IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL REVIEW CASE NO. 9 OF 2019

BETWEEN

FELIX CHIKAKUDA.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Hon Justice M L Kamwambe

Maele of counsel for the Appellant

Chisanga of counsel for the State

Amos...Court Clerk

JUDGMENT

Kamwambe J

The Appellant was convicted on the 22nd February, 2018 by the Salima First Grade Magistrate Court of the offence of possession of Indian Hemp without a licence contrary to regulation 4 (a) as read with section 19 of the Dangerous Drugs Act. He was convicted on his own plea of guilty of being in possession of 970.00 kgs of Indian hemp and was sentenced to 3 years imprisonment. The Applicant moves this court to review the propriety of the conviction and sentence.

The main issue for determination is whether the accused was in possession of the chamba or not. The view of counsel for the

Applicant is that accused did not qualify to be said that he was in possession. I will come to the main issue later.

Time and again I have lamented why lower courts do not follow the procedure laid down in section 251 (2) before the court enters a guilty plea. It clearly says that the court should convince itself that the accused understands the nature and consequences of a guilty plea. It reads as follows:

> *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 the truth of the charge against him.*

Following the above, the court must inquire from the accused if he knows that the offence is a serious one which may attract a long imprisonment sentence; and whether his guilty plea is given freely from his heart. If the answer is in the affirmative, then the court should ascertain that the key elements of the offence are outlined and admitted accordingly. In our present case, the issue of possession should have been specially exposed to the accused if he admits that he knew that what was in the bags or what was carried was chamba. If this were done, the application for review would not come in. However, this court has the powers to consider the totality of the lower court record so as to determine if the irregularities were fatal to the conviction and therefore unjust to keep the accused in custody. Counsel for the Applicant has cited three cases one being **Daniel Chikapenga v Republic Criminal Appeal No. of 2016** (citation not completed) in which convictions upon a plea of guilty were quashed and sentences set aside as the trial courts did not comply with the proviso to section 251 (2) of the Criminal Procedure and Evidence Code, and a retrial ordered before a court of competent jurisdiction. I did the same thing in **Isaac Sitole and Emmanuel Cosmas v R** Criminal Appeal No. 37 of 2016 (unreported).

The higher court ought to minutely examine the record to ensure that no injustice was occasioned by the irregularity or non-compliance. It should be admitted that at first very stern measures were taken which led to retrial. But not every such instance should lead to retrial. Alternative remedies are acquittal or confirmation of the conviction and sentence after analysing what transpired. In my view the cardinal principle to be followed is the *interest of justice* surrounding the circumstances of the case. Mind you, the provision does not prescribe the remedy for non-compliance, hence, it leaves it open for the due consideration by the court of competent jurisdiction. It would not be in the interest of justice that where all the elements of the offence are admitted without qualification and the accused has confirmed that the facts narrated by the prosecution are correct, to acquit or order a retrial just because the trial court did not comply with s251 (2) proviso thereto. One may ask if any injustice has been occasioned anyway. I am not condoning the practise of ignoring due compliance knowingly or unknowingly but am just saying that yes, there is non-compliance by the trial court, but let us go another inch or mile to see if it is necessary to acquit or order a retrial in the interest of justice.

The court ought to ask itself what injustice is occasioned to the Appellant, as convict then, due to the omission of explanation to or enquiry from him about the nature and consequences of a guilty plea. It should be stated how Appellant has been affected by the omission or how he was misled which otherwise could have made him plead not guilty. For instance, if he was not aware of the seriousness of the offence and that he would spend long time in custody he would have chosen to plead not guilty. Sometimes prosecutors or even defence counsel tend to entice the accused person to plead guilty promising that he will be sentenced to serve community service. The court affords him opportunity to see the whole picture about the offence and its maximum sentence so that accused gives an informed decision on how to plead. He must plead with a free heart without any undue influence from any quarter. On the other hand, he may have given a guilty plea freely regardless of the court's omission. Circumstances will show how

the case herein, the item is not in their physical custody the drug itself or its place of abode should be subject to the control of the accused.

There is no claim that he never knew that the contraband was Indian hemp. He knew he was conveying indian hemp. His liability cannot, in the circumstances, be absolved. He committed the offence of possessing Indian hemp without a licence together with the alleged owners because he joined the league. This is a situation where s22 of the Penal Code would apply as from Nkhotakota they now formed a common intention to prosecute a common purpose. When they were about to be arrested they all run away abandoning the vehicle, acknowledging their guilt.

I have also observed that when plea was being taken on page 26 of the record, the accused was represented by counsel Matumbi who would have taken care of the interests of the accused. The proviso is especially necessary where an accused person is not represented.

This appeal fails.

Pronounced in open court this 29th day of October, 2019 at Principal Registry, Chichiri, Blantyre.

M L Kamwambe

JUDGE