

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 1002 of 2002

THE REPUBLIC

Versus

Peter Petro Bondolipinde Nkhuya

In the Second Grade Magistrate court sitting at Thambani Criminal case number 30 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Chimwaza, Deputy Chief 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 housebreaking. The court below convicted the defendant, Peter Petro Kaliponde Nkhuya, of housebreaking and theft of a bicycle. Housebreaking and theft of a bicycle are offences under sections 309 and 282 (h), respectively, of the Penal Code. The lower court sentenced the defendant to five years imprisonment on each count. The judge, correctly in my view, thought the lower court's sentence for both offences was manifestly excessive.

On the 11th March 2002 the complainant, Mr. Langison Mzembe, left the house to fetch firewood. He locked his house. He came back to find the house broken into. The intruder stole a bicycle from the house. The defendant admitted the charge at the police. He pleaded guilty in the

lower court. The defendant is 21 years old. The defendant admitted to previous convictions. 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.

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 a trespass there was. There is, however, no evidence on the nature and extent of the trespass. The complainant was not at the house at the time of the crime. The trespass was not accompanied by threats or actual violence. He is young. The defendant pleaded guilty. This crime is the threshold case deserving a sentence of three years imprisonment.

The sentence of five years' imprisonment for burglary and theft of a bicycle were based on the defendant's previous convictions. Since the prosecution charged the burglary, the theft of a bicycle offence could not, to avoid double punishment, be aggravated by the housebreaking. Under guidelines of this Court, *Paulo v R (1923-61) 1 ALR (Mal) 682*, one-and-a-half years' imprisonment is appropriate for theft of a bicycle where the bicycle is not recovered. The sentence of five years imprisonment could only have been based on the defendant's previous convictions. Previous convictions are not a reason for passing a sentence higher than one justified by the nature and circumstances of the offence, the circumstances of the offender and the victim and the public interest. There are decisions of this Court: see *Bwanali v R (1964-66) ALR (Mal) 329*. There is also a decision of the Supreme Court: *Maikolo v R (1964-66) ALR (Mal) 584*.

I set it aside the sentences five years' imprisonment on both counts. The defendant will serve three years and one-and-a-half years' imprisonment for the burglary and theft, respectively.

Made in open court this 3rd Day of October 2002

D F Mwaungulu

JUDGE