IN THE HIGH COURT OF MALALWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 123 OF 1998

THE REPUBLIC

VERSUS

PATRICK MOFFAT

GERALD BANDA

MIKIYASI SOLOMON

THOMAS CHITSULO

In the First Grade Magistrate Court sitting at Soche criminal case no. 722 of 1998

CORAM: D F MWAUNGULU (JUDGE)

Manyungwa, Assistant Chief Staete Advocate, for the state

Defendants, absent, unrepresented

Kachimamnga, an official coutrt interpreter

Mwaungulu, J

JUDGEMENT

The Blantyre Chief Resident Magistrate remitted this matter to this Court to consider the sentence and other procedural irregulaities in the proceedings in the court below. The first grade magistrate convicted the four defendants of breaking into a building and commiting a felony

there and a conspiracy to commit a felony. Breaking into a building and committing an offence therin and conspiracy to commit a felony are offences under sections 311 and 404 of the Penal Code, respectively. The first grade magistrate sentenced the defendants t o pay fines. On the first count the defendants were to pay K400, in default four months imprisonment with hard labour. On the second count they were to pay a fine of K300, in default three months imprisonment with hard labour. There were several procedural iregularities, as the Chief Resident Magistrate indicates, and the sentences are wrong in principle.

The first problem relates to the the procedure taken for obtaining a plea. There were two counts. The lower court should have read each count separately and recorded a plea to it from all the defendants. Equally, when asking when accepting the facts the presecutor proffered to support the plea, the court should have asked each defendant. The First Grade Magistrate read the two counts together and called each one of them to plead at once. There was one plea recorded for the two counts. This, as the Chief Resident Magistrtae indicated, is impermissible. It can, and probably did, confuse defendants wishing to plead guilty only to one count. The defect in the plea however is curable under sections 353 and 362 of the Criminal Procedure and Evidence Code. The irregularity, albeit confusing to the defendant's, never prejudiced them.

The Chief Resident Magistrate also observed that the lower court could not have imposed a fine for breaking into a building and committing a felony. Under our law, breaking into a building is not as serious as housebreaking or burglary. The Chief Resident Magistrate is right though that those breaking into buildings and committing crimes there, like those breaking houses at night or during the day, risk losing liberty. Breaking into a building and committing a felony there is a compound crime involving commission of another felony. It is rare that this Court approves a fine for a felony, let alone the one the lower court convicted the defendants for. Courts should show more flexibility becuase of the condition of our prisons and that some felonies are not as serious and could be committed in very innocuous circumstances. It should really be unoften though that an offence like this should be punished by a fine.

There is nothing on the record justifying such a course. Of course, the defendants were young. Some were going to school. One of them is at the Polytechnic. Our young people should realise that there are certain offences so heinous where a plea of guilty, age, first offence, etc., may never be accepted. If, these factors ever played on the court's mind, the court should have ordered a prison sentence and suspended it on condition as to compensation or abstinence from crime.

Moreover the default sentences were ultra vires. Under section29 as ammended in 1989, the maximum default sentence for fines between K100 and K1000 is three months. The lower court could not therefore impose a default sentence of four months in default of a fine of K400.

Unfortunately, this matter has taken too long to be reviwed. The lower court's order is dated 22nd June, 1998. The Chief Resident Magistrate sent the file to this Court on 28th July, 1998.

The Registrar first set the matter down for 29th January, 1999, rather unusual in view of the Chief Resident Magisatrate's conc erns. There is no explanation for why the matter was not heard on 29th January, 1999. On 5th August, 1999, the matter was set down for 2nd September, 1999. There is no explanation for why the matter was not heard on that day either. Nothing happened until the matter was set down for 22nd August, 2000. With this interposition of time, it is extremely unjust to alter the sentence to what I suggested.

I therefore confirm the sentence.

Made in open court this 22nd of August, 2000.

D F Mwaungulu

JUDGE