

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 725 OF 2000**

**THE REPUBLIC
VERSUS
KALONGA ALICK**

From the Second Grade Magistrate sitting at Khama Criminal Case No. 82 of 1999

CORAM: D F MWAUNGULU, J

For the State, Mwenelupembe, the Deputy Chief State Advocate

Defendant, absent

Kachimanga, the official Court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter from the Khama Second Grade Magistrate Court wanted this Court to enhance the sentence. The second Grade Magistrate sentenced the defendant, Kalonga Alick, to fifteen months imprisonment with hard labour. The Second Grade magistrate convicted the defendant of breaking into a building and committing a felony therein. Breaking into a building and committing a felony therein is an offence under section 311 of the Penal Code. The judge thought the sentence manifestly inadequate. The Deputy Chief State Advocate and I agree that on the circumstances of this Case the Second Grade magistrate's sentence was right.

The defendant admitted the charge at the police. He pleaded guilty when he appeared before the Second Grade Magistrate at Khama. On 13th February, 2000, the complainant, a barber at Namwera Trading Centre, closed his shop. He came back to find the shop broken into. Whoever it was, the intruder stole two shavers (valued at K1, 500) and some discs. The defendant was arrested. The shavers, which the defendant sold to somebody else, were recovered. The discs are

unrecovered. These are the facts supporting the guilty plea.

The defendant was not represented by a legal practitioner in the lower court. He made the mitigation statement himself. There was nothing in it. The lower court never considered the mitigating factors apparent on the record. The defendant was offending for the first time. The defendant is twenty years old. Moreover, the defendant pleaded guilty to the charge.

The lower court however considered some aggravating factors. The Second Grade Magistrate considered the seriousness of the offence. He thought breaking into a building and committing a felony therein is a serious offence because the legislature has prescribed a maximum sentence of ten years. This is important to determine the gravity the legislature ascribed to the crime. For sentencing in a particular Case the sentencing court must consider the particular instance before it and decide which sentence on the range of the maximum sentence is just to the offender, the victim, the offence and the public interest. The sentencing court is not normally coming to new land. The sentencing court is treading where others have trod. There are sentencing patterns by fellow magistrates in the locality and those prescribed by superior courts. For logistical and practical reasons, most sentencing courts do not have such information. Something should be done to make such information available.

There is more however to be said of the lower court's reasoning. The Second Grade Magistrate thought the sentence to pass should deter others. Generally deterrence is the purpose of punishment and the criminal process. First offenders should not, however, be used as means to the end of general deterrence. Primarily sentences passed on young people offending for the first time should aim at deterring the particular offender. If that sentence deters others generally, it should be as of course. This means that sentences passed on young first offenders should fit the crime, the offender the victim and the public interest in preventing crime. Sentencing Courts should be wary to pass heavy sentences on first offenders for general deterrence. After all, for first offenders, the very prospect of imprisonment, rather than the actual imprisonment itself, may be all that is necessary for them to desist from further mischief. For young first offenders a short and sharp sentence may be as, if not more, effective than a longer one.

Equally problematic is the lower court's consideration of the commonplaceness of the offence in the locality. A sentencing court should indeed consider the commonplaceness of an offence. This means that the sentence in a particular Case must be enhanced because of it. Where however, the sentencing court wants to affect the level of sentences because of the change in the frequency of the crime the change in the level of sentences must be across the board. It must be clear to the prisoner and the public that the sentencing court is affecting such a development. Failure to so state may grieve an offender who suddenly feels that she is treated harshly and, more importantly, differently from others in the past equally to blame.

The sentence the Second Grade Magistrate passed here is in line with ones generally passed for the offence the defendant committed. This is a compound crime comprising of the trespass and the actual crime committed. The trespass here, 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. How much property stolen was K1, 500.00. Even in a rural setting, this was not a lot of property. If one therefore factors in that the defendant is young, offending for the first time and pleaded guilty, the lower court's sentence is impeccable. It is confirmed.

MADE IN OPEN COURT this 4th day of August 2000 at Blantyre.

D.F. MWAUNGULU
JUDGE