IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVIEW CASE NO. ..... OF 2016

(Being Criminal Cause no. 606/2016, SGM Court at Thyolo before H/W Mpasu)

UNDER SECTION 42(2) (f) (Viii) OF THE CONSTITUTION OF THE REPUBLIC OF MALAWI

AND

UNDER SECTION 25 AND 60 OF THE COURTS ACT

AND

UNDER SECTIONS 360 AND 361 OF THE CRIMNAL PROCEDURE AND EVIDENCE CODE

BETWEEN

THE STATE

AND

PRECIOUS MICHEAL

SKELETON ARGUMENTS

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1. INTRODUCTION

This is an application for the review of the sentence of the lower Court.

2. FACTUAL BACKGROUND

2.1. The Applicant is a male Malawi citizen living with albinism. He is resident in Nchilamwela Village, Traditional Authority Nchilamwela in Thyolo District.

2.2. In Criminal Case number 606 of 2016, the Applicant was charged with being found drunk and incapable in a public place contrary to section 183 (1) of the Penal Code.

2.3. The appellant was accused of having been found "heavily drunk and knew not what his was doing" along the road at the Thyolo Trading Centre on or about 22 October 2016.

2.4. He was taken to the police where his statement was recorded under caution.

2.5. The appellant, being unrepresented, admitted to the facts and pleaded guilty.

2.6. The Magistrates Court convicted the appellant of being found drunk and incapable in a public place.

2.7. In determination of sentence, the Court considered the following as aggravating factors:

2.7.1. That the offence is highly prevalent among young men in Thyolo: "They drink beer so excessively and they are unable to go back home."

2.7.2. That the appellant is a person with albinism.

2.7.3. That the offence was committed late at night (around 23:00) and he was "exposed to an attack by unknown criminals". The Court stated that "his life was in danger, and he put it himself in danger".

2.7.4. That despite recording no prior convictions, the Court noted that the appellant had *"been in a habit for a longtime, the police have been warning him several times and have got tired of him. They have been picking him from the bars several times while drunk, but he couldn't change. His actions are deliberate."*

2.8. In taking into account the appellant's albinism as an aggravating factor, it is worth noting the Court's commentary in full:

> "*Thirdly, the Court has taken judicial notice that the accused person is an Albino. Suffice to mention that he has all the rights to do anything in society that includes drinking beer. But the Court is aware that due to the killings and attacks on the Albinos in the country, it became a concern for everybody .The government came up with the tougher laws and Parliament approved them. Hundreds of people took to the streets half naked to ensure the security of the people with albinism, but it's pathetic that the same people who are the targets of attacks are too casual with their lives.*
>
> *It must be mentioned that the police officers cannot accompany these people to the bars and wait for them until 11pm and carry them home. They also have the responsibility over their lives, and that includes protection by their parents and relatives."*

2.9. In mitigation of sentence, the Court took into account the following factors:

2.9.1. That he pleaded guilty saving the Court's time and resources.

2.9.2. This was his first conviction.

2.9.3. With the hot weather he cannot stand the conditions of the prison cells.

2.9.4. He is a young offender being only 18 years old.

2.9.5. He goes to school (subject to the Court's qualification "if it is true").

2.10. In order to deter the appellant and give him "an opportunity to reform", the Court imposed a sentence of a MWK10, 000.00 fine or to serve 6 months' imprisonment in default of payment.

3. ISSUES FOR THE COURT'S DETERMINATION

3.1. Is the sentence imposed by the Court a quo manifestly excessive and unconstitutional?

4. APPLICABLE LAW

4.1. The Court's Powers on Review

4.1.1. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. **Section 360 of the Criminal Procedure and Evidence Code (CP & EC)**.

4.1.2. The High Court may, by way of review, exercise the same powers as are conferred upon it on appeal by **sections 353 (2) (a), (b) and (c), and 356. See section 362 of the Criminal Procedure and Evidence Code.**

4.2. **Principles Governing Sentencing**

4.2.1. Section 183(1) of the Penal Code provides:

> **"(1) Every person found drunk and incapable in any public place, or on any premises licensed under the Liquor Act, shall be guilty of an offence and shall be liable to a fine of K1,000 and on a second or subsequent conviction shall be liable to a fine of K5,000."**

4.2.2. It is worth noting for comparison that under section 183(3), a fine of MWK10,000 and imprisonment for two years is imposed on persons in public spaces or licenses premises who are in possession of a loaded firearm while drunk.

4.2.3. It is established law that the imposition of a sentence is at the sentencing court's discretion after considering factors in mitigation and aggravation. The penal statutes in Malawi provide for maximum sentences only, a ceiling below which the courts have the discretion to impose a sentence.

4.2.4. In the case of **Ayami v Rep [1990] 13 MLR 19 (SCA)** the Court stated that in considering the appropriateness of a sentence, it is imperative to evaluate the extent of the crime, the effect on the victim (or victims) and the circumstances in which it was committed, and come up with a sentence which is appropriate in that particular case.

4.2.5. The courts have further noted that in considering punishment, the court should exercise a measure of mercy. See the case of **Rep. vs Shauti Confirmation Case No. 175 of 1975.**

4.2.6. For first offenders, a court must record good reasons why a suspended sentence is not going to be imposed. That the fact that the offence is so serious that only a custodial sentence can be justified, does not necessarily mean that the offender must be given a custodial sentence. If there are strong personal mitigating factors present the court may impose other forms of sentences. **See S.339 read with s.340 of the Criminal Procedure and Evidence Code** and also **Chizumila and another Vs. Republic (1993) 16 (2) MLR, 504.**

4.2.7. In **Republic v Keke (Confirmation Case no 404 of 2010),** the Court held that :-

> **"In relation to young offenders and first offenders, it is wrong to use them for general deterrence, which is using them as a means to deter others. Such sentences are wrong in principle; they comport using life as a means to an end."**

See also **Republic Vs. A Bandawe Confirmation Criminal Case no 196 of 1997:-** *"First offenders should not be used as scapegoats for general deterrence."*

4.2.8. **Masambo Vs. Republic, 11MLR, SCA,** Makuta CJ, Unyolo J and Mtegha J at page 386 stated as follows:-

> *"It is this Court's view that a fine would be an error in law if it is beyond the maximum laid down in any law."*

4.3. **Powers in Review of Sentencing**

4.3.1. In Rep v Matebule confirmation case no. 150 of 1997, Justice Mwaungulu (as he then was) stated that:-

> *"A sentencer should always give reasons for the sentence he is imposing. Sentencing is [an] exercise of discretion across the range of a sentence prescribed by the Legislature. The exercise of the discretion is reviewable both as regards the actual sentence passed and the reasons for it. The discretion, like any other, should be exercised judicially. The Court exercising the discretion must consider all the circumstances before it and the law on the matter. It is a wrong exercise of the discretion to overlook or de-emphasize a material factor. The court reviewing the exercise of the discretion will interfere with a wrong exercise of the discretion. It is very important, therefore, that a sentencing court should give reasons for the sentences it is imposing."*

4.4. Application of Constitutional Principles in Sentencing

4.4.1. In Republic v Keke (Confirmation Case no 404 of 2010) the High Court, per Mwaungulu J held that courts "*have to ensure than their sentences do not offend [any] section of the Constitution*."

4.4.2. Mwaungulu J drew the relationship between traditional sentencing principles and constitutional obligations. He reasoned that the basis for a court to overturn a sentence includes when a sentence is "*manifestly excessive or inadequate as to comport to improper exercise of the discretion … if there would be a sense of shock after due regard of the offence, offender, victim and the public*." He affirmed, however, that *"it must not be ignored that it is also in the public interest that criminals are treated justly, humanely and according to the fundamental principles and provisions of our new constitutional order."*

4.4.3. Vitally, the Court set out the appropriate approach to be followed in relation to discrimination when it held –

> *"Sentences passed must avoid racial discrimination. More realistically they must not discriminate against gender. That does not mean that a sentences must disregard gender completely; this could mean treating different things in the same way.*
>
> *...*
>
> *By focusing on the maximum sentence and the lowest threshold of a crime, the sentence at first instance and determining the correct sentence the court is equipped to consider that the sentence fits the offender. As a matter of policy sentences that ignore this aspect run a high risk of being unfair on offenders who have committed similar crimes and are likely to be discriminatory for treating the different in the same way or treating the same people differently. Generally criminal justice treats different people differently based on age, mental capacity, antecedents and, sometimes, gender, [and] degree of participation in the crime. At the level of detail, there would be many actions or omissions and mental conditions that the sentence must individuate to the particular offender or as against another offender, which, if ignored, can result in unfair sentences."*

4.4.4. Thus courts are obliged to individualise sentences and to evaluate the effect of the particular sentence on the particular offender. However, to the extent that a sentence treats offenders of equal culpability differently, or treats different offenders the same without rational basis, such a sentence would be discriminatory and therefore unconstitutional and unlawful. See, for example: Republic Vs. Nkhoma Confirmation Case 3 of 1996:-

"The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance."

4.4.5. In the Namibian High Court decision of **S v Uirab (CR 30/2009) [2009] NAHC 25 (7 April 2009)** the accused's disability was considered by the court when reviewing his sentence of 10 months imprisonment or N$1500 on the charge of stealing a cell phone. The review court found that the sentence imposed by the lower court was highly inappropriate and induced a sense of shock. The accused was 25 years of age, unmarried with no children and unemployed due to his disability of being hearing and verbally impaired. When informed of the accused's disability, the court held that the sentence was "startlingly inappropriate" and affirmed that *"the fact that the accused is disabled, should also count as a mitigating factor in favour of the accused."*

4.5. **Applicable Constitutional Provisions**

4.5.1. Section 19 (1) of the Constitution reads:-

"The dignity of all persons shall be inviolable."

4.5.2. Section 19 (2) of the Constitution provides:-

"In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed"

4.5.3. Section 20(1) of the Constitution provides:-

"Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status"

4.5.4. Section 44(1) (f) of the Constitution reads:-

"There shall be no derogation, restrictions or limitation with regard to the right to equality and recognition before the law;

4.5.5. Section 42 (2) (f)) of the Constitution provides:-

"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial".

5. ARGUENDO

5.1. In the present case, it is submitted that sentence imposed on the appellant, and the reasoning given therefore, is manifestly excessive to induce a sense of shock in addition to be unconstitutional, and therefore unlawful, for the following reasons:-

5.1.1. The sentence is discriminatory on the basis of the appellant's albinism, a condition we submit this court should recognize as an independent ground of discrimination under section, 19(1), 19 (2) and 20(1) of the Constitution in addition to the acceptance in some circles that albinism is a disability, a concurrent grounds of discrimination.

The Court in this manner treated the appellant differently not on the basis of having a differential standard of culpability, but on the basis that his inherent

being and condition supposedly demanded a differential standard of conduct and care – reasoning, in our submission, amounting to bald discrimination.

5.1.2. The sentence is manifestly excessive being 10 times beyond the maximum sentence in section 183(1) of the penal code of MWK1, 000 for a first-offender and imposing a custodial sentence in default of payment, when no custodial sentences are provided for in section 183(1).

5.1.3. The sentence fails to take into account that there is no victim of the crime committed.

5.1.4. The Court should have, in the least, offered the appellant a suspended sentence as a first offender.

5.1.5. The Court justified the appellant's sentence on the grounds of general deterrence (in reference to the Court's observation of many youths in Thyolo District consuming alcohol, something the Court wished to deter) despite that the appellant was a first offender, thus inappropriately using him as a "scapegoat".

5.1.6. The Court inappropriately referred to alleged prior instances of the appellant's intoxication as aggravating circumstances despite that he had never been arrested or convicted under section 183(1) before, thus violating his right to a fair trial by treating him as a repeat offender.

5.1.7. The Court failed to fully appreciate the appellant's albinism as a disability and a mitigating circumstance. While we acknowledge that the Court noted the appellant's vulnerability to physical conditions of imprisonment in reference to the heat of the prison buildings, we submit that the Court did not appreciate the vulnerability of the appellant, as a person with albinism, to the stigma he would

face in prison and the prospect of violence and attacks in prison as a mitigating factor against the prospect of a custodial sentence. See **Report of the Independent Expert on the enjoyment of human rights by persons with albinism: a preliminary survey on the root causes of attacks and discrimination against persons with albinism (United Nations General Assembly A/71/255, 29 July 2016) at paras 27-29**); and **Amnesty International *"We are not animals to be hunted or sold": Violence and discrimination against people with albinism in Malawi* (2016).**

5.1.8. Finally, the Court's reference to the appellant as "pathetic" on the basis of his albinism – and its statement imposing on him a form of moral responsibility due to the actions of government and the public in relation to the significant threats of violence and discrimination that people with albinism face – infringes on his right to human dignity and equality before the law.

We submit that persons with albinism are human beings worthy of equal treatment and dignity in society in general and particularly before the law.

While the court a quo's reasoning appears to be grounded in a well-intentioned form of paternalism, it is our respectful submission that its treatment of the appellant cannot be sustained in a constitutional democracy. Its reasoning, we submit, adopts a dangerous approach that appears to impose liability on persons with albinism for the violence and social discrimination that they experience: a form of "victim blaming".

In this regard we draw this Court's attention to the **Report of the Independent Expert on the enjoyment of human rights by persons with albinism: a preliminary survey on the root causes of attacks and discrimination against persons with albinism (United Nations General Assembly A/71/255, 29 July 2016)** where the Independent Expert states at para 5:-

"Another group of myths presents ostracism, exclusion and discrimination against persons with albinism as a natural necessity. A number of these myths are highly concerning, as they seek to strip persons with albinism of their humanity and represent them as a means to an end as opposed to an end in themselves."

6. PRAYERS

6.1. We submit, therefore that the appellant's sentence should be set aside.

Dated this ……day of……2016

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LIBERTY LEGAL CONSULTANTS

LEGAL PRACTITIONERS FOR THE CONVICT