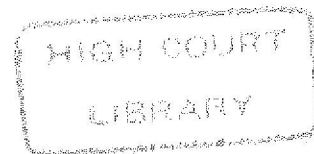


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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE No. NO. 897 OF 2020

BETWEEN:

THE REPUBLIC

AND

JOSEPH JULIUS

CORAM: THE HONOURABLE JUSTICE J. CHIRWA

Mr. Msume, Senior State Advocate for the State

Mr. Mpombedza and Mrs Chirwa, Senior Legal Advocate for
the accused.

R. Chanonga , Official Court Interpreter

Mrs Mthunzi, Court Reporter

JUDGMENT

1. Background:-

The Convict herein, **Joseph Julius**, was charged in the Second Grade Magistrate's Court at Mulanje with the offences of burglary contrary to Section 309 of the Penal Code and theft contrary to Section 278 of the Penal Code. He was convicted after a full trial and was sentenced to 48 months imprisonment with hard labour for the offence of burglary and to 12 months imprisonment with hard labour for the offence of theft. The sentences were ordered to run concurrently.

The reviewing Judge was of the view that the sentences should be enhanced

2. The positions of the parties hereto:-

It is the view of the State that the sentences imposed by the lower court were not excessive in the circumstances of the case.

It is the submission of the State that the sentence for the offence of theft depends on the value of the property stolen and that since the value of the stolen property in this case was K243,000.00, some items having being recovered, the sentence of 1year imprisonment with hard labour should thus be confirmed.

And as regards the offence of burglary, it is the submission of the State that since the Convict is a first offender, the offence was committed without any violence, though the Convict had pleaded not guilty, the sentence of 4 years imprisonment with hard labour should thus also be confirmed.

It is, on the other hand, also the position of the Defence that both sentences should be confirmed.

It is the submission of the Defence that since some of the stolen properties were recovered, the Convict is a first offender and the value of the property not recovered was very low, the sentences imposed on the Convict do not thus need to be enhanced. It is the further submission of the Defence that the sentences reflect the sentencing trends at that time.

3. Issue for Determination:-

The issue for determination by this Court is: whether the sentences imposed on the Convict herein should be enhanced as recommended by the reviewing Judge.

4. Determination:-

The question of sentencing is a matter within the discretion of the Court. It is however, trite that in the exercise of its discretion the Court ought to exercise its discretion judiciously and not capriciously.

It is a settled principle of law that when considering an appropriate sentence to be imposed on a convict a Court of law should ensure that the same befits the crime as well as the convict whilst at the same time being fair to the society and be blended with some measure of mercy see – **The Republic v. Shautti**, Confirmation Case number 175 of 1975 (unreported).

In the present case albeit the reviewing Judge did not give any reasons for his/her view for requiring the sentences herein to be enhanced, this Court had the occasion to peruse the record of the proceedings in the lower court and has observed that there are more aggravating factors against the Convict than the mitigating factors in his favour. The only available mitigating factors are that the Convict is a first offender, some of the stolen properties were recovered implying that there was no total loss to the complainant and finally that the value of the properties not recovered was minimal, that is to say, only **K243,000.00**. Against these mitigating factors, however, are the following aggravating factors; the Convict did not plead guilty to the charges but had to undergo a full trial; the Convict was the complainant's neighbour, there was thus a breach of trust; the offences were carefully planned by the Convict; some of the stolen properties were not recovered which means that the complainant had suffered some loss; the offences are very rampant in the District of Mulanje and finally, that the offence of burglary is a very

serious offence as evidenced by the maximum sentence of death or imprisonment for life reserved therefor –vide: Section 309(2) of the Penal Code.

Albeit it is the policy of the law that first offenders ought to be spared from custodial sentences, it is however, the case that where the offence is one of a serious nature and was committed with violence, a custodial sentence is called for, even where the offender is a first offender – see: **Kandula Sandramu v. Republic**, Criminal Appeal Number 31 of 2004 (unreported) cited in the State’s Skeleton Arguments. It is the view of this Court that although no violence was used in the commission of the within offence, the nature of the offence of burglary calls for the imposition of a custodial sentence.

This Court had the opportunity of perusing the case of **Republic v. Banda** [1993] 16 (1) M.L.R. 467, cited by the State in the submissions at the time of the hearing, where the court had this to say:

“An appeal court does not alter a sentence merely on the ground that it would have passed a different sentence itself. An appeal court only interferes if the sentence passed is manifestly excessive in all the circumstances of the case or if the sentence is wrong in principle”

This Court is, however, constrained to construe from the foregoing passage the conclusion that *“the reviewing court can only interfere with the sentence where it is excessive”* as contended by counsel for the State. It is the view of this Court that a reviewing judge is at liberty to interfere with the sentence even where, in the circumstances of the case, it is inadequate.

In the present case, regard being had to the nature of the offence and the extent of the aggravating factors available against the Convict, this Court would have been inclined to enhance the sentences imposed by the lower court but having regard the facts that the Convict is a first offender and still youthful and the main objective of punishment which is to help the convict reform into a better person for the society has reluctantly, decided to confirm both the sentences of 48 months imprisonment with hard labour for the offence of burglary and 12 months imprisonment with hard labour for the offence of theft. It is so ordered.

Dated this 25th day of February, 2021.


CHIRWA J.
JUDGE