IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 567 OF 1996

THE REPUBLIC

- versus -

DAVIE NDINDO

From the Second Grade Magistrate's Court at Blantyre:
Criminal Case No. 4 of 1996

CORAM: Mwaungulu, J.
Manyungwa, Principal State Advocate for the State
Chilunga, Official Interpreter
Mangisoni, Recording Officer

JUDGEMENT

The Judge who reviewed this matter set it down to regularise the charges. After looking at the record I notice that there was no confusion on the charges. On review, therefore, I also had to consider the severity of the sentence.

On the 21st of January 1996 the defendant appeared before the Senior Resident Magistrate at

Blantyre on a charge containing two counts: burglary and the related offence of theft contrary to sections 309 and 278 respectively. The defendant wanted to plead guilty to the charge. What he said on the plea is important because much of the ado in this matter has been caused by lack of appreciation by the court below of its powers.

On the count of burglary, the one that has caused the problems here, the defendant said: "I understand the charge and I accept it. I entered the building. However it is not a dwelling house as people never used to sleep in this house. It was merely a storeroom and not a dwelling house." On the other count, the defendant accepted stealing some of the items and not all contained in the event. Both responses to the charges were equivocal pleas. The Court could only accept an unequivocal plea of guilty. (**Republic -v- Benito (1978-80) 9 M.L.R. 21**) The court entered a plea of not guilty to both charges. The court could properly do that. This was not the only power available to the court however. The other alternative would have avoided the problems which arose in the matter.

On the burglary charges it was quite clear that the defendant wanted to plead guilty to an offence other than the offence with which he was charged. He wanted to plead guilty to a charge of breacking into a building and committing a crime therein contrary to sectuib 311 of the Penal Code. The court should at that stage have considered alteration of the charge to allow the defendant to plead guilty to the altered charge. Section 151 of the Criminal Procedure and Evidence Code provides:

"Where at any stage of the trial before the court complies with section 254, or calls on the accused for his defence under section 313, as the case may be, it appears to the court .... that the accused desires to plead guilty to an offence other than the offence with which he is charged, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of the new charge as it thinks necessary to make in the circumstances of the case, unless having regard to the merit of the case, such amendments cannot be made without injustice."

The opportunity arose again after the complainant had given her evidence. She told the court that the building was just a storeroom. It was a separate building. It was not obviously used as a dwelling. A "dwelling house" is defined in section 4 of the Code.

The evidence disclosed in no uncertain terms an offence other than the one with which the defendant was charged, namely breaking into a building and committing an offence therein contrary to section 311 of the Penal Code. The Court could have altered the charge for this reason and at this stage. Whenever, at any stage of the proceedings before the close of the

prosecution case and before a Magistrate has ruled that there is a case to answer the defendant intends to plead guilty to an offence other than the one charged or the evidence discloses an offence different from the one charged the court should consider altering the charge unless there is likelihood of prejudice to the defendant or the prosecution.

There were problems later when the prosecution could not produce other witnesses. This was because the charge had not been altered as suggested. The prosecution applied to discharge the defendant under section 81 of the Criminal Procedure and Evidence Code. The Court withheld that consent and properly in my view. The reasoning of the court below, with which I agree entirely, was that since the defendant seemed to concede commissions of some offence it would have been prejudicial to the defendant to discharge the defendant. Section 81 (a) of the Criminal Procedure and Evidence Code provides as follows:

If the court had consented to the prosecutions application it would not have amounted to an acquittal. It was still open to the prosecutor at some later stage to commence the proceedings if the witnesses were found. This would be unjust to the defendant for two reasons. He would have been at the mercy of the prosecution when he really wanted to plead guilty to a different offence. Moreover his punishment would have been deferred for certainly he risked conviction at some later stage. The consent of the Court was in my judgment properly withheld.

The Court, as I said earlier, could have amended the charge under section 151 of the Criminal Procedure and Evidence Code. The Court did not. Consequently the Prosecutor introduced a new charge which took care of the concerns that had been raised by the defendant, the evidence and the prosecutor. At the end of the

day the result was the same. This, however, was a decision which should have been made by the court at an earlier stage. It would have saved time and cost. On the altered charge the defendant was convicted of the offence of breaking into a building and committing an offence therein contrary to section 311 of the Penal Code.

The sentence of two and half years imprisonment with hard labour that the court below imposed on the offence as charged is manifestly excessive. The defendant just forced the door open. There was no damage to the property upon entry. There was no violence to anyone. Nobody was around during the commission of the offence. This was a simple case of breaking and entering. The property stolen was not considerable in monetary terms, K1,192, but no doubt of considerable value to a woman of the complainant's station in life. The sentence to be passed for committing this offence must depend, apart from the other usual consideration, where the felony is theft, on the nature of the breaking and entry and the amount of property stolen. In this particular case on these considerations the offence was not one that merited the sentence passed.

A court has no jurisdiction to pass sentence on an offence that has been withdrawn from it by the prosecution. The court below did not check the new charge that had been brought by the prosecution to replace the earlier charge. The earlier charge premised as it was on burglary naturally had a separate count of theft. The court below, however, without checking the new charge, made the defendant plead to the count of theft which was not in the new charge and proceeded to sentence the defendant on it. It had no jurisdiction to sentence the defendant on the charge that had been withdrawn. Where a lesser offence is a constituent part of another offence the court cannot sentence the defendant on both offences. It should have been apparent to the court below that section 311 of the Penal Code includes, in this case, the theft. it could not sentence the defendant on the offence under section 311 and for theft.

The sentence of two and half years imprisonment is set aside. The defendant will serve a sentence of one and half years imprisonment with hard labour.

Made in Open Court this 17th day of March 1997.

D F Mwaungulu

JUDGE