IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 451 of 2000

THE REPUBLIC

Versus

PETER CHAPENDEKA
TOBIAS JAMES
FOSTER CHIMALIRO
BENSON KAMBAYENI

In the Third Grade Magistrate court sitting at Chikowa Criminal case number 125 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 conviction and sentence. The court below convicted the defendants, Peter Chapendeka, Tobias James, Foster Chimaliro and Benson Kambayani, for burglary and theft. Burglary and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendants to twelve and nine months' imprisonment, respectively, for the burglary and theft. The lower court ordered the sentences to run concurrently. The judge queries the conviction because of defects in the charge. The judge, correctly in my view, also thought the lower court's sentence for burglary was

manifestly inadequate. The review, however, occurs many years after the defendants served sentences.

On the night of 1st February, 2000 the complainants, Ms. Mulindiwa and Ms. Ching'onga, who lived in a hostel together with others and before sleeping secured the house, woke up because intruders were breaking the door to the hostel. The intruders stole the complainants' clothes from the hostel. The defendant admitted the charge at the police. They pleaded guilty in the lower court. The defendants are first offenders although, it appears, the same court convicted them of offences committed around the same time.

The reviewing judge detected serious flaws in the charge. The charge had two counts: burglary and theft. The prosecution inserted the statement of the offence for the two offences simultaneously. The two counts were followed by a single 'particulars of offence' embracing the two counts:

" Peter Chapendeka, Tobias James, Foster Chimaliro and Benson Kambayeni on or about the night of 1st February 2000 at Kaphuka Private Secondary School hostel having entered in a dwelling house with intent to broke out the girls hostel and stole two suitcases containing clothes inside. All valued K7,085. Property of Judith Ching'onga and Linda Mulindiwa."

This was contrary to section 128 of the Criminal Procedure and Evidence Code. Section 128 (a) (i) provides:

"A count of a charge shall commence with a statement of the offence charged, called the statement of offence."

Section 128 (a)(ii) provides:

"The statement of the offence, shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by written law, shall contain a reference to the section, regulation, by law or rule of the written law creating the offence."

Section 128 (a)(iii) provides:

"After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."

The lower court should not, bearing in mind the defendants were unrepresented, have allowed the charge without amendment (Paundi v Republic (1966-68) ALR (Mal) 245. There was, as the reviewing judge thought, duplicity in the particulars of offence. Without the facts, elaborately prepared and presented, which the defendants accepted, the defendants could have thought they were tried for one offence. Counts and charges must be drafted so that they do not mislead the defendant concerning the offences and the issues the defendant is in court for. A court on review or appeal, unless the defendant is not prejudiced in any way either on how he understands the matters he is in court for or in the presentation of his defense, will interfere with the conviction where there are serious defects in the framing of charges (R v Miti (1923-61) 1 ALR (Mal) 205). The Court will not interfere where the defect occasions no injustice to the defendants (Britto v R (1961-63) 2 ALR (Mal) 511). In this matter, the prosecutor presented the facts in support of the plea succinctly and in a manner clearly demonstrating the defendants committed two offences. The defect in the particulars did not prejudice the defendants. The conviction is confirmed.

The reviewing judge also criticized the sentence for burglary as manifestly inadequate. 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 the trespass was simple. The trespass was not forceful or serious. It did not involve serious damage to premises. It was not accompanied by threats or actual violence. The defendants are offending for the first time. They are young. The defendants pleaded guilty. Moreover, the victims, women living alone, were vulnerable. This aspect puts the matter above the threshold case deserving a sentence of three years imprisonment. Moreover more than one person participated in the offence. The sentence of twelve months imprisonment is inappropriate. It ignores this Courts approaches after Republic v Chizumila. I would have enhanced the sentences if the defendants had not already served the sentences the lower court passed.

Made in open court this 3rd Day of October 2003

D F Mwaungulu
JUDGE