

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 276 of 2001

THE REPUBLIC

Versus

TOBETI MAKULUNI

In the First Grade Magistrate court sitting at Mulanje Criminal case number 9 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, Senior State advocate, for the state

Defendant, present, unrepresented

Kamanga, Official Interpreter

Mwaungulu, J

JUDGMENT

The judge who reviewed this matter set it down to consider the sentence. The court below convicted the defendant, Tobeti Makuluni, of rape. Rape is an offence under section 133 of the Penal Code. The lower court sentenced the defendant to four years' imprisonment. The judge thought the lower court's sentence for the rape was manifestly inadequate.

The defendant raped the complainant as the complainant was walking to her home from a garden. The defendant followed her and suggested sexual intercourse. The complainant refused. The complainant struggled with the complainant for some time. After the first act, the defendant wanted more. To extricate herself, the complainant suggested the defendant come later at the house. She immediately reported the matter to the police. The lower court's reasoning on the sentence is impeccable. The lower court considered many things. The defendant admitted the

charges at the police. He pleaded not guilty in the lower court. The defendant is 28 years old. The defendant was offending for the first time. The lower court considered the offence's gravity from the sentence the legislature prescribed.

The sentencing approach is the same for rape as with 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.

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.

For rape, this Court, in *Republic v Phiri* Conf. Cas. No. 777 of 1994, unreported, mentions matters that a sentencing court should regard when sentencing offenders for rape: violence is

used over and above the force necessary to commit the rape; a weapon is used to frighten or wound the victim; the rape is repeated, the rape has been carefully planned; the defendant has previous convictions for rape or other serious offences of a violent or sexual kind, the victim is subjected to further sexual indignities or perversions; the victim is either very young or very old and the effect upon the victim, physical or mental. This Court regarded the guideline laid by the Lord the Chief Justice in R v Billam (1986) 82 Cr. App. R. 347:

“For rape committed by an adult without any aggravating or mitigating features a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or a person who abducts the victim and holds her captive, the starting point should be eight years. At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate. Where the defendant’s behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.”

This Court, regarding the prison conditions in this country, then proffered the following guideline:

“I would suggest in Malawi the following sentences for the three categories, based, of course, on the sentences that have been passed by this Court and the Courts below, three years, six years and ten years. Existence of any of the aggravating circumstances mentioned by the Lord Chief Justice would justify an increase in the sentence.”

In this matter four years imprisonment, on the factors apparent from the evidence on the record of the circumstances around the offence, offender and the victim and the public interest, the sentence the lower court passed is not manifestly excessive for this Court to intervene. The sentence is confirmed.

Made in open court this 3rd Day of October 2002

D F Mwaungulu

JUDGE