IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 37 OF 2016

ISAAC SITOLE & ANOTHER

-V-

THE REPUBLIC

Coram: Hon. Justice M L Kamwambe

Miss Munthali of counsel for the State

Mr Maele of counsel for the Appellants

Mr Amosi... Official Interpreter

JUDGMENT

Kamwambe J

This is an appeal by the two Applicants, Isaac Sitole and Emmanuel Cosmas. They were convicted on their own plea of guilty and admission of the facts as true and correct as narrated by the State of robbery and sentenced to 96 months imprisonment with effect from 18th March, 2016. The main ground of appeal is that the lower court erred in law in failing to have regard to the proviso in section 251 of the Criminal Procedure and Evidence Code (CP&EC) before entering a plea of guilty. It goes further to say that the lower court erred in law in failing to give the Appellant an option of a fine.

The second ground is that the sentence of 96 months imprisonment is manifestly excessive.

In respect of the first ground of appeal, section 251 of the CP&ED provides that:

> 1) *"When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.*
>
> 2) *If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:*
>
> *Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification in the truth of the charge against him."*

The accused were unrepresented and they pled separately as follows:

> *"I understand the charge. I admit it. I took the said items....I used and threatened to use violence to complainant."*

At least the appellants said that they understood the charge, however, according to strict wording of the proviso, before a plea of guilty is entered, the court is obligated to ascertain that the accused has understood the nature and consequences of his plea. This must be visible on the file. This provision ensures that an accused is protected from making a mistaken plea of guilty through ignorance. This process is rarely followed by many courts. It is often bypassed. It may appear as if it is an unnecessary labour, but it is safer to abide by it because it exists in the statute. All that the court has to do is to inform the accused that he is faced with a serious

offence of robbery whose maximum sentence is life imprisonment and that he should expect a long imprisonment sentence of about 10 years, and then probably find out from accused if he still intends to plead guilty. Once the accused answers in the affirmative, a guilty plea is entered. In my view, it is as simple as that and obviously not onerous.

Such a failure to comply with the proviso makes the guilty plea defective but the court has to exercise its discretion whether in the circumstances it is proper to discharge the accused or to order him face a retrial or maintain the conviction with or without changes to the sentence. The guiding principle is where the interest of justice lies in the particular case. I have considered the requirement in the proviso and I find that its non- compliance may not prejudice the accused's interest where he voluntarily admits to the facts stated by the State. Whether the accused knows the nature and consequences of a guilty plea in a particular charge or not, the court is still duty bound by the proviso to inform the accused especially the consequences of a guilty plea.

In **Chua Ah Gan v Public Prosecutor [1958] MLJ Liv,** it was held that if the plea is one of guilty, the magistrate must make it clear that the accused understands the nature and consequences of the plea. In the Malaysian case of **Lee Weng Tuck and anor v PP** [1949] MLJ 98, the Supreme Court of Malaysia held that when an accused person pleads guilty, there must be some indication on the record to show that he actually knows not only the plea of guilty to the charge but also the consequences of his plea, including that there will be no trial and the maximum sentence may be imposed on him. I have also read the Order of my sister Judge Nyakaunda Kamanga in **Daniel Chikapenga v The Republic** Criminal Appeal No. 21 of 2016 in which she ordered a retrial.

Where a substantial part of the custodial sentence has been served, the court may discharge the accused, and where the

accused has just served a small part of imprisonment sentence, an order of retrial would not be out of place. In other cases, the court may maintain the conviction if no undue injustice is occasioned. It would not be improper to employ the aid of sections 3 and 5 of the CP&EC where the error or irregularity has not occasioned a failure of justice. The principle that substantial justice shall be done without undue regard for technicality at all times does not exempt this proviso at all.

In the circumstances of this case where the Appellant has just served about 6 months out of the 96 months sentence, I order a retrial within three months while the convict is still in custody.

Pronounced in Open Court this 20th September, 2016 at Chichiri, Blantyre

M L Kamwambe
JUDGE