IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 157 of 2002

THE REPUBLIC

Versus

JUKANI KHONGA

In the Second Grade Magistrate court sitting at Nsanje Criminal case number 17 of 2002

**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 for burglary. The court below convicted the defendant, Jukani Khonga, of burglary and theft. Burglary and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendant to four-and- a-half years and eight month's imprisonment, respectively, for the burglary and theft. The judge thought the lower court's sentence for burglary was manifestly inadequate because the defendant has a previous conviction.

On the night of 23rd and 24th January 2002 the complainant, Mr. Malenga, who when sleeping secured the house, woke up to find the house broken into. There is no evidence of the nature of the trespass. The complainant was asleep at the time of the crime. The defendant admitted the

charge at the police. He pleaded not guilty in the lower court. The defendant is 19 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 mental component comprising 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.

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.

In this matter there is no evidence of the extent of the trespass. It did not involve serious damage to premises. It was not accompanied by threats or actual violence. The defendant is offending for the first time. He is young. The defendant pleaded not guilty. Even though the defendant pleaded not guilty, this was this, in many ways, a threshold case of burglary deserving a sentence of three years imprisonment.

The reviewing judge suggested enhancing the sentence because the defendant has previous convictions. Previous convictions are no reason for a sentence higher than the sentence the offence, considering the circumstances of the victim and offender and the public interest, deserves. Previous convictions are reason why lenience should not be extended to the prisoner (See Bwanali v R () 3 ALR (Mal) 329; Maikolo v R ( ) 3 ALR (Mal) 584). In any case a court should not extend that leniency only where the offender, from the number or frequency of previous convictions, has lost the right to leniency. The defendant has only one previous conviction. This is a case where the right sentence is one meriting a threshold case. The sentence of four-and-a-half years is inappropriate. I set it aside. I sentence the defendant to three years imprisonment for the burglary.

Made in open court this 3rd Day of October 2002

D F Mwaungulu

JUDGE