020.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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


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