IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 687 of 2000

REPUBLIC

Versus

BILLY NAZOMBE

In the Second Grade Magistrate Court sitting at Phalombe Criminal Case Number 118 of 2000

CORAM: D F MWAUNGULU (JUDGE)
Nayeja, Senior State Advocate, for the State
Defendant, present, unrepresented
Chisi, the official court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter set it down to consider the propriety of a second count. The propriety of the second count the judge queries depends on how this Court resolves the apparent confusion in the proceedings in the lower court. The solution, however, is undermined by that when this Court heard the matter on 29th May 2003, the defendant had served the sentence of two years imprisonment the lower court imposed. The defendant, apparently, pleaded guilty and, on acceptance of the facts the state preferred in support of the plea, the lower court convicted him of the offence. The confusion, however, arose at the plea stage.

There are two charges bearing the same dates and relating to the same count. The first charge has a single count of theft. The defendant never pleaded to it because the state amended the charge to include a burglary count. The defendant, however, pleaded to the second charge.

On the defendant's plea, the lower court thought the proper charge was breaking into a building and committing a felony therein, an offence under section 311 of the Penal Code. The prosecution acceded to this. The amendment, it appears, was effected by alterations on the charge before the lower court. In essence the alteration involved substituting the offences in the offence section of the burglary count and substituting the name in the burglary count with the word "building.' The theft count was unaltered. The amended charge, therefore, contained two counts. The court, however, decided not to let the defendant plead to the amended charge.

There was, as the string of this Court's decisions, Goode v Republic (1971-72) 6 ALR (Mal) 461 and Republic v Petrol [1973-74] MLR 346, show, everything proper about the court accepting the amendments. A court may, by amendment, substitute a minor offence if the facts the prosecution proffer are insufficient for the major offence. There is, however, everything to say about the way the amendment was done and the procedure the lower court followed after the prosecution amended the charge. The amendment must be authenticated, must be clear when and by whom the amendment was made and must indicate the page in the record containing the court's amendment order: R v Salimu (1923) 1 ALR (Mal) 572; and Republic v Madeya [1987-89] 12 MLR 81. The lower court was oblivious to this practice. Just as the lower court overlooked section 151 of the Criminal Procedure and Evidence Code.

The lower court should not have done what it did after accepting the amendment. The lower court knew that the amended charge should have been read for the accused to plead to it. Instead, the lower court took the view that because the amendments were not substantial, it was not necessary to let the defendant plead to the amended charge. The amendments were substantial. They introduced a different offence, albeit a minor one. Section 151 of the Criminal Procedure and Evidence Code provides:

"(2) Where at any stage of the trial before the court complies with section 254, or calls on the accused for his defence under section 313, as the case may be, it appears to the court –

(a) that the charge is defective either in substance or form;

(b) that the evidence discloses an offence other than the offence with which the accused is charged;

(c) that the accused desires to plead guilty to an offence other than the offence with which he is charged,

the court may make such order to the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as it thinks necessary to make to the circumstances of the case, unless, having regard to the merits of the case, such amendments cannot be made without injustice.

(3) Where a charge is so amended, a note of the order for amendment shall be endorsed on the charge and the charge shall be treated for the purposes of the proceedings in connection

therewith as having been filed in the amended form.

(4) Every such new or altered charge shall be read and explained to the accused.

(5) The court shall thereupon call upon the accused to plead to the altered charge and to state whether he is ready to be tried on such new or altered charge.

The lower court approached the matter from that the amended charge should not be read to the defendant because the amendments were not consequential and the defendant would not be prejudiced. The section just quoted makes no distinction like one the lower court introduces. The section is mandatory when there is an amendment. Every such new or altered charge must be read for the defendant to plead to it. The question is not whether any prejudice would follow from not reading the amended charge. The question is whether there has been an amendment to the offence charged. Where there is amendment to the offence, a plea to the original charge is not plea to the offence as amended. The amended charge must be read to the defendant so that he pleads to the new offence.

The question for this Court is what is the effect of lack of pleading to an offence charged on the validity of the proceedings? All reported cases in Malawi deal with where there was a plea and the plea was defective. Decisions of this Court like R v Jailosi (1964-66) 3 ALR (Mal) 219; Smit v R (1964-66) 3 ALR (Mal) 241; Republic v Abraham (1971-72) 6 ALR (Mal) 293; and Republic v Kumwenda (1971-72) 6 ALR (Mal) 425 hold that a defective guilty plea can be cured by facts the defendant accepts as correct. These cases do not deal with a situation where the defendant has not pleaded at all. Under English law some cases deal with where the defendant never pleaded and trial proceeded based on that the defendant pleaded not guilty: R v Tasamulug, unreported, April 29, 1971; R v Williams [1978] QB 373. The rule, where trial proceeded albeit without the defendant pleading, is that the proceedings are not vitiated. In R v Williams Shaw, L.J., after reviewing the practice in England and Wales and the United States, conceded that the rule thus stated is “founded on the assumption that the intended plea was not guilty, otherwise the trial would not follow.”

The English cases of R v Boyle (1954) 38 Cr.App.R 11 and R v Ellis (1973) 57 Cr. App. R 571 consider the situation where the defendant pleads guilty. In R v Ellis Edmund Davies, L.J., stresses the need for the defendant to plead to the charge, that the defendant, not her counsel, plead to the charge and that the defendant plead to all, where more are charged, offences:

“We think that the only safe and proper course accordingly is to say, as we now do, that apart from a few very special cases) it is an invariable requirement that the initial arrangement must be conducted between the Clerk of the Court and the accused person himself or herself directly, whatever may be the decision in relation to cases where, as in Tasamalug . . ., there is a change of

plea in the course of it , though there also we express the strong view that it is highly desirable that the same rule of practice should be followed. Furthermore, if the indictment contains several counts, each must be put to the accused separately and he should be asked to plead to each in turn as it is put to him, the only exception to this being that, if he pleads Guilty to the first of a pair of alternative counts, the second need not be put-see Boyle (.1954) 38 Cr..App.R.111.

The lord Justice then said:

"Then what course should be followed if a verdict of Guilty is returned in proceedings launched in breach of this basic requirement? In Boyle (supra) all four counts in the indictment were read together to the appellant. He was then asked to plead to the whole indictment and he made a general plea of Guilty. While expressing disapproval of the procedure adopted, the Court of Criminal Appeal nevertheless dismissed his appeal against conviction, presumably on the ground that in all the circumstances there was no room for doubt as to what plea the accused was, in fact, making in respect of each of the counts. But Lord Goddard C.J. there stressed the necessity to ensure "that there can be no doubt on how the accused intends to plead"

The Lord Justice, after suggesting that doubt there will always be where the defendant is not given the opportunity to plead, quotes Lord Parker, C.J., in R v Boyle:

"Whether he was or not, in the opinion of this Court does not matter. These questions of pleas must be dealt with formally. It was never put to her and she out of her own mouth never pleaded Guilty. The only plea that remained on the record was the plea of Not Guilty….In those circumstances she has never been tried … and the proper course in the opinion of this Court is in her case to quash the conviction."

In the present case the charge was not read for the defendant to plead to it. The defendant never pleaded to the amended offence. It is precarious to assume that because he intended to plead guilty to the former offence, he would plead guilty to the later offence simply because it was a minor offence. Under section 151 (4) of the Criminal Procedure and Evidence Code the altered or amended charge should have been read to the defendant and the defendant plead to it. Moreover it is clear the lower court proceeded on a single count of breaking into a building and committing a crime therein. The lower court overlooked the theft count to which the defendant also pleaded guilty. The record does not suggest that the prosecution withdrew the count. The court probably proceeded on decisions like R v Jali Cr.Rev. Cas. No. 255 OF 1957, unreported; R v Jackson Cr.Rev.Cas No.18 of 1961, unreported; R v Louis (1961-63) 2 ALR (Mal) 67; R v Thomas (1964-66) ALR (Mal) 408; and R v Kaliyande [1990] MLR 391. This Court doubted these decisions in Republic v Kayange Conf. Cas. No. 458 of 2000, unreported. The earlier decisions were to the effect that the prosecution cannot charge the substantive crime where the defendant stands trial for breaking into a building and committing a felony therein. In this matter the defendant never pleaded to the amended offence.

The Court has two options. The Court can, without more, quash the conviction. Just as the court may set aside the conviction and order a new trial. In the latter case, the subsequent court will consider the sentence already served should there be a conviction. These options base on the decisions in R v Heyes (1950) 34 Cr.App.R. 161; and Young v Young, unreported, June 8, 1967. The defendant's earlier plea to the theft remained good. The defendant never pleaded to the offence of breaking into a building and committing a felony therein. The conviction for breaking into a building and committing a felony therein is, without more, quashed. The conviction for theft stands. The defendant served the full sentence.

Made in open court this 29th Day of May 2003.

D F Mwaungulu

JUDGE