

**THE PEOPLE v MUBANGA AND MAKUNGU (1967) ZR 94 (HC)**

HIGH COURT

EVANS J

28th JUNE 1967

**Flynote and Headnote**

**[1] Criminal procedure - Sentencing - Joint enterprise crime - Differentiation 20 in sentencing between participants.**

The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force; considerations of character and antecedents, such as age 25 and number of prior convictions, may well justify different treatment.

Case cited:

(1) *Ball v R* (1951) Cr. App. R 164.

**Judgment**

**Evans J:** The above - named prisoners, aged, respectively, twenty - five and nineteen years, were convicted on their own confessions of the 30 offence of storebreaking, contrary to section 273 (1) of the Penal Code. It was a serious case of storebreaking in that they broke into a store at Mufulira on the 23rd April, 1967, by getting through the ceiling; and they stole property and over £200 in cash valued in all at £525. On the 13th May, each was sentenced to eighteen months' with hard labour.

I 35 am of the firm opinion that these sentences were too lenient and that, having regard to the prisoners' antecedents and characters, different sentences should have been imposed on each. When sentencing, the learned resident magistrate said: "It does appear that the ringleader was the first accused (Patrick Mubanga), who has a shocking record for offences 40 involving dishonesty. Since this offence has been a joint enterprise, it would not be appropriate here to discriminate in the sentences which this court has to mete out to the two accused. There are no real mitigating factors here."

**1967 ZR p95**

EVANS J

[1] The first accused is an older man than the second and he had eight previous convictions, seven of which were for offences involving dishonesty, but the younger second accused was a first offender. In my view, there was every reason to differentiate in the matter of sentences, and I invite the attention of the learned resident magistrate to what Hilbery, J, 5 said in *Ball v R* [1] at page 166:

"It is for these reasons, and with these purposes in view, that before passing sentence the Court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in 10 which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in Court may indicate a chance of reform if leniency is extended, whereas it may seem 15 that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is 20 justified if the Court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences."

As I know from the course of my judicial duties, offences involving 25 breaking into premises and stealing are very prevalent on the Copperbelt and, in the circumstances of this offence and of the two prisoners, I consider that their sentences must be enhanced. I have given them an opportunity to make representations as to why their sentences should not be enhanced, and Patrick Mubanga has made no representations and those 30 which Mwela Makungu has made are devoid of merit.

The sentences are quashed, and in substitution therefor Patrick Mubanga is sentenced to three years' imprisonment with hard labour with effect from 23rd April, 1967, and Mwela Makungu is sentenced to two years' imprisonment with hard labour with effect from the same date. 35

*Order accordingly*