IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CONFIRMATION CASE NO. 115 OF 2000

REPUBLIC

V

MTENDE MSUKWA

Being Criminal Case Number 25 of 2000 before the Second Grade Magistrates Court at Chitipa

CORAM: **HON. JUSTICE L P CHIKOPA**
Kachale/Mwangulube State Counsel for the State
Accused Absent/Unrepresented
R S D Kahonge (Mr.), Official Interpreter
Zimba Bondo (Mr.), Recording Officer

Chikopa, J.

ORDER IN CONFIRMATION

The convict was charged and convicted of Assault Occasioning Actual Bodily Harm contrary to section 254 Penal Code. He was sentenced to serve 24 months IHL. The matter was set down to consider procedural irregularities occasioned during trial to wit: failure to make a finding of case to answer in terms of section 254 of the Criminal Procedure and Evidence Code(CP&EC), hear mitigation before the State gave the convict's antecedents and lastly imposing a custodial sentence on a first offender without giving reasons therefor.

The State was in agreement with the Reviewing Judge. It thought section 254 abovementioned is a matter of law and not procedure. The trial court should have complied with it. Failure to comply with it made the trial itself

of doubtful legality. Further the State felt that failure to comply with section 254 cannot be cured by resorting to sections 3 and 5 of the CP&EC. The State's conclusion was that the conviction herein was on the above basis alone not tenable.
Secondly, while admitting that the trial court got the procedure wrong in allowing the convict to mitigate before the prosecution had given his antecedents the State thought that this was savable under section 5 above-mentioned. The reason being that the error notwithstanding the State did give the said antecedents anyway.
Regarding the small matter of not giving reasons for sending a first offender into custody the State thought again that this was not enough a reason to warrant the quashing of the sentence but maybe a review.

Speaking for ourselves we have no doubt whatsoever that section 254 is indeed a matter of law. Once the prosecution closed its case it behoved the Trial Court to make a finding on whether or not the accused has a case to answer. This, to agree with the State, is not a matter of choice for the trial court but one of law. Not doing it equals proceeding against the law. In other words proceeding illegally. And there is no way a court will countenance an illegal trial. Sections 3 and 5 of the CP&EC cannot save a trial that proceeded in blissful disregard of section 254. To do so would in our humble view be using the very law to perpetrate an illegality. We do therefore agree with the State that the conviction herein cannot stand. It was the fruit of an illegal trial. The effective remedy is to quash it.

It was also wrong for the trial court to have first heard plea in mitigation from the convict without first hearing the convict's antecedents. Considering however that the prosecutor did eventually give the said antecedents for what they were worth our view is that such an error would not on its own have the effect of necessitating the quashing of the conviction or setting aside of the sentence. The effective remedy would have been to still take the irregularly admitted antecedents into consideration in assessing whether or not the sentence meted out to the convict was appropriate or not in the circumstances. We are precluded from getting into that exercise herein because there being no conviction sentencing is really an exercise in futility.

Section 340 of the CP&EC says a first offender must not be sentenced to a custodial sentence unless the court is satisfied, for reasons which such court should record, that there is no other way of dealing with such offender. In the instant case the convict was a first offender. Section 340 abovementioned should have been followed to the letter. It was not. The effective remedy in our view is not to automatically set aside the sentence but to consider whether in the circumstances of the case the said offender should indeed have been given a custodial sentence. As we have said above the conviction herein is no more the same having been quashed. It would be futile to start considering whether the convict as a first offender should have been sent to prison. It suffices in our view that we have laid down the procedure to be followed in dealing with first offenders.

In conclusion we do agree with both the Reviewing Judge and the State that the conviction herein cannot stand. It is quashed and the sentence set aside

Dated this June 5th, 2006 at Mzuzu.

Justice L P Chikopa

L P Chikopa
Judge

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 278 OF 2001

THE REPUBLIC
Vs
BESTEN KAWOMBE

From the First Grade Magistrate's Court sitting at Mulanje in Criminal Case No. 7 of 2001.

CORAM: CHIMASULA PHIRI J.
Miss Kalaile – Senior State Advocate
Accused – present/unrepresented
C. K. Chisi - Official Interpreter.

ORDER

After a full trial, the accused person was convicted on a charge of rape contrary to Section 133 of the Penal code. He was sentenced to 4 years IHL. The reviewing judge was of the view that this sentence leans on the lower side of the scale and needs to be enhanced.

During the hearing the accused person was asked to show cause why the sentence should not be enhanced. All he stated is that life in prison is tough and inmates are congested. Counsel for the State submitted that the sentence needs to be enhanced despite the fact that the accused person looks very sick. The offence which the accused committed is very serious attracting the maximum

sentence of death or life imprisonment. She submitted that there is AIDS scourge. Lastly, the complainant was only 15 years at the time she was victimised by the accused person.

Upon hearing these submissions, I agreed that rape is a very serious offence. It causes trauma to the victim and the victim usually carries with her the stigma for life i.e. that she was once forced into sexual intercourse in the bush or wherever. Sometimes, if the victim is a school girl, she drops out of school. This offence of rape is becoming prevalent in our society. A lot of NGO's are urging Courts to pass stiff sentences on rapists. Of course the issue of AIDS scourge is there but the position of the law has not changed. In sexual offences, if the sentence is to be enhanced on account of transmission of disease, it must be factually proved that such a disease was passed on to the victim. Fear that it might have been passed or speculation is not enough.

In the present case it must be observed that the victim was gagged in the mouth threatened to be killed if she continued to resist as she was being pulled to the graveyard bushes. It was a terrible experience for her. When someone came to her rescue, the accused had already satisfied his sexual lust.

Following the guidelines on rape cases, I enhance the sentence from 4 years IHL to 6 years IHL with effect from 31st December, 2001 despite the fact that the accused appears to be very sick.

Blantyre on the 4th day of April, 2003.

Chimasula Phiri

JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1098 OF 2005

THE REPUBLIC

VS

JAMES MAKIYI

From the Second Grade Magistrate's Court Sitting at Chiradzulu; Being Criminal Case No. 39 of 2005

CORAM: **HON. JUSTICE A.C. CHIPETA**
Kapezi (Miss), Senior State Advocate, of Counsel for the State
Accused - Present and Unrepresented
Maida (Miss), Official Interpreter

ORDER IN CONFIRMATION

On his own admission of guilt James Makiyi, the Accused, was convicted of the Offence of Escape from lawful custody contrary to Section 115 as read with Section 34 of the Penal Code. This was in the Court of the Second Grade Magistrate at Chiradzulu where in the end he was sentenced to 12 months imprisonment with hard labour. The case was disposed of on 6th May, 2005.

On a combination of the fact that the Offence of Escape is a misdemeanour and that the Accused readily admitted his wrongdoing, the learned reviewing Judge felt that the sentence meted out by the lower Court was manifestly excessive. The matter was set down following this observation. The State duly shares in this view. Miss Kapezi, Senior State

Advocate, even cited two High Court decisions wherein for the Offence of Escape the High Court did not allow the sentences imposed to exceed 6 months imprisonment and 8 months imprisonment, respectively.

I observe that the case has come for confirmation after the Accused has already served four and half months out of the sentence that was imposed on him. In my view he has already been punished sufficiently for the crime he committed. The record shows that the Accused is a first offender who is aged 20 years only. His escape was quite temporary and uncomplicated. He was arrested, tried, and punished the very day he committed the offence, before he had ripped any benefits from the escape he had just managed. This is all in addition to the offence herein being a mere misdemeanour punishable by, at the most, two years imprisonment and the fact that the Accused saved the Court's time by readily pleading guilty to the offence.

The justice of the case, I apprehend, demands that I reduce the sentence which the Court below imposed on the Accused because it was indeed unduly excessive, which I now do. In lieu thereof I condemn the Accused to such sentence of imprisonment as will result in his immediate release. Accordingly, unless held for some other sentence or for some other lawful reason, I order that the Accused be released forthwith from custody.

Pronounced in open Court the 22nd day of September, 2005 at Blantyre.

A.C. Chipeta
JUDGE

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 1102 OF 2001

The Republic Vs Stance Chikopa and Ibrahim Kantande

From the First Grade Magistrate Court sitting at Dalton Road, Limbe in Criminal Case No. 296 of 2000

CORAM: CHIMASULA PHIRI J.
Miss Nayeja – Counsel for the State
Accused – Both present/unrepresented
C. K. Chisi - 0fficial Interpreter.

O R D E R

The two accused persons were convicted after a full trial with the offence of armed robbery contrary to Section 301 of the Penal Code. Stance Chikopa was sentenced to 5 years imprisonment with hard labour while Ibrahim Kantande was sentenced to 8 years imprisonment with hard labour. The reason for this disparity is that the second accused has a previous conviction of similar type. The matter has been set down to enhance sentences.

The reviewing judge expressed his sentiments that the sentence ought to be enhanced. The State is of the similar opinion.

The first accused pleaded for mercy. He stated that he has learnt a bitter lesson in prison and is infected with TB.

Similarly the second accused pleaded for mercy and said he will never commit any offence again.

Counsel for the State submitted that there are more aggravating factors than mitigating factors. For example, the offence is per se very serious and it has become prevalent. The accused persons had firearms and other dangerous weapons. Further, they acted in a group and that clearly demonstrates that is was an organised crime. Again both accused persons pleaded not guilty.

I agree with the views of the reviewing judge and counsel that the sentences which were passed on these accused persons are manifestly inadequate. The offence of armed robbery is very serious per se. It is increasingly becoming prevalent. The society has become an unpleasant place to live in because of such offences. One feels unsafe in his/her own house because of the so many break-ins at night or day. Again one feels unsafe on the streets because of the so many robbers and rapists. The situation needs to be contained. We must respect each other's human rights.

Therefore I enhance the sentence for the first accused from 5 years to 8 years imprisonment with hard labour. The second accused, who is a repeat offender, shall have his sentence enhanced from 8 years to 10 years imprisonment with hard labour. The sentences shall be operative from 15th November, 2000.

PRONOUNCED in open court this 12th day of June 2003 at the High Court in Blantyre.

Chimasula Phiri
JUDGE

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 1262 OF 2001

REPUBLIC Vs SAIDI IPHANI & ALFRED NELIYALA

From the First Grade Magistrate's court sitting at Soche, Blantyre in Criminal Case No. 504 of 2001

CORAM: CHIMASULA PHIRI J.

Miss Nayeja	-	Counsel for the State.
First accused	-	Present/unrepresented.
Second accused		Absent/unrepresented.
C. K. Chisi	-	Official Interpreter.

ORDER

After a full trial the two accused persons were found guilty on two counts of burglary and theft contrary to Sections 309 and 278 respectively of the Penal Code. Each one of them was sentenced to 36 months for the burglary and 6 months for the theft. The matter has been set down to enhance the sentence in respect of burglary.

The proven facts are that on 3rd March 2001 the two accused persons in company of unknown persons broke into a house in Nyambadwe in the City of Blantyre occupied by Miss Kumichongwe. She was in the house at the time but in a helpless state. The accused persons were armed and

freely picked items of their choices. She was traumatised. Few items have been recovered but are in damaged state.

For this threatening and agonising conduct, the reviewing judge was of the view that the sentence for burglary ought to be enhanced. The practice is that before a sentence is enhanced, an opportunity must be given to the prisoner to show cause why the sentence should not be increased. Only the 1st accused showed up. After his submissions the matter adjourned to enable the 2nd accused to come. Later, the Prison authorities at Chichiri informed the Court that the 2nd accused is either refusing to come to Court or he goes into hiding whenever the case is called for hearing. This clearly is a symptom of the problems which exist in the management of Chichiri Prison. I do not for a moment accept the notion that a prisoner should dictate the procedures for the Courts. The Court ordered that the prisoner be brought before it. The prisoner should not engage into any type of bargain on a court order. What happened in this matter exposes some inefficiency on the part of the prison authorities requiring an inquiry.

The sentence of 36 months imprisonment with hard labour for burglary is manifestly inadequate. The State is of the same view. Considering the abundant case authorities on the subject it is clear that the offence is serious per se.

The victim now lives in constant fear for her life. Existence of persons like these accused persons is a threat to peace. These offences have become prevalent. These accused persons pleaded not guilty when actually they knew that they had committed the offences. They are like human beings without conscious. They deserve to be punished

(retribution) and they must be kept out of society for a long time (deterrence) and hopefully they will come out of prison as reformed persons ready to assist in the development of the country.

Therefore, I enhance the sentence of 36 months imprisonment with hard labour for burglary to 60 months imprisonment with hard labour for each accused persons with effect from the date of their arrests.

PRONOUNCED in open court this 24th day of July 2003 at Blantyre.

Chimasula Phiri
JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1143 OF 2001

THE REPUBLIC

VERSUS

ISAAC PITASONI

From the Fourth Grade Magistrate's Court Sitting at Mitole/Chikwawa: Being Criminal Cause No. 107 of 2001

CORAM: THE HON. MR JUSTICE F.E. KAPANDA
The State, Absent
Accused, Absent
Mr S.N. Ngwata, Court Clerk

Date of review: 31st August 2001
Date of order: 31st August 2001

Kapanda, J

ORDER ON REVIEW

Introduction

This matter is before me so that I review the sentence that was imposed on the defendant by the trial magistrate.

The matter was referred to this court by the Chief Magistrate in terms of Section 361 of the Criminal Procedure and Evidence Code. The court has proceeded to review the case in the absence of both the State and the defendant because no adverse order will be made against the convict. Further, this court was not obliged to hear any of the parties during this review unless the court was minded to make an adverse order against the convict herein. This approach is in keeping with the stipulation in Section 362(2), as read with Section 363, of the Criminal Procedure and Evidence Code. Enough with the introductory remarks.

Facts of the case

The convict in this matter was charged with the offence of conduct likely to cause a breach of peace. This offence is provided for in Section 181 of the Malawi Penal Code. As a matter of fact, the State indicted the defendant under this section. The particulars of offence charged that the convict, on or about the 10th day of August 2001 at Chikwawa Police Station, conducted himself in a manner that was likely to cause a breach of peace to the Police Staff and others at the station.

The defendant pleaded guilty to the charge that was preferred against him. The facts of the case were read out to him. He accepted that the same were correct and the court convicted him accordingly. The court proceeded further to sentence him to an effective custodial term of imprisonment of five(5) months.

Consideration of the issue: Punishment

The punishment that was imposed on the convict was not only excessive but also erroneous and unlawful. This comes out clearly and unequivocally when one reads the provision that creates this offence. The pertinent stipulation in Section 181 of the said Penal Code. The terms of the said Section 181, under which the defendant was indicted, are as follows:-

> "Every person who in any public place conducts himself in manner likely to cause a breach of conduct shall be liable to a fine of K50.00 and to imprisonment for three months."

As mentioned earlier, the trial magistrate made an order that the defendant should lose his liberty for a period of five months. This order is illegal and has no basis in law. I say this because of the following: firstly, let me observe that the maximum custodial penalty

provided in the above quoted section was clearly disregarded. A person convicted of an offence under Section 181 of the Penal Code can only lose his liberty for a maximum period of three months and not five months. In point of fact, the convict ought to lose his liberty in exceptional circumstances due regard being had to the fact that the court might as well impose a penalty of payment of a fine. Secondly, it is important to note that it is trite law that where a penal provision states that a punishment of an offence "shall be the payment of a fine and imprisonment" for some specific period the court should not rush to impose the penalty of imprisonment. The court should consider the option of payment of fine first. If such option would not be adequate to punish the offender then the court would be allowed to consider the meting out of a custodial imprisonment. This is the case because it is settled law that if the words "fine and imprisonment" appear in such penal provisions the court should read the words disjunctively. Thus, the court should read the stipulation as saying "fine or imprisonment." The magistrate did not bear this in mind at the time he was considering the penalty to be imposed on the defendant. The record of the proceedings from the court below does not indicate that there was no other way of dealing with the convict herein apart from imprisoning him. It is not even the case on record that the payment of a fine would not have sufficiently punished the defendant. This was wrong on the part of the court in quo.

Thirdly, the sentence of five months imposed on the defendant, which was unlawful, should have entitled him to qualify for an order of community service. This option should have been ignored if the defendant had refused to perform community service.

Lastly, there is nothing on record to show that the magistrate considered the provisions of Section 339 as read with Section 340 of the Criminal Procedure and Evidence Code. If the court had resort to these provisions it could have realised that it was wrong to send the convict to prison. Indeed, in view of the fact that the defendant is a first offender who had pleaded guilty to the charge preferred against him, and considering that the maximum penalty for this offence is a term of imprisonment of less than a year, the court ought to have seriously considered other forms of punishment other than the custodial imprisonment that was meted out on the convict.

This court has already formed the view that the sentence herein is erroneous and unlawful. It must, therefore, be remedied. The court will invoke the provisions of Section 362(1), as read with Section 353(2)(a)(iii), of the Criminal Procedure and Evidence Code. In the premises, I alter the sentence that was imposed by the court below and substitute it with a sentence that would result in the immediate release of the prisoner. It is so ordered.

Made in Chambers this 31st day of August 2001, at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NUMBER 4 OF 2002

The Republic

versus

Paulo Mofolo

From the First Grade Magistrate sitting at Mulanje being Criminal Case No. 37 of 2001

Coram: D F Mwaungulu, Judge
Kalaile, State Advocate for the State
Defendant, present, unrepresented
Kabvina, Recording Officer

Mwaungulu, J

Judgment

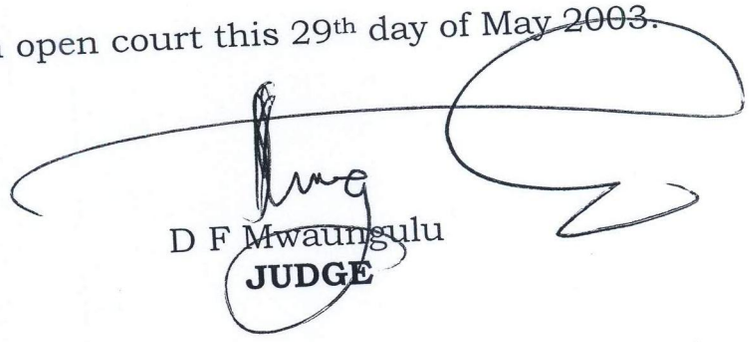
The judge who reviewed this matter set it down to consider the sentence. The lower court sentenced the defendants, Paulo Mofolo and Peterson Mbawela, to two years imprisonment on each of the two counts of theft that the lower court convicted the defendants for. The judge thinks, correctly in my view, the sentences are manifestly excessive. The sentence bases on the finding of the lower court that the defendants on two different occasions stole television aerials. They sold the aerials to third parties.

Even on the view that the lower court took when passing the sentences on this matter, the sentence of two years imprisonment is manifestly excessive. First the lower court thought that theft is a very serious offence. Of course theft is a felony. Sentencing courts should heed this court's observations on simple theft in *Republic v Kamuna*, conf. Cas. No 669 of 2002, unreported.

A sentencing court, when arriving at an appropriate particular sentence in a particular case must consider the nature of the offence that come before it, courts of co-ordinate or superior jurisdictions and the sentences it or courts of coordinate or superior courts impose. As regards the former, apart from the nature of the property stolen, and this fact is not important here, the lower court and courts of coordinate and superior jurisdictions have before dealt with properties, motor vehicles, to name a few, valued many times over the values the lower court dealt with. Even for commonplace goods, the lower court and coordinate and superior courts, have dealt with more quantities and higher value of property. Two years imprisonment for property valued at K2,500 is manifestly excessive, given the values and quantities court handle daily. This was not even the intermediate of the instances of theft that courts handle.

Secondly, the lower court justified the sentence based on the commonplaceness of the offence. Commonplaceness of the offence is a factor courts regard in passing sentence. A sentencing court must, however, avoid two subtle dangers in the proposition. The court might in such circumstances be pursuing deterence. A court must, particularly for youthful or first offenders as scapegoats for general deterrence. A court must, avoid using youthful offenders or first offenders aim for special deterrence, a sentence that prevents the particular offender from further crime. The sentence must therefore fit the crime and the offender. The second danger is arriving at a sentence very close to the maximum with a view to pass a sentence that will affect the ubiquilousnoss of the offence. The correct way to address inadequate maximum sentences is the legislature, which prescribes the maximum sentences. The sentencing court's duty is to consider the range of the offence and assign an appropriate sentence within the maximum prescribed by the legislature. The present case is not the worst instance of the offence and obviously the sentence the lower court assigned overlooked sentencing trends and the maximum prescribed for the offence. It is unfortunate that the matter was not set down sooner. I, reluctantly, confirm the sentence.

Made in open court this 29th day of May 2003.



D F Mwaungulu
JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 133 OF 2002

THE REPUBLIC

VERSUS

MIKOLASI DZINJALAMALA

From the Second Grade Magistrate's Court at Bangula
Criminal Case No. 14 of 2002

CORAM: MWAUNGULU, J
Kalaile, State Advocate, for the State
Accused, present and unrepresented
Kamanga, Official Interpreter

Mwaungulu, J

JUDGMENT

The reviewing judge set this matter down to consider reducing the sentence of three year imprisonment the Bangula Second Grade Magistrate imposed on the defendant for burglary. The reviewing judge thought the six months imprisonment for theft was appropriate. On reading the case, the Second Grade Magistrate Court came to the correct sentence for burglary.

On the date of the crime, Mr Bandazi was not in the house. Mrs Bandazi was with her children. She woke up just in time when the defendant and his group were breaking and entering the house. They took the radio from the house. Mrs Bandazi shouted for help. The defendants were not arrested that day. They several days later returned the radio to the house. The defendant was arrested. He admitted at the police and before the lower court to committing the burglary. There is little information on how the extent of the trespass to the house. The radio stolen is not worthy much. The reviewing judge suggests three reasons, two of which are relevant,

for the reduction of the sentence the lower court imposed for burglary. The first reason is that the defendant was committing the offence for the first time. The second reason is that the defendant pleaded guilty to the charge. The lower court in fact considered these two aspects in passing the sentence.

Of course the lower court never mentioned Republic v Chizumila, Conf. Case No. 316 of 1994. There is no doubt however that the lower court had that case in mind. In that case this Court thought that for burglary or housebreaking six years imprisonment should be the starting point. The sentencing court would then scale upwards or downwards depending on the aggravating and mitigating factors around the crime, the victim and the offender. As this Court stresses from time to time, the starting point relates to the simplest instance of the crime from the standpoint of the *actus reus*, the act or omission constituting the crime, and the *mens rea,* the mental condition, if it be necessary for the commission of the crime necessary for the commission of the offence, if it be necessary for the crime for the crime.

Burglary or house breaking involves a trespass to a dwelling house. The circumstances that aggravate or extenuate the trespass, such as wanton destruction to premises on entry to the premises, are the sort of things that the court would look at when deciding whether to enhance or reduce the sentence. In this particular case as we have noted there is very little information on the actual trespass. The court will also consider the mental complexion of the crime. The fact that more than one person was involved in the planning and execution of the crime, aggravates the mental complexion of the crime. The court is likely to increase the sentence on that account.

In this particular case the defendant worked in concert with others. The court will also consider whether there was disturbance to the occupants at the time of the burglary or the housebreaking. To that question the degree of terror or anxiety the victims experienced will influence the sentence. There was disturbance. The wife was not put to much fear or terror. Mrs. Bandazi was all alone, without her husband, with young children in the house. This court has always proceeded on the basis that it does not interfere

with the sentence of the lower court simply because if it was the sentencing court it would have passed different sentence. This court proceeds on that sentencing is a in the discretion of the trial court. This Court only intervenes if, on the facts, the sentence is manifestly excessive or inadequate as to involve an error of principle or is in principle erroneous. The sentence that the lower court passed is the one that this court approves on the so many mitigating factors existing in this matter. Apart from the disturbance to the victims, this was a simple burglary notwithstanding that one or more people participated.

The other reason raised by the reviewing judge for reducing sentence of a burglary was that the property stolen was of little value. That consideration in my judgment is not very crucial when sentencing for burglary or housebreaking. The legislature, in creating the offences of burglary and housebreaking, wanted to proscribe trespass on dwelling house with intent to commit a felony. The crime is complete when there is trespass and entry as the Penal Code defines with intent to commit a felony irrespective of whether the crime is committed or not. It may be necessary in some cases when sentencing for burglary or housebreaking to consider the fact whether the felony was committed. That is unnecessary where, as happened here, the offence committed in the course of the burglary or housebreaking, is subject of a separate count. There is prospect of double punishment. In the circumstances where that the offence was committed is a necessary consideration, the sentencing court must avoid leaving the impression that for an offence complete according to the law, a man should escape the appropriate punishment simply because he did not commit the offence he intended to. The legislature, as it did with breaking into a building and committing a felony therein, never created a compound crime. It proscribed breaking and entering into a dwelling house with intent to commit a crime. It matters less that the offence was not committed.

I therefore confirm the sentence the lower court passed for burglary.

Made in Open Court this 16th Day of June 2002

D F Mwaungulu
JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO.311 OF 2002

THE REPUBLIC

VERSUS

LEMSON NSEULA
PHONEX SHANE

From the Second Grade Magistrate Court sitting at Mangunda being Criminal case number 95 of 2001

CORAM: MWAUNGULU (JUDGE)
Kalaile, State Advocate for the State
Defendant, present, unrepresented
Nthole, Official Interpreter

Mwaungulu, J.

The Judge who reviewed this matter set the matter down to consider the sentence. The Second Grade Magistrate convicted the defendants, Lemson Nseula and Phoenix Shane, of burglary and theft. Burglary and theft are offences under sections 309 and 278, respectively, of the Penal Code. The court below sentenced the defendants, again respectively, to four and two year imprisonment. The lower court ordered the sentences to run consecutively. It is this order, not the severity of the sentence, that the reviewing judge queries.

The Penal Code provides that sentences for distinct offences should, unless the court orders them to run concurrently, run consecutively. The practice, crystallised into law, is to order the sentences for offences, which are part of one transaction or of a similar character committed in a very short time to run concurrently.

The defendants on 6th April 2001 broke and entered the complainant's house and stole property. The offences were part of one transaction. In such cases this Court almost invariably orders sentences to run concurrently. This does not suggest that the court may not order

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 395 OF 2002

THE REPUBLIC

VS

SAULO BASMAN MAMBILINYA

From the Second Grade Magistrates' Court
Sitting at Thambani, Mwanza: Criminal Case No. 6 of 2002

CORAM: HON. JUSTICE A.C. CHIPETA
Phiri (Mrs), Principal State Advocate, of Counsel for the State
Accused - Present and unrepresented
Ngwale, Official Interpreter
Katemana (Mrs), Court Reporter

ORDER IN CONFIRMATION

The Accused, Saulo Basman Kambilinyu, was in the Court below given two equal concurrent sentences of 36 months imprisonment with hard labour duration each. This was for the offences of Burglary contrary to Section 309(a) of the Penal Code and Theft contrary to section 278 of the same Code. Having pleaded Not Guilty the State called two witnesses to buttress its allegation and the Accused was the sole witness for his side of the case.

The case has been set down because of the concerns expressed by the learned Reviewing Judge who first looked at the record of the lower Court. The transition of the case from the prosecution side to the defence side, the content of the judgment delivered, and the sentence on the Second Count all exercised the mind of the learned Judge. The State shares in these concerns. It however argues that the deficiencies spotted in the procedure adopted at "case to answer" stage and in the judgment are errors that can be cured by application of the principle of substantial justice without payment of undue regard to technicality. It is argued that the errors the lower Court committed in this regard did not occasion a failure of justice in the case. As for the sentence of 3 years imprisonment with hard labour imposed for Theft when an equivalent period was imposed for the Burglary Count, the State too feels that this was manifestly excessive and that it is due for reduction in this Court.

It is trite in the spirit of Section 254(1) of the Criminal Procedure and Evidence Code that in the conduct of a criminal trial a Court cannot just move from prosecution case to defence case without a pause like a vehicle without brakes. The presumption applicable in these cases is one that the Accused is innocent until proved guilty. It is thus not automatic that the moment the State close the presentation of their case the Accused must give evidence. A Court should only find it necessary to call an Accused person on his or her defence under Section 254(1) aforesaid, if, and only if, it feels that a case has been made out against him/her sufficiently to require him to make a defence. See: Day vs R [1923-60]1 ALR Mal. 625.

The test to be applied at this stage of the case is quite a delicate one and a Court cannot do otherwise than make deliberate efforts to apply it correctly to the evidence thus far adduced before taking a decision on whether or not it is necessary to cross over to the defence side of the case. It is to be borne in mind that if no prima facie case has been made out against the accused the only option left open is for the

Court to acquit him even before calling him on his defence. See: Rep vs Dzaipa [1975-77]8 MLR 307 and Namonde vs Rep [1993]16(2) MLR 657 among other cases.

It is also worth recalling to mind that under Section 42(2)(f)(iii) of the Constitution the Accused enjoys the right to silence. Thus even if an Accused person is, in the Court's view, legally due to be called upon to defend himself/herself, it does not follow that entry on such defence is compulsory. I believe that the right to silence being constitutional it is mandatory for the Court to alert the Accused in clear terms of its existence so that he/she can consciously decide whether or not to exercise it and whether or not to call any witnesses in defence.

In m y reading of the lower Court's record I have seen no indication whether the lower Court took any moment to reflect on and to decide on the status of the case up to the close of the prosecution case, as per the requirements of Section 254(1) of the Criminal Procedure and Evidence Code. I equally see no hint whether, the Court made any attempt to educate the Accused of his constitutional right to silence for him to decide whether or not to enter on his defence. The record simply shows that when the State closed its case on 20th August, 2002 the Court just announced its adjournment to the following day for the Accused to give his defence. The absence of a ruling in this case on the question whether or not the State had, through the evidence it had adduced, either raised or failed to raise a case sufficiently to require the accused to make a defence is, in my view, a grave error.

Turning to the judgment that was delivered I again find myself in agreement with the learned Reviewing Judge as regards the style in which it was framed. It is to be noted that the law has been quite generous in providing guidelines as to the pattern judgments of Courts ought to take. Section 259(1) of the Criminal Procedure and Evidence Code urges Courts, once they have heard both prosecution and defence evidence to deliver judgment in the manner provided by Sections 139

and 140 of the same Code, either acquitting or convicting the Accused. Pertinent for our purposes in the cited provisions is that apart from the requirement that judgment be pronounced in open Court it should be in writing and must, inter alia, contain the point or points for determination, the decision thereon, as well as the reasons for the decision.

The judgment the lower Court pronounced in this case while in the end concluding with a conviction verdict does not quite comply with the pattern a judgment ought to follow. After indication that the Accused denied the charge the judgment proceeds into a summary of the evidence of prosecution witnesses and then into the evidence of the Accused. The only appendage attached to this summary is "According to the evidence adduced by the prosecution in the issue Court finds the Defendant guilty on both accounts." There is no reference to burden and standard of proof in a criminal case, let alone an assessment of whether the Prosecution in this case at all achieved this standard. There is even no assessment of the evidence to indicate whether the lower Court made any findings of fact and as to why it preferred the prosecution evidence. The way the entire judgment was couched it is not possible to tell why the learned Magistrate ended up with the conclusion he reached.

How a Court of law ends up finding a person guilty of an offence is not supposed to be a mystery. A judgment ought to clearly and elaborately explain how the Court lands such conclusion and this is what lies behind the expression not only must justice be done, but it must be seen to be done. The judgment herein falls far short of the requirements of Section 140 of the Criminal Procedure and Evidence Code. It does not even indicate how the lower Court viewed defence testimony. It certainly does leave me in doubt whether the conclusion the Court reached is the one it would have reached had it followed all the requisite guidelines. I think that this shortfall in the presentation of the judgment, in its own right, also amounts to an error of grave magnitude.

Weighing the two errors of the lower Court discussed above, I do not think that they are as light as the State would have me believe. To skip a mandatory assessment that can either lead to acquittal or to entry on defence at the close of the prosecution case and even to skip warning an accused of his constitutionally guaranteed right *vis-s-vis* giving or withholding evidence in defence cannot really be said to be a minor error, omission, or irregularity with no effect on the justice administered at the end of the case. So also I find it difficult to accept that pronouncing a judgment that has no reference to the onus and standard of proof and one that does not assess the evidence available, but one that just accepts prosecution testimony as gospel truth without supporting reasons is such a minor error, omission, or irregularity and that it did not in this case occasion a failure of justice.

I must say that the trial of the Accused was ill-handled in the Court below and that the conviction on the counts of Burglary and Theft herein cannot be sustained on account of the many procedural errors the lower Court committed in the course of dealing with the case. I was minded to say something on the sentence on the second count which also concerned the learned reviewing judge. If I were to confirm the convictions I was likely to reduce the sentence for theft as theft is an offence of far less gravity than Burglary is and it does not make sense for the two offences to carry the same level of sentence. As, however, my observation is that there is something amiss as regards the convictions I need not say more on sentence.

All in all, as I have found above, it is very unsafe to endorse the convictions the lower Court entered against the Accused herein. I now quash both convictions and direct that the Accused be retried on the charges herein before the First Grade Magistrate at Mwanza or, if none is available, before at least a different magistrate, with due attention being paid to the proper trial procedure as provided under the Criminal Procedure and Evidence Code. Should the Accused still end up convicted, the sentence to be passed on him should take into account the imprisonment he has so far already suffered

since 21st August, 2002. Retrial must start within 21 days hereof, failing which the Accused is to be set free from this case without further conditions.

Pronounced in open Court the 19th day of July, 2004 at Blantyre.

A.C. Chiptea
JUDGE

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case number 431 of 2002

REPUBLIC

Versus

MISSI MANYOZO

From the First Grade Magistrate Court sitting at Soche Case number 20 of 2003

CORAM: **DF MWAUNGULU (JUDGE)**
Chimwaza, Deputy Chief State Advocate, for the State
Defendant, present, unrepresented
Kamanga, court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter set it down to consider the sentence the lower court imposed on the defendant. The Soche First Grade Magistrate Court convicted the defendant, Missi Manyozo, of theft. Theft is an offence under section 278 of the Penal Code. The lower court sentenced the defendant to three years imprisonment with hard labour. The reviewing judge, correctly in my judgment, thought the sentence manifestly excessive. In my judgment, the sentence errs on the side of principle too.

The facts are not complex and, to the extent they resolve matters the judge raises, are as follows. The defendant stole a cell phone worth K7, 000 from the person of the complainant. He pleaded guilty in the lower court. The lower court approached the matter from the perspective that theft is a very serious offence. Of the crimes in our Penal Code, the law indicating offences involving high moral turpitude, simple theft is not even in the top

or middle bracket of serious crimes under our criminal law. On the contrary, among the felonies, a classification still persisting in our criminal law, theft is the lowest of offences, attracting a maximum sentence, as the lower court observed, of five years imprisonment. The sentence may however be higher where the offence occurred in aggravating circumstances. Although, the defendant stole from the person of the complainant, the prosecution did not charge the defendant of the aggravated offence. Circumstances justifying an aggravated offence should influence the sentence of the simple offence provided, of course, the sentencing court minds the risk of sentencing the defendant for which the prosecutor has not charged the defendant. Even with that the sentence passed here is manifestly excessive.

The lower court also approached the matter from that the defendant had a previous conviction. The lower court thought the defendant was not entitled to leniency at all. The lower court should not have approached the matter that way. First, the offence was quite different from the one the lower court convicted the defendant for this time around. Generally, and the case of *R v Chang'ono* (1964-66) ALR (Mal) 415, suggests it, it is previous convictions the similar offence charged that the court should consider. This Court in *Republic V Kamuna,* Conf.Cas. No. 669 of 2002, unreported, followed *R v Chang'ono.* Moreover, the defendant had only one previous conviction. In *Republic v Zwangeti* Conf. Cas. No. 179 of 2002, unreported, this Court said:

> "Of course, the defendant had a relevant previous conviction. It was only one. The defendant, in my judgment, had not lost his whole right to leniency."

Thirdly, previous convictions are not a reason for passing a sentence higher than one justified by the nature and circumstances of the offence, the circumstances of the offender and the victim and the public interest. There are decisions of this Court: see *Bwanali v R* (1964-66)3 ALR (Mal) 329. There is also a decision of the Supreme Court: *Maikolo v R* (1964-66) ALR (Mal) 584. The sentencing court must arrive at the right sentence deserved by the crime. After that, previous convictions are reasons for maintaining the right sentence (*R v White* (1923-61) 1 ALR (Mal) 401; and *Bwanali v R.* Moreover the lower court just accepted the prosecutor's

assertion that the offence was unrelated to the one the defendant stood charged for. The lower court should have called for its record to ascertain what the offence was and whether it was not similar to the offence the defendant answered in the lower court. There is another reason why the lower court should have called the record: the court had to be sure the offence and therefore the conviction was previous. The offence the defendant answered in the lower court this time around could have been committed earlier or at the same time as the present offence only that the latter was prosecuted later. More importantly, if the offences were committed around the same time and could have been charged together, the sentences could have run concurrently. A lower court, must, therefore, in the circumstances obtaining here call for the record from the court that first convicted the defendant.

The offence, theft of property worth K7, 000, even factoring in the victim's station in life, is manifestly excessive. Moreover, the defendant is young, pleaded guilty to the offence and, given the difficulties just considered, is offending for the first time. It is wholly inappropriate for sentencing courts to pass long and heavy sentences for young offenders committing otherwise not serious offences. For first and youthful offenders, a short and a quick prison sentence, if deserved, may just be as effective. Sentencing courts must take pleas of guilty seriously. Apart from saving courts resources, time and space, such pleas redirect the court's effort to more deserving cases. Moreover, such pleas are the surest proof that avoids miscarriages of justice possible through the trial process. These matters were stressed in *Kamuna V Republic*. Lower courts should, when dealing with first offenders follow the suggestions this Court made in *Bobat v Republic* Criminal Appeal case number 29 of 1994, unreported. This is a sure way to arrive at the right sentence. In my judgment a sentence lower than six months was appropriate. The lower court should have ordered community service or suspended the sentence. I pass a sentence as results in the defendant's immediate release.

Made in open court this 24th Day of July 2003.

D F Mwaungulu
JUDGE