IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NUMBER 932 OF 1999

THE REPUBLIC

VERSUS

DUWA NAPOLO

CHARLES DULANO

JOHN BIZIWECK

CORAM: D F MWAUNGULU, J

The State, absent

The defendant, absent

Kachimanga, the official interpreter

Mwaungulu, J

ORDER IN CONFIRMATION

The judge who reviewed this matter set it down to consider the sentence the First Grade Magistrate at Thyolo passed against the defendants. The First Grade Magistrate convicted the defendants, Duwa Napolo, Charles Dulano and John Biziweck of escape from lawful custody. This is an offence under section 115 as read with section 34 of the Penal Code. The First Grade Magistrate sentenced each appellant to a fine of K300 in default six months' imprisonment with hard labour. The reviewing judge queries the default sentences. The default sentences are beyond those prescribed under section 29(3) of the Penal Code. There are other problems with the First Grade Magistrate's order.

The three defendants pleaded guilty to the offence when they appeared before the First Grade Magistrate. The facts supporting the plea are simple. The three defendants were at Thyolo prison on suspicion of a robbery. On 11th April, 1999 they escaped from Thyolo prison. They used a saw to break the prison's burglar bars. The police arrested them several days thereafter. The defendants admitted the matter at the police. They, as we have seen, pleaded guilty before the Thyolo First Grade Magistrate.

The defendants were unrepresented in the lower court. They made the mitigation statements themselves. They raised very serious points. Most important is that the police injured all of them, all of them seriously, in the shooting when the police affected the arrest. The circumstances of the arrest are not, just as they were not in the court below, before this Court. The aspect must, therefore, be interpreted favourably for the defendants. The Court has to consider such injury when sentencing the defendant. The sentencing court may ignore such injuries if the defendant fires at the police or if the injury was necessary to affect an arrest where the prisoner resists the rearrest. The First Grade Magistrate, correctly in my view, considered the defendants' guilty plea and that the defendants were first offenders. The First Grade properly ignored the domestic matters that the defendants raised. The First Grade Magistrate had these considerations in mind when imposing fines for the offence.

Courts should not normally impose a fine for escape from custody. Although a misdemeanour, courts should impose immediate custodial sentences for escape from lawful custody. Escape from custody is a serious matter. Offenders should not think that at the payment of money they can escape from lawful custody. They should know that if they escape custody they are likely to go to prison for it. This court, to express its opprobrium, normally orders an immediate prison sentence to run consecutively rather than concurrently with the sentences on the substantive offences to express. Those who escape from prison should expect to serve immediate custodial sentences. Fines should really be the rare thing.

Probably on the factors raised in mitigation the lower court had difficulties with the appropriate non-custodial sentence. It is unnecessary to consider that here. The reviewing judge queries the default sentence. It is useful to inform most magistrates about section 29 of the Penal Code and the recent amendment to it. The First Grade Magistrate never considered the section or the amendment. It is usual for courts at that level not to have access to recent amendments. The amended provision is :

SECTION 29(3) OF THE PENAL CODE AS AMENDED

AMOUNT	PERIODS
Not exceeding K100.....	1 month
Exceeding K100.00 - not exceeding K1, 000	3 months
Exceeding K1, 000 - not exceeding K3, 000	6 months
Exceeding K3, 000 - not exceeding K5, 000	8 months
Exceeding K5, 000	12 months

The court should, unless the penal section provides otherwise, impose default sentences according to this section. The First Grade Magistrate imposed a default sentence beyond what the law permits The default sentence is therefore wrong in principle. It also appears that the

defendants actually served the default prison sentence.

It might be useful therefore, to inform the prison authorities' and lower courts' attention to section 15 (3) of the Criminal Procedure and Evidence Code. I hope the prison authorities never carried out the default sentence. Prison authorities should not carry out default sentences where a lower court imposes a fine beyond K100.00 until this Court has exercised its power of review or appeal. Section 15, subsection 3 provides:

"(3) No person authorised by warrant or order to levy any fine falling within subsection (1) (b), and no person authorised by any warrant for the imprisonment of any person in default of the payment of such fine, shall execute or carry out any such warrant or order until he has received notification from the High Court that it has exercise of its powers of appeal or review confirmed the imposition of such fine."

It is unfortunate that it took this long to set the case down. There has been great injustice to the defendants if they have had to serve the full course of the default sentence. The injustice would have been avoided by this court being more punctilious with the safeguards and procedures introduced by the Criminal Procedure and Evidence Code 1968. I therefore set aside the sentence of the court below. The default sentence will be 40 days imprisonments with hard labour.

MADE IN OPEN COURT this 8th day of June 2000 at Blantyre.

D.F. MWAUNGULU

JUDGE