IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NUMBER 278 0F 2000

THE REPUBLIC

VERSUS

MISHECK MVALUME

ALFRED CHIKOPA

From the First Grade Magistrtae Court at Balaka Criminal Case Number 37 of 2000

CORAM: D F MWAUNGULU, J

The State, Absent

The Defendant, Present and unrepresented

Kachimanga, Official Court Interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter querried two aspects of the sentence. First, he thought the sentence of two years imprisonment the First Grade Magistrtae passed for robbery was manifestly inadequate. Secondly, he questions why the First Grade Magistrate ordered the three sentences to run consecutively. The First Grade Magistrate convicted the defendants for two offences of breaking into a building and committing a felony there and robbery. These are offences under sections 311 and 301, respectively, of the Penal Code. The First Grade Magistrate sentenced the defendants to two years imprisonment on each of the three counts. He ordered the sentences to run consecutively. The defendants, therefore have to serve six years imprisonment. The reviewing judge wants this order considered.

All the three offences the First Grade Magistrtae convicted the defendants for occurred within five days between 17th and 21st January 2000. On 17th January, 2000 the defendants broke and entered Mr Douglas Kalulu's shop at Mponda Village in Balaka District. They stole huge quantities of grocery items. The next day it was a robbery on Mrs Shupekile Lupande. Again quite a haul of property occurred. On 21st January, 2000 it was the turn at Mrs Irene Kondani's shop. The defendants stole a lot of property as well. The property was found on them within a short time. They were selling most of it when the police caught with them.

Their mitigation statements were not drawn by counsel. The defendants never made the best of it. They raised domestic concerns. The First Gradae Magistrate, properyly in my view, never considered them. In Millo v Republic, Crim App No 30 of 2000 this Court said:

"Sentencers should not normally consider domestic matters. These are matters offenders should put in the equation when embarking in conduct society disapproves and enforces with criminal sanctions. There is a public element in criminal justice not easily dispelled by domestic considerations. The public interest in the criminal process would be precariously compromised if courts unduly consider such matters."

The First Grade Magistrate, however, considered mitigating and aggravating circumstances on the record. The First Grade Magistrate, however, at least for the robbery, underrated the strength of the aggravating factors and accentuated disproportionately the mitigating factors.

Breaking into a building and committing a felony therein may not, compared to other offences of the same genus and others, be as serious. Small businesses, however, would not afford the huge security costs crimes the defendants perpetrated imply. The criminal process may be the only insurance. Courts assure small businesses by imposing appropriate sentences for those raiding small shops like the complainants' ones have been shown to be. Moreover the defendants acted in concert to commit crime. Courts should impose heavier sentences for those who in concert set out to commit crimes. There is greater threat to society when people band together to commit crime. Moreover the defendants committed several offences in a short period. Courts should increase sentencences to reflect that the defendant has committed more offences. If this is not done, a man who has committed only one offence, everything being equal, may be grieved, particularly where the court orders the sentences to run concurrently, that he will be in prison for the same period as one who committed more offences albeit in quick succession.

The unfairness is cured by imposing a heavier sentence for the individual offences to reflect that the defendant committed more offences and ordering the increased sentences to run concurrently. The First Grade Magistrate wanted to pass heavier sentences. He was constrained by that the individual sentences would heve been harsher on the facts. He therefore opted for shorter sentences which he ordered to run consecutively. This he could not do. The Court should impose an appropriate sentence for each offence. The Court must foresee that a defendant can successfully appeal against conviction on all save one count. A sentence reduced because a

consecutive order appeared appropriate punishment would, therefore, look unfair if the court decides not to reconsider the sentence. This is not off the point. The state has no right under our legal system to appeal against quantum of sentence where there is no legal issue. On the facts, a concurrent order, as the Reviewing judge thought, was the right course. The offences were committed by the same defendants in quick succession. They are related offences. A consecutive order was not apposite.

The First Grade Magistrate justified his sentences on that the defendants are young offenders who committed crime for the first time. That may be true for the breaking into a building and committing a felony threin. For robberies of the kind the defendants perpetrated in concert and very seriuos crimes sometimes a plea that the defendants are young or offending for the first time should not be listened to. Naturally, because they are young and have a bigger future, we feel as courts that they should be given a chance unless they have really squandered it. There are timeshowever when justice demands that such considerations should not influence our minds. If, as here, defendants mark their debut in a life with pomp, the courts must match their entrance with fanfare. In relation to the robbery, therefore, the mitigating factors were overplayed and the aggravating factors underplayed. In Maganizo v Republic, Crim. App. No 5 of 1997 this Court said:

" I agree entirely with the observations of Ewbank, J., in the Court of Appeal in **R. -v- Richardson and others**, 'The Times', February, 1988. Some crimes, he said, are so heinous that a plea of youth, a plea that the crime was a first offence or that the offender had not been to prison before were of little relevance."

I agree with the reviewing judge that the sentence for robbery was manifestly inadequate.

I set aside the sentence for robbery. The defendants will serve four years imprisonment with hard labour. I confirm the sentences on the breaking into a building and committing a felony therein. The consecutive order is set aside. The sentences will run concurrently.

Made in open Court this 8th Day of June 2000

D F Mwaungulu

JUDGE