

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

THE REPUBLIC

VERSUS

ENOCH NAZOMBE

In the First Grade Magistrate Court sitting at Limbe Criminal Case No. 153 of 1997

CORAM: Mwaungulu, J

Kapanda, Senior State Advocate, for the state

Defendant, present, unrepresented

Mangwana, Official Interpreter

Marsen, Recording Officer

Mwaungulu, J

JUDGMENT

On the 8th of July 1997, the First Grade Magistrate at Limbe sentenced Enoch Nazombe to seven years' imprisonment with hard labour for burglary. The judge who reviewed the matter thought this sentence was manifestly inadequate in the circumstances of the case. The case was set down to consider enhancing the sentence. Both the reviewing judge and the court below were for the most part influenced by the consideration of the injuries sustained while the offence was committed. It might be useful to see what actually happened on that day.

The defendant was inside the house of the Migweddes stealing. Mr. Migwede was waken by his wife about the intruders. He woke up and found the defendant running away with a radio. The defendant had a panga knife with him. The defendant started running away. The defendant started running away. The complainant set a chase. The defendant hit the complainant with a panga knife. The defendant picked the same panga knife and hit the defendant. The defendant was overpowered. He was arrested. He was charged with burglary and theft. He pleaded guilty to the two offences.

The Court below was told that the defendant had a previous conviction. The court below accepted this. The conviction was not previous. The defendant had already been arrested for this offence. He escaped from the hospital where he was being treated for the injuries inflicted on him by the complainant. He was convicted for escape from lawful custody. This is the matter which was being put as a previous conviction. To amount to a previous conviction the offence must have preceded the offence under discussion. The court does not look at the date of conviction (**Seneki v R** (1923-61) 1 ALR (M) 630). The escape from lawful custody was committed after the offence under discussion was committed.

Even if it was considered a previous conviction, it should have been ignored for purposes of sentencing the defendant in the case under consideration. Where an offender has previous convictions for offences not the same in nature as those for which he now is being sentenced, the court may ignore the previous convictions. There is very little, if anything, between the offences which the defendant stood sentence and escape from lawful custody.

The criticism of the reviewing judge and the approach which the court below took of the matters before it are premised on the injuries that the complainant suffered when affecting the arrest. The defendant was not charged with any offence relating to the injuries. The prosecution chose not to. The question which immediately arises is to what extent can acts constituting other offences affect a sentence on a different offence? In a proper case those acts can be regarded as circumstances around the offence which the sentencer has to take into account. There is however the risk of punishing an offender for offences for which he has not been charged. The sentencer cannot pass a sentence on the basis that the offender on the facts is guilty of offences for which he has not been charged (**R v Chadderton** (1980) 2 Cr.App.R(S) 272). “A man is entitled, “said Lord Justice Griffiths in **R v Lawrence** (1983) 5 Cr.App.R.(S) 220, “to be sentenced for the offence to which he pleads guilty, not to another offence which might well have been laid against him.” Much as the conduct of the defendant was despicable, where the prosecution has preferred certain charges against the defendant to which the latter has pleaded guilty, there must be care to avoid the impression that the defendant is not punished for offences for which he has not stood trial. The sentence passed by the lower court is susceptible of such criticism.

Offences of burglary and housebreaking deserve long and immediate imprisonment. The offences are punishable with death or life imprisonment. They therefore belong to a group of offences regarded very seriously under our criminal law. Besides, in spite their seriousness, they are very commonplace, if the records of the courts are anything to go by. The two offences with the related offence of theft result in many millions of kwacha of loss of property in the country each year. Households spend an equivalent amount for insurance and security. The offences are a desecration of the home. It is for these reasons and others that this court is now recommending long, and immediate imprisonment for these offences.

In **Republic v Chizumila**, (1994) Conf. Cas. No 316, this court said that the starting point for burglary should be six years imprisonment with hard labour. The sentence should be scaled upwards or downwards to reflect mitigating and aggravating factors. Always this will involve a consideration of the extent and the circumstances in which the crime was committed, the personal circumstances of the defendant, the impact of the crime on the victim and the public interest in prevention of crime. For burglary the legislature directed its mind to trespass with intent to commit a crime. The extent of the trespass will have a bearing on the sentence actually passed. Where therefore there has been substantial damage to the premises or property in breaking and gaining entry, the sentence will be enhanced. Equally, where the victims were disturbed or injured, the court will regard that. Then there will be a host of other considerations that reflect a disposition beyond the ordinary mental requirement for commission of a crime, such as meticulous planning or that more than one person was involved in the execution of the criminal design. All these, and the list is not exhaustive, are the sort of things that the sentencer has to look at when dealing with an offender convicted for burglary.

In this matter the sentence passed by the court below, even taking for the injuries sustained is manifestly excessive. It actually leaves one in no doubt that the defendant was being punished for acts which constituted a crime which the prosecution never brought against him. I set aside the sentence of seven years' imprisonment imposed on the defendant. I substitute a sentence of four years imprisonment with hard labour. The sentences will run concurrently as the court below ordered.

Made in open court this 12th Day of December 1997.

D.F. Mwaungulu

JUDGE