IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 502 OF 1994

THE REPUBLIC

VERSUS

TCHAKA NHLEMA

From the First Grade Magistrate's Court at Balaka

Criminal Case No. 254 of 1994

CORAM: MWAUNGULU, J

Manyungwa, State Advocate, for the State.

Accused, present but un represented.

Mwenyeidi, interpreter

Tsoka, recorder

Mwaungulu, J

JUDGMENT

The Judge set down this case to consider the adequacy of the sentence. The defendant was convicted on three counts of breaking into a building and committing an offence therein contrary to section 311 of the Penal Code. On the first count he was sentenced to twelve months imprisonment with hard labour. On the other two he was sentenced to eighteen months imprisonment with hard labour. The sentences were ordered to run concurrently. The sentences were ordered to take effect immediately.

The sentence was passed on 1st November 1994. The Reviewing Judge had it on 11th January 1995. The case was not set down till 24th February 1996. By that time the defendant had served his prison sentence. This kind of procrastination no doubt undermines the beneficence of the reviewing process for which there is a statutory sanction. Our Legislature must have thought that irregularities and injustices in sentencing which may occur in subordinate Courts can be remedied and at that speedy by this Court.

The defendant has right to appeal against the sentence. Contrary to what has been accepted as the practice, the Director of Public Prosecutions has a right to appeal to the High Court against a sentence. The power is implicit in section 346 of the Criminal Procedure and Evidence Code, particularly in subsection 3:

While as the Director of Public Prosecution may not appeal where the only issue is the quantum of the sentence, where that quantum is challenged on a question of law, the Director of Public Prosection has and should have a right of an audience. All sentences are discretionary. The discretion should be exercised judicially. Where the challenge is that the discretion has not been exercised judicially there is a question of law on which the Director of Public Prosecution can appeal against an order of a sentence.

The appeal process, whether by the defendant or the Director of Public Prosecution, is practically and in principle a slow process. Matters are quickly disposed of through the review process. It then becomes a problem when this process for no reasonable explanation breaks down. No doubt the review process serves a useful purpose where a bulk of criminal jurisdiction is with subordinate Courts. It is then unexpected that these benefits should be daunted with tardiness.

Before the First Grade Magistrate in Mzimba three counts of breaking into a building and committing a felony therein were preferred against the defendant. Two of these, one in Chibuku bar and another at Mr. Kamanga's grocery, took place on the night of the 16th to the 17th of June, 1994. The other, involving Mr. Chisi's grocery, occurred on the 3rd of July, 1994. In the Chibuku bar property worth K148.00 was involved. In Mr. Kamanga's shop K1,037.00 was stolen. In Mr. Chisi's house K1,019.50 worth property was involved. In all these places the defendant entered by breaking locks.

When the Court sentenced the defendant it concentrated on justifying the immediate prison

sentence. For this the Court noted that the defendant was a first offender and that there was considerable loss to the complainants. In passing the sentence the Court stipulated that the sentence imposed was for deterrence. There is little in the order of the Court below to show how and why the sentence of eighteen months imprisonment was imposed.

When it comes to the actual sentence to pass, the Court must consider all the facts touching the sentence. There were factors in favour of the prisoner one of which was that the defendant was a first offender. He came, however, with a bang. He committed several serious offences in a period of a fortnight or so. He is aged twenty-five. That is a consideration, but, as I have just said, he has entered crime with committing several serious offences in a short span. The defendant has a modus operandi which he executes with precision and much success. He pleaded guilty. The Court must regard twelve months or eighteen months imprisonment with hard labor is inadequate. The starting point for this offence should be three years. This sentence should be scaled down to reflect mitigating circumstances or scaled upwards where there are aggravating circumstances. Though there were mitigating circumstances there were outweighed by those aggravating. Curiously here the defendant committed several offences. This is an aggravating circumstance which should result in the enhancement of a sentence on a particular count if only to avoid the anomaly that a defendant who has committed one offence gets the same treatment as another committing the same offence in similar circumstances several times over(**Republic v Nduna** (1995) C.C. No.1212).

If the defendants were here, I would seriously have considered enhancing the sentence. I confirm the sentence.

Made in open Court this 6th day of March 1996 at Blantyre.

D.F. Mwaungulu

JUDGE