IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 734 OF 1999

THE REPUBLIC

VERSUS

JOHN MOFFAT

From the First Grade Magistrate's Court sitting at Limbe Criminal case NO. 1331 of 1998.

CORAM : D F MWAUNGULU, J.

Mr. Mwenelupembe, Deputy Chief State Advocate, for the State.

Defendant, present/unrepresented.

Mrs Kachimanga, Recording Officer.

Mwaungulu, J.

JUDGMENT

The judge who reviewed this case from the First Grade Magistrate at Midima Road wanted this Court to consider the sentence. The First Grade Magistrate sentenced the defendant to four years imprisonment with hard labour. The First Grade Magistrate convicted the appellant of breaking into a building and committing a felony therein. Breaking a building and committing a felony therein is an offence under section 311 of the Penal Code. Of course the reviewing judge was concerned about the severity of the sentence. He thought that the sentence was manifestly inadequate and should be enhanced. This Court is also concerned however, with the warrant of commitment the First Grade Magistrate issued and the time it has taken the Registrar to set the case down

for hearing.

The sentence this Court will pass turns out on the facts. The facts reveal the circumstances of the crime. These circumstances will determine whether the sentence of the court below should be reduced, confirmed or enhanced. The sentence here ought to be reduced. In Republic v Alick, Conf. Cas. No. 725 of 1999, unreported, this Court alluded to that the sentence depends on the circumstances of the offences comprising the compounded offence of breaking into a building and committing a felony therein. Where, as here, the felony committed in the building is theft, the sentence, among other things, depends on the extent of the trespass and the amount of property stolen. Where the trespass involves violence or destruction to the premises, a heavier sentence is appropriate. Equally, the sentence will be higher if more property is stolen. This Court said:

"This is a compound crime comprising of the trespass and the actual crime committed. The trespass in this case, at least from the record, did not involve violence or serious damage to the shop. From what appears on the record this was a simple breaking into the shop. The amount of property stolen was K1,500.00. Even in a rural setting, this was not a lot of property."

The reviewing judge must have thought that the sentence should be enhanced because of the value of the property stolen. It is obvious from the facts that the lower court found that the trespass was not extensive. The critical witnesses to the crime are three watchmen on adjacent premises. Their evidence is contrary to what Mr. Bashir, the owner of the shop from which the property was stolen, said to the lower court. Mr. Bashir was not there when the three watchmen cordoned the defendant. The watchmen's evidence is that only one person was on the premises. Mr. Bashir suggested to the court below that there were other people with the defendant when the offence was committed.

The story of the three watchmen, which makes more sense to this Court, is that all of them had seen a man, the defendant, go up the premises in the early part of the night. For several hours the watchmen watched him closely for what he would do. The defendant never came down. The watchmen went up to check. They found the defendant there. He had two bags with him. The bags contained some plumbing material. After the watchmen arrested the defendant, Mr. Bashir conducted a stock check in the shop.

This, in my judgment, is where doubt begins. Mr. Bashir's evidence is that the stock check revealed that the defendant stole 190 bundles of 50 bicycle tubes each, 2 bags of plumbing material, 36 bundles of a hundred bicycle tubes each and 19 cartons of radios. Mr. Bashir put the value of this property at K400,000.00. 190 bundles of 50 tubes each make 9,500 tubes. 36 bundles of 100 tubes each make 3,600 tubes. How all these tubes could be contained in two bags the watchmen found is amusing. The watchmen actually state that the bags contained plumbing material. There were no tubes. In fact the First Grade Magistrate doubted that the defendant stole the radios alleged. On that pretext the

First Grade Magistrate asked that the value of the radios be deducted from the value averred in the charge. I have, on the evidence on the record, real doubt whether the defendant stole all the property alleged in the count.

The trespass on the premises was an aperture in the roof. There is no evidence of damage to the property. The breaking was not therefore of the serious type. The property stolen appears overstated. The sentence should not be enhanced. The defendant is offending for the first time. I do not think that the sentence is right. I set aside the sentence of four years imprisonment with hard labour. The defendant will serve a sentence of Two years imprisonment with hard labour.

This Court raises the problem this Court detected in Republic v Menard, Conf. Cas. No. 951 of 2000, unreported. The Registrar when fixing this date did not, on the face of it consider section 15(4) of the Criminal Procedure and Evidence Code. Section 15(4) provides:

“An officer in charge of a prison or other person authorised by warrant of imprisonment falling within subsection (1) © (I) (ii) or (iii) shall treat such warrant as though it had been issued in respect of a period of two years, one year or six months respectively, as the case may be, until such time as he shall receive notification from the High Court that it has in the exercise of its powers of appeal or review confirmed that such sentence may be carried out as originally imposed.”

Section 15 (1) © provides:

“Where in any proceedings a subordinate court ... imposes a sentence of imprisonment exceeding - (I) in the case of a Resident Magistrate’s court, two years; (ii)in the case of a court of a magistrate of the first or the second grade, one year; or (iii) in the case of a court of a magistrate of the third grade, six months ... it shall forthwith transmit the record of such proceedings to the High Court in order that the High Court may exercise in respect thereof the powers of review conferred by Part XIII.”

Section 15 (4) imposes a duty on this Court to exercise its powers of review within the statutory period. The Prison authorities cannot and should not, even if the sentence is higher, keep a prisoner beyond the statutory period if this Court has not exercised its powers of review under Part XIII of the Criminal Procedure and Evidence Code. Form XXVI of the Criminal Procedure (Forms) Notice (Warrant of Commitment) confirms this. After specifying the sentence’s duration, the penultimate paragraph reads:

“Unless confirmation of the said sentence shall sooner be communicated to you

by ..... you are required to release the prisoner at the expiration of the period appropriate in the case of a sentence of ..... months imprisonment."

The magistrate, of course depending on her grade, issuing the warrant of commitment must specify to the prison authority or any person authorised to carry out the imprisonment sentence the statutory period in section 15 (4) of the Criminal Procedure and Evidence Code. This Court in Republic v Menard stressed the matters to consider when setting a case down for confirmation or review:

"The Registrar, when setting the case down for 3rd August, 2000, should have regarded the judge's actual directions, section 15 (4) of the Criminal Procedure and Evidence Code and section 107 of the Prison Act."

In this matter the Prison Authorities could, under section 15 (4) of the Criminal Procedure and Evidence Code, only keep the defendant for one year since this Court had not exercised the powers of appeal or review. The First Grade Magistrate did not specify the period under section 15 (4)of the Criminal Procedure and Evidence Code for which the prison authorities could keep the prisoner without an order of this Court confirming the First Grade Magistrate's sentence. Equally the Registrar could not, in view of section 15 (4) of the Criminal Procedure and Evidence Code set down the case for over one year after the First Grade Magistrate sentenced the defendant.

Made in Open Court this 4th day of August 2000

D F Mwaungulu

JUDGE