IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 3 OF 1996

THE REPUBLIC

VERSUS

RONALD CHIKOKA NKHOMA

From the First Grade Magistrate's Court at Mzuzu
Criminal Case No. 183 of 1995

CORAM: MWAUNGULU, J
Divala, State Advocate, for the State
Accused, present and unrepresented
Tsoka, Official Interpreter
Mwenyeidi, Recording Officer

Mwaungulu, J

JUDGMENT

When I heard this case on the 1st of February 1996, I ordered for the defendant, Ronald Nkhoma, such a sentence as resulted in his immediate release. The defendant was found guilty of the offence of theft contrary to section 278 of the Penal Code. He was sentenced to four months imprisonment with hard labour. The sentence was to be served immediately. The Reviewing Judge, with whom the State Advocate agrees, thought that the sentence should have been suspended. I agree. The approach of the Court was a compromise of two aspects of sentencing, the purpose and the principles of sentencing.

The defendant was cordoned by two security guards when he was leaving Mzuzu market after the market had closed for that day. One guard wanted to know if the bag the defendant carried was his. When the watchman went to check with his friend, the defendant decamped. He was arrested by the two guards and taken to the police with the bag. The complainant, who keeps his bag of beans in the market after close down, came the next morning to find that his bag of maize had been stolen. He reported to the police. To his amazement, the bag of beans and the defendant were already at the police. The defendant was convicted after trial and sentenced to four months imprisonment with hard labour. The question before me is whether the sentence should have been suspended.

It is not that the question of suspension was not considered by the Court below. The sentencing Court said that, although hitherto it had been reluctant to send first offenders to prison, with increased theft in the locality, in places such as markets, bus stages, self-service shops, etc., it was reluctant to give first offenders suspended sentences where theft occurs in such places. The Court went on to say that because Courts have been lenient to thieves, the public has taken the law in its own hands by burning those suspected of having stolen at such places. This is a stark observation from the Court which has the best knowledge of the locality.

The purpose of the criminal law is to prevent crime. The way in which this is achieved is by the Court imposing an appropriate sanction, an appropriate penalty, for infraction of the Penal Code. A survey of sentences permitted under our criminal law will show that the purposes served are retribution, deterrence, reformation, rehabilitation and incapacitation, the latter being achieved by incarceration of the offender for limited period to prevent him from committing other offences in the community, although not in prison. While any sentence imposed by a Court achieves any of these purposes, a Court has to apply correct principles of sentencing.

It is not proper that the Court to achieve any of the purposes of sentencing, retribution deterrence, incapacitation, reformation and rehabilitation, should compromise principles of sentencing. Principles of sentencing are different from purposes of sentencing. Normally the purposes of sentencing do not assist the Court in arriving at the appropriate quantum of a sentence. An appropriate sentence must achieve proportionality equality and restraint. The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance. The question of suspension of a sentence, a principle of sentencing, should be treated distinctively from the question of deterrence.

The Court's approach should not have been what it clearly was that the sentence should not be suspended because the offence is commonplace and that immediate imprisonment would be a deterrence, general and special. The fact that the offence is commonplace in the locality per se cannot be a reason why a sentence should not be suspended. Whether, when dealing with a first

offender, a prison sentence should be suspended depends on the youth, old age, character, antecedents, home surroundings, health or mental condition of the defendant, the nature of the offence or the extenuating circumstances in which the offence is committed.

The question of suspension arises after, not before, an appropriate prison sentence has been arrived. This is implicit in section 340, the power for suspending a prison sentence for first offenders:

"(1) Where a person is convicted by a court other than the High Court of an offence (not being an offence the sentence for which is fixed by law) and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo impisonment (not being impisonment to be undergone in default of the payment of a reasonable fine) unless it appears to the court, on good grounds(which shall be set out by the court in the record), that there is no other appropriate means of dealing with him."

This is well illustrated by the earlier case of (**Rep. V. John**(1978-80)9 M.L.R. 207) and recently in **Bhobat v Rep**(1994) C.A. No. 29).

Where a sentencing Court detects an upsurge in crime, the course to take is to increase the level of a sentence to achieve deterrence. The sentence achieves deterrence on the particular offender so that he does not repeat the crime in future. The sentence will also achieve general deterrence on others who are planing to enter crime to relation to first offenders this Court has proceeded on the basis that first offenders should not be used as guinea pigs for general deterrence. In practice this approach has entailed that first offenders must receive such sentences as fit the crime and prevents them from further mischief. Consequently, general deterrent sentences have been meted on repeat offenders, for utilitarian reasons too. For these a premium has been added to deal with the commonplaceness of the sentence. An upsurge in crime, therefore, is better served by an increase in the level of sentences imposed for first or repeat offenders. It is a grotesque principle to relate commonplaceness of the offence to suspension of a sentence.

Once an appropriate prison sentence has been achieved, the question of suspension arises automatically when the offender is committing the offence for the first time. Obviously if an appropriate adjustment has been made to the prison sentence to reflect the upsurge in crime and the sentence arrived at has reached a level where suspension is inappropriate, the prison sentence will be suspended only for the reasons mentioned earlier. The commonplaceness of an offence, therefore, is not a reason why the sentence should not be suspended.

In relation to theft, this Court has said that it is not one of those offences regarded serious in our

criminal law. While as a prison sentence is always appropriate, minor infractions could be well treated by suspension of a sentence. The Court below having arrived at a sentence of four months imprisonment with hard labour, it is axiomatic that the Court regarded this as a minor infraction. The sentence could very well have been suspended. The defendant has served the most part of the sentence. I pass such a sentence as results in the prisoner immediate release.

Made in open Court this 1st day of February 1996 at Blantyre.

D.F. Mwaungulu

JUDGE