IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 8 OF 1981

B E T W E E N

DIRECTOR OF PUBLIC PROSECUTIONS . . . . . APPELLANT

A N D

PYARALI KANJI . . . . . RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam) (Kimicha, J.) dated the 29th day of December, 1980,

in

Criminal Appeal No. 61 of 1980

REASONS FOR JUDGMENT

NYALALI, C.J.:

When this appeal by the Director of Public Prosecutions came up for hearing on 25th May, 1981, we allowed the appeal, quashed the judgment of the High Court, restored the sentence of two years' imprisonment imposed by the trial district court and directed the respondent to be committed to prison to serve his sentence, but we reserved our reasons until now.

The respondent, Pyarali Kanji, was charged and convicted in the district court of Ilala District with the offence of receiving stolen property - c/s 311(1) of the Penal Code and was sentenced to two years' imprisonment, subject to confirmation by the High Court. On the day of the conviction and sentence, that is, 18th December, 1980, the respondent, when informed of his rights of appeal, told the trial court "I elect to remain in remand custody pending result of my appeal". The trial court recorded "Accused elects to remain in remand custody pending the result of his appeal". The commitment warrant was duly prepared with an endorsement to the effect that the prisoner had elected to remain in remand prison pending the result of his appeal.

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On 23rd December, 1980, a petition of appeal and an application for bail pending appeal were filed in the High Court at Dar es Salaam, but the appeal, which was not given a serial number, was not entered into any register nor was a case file opened for the appeal. On the other hand, the application for bail was given a serial number 61 of 1981, and a Miscellaneous Criminal Cause File was duly opened and the application was duly entered into the appropriate register. All the proceedings in the High Court took place in this case file.

On the 29th December, 1980, when the application for bail came up for hearing before Kimicha, J., Advocate for the appellant applied to withdraw the application for bail and also to withdraw the appeal against conviction and asked to argue the appeal against sentence only. Mr. Huka, learned State Attorney, informed the court that he was ready to argue the appeal against sentence. After hearing submissions from the Advocate for the appellant and the State Attorney, the learned Judge delivered on that day the following brief judgment:-

> " The appellant in this case Pyarali Kanji was convicted by the District Court of receiving stolen property contrary to section 311(1) of the Penal Code and sentenced to two years' imprisonment.
>
> He then filed an appeal to this Court against conviction and sentence. He at the same time filed another application applying for bail pending determination of his appeal.
>
> Consequently today's hearing was for the application for bail pending determination of the appeal and not for the appeal itself.
>
> Mr. Raithatha appeared for the appellant and Mr. Huka appeared for the Republic.
>
> At the commencement of the hearing of the Chamber application Mr. Raithatha told the court that he was withdrawing his appeal against conviction and for his application for bail pending determination of the appeal. He however, sought the permission of the court to be heard on the gravity of the sentence.

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" He firstly argued that the offence did not fall under the Minimum Sentences Act, 1972, and cited High Court of Tanzania Criminal Appeal No. 225 and 236 of 1974 and Court of Appeal Criminal Appeal No. 25 of 1978.

Apparently the appellant is in very bad health, he had to be assisted by two persons when he was brought into Chambers for the hearing of the appeal. I have been informed that he has been in this condition for the last five days and has hardly eaten anything during that period. He really looks sick and exhausted.

I am satisfied from the cases cited before this Court that the appellant's offence does not fall under the Minimum Sentences Act, 1972.

This court has, therefore, discretion in assessing sentence.

After considering the mitigating factors submitted by the defence counsel and after observing the appellant's health here in court I find that a sentence of a fine would meet the justice of the case than a sentence of imprisonment.

Consequently the appellant's conviction is upheld but his sentence is set aside. He is instead of the prison sentence, sentenced to a fine of shs. 3,000/- (three thousand only). The fine is to be paid today. Appellant to be released from custody soon after paying the fine.".

The Director of Public Prosecutions was aggrieved by the judgment of the learned judge. In this appeal Mr. Huka, learned State Attorney, appearing for the Director of Public Prosecutions stated in effect that the learned judge was not justified in interfering with the sentence of imprisonment imposed by the trial district court. On the other hand, Mr. Kesaria, learned advocate for the respondent, submitted in effect that the learned judge had discretion in law to do what he did.

The first point for consideration and decision in this appeal is whether the first appellate judge had power to interfere with the sentence of imprisonment imposed by the trial district court. Undoubtedly, under the provisions of section 319(1)(b) the learned judge had discretion to "increase or reduce the sentence or alter the nature of the sentence". But the High Court being a

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judicial body has to exercise its discretion judicially.

The question then arises whether the learned judge of the High Court in interfering with the sentence of imprisonment imposed by the trial district court did act judicially. The principles on which an appellate court can interfere with the sentence imposed by a trial court are well established; among them being the principle which allows an appellate court to interfere with an illegal sentence imposed by the lower court, also the principle which allows an appellate court to interfere with the sentence which is manifestly excessive or which is based on improper factors.

In the present case the learned appellate judge of the High Court interfered with the sentence of imprisonment imposed by the district court and substituted a sentence of a fine not because he thought the sentence of imprisonment was illegal or was manifestly excessive or based on improper factors but because of the mitigating factors submitted on on appeal, and because of the appellant's health as observed by the learned judge. What then were these mitigating factors submitted by the learned advocate for the appellant to the learned judge of the High Court? From the record of the proceedings it is clear that the learned defence counsel submitted five mitigating factors and these were that the appellant was a first offender; that the stolen goods in the appellant's possession were all recovered; that there was no evidence concerning the value of the goods; that the appellant was not a professional thief; that the appellant had an aged mother and sister and that the appellant was very much in bad health.

According to the record of the proceedings at the trial in the district court it is apparent that the learned trial district magistrate was aware of the fact that the appellant was a first offender when he imposed the sentence of two years' imprisonment.

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No suggestion was advanced in the High Court to indicate that the sentence of two years' imprisonment was manifestly excessive. Furthermore, it is not true that there was no evidence about the value of the goods in question. On the contrary it is on record that the thief offered to sell the goods for shs. 20,000/- but finally settled at shs. 10,000/-. With regard to the factor of the appellant having an aged mother and sister depending on him, it cannot in any way affect the sentence imposed by the trial district court as it was neither raised in mitigation in the district court nor did it arise from the evidence adduced at the trial. It was raised for the first time on appeal in the High Court and is thus not relevant in determining the propriety of the sentence imposed by the trial district court. The same applies to the poor health in which the appellant found himself some days after he was sentenced by the trial district court. The irrelevancy of this factor is demonstrated by the fact that, by the time of hearing this appeal in this court, the convict was apparently in good health.

With regard to the fact of the respondent not being a professional thief, it all means that he was a first offender and the magistrate took account of it. So, it can be said that the sentence imposed by the trial court was neither excessive nor illegal nor otherwise improper. The learned judge was therefore not justified in interfering with that sentence.

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That is why we allowed the appeal filed by the Director of Public Prosecutions and made the directions stated earlier in this judgment.

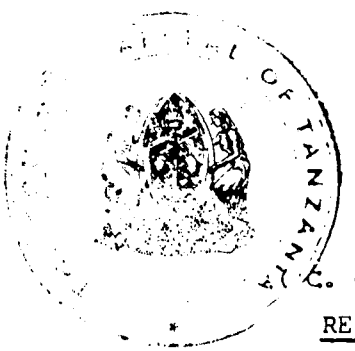
DATED at DAR ES SALAAM this 29th day of June, 1981.

F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(C. G. MTENGA)
REGISTRAR