IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation case number 481 of 2000

REPUBLIC

Versus

CLIFFORD ZINKAMBANI

In the Third Grade Magistrate Court sitting at Chikwawa Criminal Case number 4 of 2000.

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, Senior State Advocate, for the State

Defendant, present, unrepresented

Nthole, official court interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter set it down to consider the plea and consequently the conviction. The Chikwawa Third Grade Magistrate Court convicted the defendant, Clifford Zinkambani of housebreaking and theft. Housebreaking and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendant, respectively, to eight and four months' imprisonment. The reviewing judge doubted the conviction. Ms. Kalaile, appearing for the state, also questions the sentence the lower court passed.

On what proceeded in the court below, the lower court, for two reasons, should not have entered a plea of guilty on the housebreaking count. First, the words the lower court recorded have been considered by this Court as inadequate as a guilty plea. The defendant in answer to the charge said, 'I plead guilty.' A line of authorities, the latest of which is Republic V Kachisa, Conf.Cas. No.95 of 1999, unreported, suggest that statements like 'I admit', 'It is true', and 'I plead guilty'

are insufficient to found a guilty plea. The principle has the support of the Supreme Court of Appeal. In Magwaya v Republic (1975-77) 8 MLR 323 where Skinner, C.J., approved this statement by Bolt, J., in Smit v R (1966-68) 4 ALR (Mal) 241 at 243:

"Answers such as 'I admit', 'it is true', 'I do not deny' and the like are not sufficient and it is essential, when a magistrate is putting a charge to an accused person, that he puts to him each and every element of the offence and obtains a separate reply. If this is not done injustice and misunderstanding of the true position can easily result.

Secondly, when the facts were read to him, he qualified his earlier plea. The defendant informed the lower court that the house was open. Burglary or housebreaking involves a breaking and entry. The defendant's answer was a denial of breaking and entry. The lower court should have altered the plea to not guilty. This case can, on this aspect, be distinguished from Republic v Kachisa on the facts. In that case the judge set the case down for review because of a qualification which the judge on review thought was not a sufficient defense to undermine the plea. The Court said:

"Obviously, a qualification undermines the plea. Not all qualifications, however, undermine the plea. Only qualifications suggesting a defense or a substantial departure from particulars have that effect. . . . The defendant's qualification raised no defense to the charge. It is no defense, except in case of duress, that one sent another to commit a crime. The person who commits actually the crime and the one who sent him are parties to the crime.

The facts the defendant accepted never refer to a breaking or entry. The defective plea cannot be cured by the facts. The conviction and sentence for housebreaking are set aside. The conviction and sentence for theft are confirmed.

It may still necessary to comment on the sentence the lower court passed for the housebreaking notwithstanding that the conviction on it has been set aside. The lower court was obviously oblivious to sentences this court approves for burglary where, of course, the offence committed in the house is a theft.

The sentencing approach is the same in burglary as for other offences. The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest

Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and mental component comprising the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize

circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence.

Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.

While the criminal law is publicly enforced, the victim of and the effect of the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example for offences against the person in sexual offences, the victim's age is important. An illustration of circumstances on indirect victims is the effect of theft by a servant on the morale of other employees, apart from the employer.

Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public order. The objectives of punishment range from retribution, deterrence, rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case.

Applying these principles to burglary or housebreaking, burglary or housebreaking involves trespass to a dwelling house. Circumstances showing intensity, extent or complexion of the trespass are where the breaking and entry are forceful and accompanied by serious damage to premises or violence to occupants, fraudulent or by trickery. The court may enhance the sentence where more than one person was involved in the crime and whether the defendant committed more than one offence in the same transaction or generally where other similar offences were committed in quick succession. Moreover the court may regard the seriousness of the crime the defendant intended to commit when breaking and entering the dwelling house. The court may regard, where, which is rare, the felony intended is not committed or, where committed, not charged, the nature and extent of the crime committed. A sentencing court may affect the sentence where victims were actually disturbed and, therefore, put in much fear, anxiety, humiliation or despondency. Equally, a sentencing court will seriously regard that the victims were elderly or vulnerable.

The six years starting point set in Chizumila v Republic Conf. Cas. No. 316 of 1994, unreported

presupposes the crime which a reasonable tribunal would regard as the threshold burglary or housebreaking without considering the circumstances of the offender and the victim and the public interest. The approach is that all these considerations would affect the threshold case. Consequently, depending on intensity of these considerations, the sentencing court could scale up or down the threshold sentence. At the least, for a simple burglary, involving the minimum of trespass, irrespective of the plea where victims are not vulnerable, all being equal, the lowest the sentence can get is three years imprisonment. Housebreaking and burglary will seldom, if ever, be punished by a non-custodial sentence or an order for community service.

Made in open court this 29th of May 2003

D F Mwaungulu

JUDGE