

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
(Confirmation Case Number 633 of 1999)**

**THE REPUBLIC
versus
ALLAN BANDA
CHARLES MATUPA
AND
MANUEL KANTHITI**

From Soche First Grade Magistrate Court Criminal Case No. 286 of 1999

CORAM: D F MWAUNGULU (JUDGE)

**Chimwaza, Principal State Advocate, for the State
Defendant, present, unrepresented
Nthole, an official interpreter**

Mwaungulu, J

JUDGEMENT

On the 14th August 2000, I enhanced the sentences in this matter. The reviewing judge wanted this Court to enhance the sentences the Soche First Grade Magistrate passed against Allan Banda, Charles Matupa, Manuel Khanga and Joe Kanthulu. The Soche First Grade Magistrate convicted the defendants of burglary and theft, offences under sections 309 (a) and 278, respectively, of the Penal Code. The Lower court sentenced the defendant to three years and two years, respectively, for the burglary and theft. For reasons appearing later, the lower court's sentences were manifestly inadequate as to involve an error of principle.

On the night of 20th and 21st March 1999 the complainant and another woke up around 3.00 o'clock a, m, because intruders were breaking the door to their house open. The intruders, armed with panga knives, grabbed the complainant and gagged him and his colleagues to chairs. The intruders stole property worth K170, 250.

The lower court considered two factors favourable to the defendants. One factor, that the property was recovered only applies, in my judgement, to the theft count. It is irrelevant to the sentence for burglary or housebreaking. Housebreaking or burglary, in their rudimentary forms, involves a trespass into a dwelling house with intent to commit a felony. The offence is complete on entry even if no offence is committed in the dwelling house. That the offence was actually committed in the dwelling house is, in my judgement, remotely significant to a sentence intended for the trespass with the specified intention. Moreover, if gravity of the offence actually committed influences the burglary or housebreaking, there is a danger or risk of double punishment particularly where, like here, the offence committed during the burglary or housebreaking is, as it should, charged separately. Of course, recovery of property stolen militates against a longer sentence for theft. Here, as we see shortly, it should not have meant much.

Secondly, the Lower court considered that this was the defendants' first crime. Where punishment involves loss of freedom, as it certainly should for burglary or housebreaking, courts should impose quick and sharp sentences for first offences with the primary aim of only deterring the particular offender from further crime. Deterrence of others should only be as a matter of course, not a primary pursuit, when sentencing young and first offenders. The circumstances and gravity of the crime and the defendant's highhandedness in this matter justify a departure from these considerations in favour of a longer prison sentence than that the lower court passed.

This was not the usual burglary. On this Court's guidelines in *Republic v Chizumila*, Conf. Cas. No 316 of 1994, unreported, the lower court sentence should not have been what it was. In *Republic v Chizumila* this Court stated that the starting point for burglary or housebreaking should be six years imprisonment. Sentencing courts could scale up and down the starting point to reflect mitigating and aggravating circumstances affecting the crime, the offender and the victim and the public interest in preventing crime. In this respect, there was little for scaling down the starting point. There was more aggravation.

First, the trespass was more than usual. The intruders used panga knives and metal bars to break open the door, all in the hearing of the victims. The intruders disturbed the victims and subjected the victims to physical intimidation and manhandling displaying a high level of criminality. They stabbed one victim. More importantly, more than one person participated in the crime. They stole a large amount of property. There is more threat to society when a people act in concert to commit crime.

For these reasons the sentences the lower court passed are manifestly inadequate. I set them aside. The defendants will serve six and three and one and half years for burglary and theft respectively.

Made in Open Court, this 14th day of August 2002.

D F Mwaungulu

JUDGE