IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 833 OF 1997

THE REPUBLIC

VERSUS

LASTONE NYUNGWE

In the First Grade Magistrate Court sitting at Thyolo
Criminal case No. 140 of 1997

CORAM: Mwaungulu, J
Kapanda, Principal State Advocate, for the state
Defendant, present, unrepresented
Soka Banda, Official Interpreter
Marsen, Official Recorder

Mwaungulu, J

JUDGMENT

This case was set down by the Honourable Mr. Justice Chimasula to consider the sentence passed on the defendant. The defendant, Lastone Nyungwe, was convicted by the First Grade magistrate at Thyolo of the offences of burglary and theft. He was sentenced respectively to two years and one year imprisonment with had labour. The sentences were ordered to run concurrently and immediately. The reviewing judge thought that the sentence on the burglary should be enhanced.

On the night of the 3rd of August 1996 the defendant went to the complainant's house. He found

the house locked. The complainant, a business woman, was out to the market. The defendant carried a metal bar. He used it to break the lock. He entered the house and stole property worth K2, 110. When he was arrested by the police, he confessed to the crime. He also pleaded guilty when he appeared in the court below.

In passing the sentence the court below considered a number of things.The defendant is thirty-one years of age. All the property, except the three bags of maize, stolen was recovered. The defendant was at the date of conviction serving another prison sentence. The court below considered all these aspects and passed the sentence which I mentioned earlier.

The honorable judge's observations are apposite. They are based on the experience of this court nationwide in relation to this offence. Gone are the days when this court used to pass medium sentences for this offence. Those sentences did not yield a reduction in the level of this crime. If what comes to this court is anything to go by, there has been a phenomenal upsurge in this crime that can partly be explained on the sentencing policy of our courts. This court has therefore of late stated that burglary and housebreaking should be punished by long and immediate sentences(**Republic v Chizumila**,(1994) Conf. Cas. No 316).The long and immediate sentences of imprisonment are justified on more grounds than one. The offence is among offences regarded grave under our penal provisions. Its commonplaceness leaves victims and the society at abject insecurity. The quest for security leaves those who can afford to pay huge sums for it. This court has proposed that the starting point for burglary should be six years imprisonment. This benchmark should be scaled downwards to reflect mitigating factors or upwards to cater for aggravation.

The offence of burglary is directed toward trespass on dwelling houses with intent to commit a felony. It is distinct from the crime actually committed inside the house. The defendant does not have to commit any offence in the house before he is caught by the proscription. He is guilty even if no offence was committed in the house. It suffices if he broke and entered the dwelling house with intent to commit a felony. This is important because, when sentencing the defendant for burglary where, like here, the defendant stole from the house, it is irrelevant that the property stolen was recovered or that the defendant found nothing or very little to steal. The crucial considerations are the extent of the trespass and the circumstances around the crime. These include the manner and extent of the breaking and entry. If more people were involved, obviously the court has to consider that. There could be considerable damage to the premises as entry is gained. There could be disturbance to the occupants as the crime is executed. This would leave the victims in extreme fear and insecurity. The victims could be women, old people or labouring under all sorts of infirmities. These, and the list is not exhaustive, are the sort of things that a sentencer has to look at when sentencing offenders guilty of burglary or housebreaking.

That the property stolen was recovered, in my judgement should not be a serious matter when sentencing an offender for burglary.

In this matter, there were very few factors in favour of the defendant. These were not the only offences he committed. The defendant was armed for the crime. He carried housebreaking equipment. The only damage to the premise however was to the lock. No other damage is mentioned. This was not a serious case of trespass. The complainant was not there. It was an offence however which deserved more than the court below passed. The court below was probably influenced by the sentence that the defendant was serving at the time of conviction. The approach of the court to that sentence is unacceptable.

Where, as happened here, it is notified the sentencing court that the defendant is serving another sentence and the defendant is not represented by counsel, it might be very useful that the court should call for the record or receive some information on the previous sentence. It is not unoften that, although the convictions are separate, the offences could pertain to the same transaction or committed in quick succession to one another. In either of those cases the appropriate would be to order the sentences to run concurrently. This consideration is denied the defendant if the court does not check the record of the previous sentence. Moreover there is always a duty on the court if the defendant is serving other sentences to ensure that the total sentence is not oppressive and excessive particularly, as happened here, where the court is going to order the sentences to run consecutively. In **R.v. Millen**(1980) 2 Cr.App.R(S) 357 the appellant was sentenced for robbery and other offences to a total of five years' imprisonment, with a suspended sentence of two years activated. Eight days later he appeared before another judge and was sentenced to a further term of three years', consecutive, for burglary. The sentencer declined to consider the sentence in relation to the earlier sentence. "We think," said Dunn, L.J., "that the learned judge failed to have regard to the principle of totality. He should have looked at the total, period which this man was to serve for the various offences of which he had previously been convicted, as well as the matters which the learned judge was currently dealing..."This consideration was not followed by the court below.

The sentence of two years imprisonment with hard labour for the burglary is set aside. The defendant will serve a sentence of three years' imprisonment with hard labour.

The sentence will run concurrently with the sentence on the theft count. These sentences ill also run concurrently with whatever sentence the defendant is

currently serving.

Made in open court this17th Day of November 1997

D.F. Mwaungulu

JUDGE