IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NUMBER 489 OF 2000

THE REPUBLIC

VERSUS

KEYALA NALUMO

AND

WILLY DICKSON

From the First Grade Magistrate Court at Limbe Criminal Case No. 223 of 1999

CORAM: D F MWAUNGULU(JUDGE)

Chimwaza, Principal State Advocate, for the State

Defendant, absent, unrepresented

Kachimanga, Official Court Interpreter

Mwaungulu, J

JUDGEMENT

This matter was set down by the Honourable Mr. Justice Hanjahanja to consider the sentence. The Limbe first grade magistrate sentenced the defendants to four years imprisonment with hard labour for each count of burglary and theft. Burglary and theft are offences under section 309 and 278 of the Penal Code, respectively. The reviewing judge wanted the sentences reduced. The First Grade Magistrate sentenced the defendant on 12th February, 2000. The record does not show when the record was sent to this Court. The record does not show as well when the matter was received by this Court. The judge made the order to set down the matter on 7th July, 2000,

five months after the lower court's sentence. It is unclear when the matter was sent to the judge.

The matter was not set down for the whole of 1999. The record was looked into on 15th August, this year, more than a year after the judge's order to set down. On 15th August, 2000 the Registrar set the case down for hearing for today the 1st September, 2000. Under section 15(4) of the Criminal Procedure and Evidence Code the Registrar should have set the case for before 12th February, 2000. Prison authorities could only keep the defendant up to that date.

In the last few years the review system in our criminal justice system has strained. It is necessary, therefore, to rationalise, and restate the law and practice and duties arising from the statutory provisions. The lay magistracy in Malawi handles close to 90% of the criminal load at first instances. The lay magistracy undergoes a basic training equipping them with some aspects of substantive and procedural law and the law of evidence. The clerk to the court, unlike in the United kingdom, is not a solicitor, in our context, a legal practitioner. In the United kingdom, lay magistrates, who sit in numbers more than one, are advised by the clerk to the court, who is a solicitor. The difficulties we have in recruiting professional magistrates mean that we cannot afford to have our lay magistrates advised by a legal practitioner. The review mechanisms under the Courts Act and the Criminal Procedure and Evidence Code becomes important.

The review mechanism in criminal proceedings essentially refers to the right of appeal under the Criminal Procedure and Evidence Code and review procedure under the Courts Act and the Criminal Procedure and Evidence Code. The right to appeal in criminal proceedings is entrenched by statute, section 361 of the Criminal Procedure and Evidence Code. The right exists in most democracies to which this country belongs. The right may be truncated for expedience and cost. The right however has not been taken away by legislation. The review mechanism in the Criminal Procedure and Evidence Code complements the right of appeal.

The power of review in criminal proceedings is in two provisions in the Courts Act. Section 25 provides:

"The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure."

Section 26 provides:

"(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any

party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court."

Section 26 is a general supervisory and superintendency provision applicable to criminal matters still pending in subordinate courts. It has to be read with sections 70, 74 and 75 of the Criminal Procedure and Evidence Code. The power of review that concerns us is the review of decisions by magistrates at first instances. That power is underlined by section 26 of the Courts Act and adumbrated by the Criminal Procedure and Evidence Code.

The paramount provision is section 362(1) of the Criminal Procedure and Evidence Code:

"In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by section 353 (2) (a), (b) and (c) and by section 356."

The courts interpret the words 'otherwise comes to its knowledge' generously. The words cover where this Court calls for the file under section 360 and confirms sentences under section 15. Under this generous interpretation this Court has accepted requests on letters from defendants or anyone raising a matter concerning the justice of the case, such as a newspaper report. Where there has been some injustice, this Court has allowed, under this magnanimous interpretation, the State's representations on the sentence and, albeit rarely, conviction.

Under section 362 of the Criminal Procedure and Evidence Code this Court has the same powers as on appeal. Section 353 (2) of the Criminal Procedure and Evidence Code provides:

"After perusing such record and, in the case of an appeal by the Director of Public Prosecutions, after hearing him, if he appears, and the respondent or his counsel, if he appears, or, in the case of any other appeal, hearing the appellant or his counsel, if he appears, and the Director of Public Prosecutions, if he appears, the Court may, if it considers that there is not sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal by any aggrieved person from a conviction-

(I) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial, or direct that he be retried; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal any aggrieved person from any other order, alter or reverse such order;

(c) in an appeal by the Director of Public Prosecutions from a finding of acquittal

(I) if the finding of acquittal was arrived at without the defence having been called, remit the case to the subordinate court with a direction to proceed with the trial and to call on the defence;

(ii) in any other case, convert the finding of acquittal into one of conviction and either make an order under sections 337, 338 or 339 or pass sentence or remit the case to the subordinate court for sentence,

and in any of the cases mentioned in this subsection the Court may make any amendment or any consequential or incidental order that may appear just and proper."

Under this provision, this Court, on review, can alter a conviction or sentence passed by a subordinate court at first instances. This Court has therefore altered convictions into acquittal or entered alternative verdicts. This Court however does not acquittals into convictions. This Court proceeds on that the state should appeal against acquittals. Under this provision it does not matter whether the defendant is offending a second time.

The usual way in which this Court exercises its reviewing power is through the mandatory provisions of section 15 of the Criminal Procedure and Evidence Code. Under the section, an immediate prison sentence on a first offender, a fine exceeding K100 and two years, one year, six months and three months imprisonment by, respectively, a Resident, First, Second or Third Grade Magistrate, must be confirmed by this Court. Consequently, for imprisonment of less than two years, one year, six months and three months by, respectively, a Resident, First, Second or Third Grade Magistrate, on a subsequent offender need not be confirmed by this Court. These matters would come to this Court though what is in the preceding paragraph. Section 15 of the Criminal Procedure and Evidence Code provides:

"(1) Where in any proceedings a subordinate court -

(a) imposes a sentence or corporal punishment;

(b) imposes a fine exceeding K100;

© imposes any sentence of imprisonment exceeding -

(I) in the case of a Resident Magistrate's court, two years;

(ii) in the case of a court of a magistrate of the first or second grade, one year; or

(iii) in the case of a court magistrate of the fourth grade, six months; and

(iv) in the case of a court of a magistrate of the fourth grade, three months.

(d) imposes any sentence of imprisonment upon a first offender which is not suspended under section 340, it shall forthwith transmit the record of such proceedings to the High Court in order that the High Court may exercise in respect thereof the powers of review conferred by Part XIII.

(2) No officer in charge of a prison or other person authorized by any warrant or order to carry out any sentence of corporal punishment falling within subsection (1) (a) shall do so, either wholly or in part, until he has received notification from the High Court that it has in exercise of its powers of appeal or review confirmed such sentences.

(3) No person authorized by warrant or order to levy any fine falling within subsection (1) (b), and no person authorized 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 in exercise of its powers of appeal or review confirmed the imposition of such fine.

(4) An officer in charge of a prison or other person authorized by a warrant of imprisonment to carry out any sentence of imprisonment falling within subsection (1) (c) (I), (ii) of (iii) shall treat such warrant as though it had been issued in respect of a period of two years, one year or six months respectively, as the case may be, until such time as he shall receive notification from the High Court that it has in exercise of its powers of appeal or review confirmed that such sentence may be carried out as originally imposed.

(5) Nothing in this section contained shall affect or derogate from the powers of the High Court to reverse, set side, alter or otherwise deal with any sentence of a subordinate court on review or appeal.

(6) When a subordinate court has passed a sentence or made an order falling within subsection (1) it shall endorse on the warrant or order that the sentence or order is one required to be submitted to the High Court for review and which part if any of the sentence or order may be treated as valid and effective pending such review.

(7) In this section "sentence of imprisonment" means a substantive sentence of imprisonment or a sentence of imprisonment in default of payment of fine, costs or compensation or a combination of such sentences and includes a sentence of imprisonment the operation of which is suspended under section 339."

While under the provisions just considered the review mechanism is other driven, the mechanism in section 15 of the Criminal Procedure and Evidence Code is court driven. The section imposes a duty on the lower court to transmit the record to this Court speedily for this Court to review the sentence under the powers in the Criminal Procedure and Evidence Code and the Court's Act. Equally, there is a duty on this Court to review the sentence as soon as possible. To reenforce the policy the Criminal Procedure and Evidence Code provides that, if this Court does not exercise the powers, prison authorities can only keep the prisoner for up to two years, one year, six months and three months for a sentence imposed by a Resident Magistrate, First Grade, Second Grade and Third Grade magistrate, respectively. Speed, therefore, is important. Courts, lower and this Court, must act timeously because the review mechanism under section 15 of the Criminal Procedure and Evidence Code is court driven.

There are good reasons why the categories of sentences in section 15 of the Criminal Procedure and Evidence Code should be confirmed. For first offenders, it is the policy of the law that first offenders should be sent to prison for good reasons (section 340 of the Criminal Procedure and Evidence Code). In Republic v Matindi, 1976 (CC No. 1699), Jere, J., said :

"The philosophy behind this legislation is that first offenders should be kept out of prison because contact with hardened criminals might have a bad influence on them, and, secondly, they should be given a chance to mend their ways but with an areal threat that if they commit another offence during the period, the suspended sentence will be revived. In this way, therefore, the suspended sentence provides an incentive to first offenders to keep the law."

Equally monetary penalties should be checked for reasonableness and fairness. There is a risk of

imprisonment in default. Imprisonment for monetary penalties is looked at grudgingly by the legislature and courts. The Criminal Procedure and Evidence Code answers the matter in two ways. It requires a fine of above K100 to be confirmed by this Court. It also stops enforcement of a default sentence until the fine has been confirmed by this Court.

The law allows imprisonment, without necessity of review, of repeat offenders to imprisonment of only up to two years, one year six months and three months for a Resident, First Grade, Second Grade and Third Grade magistrate, respectively. The legislature must have considered prison sentences above these levels serious enough to require review by this Court.

There are an underlying policy consideration and purpose for all instances where the legislature required a review of the sentence imposed. Those ends are not achieved by actions that disregard timeous transmission of records to this Court, placement of records before a judge, consideration of those cases by a judge and setting down by this Court of matters that the judge ordered to be set down. Sometimes problems arise after the case is set down.

Three situations could occur after the case has been set down. The first is that the judge is not available. That should not happen. First, because, such cases involve the liberty of a citizen. A person serving sentence, even if the conviction is right, retains all his basic rights. One such right is his right to a speedy trial or criminal process. Secondly, the non-availability of a judge at a given time undermines access to justice. A day lost for determination of a case means the case is pushed to a time when another citizen's rights would have been determined. An adjournment of necessity affects the access to justice of those whose rights could have been determined on the appointed date. There is no remedy to this except to establish a system where a judge is always available to handle cases when set down.

The second scenario is that neither of the parties is served. If the parties are absent and they were served, the court has to consider making the order. None of the parties are entitled to be heard when this Court is exercising its powers of review. The Criminal Procedure and Evidence Code only proscribes making an order adverse to the defendant. This Court therefore can make an order not favourable to the state. It can, although it is advisable to ensure that the state is heard or at the least given an opportunity to be heard, acquit the defendant.

The practice has been to give the state an opportunity to be heard. Usually the state has been heard. The state has however at times chosen not to be heard and told the court to proceed accordingly. Consequently, this Court has proceeded without the state. This has been extremely useful in disposing simple matters. It should be encouraged. Where the State has not appeared the judge has to exercise the discretion after regarding the purposes and goals in the review provisions just considered.

The last scenario is that this Court has not set the cases timeously. This is what happened here.

This can cause injustice to the defendant and the justice system. The matters to consider when setting the matters down are laid down in Republic v Menard, Conf Cas. No. 951 of 2000, unreported:

"The Registrar, when setting the case down for 3rd August, 2000, should have regarded the judge's actual directions, section 15 (4) of the Criminal Procedure and Evidence Code and section 107 of the Prison Act."

Apart from one aspect to be considered shortly, this was a simple trespass to the dwelling house. This however is a case where courts are basically targeting the basic mental element of the crime. Heavy sentences are justified because courts want to discourage offenders from contemplating to break into dwelling houses to commit felonies. In targeting the mental element, courts will therefore increase the sentence to reflect that more minds were involved in the criminal scheme. There is more threat to society when people choose to act in concert to commit crimes. Beyond this the sentence will be enhanced where the trespass, the breaking and entry, was accompanied by violence or large damage to the premises. Similarly, the sentence will be enhanced if there was actual disturbance to residents. The Court may have to consider the circumstances of the victim. For example, a burglar should expect unkindness if the victim is young children, elderly people or disabled.

The only aggravating circumstance was that the defendants acted in concert. There was no disturbance to the victims. The First Grade Magistrate considered this Court's decision in Republic v Chizumila, Conf. Cas. No. 316 of 1994, unreported. The defendant, however, pleaded guilty. A guilty plea is a factor, notwithstanding the defendant never raised it, a sentencing court should consider when determining the sentence. Courts should encourage guilty pleas. It is now the established that guilty pleas should reduce the possible sentence by a third. (Republic v Mtaya, Con. Cas. No. 98 of 1995, per Mwaungulu J.; Republic v Mtenje, Con. Cas. No. 133 of 1995 per Mwaungulu J.; Republic v Zuwawo, Con. Cas. No. 405 of 1996 per Chimasula Phiri J; Republic v Kholoviko, Con. Cas. No. 434 of 1996 per Ndovi J.) Th sentence of four years on the burglary charge is set aside. The defendant will serve three years.

The sentence on the theft is also manifestly excessive. The First Grade Magistrate thought that the amount of property stolen was considerable. This Court, as pointed out in Republic v Nambazo, Conf. Cas. No. 643 of 199, unreported, has had to deal with more property than was involved here. The limitation is the maximum sentence. Current economic trends reflected in a sinking currency and war time interest rates and inflation can only mean that sentences have to be reasonably low for a considerable part of the lower band of the crime. I reduce the sentence to two years imprisonment with hard labour.

I set aside the four years imprisonment with hard labour for each offence. If not released under section 15(4) of the Criminal Procedure and Evidence Code, I sentence the defendant to three years and two years respectively for the burglary and theft.

Made in open Court this 1st Day of September 2000.

D F Mwaungulu
JUDGE