

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 465 OF 2000

REPUBLIC

Versus

JOSEPH RAPHAEL

In the Third Grade Magistrate Court sitting at Chikowa Criminal Case Number 179 of 2000

CORAM: D F MWAUNGULU (JUDGE)

Kalaile, Senior State Advocate, for the State

Defendant, absent, unrepresented

Nthole, Official Court Interpreter

Mwaungulu, J.

JUDGMENT

The judge who reviewed this matter set it down to consider the conviction and the sentence. The Third Grade Magistrate at Chikowa convicted the defendant, Joseph Raphael, of burglary and theft. Burglary and theft are offences under sections 309 and 278 of the Penal Code, respectively. The lower court sentenced the defendant, respectively, to nine and five months' imprisonment for the burglary and theft. The reviewing judge questions the conviction because of a defective plea. The reviewing judge also suggests, if the conviction is confirmed, the sentence for the burglary is manifestly inadequate. Mrs. Phiri, Senior State Advocate, agrees with the reviewing judge on the conviction and sentence. She suggests, properly in my judgment, that the conviction should be sustained.

On the night of 13th March, 2000 the complainant, Ms. Banda, who when sleeping secured the house, woke up to find the house broken into. The intruders stole property from the house. The

complainant was asleep at the time of the crime. The defendant admitted the charge at the police. He pleaded guilty in the lower court.

The reviewing judge queries the conviction because of the defect in the plea. The lower court read the charges to the defendant. The defendant replied briefly and similarly to the two counts: "I understand the charge and I plead guilty." This Court often stresses that trial courts should be wary to accept such assertions, without more, as adequate for a court to enter a plea of guilty. A court must put to the defendant all the issues of fact and elements of the offence before accepting and entering that the defendant is pleading guilty. Failure to do so is a defect curable under section 5 of the Criminal Procedure and evidence code where, as here, there is no failure of justice. The facts, accepted by the defendant, the prosecution proffered to support the guilty plea demonstrate to all intents and purposes that the defendant, despite the lower court's omissions, intended to plead guilty. This Court cannot therefore alter the lower court's verdict.

The judge also queried the sentence on the burglary. The defendant is 18 years old. He is a first offender. The lower court's reasoning on the sentence overlooked many things this Court suggests are important to arrive at a sentence in all cases and particularly the offences of housebreaking or burglary. The lower court never regarded this Court's direction in *Republic v Chizumila Conf. Cas No. 316 of 1994*, unreported. The lower court, following this Court's direction in *Republic v Mkwate [1973-75] 7 MLR 407*, decide, correctly in my judgment, that the sentence for burglary would be custodial. The lower court considered the seriousness of the offence from the standpoint of the sentence Parliament prescribed, the age, that the defendant committed the offence for the first time and the guilty plea.

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 the mental component of 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* 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 opening and pushing a door. 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 defendant is offending for the first time. He is young. The defendant pleaded guilty. This aspect distinguishes this case from *Republic v Tembo Conf. Cas. No. 726 of 2000*, unreported. This was, in many ways, the threshold case where, for purposes of consistency, this Court approves three years imprisonment. The sentence of nine months

imprisonment is inappropriate. I would have set it aside and enhanced it were it not that the Court heard the matter after the prisoner served the sentence the lower court imposed. I therefore confirm the sentence.

Made in open court this 3rd Day of October 2003

D F Mwaungulu

JUDGE