

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 234 of 2001

THE REPUBLIC

Versus

JAMES KACHULE

In the First Grade Magistrate court sitting at Thyolo Criminal case number 254 of 2000

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, State advocate, for the state

Defendant, present, unrepresented

Nthole, Official Interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter set it down to consider the sentence the lower court imposed. The court below convicted the defendant, James Kachule, of attempted burglary and unlawful wounding. Burglary and unlawful wounding are offences under sections 309 and 241, respectively, of the Penal Code. The lower court sentenced the defendant to five and one-and-a-half years' imprisonment, respectively, for the attempted burglary and unlawful wounding. The judge, correctly in my view, thought the lower court's sentence for attempted burglary was manifestly excessive.

On the night of the 28th December 1998 the complainant, Mr. Dabson, who when sleeping secured the house, woke up by the noise of the breaking of a wall to the house. The defendant admitted in the court below that the complainant interrupted them before they could break into

the house. For this reason, the lower court allowed the prosecution's amendment of the charge from burglary to attempted burglary. The defendant stabbed the complainant. The defendant is 22 years old. He is a first offender. The lower court's reasoning on the sentence is meager and only referred to the seriousness of the offence. The lower court, when determining the sentence, overlooked circumstances around the offence, the offender and the victim emanating in the course of trial and in mitigation.

The sentencing approach is the same in burglary as for other offences. The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest

Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and the mental component of the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence. Generally, unless there are serious public interest concerns or compelling circumstances around the offence, the offender and the victim to address and subject to specific punishment for particular attempts, a sentencing court should pass lower sentences for attempts than for full crimes.

Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.

While the criminal law is publicly enforced, the victim of and the effect of the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example for offences against the person in sexual offences, the victim's age is important. An illustration of circumstances on indirect victims is the effect of theft by a servant on the morale of other employees, apart from the employer.

Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public order. The objectives of punishment range from retribution, deterrence,

rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case.

Applying these principles to burglary or housebreaking, burglary or housebreaking involves trespass to a dwelling house. Circumstances showing intensity, extent or complexion of the trespass are where the breaking and entry are forceful and accompanied by serious damage to premises or violence to occupants, fraudulent or by trickery. The court may regard, where, which is rare, the felony intended is not committed or, where committed, not charged, the nature and extent of the crime committed. A sentencing court may affect the sentence where victims were actually disturbed and, therefore, put in much fear, anxiety, humiliation or despondency. Equally, a sentencing court will seriously regard that the victims were elderly or vulnerable.

The six years starting point set in *Chizumila v Republic* Conf. Cas. No. 316 of 1994, unreported presupposes the crime which a reasonable tribunal would regard as the threshold burglary or housebreaking without considering the circumstances of the offender and the victim and the public interest. The approach is that all these considerations would affect the threshold case. Consequently, depending on intensity of these considerations, the sentencing court could scale up or down the threshold sentence. At the least, for a simple burglary, involving the minimum of trespass, irrespective of the plea where victims are not vulnerable, all being equal, the lowest the sentence can get is three years imprisonment. Housebreaking and burglary will seldom, if ever, be punished by a non-custodial sentence or an order for community service. The guideline this Court laid in *Republic v Chizumila* apply to attempted burglary and housebreaking to the extent that offenders should expect a lesser sentence than one for the full offence.

In this matter the trespass was not simple. The defendant and others were breaking the wall to the house. The trespass was forceful or serious. It did involve serious damage to premises. It was accompanied by actual violence. The defendant is offending for the first time. The sentence of five years for attempted robbery on the circumstances of the offence, the offender and the victim is manifestly excessive. This was not a complete burglary. It was an attempt. The Penal Code does not create a specific offence of attempted burglary. The lower court allowed amendment to an attempt to commit an offence under sections 401, 402 and 403 of the Penal Code. The maximum sentence for an attempt under consideration is seven years imprisonment. The sentence is close to the maximum given the defendant is young, is offending for the first time and pleaded guilty. The sentence of five years imprisonment for burglary is inappropriate. I set it aside. I sentence the defendant to one year imprisonment on the attempted burglary. The lower court's concurrent order remains

Made in open court this 8th August 2002

D F Mwaungulu

JUDGE