IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1143 OF 2001

THE REPUBLIC

VERSUS

ISAAC PITASONI

From the Fourth Grade Magistrate's Court Sitting at
Mitole/Chikwawa: Being Criminal Cause No. 107 of 2001

CORAM: **THE HON. MR JUSTICE F.E. KAPANDA**
The State, Absent
Accused, Absent
Mr S.N. Ngwata, Court Clerk

Date of review: 31st August 2001
Date of order: 31st August 2001

Kapanda, J

ORDER ON REVIEW

Introduction

This matter is before me so that I review the sentence that was
imposed on the defendant by the trial magistrate.

The matter was referred to this court by the Chief Magistrate in terms of Section 361 of the Criminal Procedure and Evidence Code. The court has proceeded to review the case in the absence of both the State and the defendant because no adverse order will be made against the convict.

Further, this court was not obliged to hear any of the parties during this review unless the court was minded to make an adverse order against the convict herein. This approach is in keeping with the stipulation in Section 362(2), as read with Section 363, of the Criminal Procedure and Evidence Code. Enough with the introductory remarks.

Facts of the case

The convict in this matter was charged with the offence of conduct likely to cause a breach of peace. This offence is provided for in Section 181 of the Malawi Penal Code. As a matter of fact, the State indicted the defendant under this section. The particulars of offence charged that the convict, on or about the 10th day of August 2001 at Chikwawa Police Station, conducted himself in a manner that was likely to cause a breach of peace to the Police Staff and others at the station.

The defendant pleaded guilty to the charge that was preferred against him. The facts of the case were read out to him. He accepted that the same were correct and the court convicted him accordingly. The court proceeded further to sentence him to an effective custodial term of imprisonment of five(5) months.

Consideration of the issue: Punishment

The punishment that was imposed on the convict was not

only excessive but also erroneous and unlawful. This comes out clearly and unequivocally when one reads the provision that creates this offence. The pertinent stipulation in Section 181 of the said Penal Code. The terms of the said Section 181, under which the defendant was indicted, are as follows:-

> "Every person who in any public place conducts himself in manner likely to cause a breach of conduct shall be liable to a fine of K50.00 and to imprisonment for three months."

As mentioned earlier, the trial magistrate made an order that the defendant should lose his liberty for a period of five months. This order is illegal and has no basis in law. I say this because of the following: firstly, let me observe that the maximum custodial penalty provided in the above quoted section was clearly disregarded. A person convicted of an offence under Section 181 of the Penal Code can only lose his liberty for a maximum period of three months and not five months. In point of fact, the convict ought to lose his liberty in exceptional circumstances due regard being had to the fact that the court might as well impose a penalty of payment of a fine. Secondly, it is important to note that it is trite law that where a penal provision states that a punishment of an offence "shall be the payment of a fine and imprisonment" for some specific period the court should not rush to impose the penalty of imprisonment. The court should consider the option of payment of fine first. If such option would not be adequate to punish the offender then the court would be allowed to consider the meting out of a custodial imprisonment. This is the case

because it is settled law that if the words “fine and imprisonment” appear in such penal provisions the court should read the words disjunctively. Thus, the court should read the stipulation as saying “fine or imprisonment.” The magistrate did not bear this in mind at the time he was considering the penalty to be imposed on the defendant. The record of the proceedings from the court below does not indicate that there was no other way of dealing with the convict herein apart from imprisoning him. It is not even the case on record that the payment of a fine would not have sufficiently punished the defendant. This was wrong on the part of the court in quo.

Thirdly, the sentence of five months imposed on the defendant, which was unlawful, should have entitled him to qualify for an order of community service. This option should have been ignored if the defendant had refused to perform community service.

Lastly, there is nothing on record to show that the magistrate considered the provisions of Section 339 as read with Section 340 of the Criminal Procedure and Evidence Code. If the court had resort to these provisions it could have realised that it was wrong to send the convict to prison. Indeed, in view of the fact that the defendant is a first offender who had pleaded guilty to the charge preferred against him, and considering that the maximum penalty for this offence is a term of imprisonment of less than a year, the court ought to have seriously considered other forms of punishment other than the custodial imprisonment that was meted out on the convict.

This court has already formed the view that the sentence herein is erroneous and unlawful. It must, therefore, be remedied. The court will invoke the provisions of Section 362(1), as read with Section 353(2)(a)(iii), of the Criminal Procedure and Evidence Code. In the premises, I alter the

sentence that was imposed by the court below and substitute it with a sentence that would result in the immediate release of the prisoner. It is so ordered.

Made in Chambers this 31st day of August 2001, at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE