

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 523 of 2001

THE REPUBLIC

Versus

JOSEPH MUSTAFA

In the First Grade Magistrate court sitting at Midima Criminal case number 90 of 2001

**CORAM:** DF MWAUNGULU (JUDGE)

Chimwaza, Deputy Chief 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 lower court imposed for housebreaking. The court below convicted the defendant, Joseph Mustafa, of burglary and theft. Housebreaking and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendant to six years and one-and-a-half years' imprisonment, respectively, for the burglary and theft. The judge, correctly in my view, thought the lower court's sentence for burglary was manifestly excessive.

On the night of 21st January 2001 the complainant, Mr. John, who secured the house before going to the market, found, when he came back, the house broken into. The intruders pushed a rock used to secure the house and stole property from the house. The defendant admitted the charge at the police. He pleaded not guilty in the lower court. The defendant is 20 years old. He is a first

offender.

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 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.

In this matter the trespass was simple. It involved just pushing a rock used to secure the house. The trespass was not forceful or serious. It did not involve serious damage to premises. It was not accompanied by threats or actual violence. The occupants were not disturbed. The defendant is offending for the first time. He is young. This is a above the threshold case deserving a sentence of three years imprisonment.

The sentence of six years imprisonment is inappropriate. The prosecutor informed the court the defendant was offending for the first time. The lower court, without proof of previous convictions, sentenced the defendant on based on that defendant was convicted before. The court cannot, when passing sentence, consider previous convictions where they were not proved. The prosecutor having informed the court the defendant had no previous convictions, the convictions the lower court took into account were not put to the prisoner. They should have been put to the prisoner so that the prisoner admitted or denied them. The court could take the previous convictions, without proof, if the defendant admitted them (See *Nyirenda v R* (1964-66) ALR (Mal) 181). Short of that the prosecution should have been required to prove the previous convictions.

It appears, however, that the lower court acted from its own, rather than the prosecutor's, knowledge of the convictions. A sentencing court could, in my judgment, rely on such knowledge acquired in the course of its judicial functions. The court must, in my judgment, produce the records in its possession or call for those not in its possession and put the convictions to the prisoner. One reason for this must be so that the court is sure that the convictions re previous, in the sense that the convictions do not relate to offences which should have been tried together with the present case, the convictions are not remote from the present conviction and are such as should be considered by the court (See *R v Chang'ono* (1964-66) ALR (Mal) 415; *Rendall- Day v Republic* (1966-68) ALR (Mal) 155; *Republic v Faiti* (1966-68) ALR (Mal) 90 *R v Chakhumbira* (1964-66) ALR (Mal) 303; and *Seneki v Republic* (1923) 1 ALR (Mal) 639. Moreover previous convictions are not a reason for passing a sentence higher than the one deserved by the justice of the case based on the nature and circumstances of the

offence, the circumstances of the offender and the victim and the public interest in preventing crime. They are a reason why leniency should not be extended to a prisoner. There are many decisions of this Court to that effect: *Bwanali v R* (1964-66) ALR (Mal) 329. There is also a Supreme Court of Appeal decision in *Maikolo v R* (1964-66) ALR (Mal) 584. I sentence the defendant to three years imprisonment on the housebreaking count.

Made in open court this 3<sup>rd</sup> Day of October 2003

D F Mwaungulu

JUDGE