

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 144 of 2003

THE REPUBLIC

Versus

LLOYD AMANI

In the First Grade Magistrate court sitting at Nsanje Criminal case number 75 of 2001

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, Senior State advocate, for the state

Defendant, present, unrepresented

Kamanga, Official Interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter set it down to consider the sentence. The court below convicted the defendants, Lloyd Amani, 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 lower court sentenced the defendant to three-and-a-half years' imprisonment. The judge thought the lower court's sentence for breaking into a building and committing a felony therein manifestly inadequate.

The defendant broke, entered and stole from the complainant's grocery property valued at K10,000. The complainant was not at the shop when the offence occurred. The defendant admitted the charges at the police. He pleaded not guilty in the lower court. The defendant is 37 years old. The defendant admitted to a relevant previous conviction. The lower court's reasoning on the

sentence is meager. The lower court considered the offence's gravity from the sentence the legislature prescribed. Clearly, however, the lower court imposed a heavier sentence because of the defendant's previous conviction

The sentencing approach is the same for breaking into a building and committing a felony therein as with 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 breaking into a building and committing a felony therein, breaking into a building and committing a felony therein is a compound crime involving a trespass and

commission of a felony inside the building. In relation to the trespass, a sentencing has to consider the nature and extent of the trespass imposing a heavier sentence where there is serious damage to the premises or disturbance to people present during the crime. The sentence will certainly be influenced by the seriousness of the crime committed in the building. Certainly, the sentence will be higher where the offence committed is grave from the standpoint of the sentence the legislature prescribed. For less serious crimes the sentence may be enhanced because the offence committed in the building was, minding the circumstances of the offence, the offender and the victim and the public interest, serious.

In this matter three years imprisonment was manifestly excessive. Of course, from the evidence the value of the property stolen, given the complainant's station in life, was considerable. Courts have handled for similar offences involving similar victims larger quantities and value of property. Moreover, the lower court should have considered trends emanating from this Court on this offence and injuries involved. If the lower court had done that it would not have imposed the sentence it imposed.

Of course, the defendant had a relevant previous conviction. It was only one. The defendant, in my judgment, had not lost his whole right to leniency. In an appropriate case, and this was one, a sentencing court may overlook petty previous convictions (*Rendall-Day v Republic* (1966-68) ALR (Mal) 155. Moreover, previous convictions are no reason for a sentence higher than one the offence and the offender, after considering the circumstances of the victim and the public interest, deserve. Decisions of this Court (*R v White* (1923-61) 1 ALR (Mal) 401; *Bwanali v R* (1964-66) ALR (Mal) 329) and the Supreme Court (*Maikolo v R* (1964-66) ALR (Mal) 584) are to the similar effect.

The sentence of three-and-a-half years' imprisonment is, as the reviewing judge and the state observed, inappropriate. I set it aside. I sentence the defendant to two years imprisonment.

Made in open court this 6th June 2003

D F Mwaungulu

JUDGE