IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1082 OF 1995

THE REPUBLIC

VERSUS

CHARLES NTABA

RICHARD EDWARD

EDWARD MOYA

From the Resident Magistrate's Court at Mchinji
Criminal Case No.73 of 1995

CORAM: MWAUNGULU, J
Chipeta, Chief State Advocate for the State
Accused, present and unrepresented
Marsen, Official Interpreter
Mwenyeidi, Recording Officer

Mwaungulu, J

JUDGMENT

This case was set down by the Reviewing Judge to consider the disparity of the sentences. The defendants, Charles Ntaba, Richard Edward and Edward Moya, were convicted by the First

Grade Magistrate at Mchinji of the offence of theft of cattle contrary to section 278 as read with section 281 of the Penal Code. The first defendant was sentenced to a prison term, which had to be served immediately, of eight months. The second defendant was sentenced to a fine of K50.00 in default two months public works. The third defendant was bound over for a period of six months. These disparate sentences attracted the comments of the Reviewing Judge.

The facts of the case are not complicated and, in so far as they help us to resolve the issue raised by the Reviewing Judge, are as follows. The complainant on 27th March 1995, the same day his head of cattle was stolen, reported the theft of his cattle at Namizana Police Post. The Police mounted an enquiry immediately. The three defendants were arrested by the police selling beef. When interrogated by the police they admitted the offence. They made statements at the police. The statements unfortunately have not been brought to this Court's attention. This is important as we will see later. When the defendant's appeared before the Court below, all of them pleaded guilty and were convicted.

The defendant, particularly the second and third defendants, made statements before the Court passed the sentences it imposed, statements which have a bearing on what will be decided in relation to disparity. The second defendant told the Court that he was asked by the first defendant to help him and, as his uncle had a Kraal, he went there and stole the bull. The third defendant told the Court in the same vent as the second defendant. The Court seems to have taken the fact that the first defendant was the most culpable because in the order made the Court said "In all this the principal offender was the first defendant."

Of course the Court does give another reason why the second defendant got the sentence he got: he was wounded during the arrest. All in all, however, the disparity is explained based on the participation of the defendants in the crime.

A Court can pass disparate sentences to reflect personal characteristic of the offender and degree of participation in a crime **[Kamodzi v Republic** [1994] Cr. App. Case No. 25, **Republic v Maulana and Others** (1994) CC. No. 1246.] The problem that has arisen here is that the premise on which the Court below arrived at the performance of the three defendants is shaky.

The Court when it is going to pass disparate sentences because of the participation of the defendants must determine the degree of participation. Where there has been a trial, the Court can have regard to the statements during trial of the co-defendants bearing in mind of course that such statements may be self-servicing. Where the defendant has pleaded guilty, he should be given an opportunity to put his version of events. In **R v Smith** [1988]10 Cr. App. R. (S) Lord Lane C.J. said:

"In deciding what the factual situation was he is not bound by the rule of admissibility which would be applicable in the trial of the issue of guilt or innocence. He can take into account the contents of witness statements or depositions; he can take into account evidence he may have heard in the trial of co-defendants. He must, however, (and this is perhaps to state the obvious)

bear in mind the danger that self-serving statements are likely to be untrue, that such stats have as a rule not been subjected to cross-examination and that the particular defendant whom he is sentencing may not have had the opportunity to put forward his version of events. The last danger can be avoided by giving the defendant the opportunity to give evidence if he wishes. As in the Newton (1982)4 Cr.App. (S) 388 situation, the aim is to provide the judge with the fullest information possible, whilst at the same time ensuring that the particular defendant has every opportunity to present his side of the picture."

Here I have not seen the statement of the defendant at the police. If reliance was had on the two defendants' statement at the police, in so far as there was a plea of guilty, the Court could not properly rely on them or at least the Court should have done so with circumspection. The Court, however, apparently relied so much on what the two defendants had said about the first defendant. It should have invited the first defendant to put his side of the story. The sentencing Court was wrong in sentencing the defendant disparately on the premise it took.

The sentence the Court below imposed on the defendant was the right one. If anything, it was the sentence of the two defendants which should have been adjusted. I cannot make an order averse to them without hearing them. I make no order.

Made in open Court this 25th day of January 1996 at Blantyre.

D.F. Mwaungulu

JUDGE