



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL REVIEW CASE NO. 8 OF 2017**

THE REPUBLIC

V

DUNCAN BAULA AND ANOTHER

CORAM: Hon. Justice Kamwambe

Chisanga and Francisco of counsel for the State

Maele of counsel for the convict

Amos ...Official Interpreter

JUDGMENT

Kamwambe J

This matter came for review initiated by counsel for the convict under sections 360 and 361 of the Criminal Procedure and Evidence Code on the grounds that:

- 1) The lower court erred in law in convicting the convict on a plea of guilty without having regard to the proviso to section 251 of the Criminal Procedure and Evidence Code.
- 2) The offence of 8 years imprisonment for the offence of breaking into a building and committing a felony therein is manifestly excessive.

The proviso reads as follows:

"Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and the consequences of his plea and intends to admit without qualification the truth of the charge against him."

Because of the number of reviews regarding courts ignoring the application of this proviso, it has become imperative to warn courts to be wary and vigilant when dealing with a guilty plea. In some, if not many instances, even the High Court has ignored application of the proviso. We should rise to the standard imposed by the law. I am fascinated by the reply of the State which goes like this:

"In the present case the trial court entered a plea of guilty without having regard to the proviso. However, at page 10 of the lower court record, the accused persons are stating that they have understood the facts and that they are correct. This means that even though the court did not comply with the proviso to section 251 of the Criminal Procedure and Evidence Code, the accused persons admitted to the correctness of the facts and this entails that at this point the accused persons must have understood the nature and consequences of their guilty pleas. The same entails that even had the court warned the accused persons on the consequences of their pleas, i.e. conviction, the outcome would be the same, (conviction)."

I do not agree with the reasoning of the State. The admission of the facts to be true and correct does not in any way entail that the accused persons have understood the nature and consequences of their guilty plea. At this stage they have just confirmed that the facts are as narrated by the State, and the facts do not speak about the nature and consequences of the guilty plea at all. It would therefore be wrong to assume that an admission

is tantamount to understanding the consequences of a guilty plea, especially by unrepresented and ordinary accused persons.

You cannot substitute the requirement to explain the nature and consequences of a guilty plea with an admission of guilt because these are sequential in that you start with obtaining a guilty plea, after which, the court proceeds to doing its task of ascertaining that the accused persons have understood the nature and consequences of their guilty plea. As such, they are not alternatives. One cannot stand in the place of another. This makes it imperative that the procedure under the proviso cannot be dispensed with and should not be taken lightly as it is an important procedure the breach of which would have dire consequences.

Let me take this opportunity to explain again that the proviso has an important purpose of ensuring that due justice is accorded to the accused especially those unrepresented. It is not uncommon to hear a convict complaining that he admitted guilty because the police prosecutor promised him freedom by the courts, only to be surprised with a custodial sentence. The practice under the proviso ensures that the constitutional requirement of a fair trial is fulfilled. It is necessary that the accused person makes a final unequivocal plea of guilty after a clear understanding of what may befall him and the nature of the offence by clearly explaining the seriousness of the offence and the gravity of the offence. It would not be unwise though at this stage to explain to the accused person the effect of guilty plea.

In the case of **Isaac Sitole and Immanuel Cosmas v Rep. Criminal Appeal No. 37 of 2016 (unreported)** I quashed the convictions for robbery on the grounds that the trial court did not have regard of the proviso to section 251 of the Criminal Procedure and Evidence Code before entering a plea of guilty, and I ordered a retrial because the accused persons had not served a substantial part of the sentence. Likewise, on 29th June, 2017 I ordered a retrial of this case to commence within two months.

On the issue of sentence I would wish to agree with the convict that it is manifestly on the higher side in view especially of a guilty plea and recovery of the stolen property. Since the matter went for retrial, the magistrate seized of the matter should exercise his/her discretion on the quantum of sentence.

Pronounced in Open Court this 19th day of January, 2018 at Chichiri, Blantyre.


M L Kamwambe
JUDGE