Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CRIMINAL APPEAL CAUSE NO. 6 OF 2016

(BEING CRIMINAL APPEAL CASE NO. 213 OF 2013
HIGH COURT LILONGWE REGISTRY)

BETWEEN:

ISAAC DALIKENI AND OTHERS ..... APPELLANTS

AND

THE REPUBLIC .....RESPONDENT

CORAM : THE HON. A.K.C. NYIRENDA SC, CHIEF JUSTICE
THE HON. E.B. TWEA SC, JUSTICE OF APPEAL
THE HON. A.D. KAMANGA SC, JUSTICE OF APPEAL

E. Chibwana – Counsel for the Appellant

J. Matonga – Counsel for the Respondent

Absent – Judicial Research Officer

Mrs Chimtande – Recording Officer

JUDGMENT

Nyirenda SC, CJ

This is a unanimous decision of this Court and will be read by Justice Twea SC, My Lord.

Twea SC, JA

The six appellants: Messrs Isaac Moyo, Innocent Magoli, Luciano Nyanga, Isaac Dalikeni, Assan Banda and Jack Loti appeared before the Chief Resident Magistrate Court on a charges of, among others, theft by a person employed in the public service, with four others who have elected not to appeal. They were all convicted and sentenced to 14 years imprisonment, except Etta Mtalimanja – Banda who was with child and her sentence was suspended on account of the best interests of the child.

They appealed against the conviction and sentence to the High Court. The High Court confirmed both the conviction and sentence. They now appeal to this Court.

The appellants filed diver's grounds of appeal, mainly against sentence. However, the arguments advanced, at times, gave sway to appeal against conviction. We wish to put it on record that the appeal is before this Court from the criminal appellate jurisdiction on the Court below, section 11 (2) of the Supreme Court of Appeal Act therefore applies. It states:

> *"(2) Any person aggrieved by a decision of the High Court in its criminal appellate jurisdiction or in exercise of the powers of review conferred upon the High Court by Part XIII of the Criminal Procedure and Evidence Code may appeal to the Court on a matter of law but such decision shall be final as to matters of fact and as to severity of sentence."*

Cases are abound that support this position at law: **Chipembere v Regina 1961 – 63 ALR mal. 63**. This is an old case that stated the law

then and supports that position now. Further, it is trite that irregularity in the form of judgment, as long as it does not occasion a failure of justice, is not fatal: see **Saimon v Republic 1971 – 72 ALR Mal. 211.** Therefore submissions on principles and purpose of sentence, sentencing of first offenders, conviction or severity of the sentence, in the absence of any arguments on misconception of the law are not relevant in this appeal.

Having disposed of the above issues we will now consider the appeal in terms of submission on "**lex mitior**" ("the milder law") which all the appellants raised. The doctrine of "**lex mitior**" is the converse of "ex post facto" It mandates for criminal defendants, whose cases have not been finalised, to enjoy retroactive benefits of statutes that either decriminalise conduct all together or reduce punishment for it[1]. The appellants raised several issues on this doctrine in their submission.

The gist of the argument by the appellants was that they were found guilty and convicted on August, 1, 2013. They were sentenced to 14 years imprisonment on September, 13, 2013. They contended that between the time of conviction and sentence, section 283 of the Penal Code was amended, more particularly, in respect of the sentencing regime. Their argument, and therefore their case, was based on the change, or amendment to Section 283 (4) and (5) of the Penal Code. For the purposes of this case, we reproduce the provision before and after amendment. The pre-amendment section 283 (4) read as follows:-

> *"(4) Notwithstanding section 27 (2) and (3), where a person employed in the public service is convicted of theft under subsection (1), he shall be sentenced to imprisonment for a period not less than that set out in the following table opposite the amount or value which corresponds to the amount or value of the money or other property stolen by him less the amount of any money repaid to the employer by the convicted person by*

[1] Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert – Peter K Western, The Social Science Research Network Electronic Paper Collection: Http://SSRN.com/abstract =2588143, paper No.445, March 2015.

way of restitution or the value of other property in respect of which restitution has been made by him to the employer.

Amount or value	**Period of imprisonment**
Not exceeding K2,000.....	*12 months*
Exceeding K2,000.00 but	
Not exceeding K5,000	*2 years*
Exceeding K5,000 but	
Not exceeding K8,000.	*3 years*
Exceeding K8,000 but	
Not exceeding K12,000.	*4 years*
Exceeding K12,000 but	
Not exceeding K20,000.	*5 years*
Exceeding K20,000 but	
Not exceeding K40,000. .....,,.....	*7 years*
Exceeding K40,000 but	
Not exceeding K50,000.	*8 years*
Exceeding K50,000 but	
Not exceeding K80,000.	*10 years*
Exceeding K80,000.	*14 years*

Provided however that the provision of this subsection shall not apply in any case where either-

(a) the person convicted has by way of restitution repaid in full the amount of any money proved to have been stolen by him

or has made full restitution in respect of any other property stolen by him, or both, as the case may be,

(b) the amount stolen or value of the money or other property stolen did not exceed K500.

(5) The maximum punishment under this section shall be imprisonment for life"

The amended provision, section 283 (4) reads as follows;-

"(4) The punishment for an offence under this section shall be an imprisonment for a minimum term of two years and a maximum of imprisonment for life"

It was the submission of the appellants that the amended version, section 283 (4), provides a milder regime of punishment than the original one. It was further urged that in terms of section 42 (2) (f) (vi) of the Constitution the appellants are entitled to leniency. The full text of this Constitutional provision reads as follows:-

"(2) *Every person arrested for or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -*

...

(f) as an accused person, to a fair trial, which shall include the right –

...

(vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed"

It is clear from this Constitutional provision that our Constitution prohibits retroactive criminalization of any act or mission or passing of a

more severe punishment for an act or omission than what was lawful at the time the act was committed or omission done.

The appellants conceded that they did not have direct authority on the application of the doctrine. However, their argument was that since the Constitution was silent on this point, it was amenable to the interpretation that it does not prohibit the application of the doctrine of "**lex mitior**." They referred us to Article 15 (1) of the International Convenant on Civil and Political Rights (1CCPR). This reads:-

> *"Article 15*
> *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby"*

The appellants also refered us to decisions of European Court of Human Rights and some local authorities.

In our view Article 15 (1) of the ICCPR is consistent with section 42(2) (f) (vi) of our Constitution save for the last part that mandates direct application of a subsequent lenient statutory penalty. We acknowledge that the appellants did not fully research on issues that they raised. They did not even explore the diverse interpretations of the doctrine of "**lex mitior**" in view provisions of our Constitution, the ICCPR and the decision of European Court of Human Rights. It is important however, to note that there is no direct authority on the applicability of the doctrine of "**lex mitior**" in our jurisdiction. Further, we take note that not all nations of the United Nations have embraced this doctrine. The applicability of this doctrine under our Constitution, which came into effect after the ICCPR, therefore requires more research than what was

presented before this Court in this appeal. We therefore, have to revert to the application of our Constitution and statutory laws.

What we are called upon is to decide whether the trial court and the Court below erred in the application of the law and whether section 283 (4), as amended, is more favourable so as to to trigger the application of the doctrine of "**lex mitior**".

The State, in response, strongly opposed the position espoused by the appellants and argued that at common law, the trial court and the Court below applied the law correctly.

We have considered the arguments raised by both parties. The starting point, in our view, should be our General Interpretation Act. Section 14 of the General Interpretation Act states as follows:-

> *"14 – (1) Where a written law repeals and re-enacts with or without modification, any provisions of any other written law, unless a contrary intention appears –*
>
> *(a) all proceedings commenced under any provisions so repealed shall be continued under and in conformity with the provision as repealed:-*
>
> *...*
>
> *(2) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not-*
>
> *...*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or*
>
> *(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be*

instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made".

This is the statutory position which reflects the common law as argued by the State. Section 14 of the General Interpretation Act is a general saving section. Without it the interpretation of amendments to penal statutes would have been very diverse. We would be very slow to speculate on the applicability of the doctrine of "**lex mitior**" in the absence of full arguments on the position. The trial court and the Court below therefore, cannot, in this respect, be faulted for applying the penal provisions before the amendment. The argument by the appellants that the courts were wrong therefore has no leg to stand on.

Going further, it was argued that the amendment of Section 283 (4) of the Penal Code provided a milder regime of punishment. We would not find so. We agree with the appellants that the amended version lowers the threshold in respect of the minimum period of imprisonment. Be this as it may, the scheme of punishment is still mandatory and more severe.

The courts can only exercise discretion in respect of the upper limit of a custodial sentence. In this respect, as we stated earlier, the arguments on principles or purpose of sentence or sentencing a first time offender are not relevant. Once the offence is proved, the minimum period of imprisonment will apply. The Court has no discretion to pass a lower sentence than the minimum.

It is important to note that the amendment removed the discretion of the courts, not to apply the mandatory minimum custodial sentence, where there is full restitution of the money or property stolen, or where the money or property stolen is less than K500.00 in value. The significance of this is that the courts have lost the authority to exercise discretion not to impose a sentence of imprisonment where there is full restitution of the money or value of the property stolen or where the money or value of the property stolen is less than K500. This is a

significant departure from the old sentencing regime. As the law now stands any person who commits the offence of theft by a person employed in the public service will serve a custodial sentence; a mandatory minimum imprisonment of two years. The new sentencing regime therefore is not mild.

Further, the arguments by the appellants discloses a fundamental contradiction. While it may appear that the threshold for those who steal a lot of money or property has been lowered, it is significant to note that those who steal less amounts of money or property or have made full restitution thereof will now serve a mandatory minimum imprisonment of two years. With this in mind we find that the amended section is not milder law.

The amendment retains the discretion of the court. We do not think, we should disturb the principles on which courts exercise their that discretion in sentencing. Having disposed of the point of law that gave us jurisdiction in this appeal, we need not consider the rest of the submissions.

We, accordingly, confirm the finding of the Court below. This appeal is dismissed.

Pronounced in Open Court this 7th day of February 2019 at Lilongwe.

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THE HON. A.K.C. NYIRENDA SC, CHIEF JUSTICE

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THE HON. E.B. TWEA SC, JUSTICE OF APPEAL

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THE HON. A.D. KAMANGA SC, JUSTICE OF APPEAL