IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
REVIEW CASE NO. 58 OF 2016
(Being Criminal Case No. 142 of 2016)

(In the Fourth Grade Magistrate Court Sitting at Dedza)

THE REPUBLIC

AND

PEMPHO BANDA AND 18 OTHERS

CORAM : **NTABA, J.**
: Mr. M. Mtonga, Counsel for the State not present
: Mr. F. Maele, Counsel for the Convicts
: Mr. D. Banda, Court Interpreter
: Mrs. L Mbonga, Court Reporter

Ntaba J.

REVIEW ORDER

1.0 BACKGROUND

1.1 The Fourth Grade Magistrate sitting in Dedza convicted Ms. Pempho Banda and eighteen other ladies for the offence of living on the earnings of prostitution contrary to section 146 of the Penal Code. The particulars of the charge were that Pempho Banda and 18 others on or about the 23rd day of February, 2016 at Dedza District Assembly in the District of Dedza knowingly lived wholly or in part on the earnings of prostitution.

1.2 The court sentenced them all to pay a fine of MK7,000.00 each subject to confirmation by the High Court on 25th February, 2016. The conviction was on their own plea of guilt.

1.3 It is against this finding of the lower court that the nineteen (19) convicts seek a review. They raise the following grounds of review –

1.3.1 the fourth grade magistrate had no jurisdiction over the offence of living on the earnings of prostitution under section 146 of the Penal Code;

1.3.2 the particulars of the charge were bad for misjoinder;

1.3.3 the plea was wrong in law as the court recorded a unanimous plea;

1.3.4 the particulars of the charge were bad in law as they did not capture the essential elements of the offence;

1.3.5 the charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself; and

1.3.6 the plea of guilty is wrong in law as the court did not comply with the mandatory provisions of the proviso to section 251 of the Criminal Procedure and Evidence Code.

2.0 THE APPLICATION FOR REVIEW

2.1 The convicts filed a review with the court citing the court's inherent jurisdiction. They supported their application with skeleton arguments which they adopted in their entirety to support the call for review by this court. Firstly they argued that the Fourth Grade Magistrate had no jurisdiction over the offence of living on the earnings of prostitution under section 146 of the Penal Code. They cited section 13(4) of the Criminal Procedure and Evidence Code which provides that
-

> A court of a magistrate of the fourth grade may try any offence specified in the Third Schedule in respect of which the maximum sentence does not exceed the jurisdiction conferred on such court under section 14 (3).

2.2 They further stated that according to section 14(4)(b) of the Criminal Procedure and Evidence Code provides that the court of the fourth Grade may pass a sentence of imprisonment for a term not exceeding twelve (12) months or a fine not exceeding MK100,000 or both. Accordingly, the offence of living on the earnings of prostitution in section 146 of the Penal Code is a misdemeanour and in terms of section 34 of the Penal Code has a maximum sentence of twenty four (24) months. Thus since the maximum sentence for the offence of living on the earnings of prostitution is 24 months thereby exceeding the jurisdiction of the said lower court.

2.3 The second ground for review was that the particulars of the charge were bad for misjoinder. It was their argument that y including all the 19 convicts in the same count created the impression that the accused persons jointly committed the alleged offences. However the caution statements were very clear in that the convicts were all acting independently of one another hence they could not be included in the same count as if they were committing the offence together. In ***Republic v Foster and Others*** [1997] 2 MLR 84(HC) where the twelve accused persons were arrested at three (3) different locations and accused in one charge of being rogue and vagabond and the court held such to be a misjoinder.

2.4 Regarding the plea being wrong in law as the court recorded a unanimous plea; it was their assertion that it is trite law that upon a plea a court is supposed to

read the charge and explain it to the accused person and obtain separate replies on the same, that, since there were 19 accused persons, the court had to obtain separate replies for each of the accused persons. However, none was done in this case and the elements of the charge were never put to the accused persons. This was clearly wrong. The rationale for such a process is to ensure that the court has an individual reply from each of the 19 persons. The said case of ***Foster*** held that the acceptance of guilty pleas can only be made where each accused person admitted all the essential elements of the offence. It was their submission that the plea was therefore defective as the court took a unanimous plea and did not put the elements of the offence separately to the convicts.

2.5 The fourth ground was that the particulars of the charge were bad in law as they did not capture the essential elements of the offence. Arguably **t**he lower court erred in law and fact in convicting the accused person as the facts from the State did not disclose an offence under the charged section namely the fact that for the purpose of gain, the accused person exercised control, direction or influence over the movements of a prostitute or prostitutes in such a manner as to show that she or they aided abetted or compelled her or them of their prostitution with any person or generally.

2.6 The convicts also argued that the charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself. They did concede d that section 146 may capture every woman who lives on the earnings of prostitution. This means it can capture any female relation of the prostitute including the children of the prostitute or parent if they depend on the earnings of the prostitution. This position is confirmed by the learned authors of Blackstone's Criminal Practice (2004) para. B3.90 on page 245. The authors state as follows –

> Taken at their widest, the wording of both offences would be apt to incriminate any person whose livelihood depends in any measure upon the earnings of a prostitute or prostitute. The effect of interpretation would be to cast the net more widely

2.7 They highlighted that the preceding section 145 of the Penal Code is similar to section 146, but refers to men living on the earnings of prostitution. However the differentiation came about when one examined the history of the offence. Both sections stem from the British Colonial Office Model Criminal Code and are exactly the same as those provisions adopted in the criminal codes of other former British colonies. Consequently, the actual provisions were never debated in the Malawian parliament but originate from debates in the English Parliament and that is how this court can understand the motivation behind their enactment.

2.8 In 1898 an amendment to the Vagrancy Act was passed to protect sex workers by criminalizing persons who made a living on the earnings of a prostitute. The Secretary of State for the Home Department in 1989 noted that it was intended for the purpose of bringing under the operation of the Vagrancy Act, 1824, as rogues and vagabonds, those men who lived by the disgraceful earnings of the women whom they consorted with and controlled as reported in House of Commons Debate on the Vagrancy Act Amendment

Bill, 14 March 1898,

Hansard. Notably, the initial section passed in 1898 related to males. It was only in 1912, when English lobbyists sought to deal with sensationalist and unsubstantiated allegations of white women being trafficked to colonies for the purpose of prostitution which led to the creation of section 146. These allegations led to debates in both Houses of the English Parliament on the Criminal Law Amendment (White Slave Traffic) Bill. At the time, considerable pressure was put on the English Parliament to pass the Bill on an urgent basis. It is recorded that on numerous occasions that the members of the House of Lords and House of Commons expressed their dismay at the manner in which this legislation was rushed through Parliament.

2.9 The history of the section clearly indicated that the introduction of an offence of living on the earnings of prostitution was never aimed at sex workers, but rather at those who exploited them. Discussions in the House of Lords on the Bill emphasized that immorality is not a crime in the eyes of the law, prostitution is not a crime in the eyes of the law, and the Bill did not seek to suppress either the one or the other but merely sought to amend in certain respects the law as it existed as per the House of Lords Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 28 November 1912, Hansard. Notably it was not bothered with the immoral man and immoral woman because the law is not concerned but with the procurer, the kidnapper, the souteneur, the trafficker in human life, the person, man or woman, who fattens on the proceeds and earnings of another's degradation as noted in the House of Lords debate on the Criminal Law Amendment (White Slave Traffic) Bill, 9 December 1912, Hansard.

2.10 Initially, the debate on the Bill in the House of Lords encouraged an amendment which would extend the provisions of the Vagrancy Act of 1898 to female persons living on the earnings of prostitution. An objection was raised that the effect would be to apply the crime to, for example, a disabled mother living on the earnings of her daughter as in the House of Lords debate on the Criminal Law Amendment (White Slave Traffic) Bill, 9 December 1912, Hansard. Both Houses of Parliament concurred that the section was inserted only to impose penalties on women who commit acts analogous to the act of procuration—a crime for which male convicted persons could be punished by flogging—but the dilemma was that women had been excluded from flogging as a method of punishment since 1824 noted in the House of Commons debate on the Criminal Law Amendment (White Slave Traffic) Bill, 11 December 1912, Hansard. For this reason, the House of Commons suggested the creation of a separate but similar offence applying to women that did not include the penalty of flogging or the presumptions relating to a person living with a prostitute.

2.11 The Vagrancy Act of 1898 was repealed in England and incorporated into the Sexual Offences Act in 1956, becoming section 30(1) and (2) of the new Act. Notably section 31 of the Sexual Offences Act of 1956 dealt with a woman exercising control over a prostitute. Both these sections were eventually repealed in England by the Sexual Offences Act of 2003 and replaced with a single provision dealing with any person exerting control for gain over a prostitute.

2.12 The convicts contention therefore was that the separation of the two offences to deal with women and men was rationalized on the fact that section 145 included corporal punishment as a punitive option for men but not for women under section 146. Although reference to corporal punishment in Malawi was eventually deleted by the Penal Code (Amendment) Act 1 of 2011, thus making them the same.

2.13 Looking at the issue of living on the earnings of prostitution, the case of ***Shaw v DPP*** [1962] AC 269-71, 263-4; STEWART 83 CR App r 327 has defined it as encompassing a situation where a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes". And furthermore that living on refers to living parasitically. A similar finding was made in the Canadian Case of ***R v Grilo*** **[**1991] 2 SCR (3d) 514 as well as ***Public Prosecutor v Quek Chin Choon*** **[**2014] SGHC 268 (Singapore. Likewise, another Canadian case***, R v Downey*** [1992] 2 S.C.R 10 held that the offence of living on the earnings of prostitution targets parasitic relationships. Cory J stated as follows -

> *"It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1)(j) [now s. 212(1)(j)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp.*
>
> *The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors, for instance (**Shaw v. Director of Public Prosecutions**, [1962] A.C. 220 (H.L.)). It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute (**Grilo**). These refinements render the prohibition narrower than its words might suggest*."

2.14 Furthermore the Court of Appeal for Ontario in the case of ***Canada (Attorney General) v Bedford*** [2012 ONCA 186 further confirmed that the prohibition of living on the avails of prostitution was aimed at preventing the exploitation of prostitutes and the profiting from prostitution by pimps. Also noted that despite the Canadian prohibition of living on the earnings of a person engaged in prostitution, the court observed that Parliament has chosen not to criminalize prostitution. In the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity. The court held that the provision had been interpreted by courts to apply generally to people who provide goods or services to prostitutes, because they are prostitutes. This interpretation includes, but is not restricted to, pimps. The court also noted that the section was grossly disproportionate to the extent that it criminalized even non-exploitative relationships between prostitutes and others that could have served to enhance sex workers' safety. The court chose to read by implication words of limitation into the statute, such that the prohibition related to living on the avails of

prostitution *in circumstances of exploitation*. The court argued that such an approach cured its constitutional defect and aligned the language of the provision with its legislative goal.

2.15 It was their opinion that section 146 being derived from an English law, it followed that its interpretation should be in accordance with the interpretation that obtains in English Criminal Law especially if determined in line with section 3(b) of our Penal Code. In English Criminal Law, the term "living on the earnings of prostitution" was interpreted to apply to parasitic relationships in which there was exploitation of the prostitute and not apply to the sex worker herself. Therefore it would be an affront to common sense for the provision to be interpreted otherwise in Malawi. Moreover, having regard to section 3 of the Penal Code, the convicts herein did not commit any offence of living on the earnings of prostitution at all.

2.16 It was their strong assertion that section 146 applies to women who live parasitically on prostitutes and this position was also discernible from the marginal notes of the section 146 that is *woman aiding etc for gain prostitution of another woman.* The marginal note clearly suggests that the provisions applies to women who aid the prostitution of another woman not their own prostitution. They emphasized that it was wrong to charge the accused herein with the offence of living on the earnings of prostitution when the particulars made reference to their own prostitution. Especially since the legislative history abundantly showed that the provision relating to criminalization of living on the earnings of prostitution were intended to protect sex worker from exploitation. Therefore it was unreasonable to charge sex workers with the same offence which was intended to protect them from exploitation. This would not solve the mischief which the section was intended to deal with.

2.17 In terms of section 42(2)(f)(vi) of the Constitution that every accused person has a right to a fair trial which includes the right not to be convicted of an offence in respect of any act which was not an offence at the time when the act was committed. In this case, the accused herein were convicted of an offence which did not exist at the time that they were convicted. Questionably, the conviction herein was therefore unconstitutional. The conviction herein is unsustainable and must be quashed.

2.18 On the last ground that the plea of guilty was wrong in law as the court did not comply with the mandatory provisions of the proviso to section 251 of the Criminal Procedure and Evidence Code, section 251 of the Criminal Procedure and Evidence Code provides that –

> (1) When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:

> Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.

2.19 In the case of ***Michael Iro v R*** [1966] 12 FLR 104 (Fiji) the court was of the view that there is a duty cast on a trial judge when the accused is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted, the accused person should fully comprehend exactly what a plea of guilty involves. Whilst in ***Mc Innis* v *R*** (1979) 143 CLR 575 at p. 589, Murphy J remarked quite pointedly that-

> *"The notion that an unrepresented accused can defend himself adequately goes against experience in all but the rarest cases. Even an experienced lawyer would be regarded as foolish to represent himself if accused of a serious crime."*

2.20 In ***Republic v Luwanja and Others*** [1995] 1 MLR 217, the court expressed concern that magistrates allowed persons to plead guilty without understanding what they were pleading to. Consequently, the proviso to section 251 of the Criminal Procedure and Evidence Code is clear that before a court records a plea of guilt, the court **MUST** ascertain that the accused person understands the nature and consequences of the plea and that he intends to admit without qualification to the truth of the charge. Therefore a court cannot enter a plea of guilty before it ascertains that the accused understood the nature and consequences of the plea of guilty. This section is applicable whether the accused is represented or not. It is trite law that when taking plea an accused must plead personally and where the accused is unrepresented as was the case, it becomes imperative that the court should explain the charges to the accused and where the accused pleaded guilty, to ascertain if it was their intention to plead guilty to the charge and if the consequences of the plea were understood.

2.21 Additionally, the proviso is there to ensure an accused person must understand the consequences of the plea of guilty before the court enters it. It is notable that whilst section 251 (2) of the CP and EC provides that the accused ***"may"*** be convicted, the proviso uses the word ***"shall".*** The use of the word "may" clearly shows that the even where there is a plea of guilty, a court has the discretion to accept the plea and convict thereon or not. On the other hand, ascertainment of whether the accused person understands the nature and consequences of the plea, by the use of the word **"shall"** is a mandatory requirement before a plea of guilty is recorded.

2.22 They strongly averred that a valid plea of guilty has several consequences. It waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial. Most of all a plea of guilty, relieves the prosecution of the burden to prove the case. Further it means the case will conclude and he will be convicted and immediately. An accused person must therefore be aware of these things before a court can accept a plea of guilty.

2.23 In the Malaysian case of ***Lee Weng Tuck and Amor v PP*** [1949] MLJ 98**,** the

Supreme Court of Malaysia held that when an accused person pleads guilty,

there must be some indication on the record to show that he actually knows not only the plea of guilty to the charge but also the consequences of his plea, including that there will be no trial and the maximum sentence may be imposed on him. Similarly in the case of ***Chua Ah Gan v Public Prosecutor*** **[**1958] MLJ liv**,** it was held that if the plea is one of guilty, the magistrate must make it clear on the record that the accused understands the nature and consequences of the plea. Ascertainment that an accused person understands the nature and consequences of a plea of guilty is also important as it excludes possibility a forced plea or a plea of guilty on the belief that the accused will get a lenient sentence upon such a plea. The Appeals Chambers of the International Tribunal of the Former Yugoslavia in the case of ***The Prosecutor and Drazen Erdemovic,*** Case No IT-96-22-A-7 October 1997 by four votes to one held that the case must be remitted to a Trial Chamber, other than the one which sentenced the Appellant, so that the Appellant may have the opportunity to re- plead in full knowledge of the nature of the charges and the consequences of his plea. Under paragraph 15, the court stated that -

> *"We feel unable to hold with any confidence that the Appellant was adequately informed of the consequences of pleading guilty by the explanation offered during the initial hearing. It was not clearly intimated to the Appellant that by pleading guilty, he would lose his right to a trial, to be considered innocent until proven guilty and to assert his innocence and his lack of criminal responsibility for the offences in any way. It was explained to the Appellant that, if he pleaded not guilty he would have to contest the charges, whereas, if he pleaded guilty he would be given the opportunity of explaining the circumstances under which the offence was committed*."

2.24 Remarkably, accused persons at the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, are represented by eminent lawyers yet the appeals court was still able to find that the accused person in that case pleaded guilty without understanding the consequences of the plea and it was upon this basis that the conviction was quashed. This also shows the seriousness that knowledge of the consequences of the plea is given even in International Criminal Tribunals. It was their submission that the record before this court does not at any point show that the court had regard to the mandatory provisions of the proviso to section 251 of the CP and EC before entering a plea of guilty. The court did not ascertain if the convicts herein understood the nature of the plea and the consequences thereof before recording the plea of guilty. Therefore the plea of guilty herein was wrong in law and must be quashed. Further this was not an error that is curable by section 3 and 5 of the Criminal Procedure and Evidence Code.

2.25 It was the convicts' submission that their arrest and trial was unconstitutional as they were arrested and tried for conduct which was not criminal at all. Hence it was and is illegal to arrest any prostitute for living on the earnings of her own prostitution. They concluded with the following prayers –

2.25.1 the convictions for living on the earnings of prostitution contrary to

section 146 of the Penal Code must be quashed;

2.25.2 the fines that were paid by the accused be returned to them forth with; and

2.25.3 an order that the order of this court be forwarded to the DPP, the Dedza Police Station and Dedza Magistrate Court

3.0 THE STATE'S RESPONSE

3.1 The State filed and adopted the submissions in response to the application for review by the convicts. They on the first ground for review agreed with the convicts that the court of fourth grade magistrate according to section 13(4) and section 14(4) of the Criminal Procedure and Evidence lacked jurisdiction to try the case herein. They argued that the irregularity in the case herein was curable by section 5 of the Criminal Procedure and Evidence Code. They further cited section 132 of the Criminal Procedure and Evidence Code which stipulates that a person convicted or acquitted of any offence constituted by any acts may, notwithstanding such conviction or acquittal be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged. It was their contention that the above section means the convicts could be retried as a plea of *autrofois* convict would not be available to them as held in ***R v Mwanyopa*** (HC) 3 ALR (Mal) 238.

3.2 They argued that an appellate or review court has the powers to order a retrial where it feels that the appeal has been made out in terms of section of 362 as read with section 353(2)(a)(i) of the Criminal Procedure and Evidence Code. A retrial may only be ordered where there is an error in law and procedure which cannot be cured by section 5 of the Criminal Procedure and Evidence Code. Notably, discretion to order a retrial should be exercised with reference to all the circumstances of the case particularly whether the evidence discloses a case, that is whether there is intention to recharge and is within the interests of justice as held in ***P Banda and others v R*** (SCA) 10 MLR 142.

3.3 It was advanced that the case was registered and fully tried by the Fourth Grade Magistrate Court and they acknowledged that it did not have jurisdiction to try the said offence as such the trial was a nullity. It was their submission that the convictions against the 19 women should be quashed and their sentences set aside. It was also their opinion that the court should then order a retrial before a competent court.

3.4 Regarding the issue for the charge being bad for misjoinder, they contended that under section 127(4) of the Criminal Procedure and Evidence Code such was not the case as such the ground should fail. In terms of the issue that the unanimous plea was wrong in law, the State did agree with the convicts that section 251 of the Criminal Procedure and Evidence Code was not complied with. They agreed that the elements of the offence were not put to each of the convicts separately as such the recording of the plea was wrong in law.

3.5 The State was of the opinion that the elements of the offence included that the accused must do the *actus reus* for the purpose of gain. It further requires that the accused must exercise control, direction or influence over the movements of the prostitute. None of these requirements were particularized in the charge as such the particulars of the charge were indeed bad in law and prejudiced the convicts in their pleas.

3.6 The State further argued that they believed that looking at the *actus reus* of section 146 it is inconceivable that it targeted the prostitute herself. From the statements and facts presented in terms of how the convicts were arrested for prostituting and not exercising control or aiding other prostitutes, therefore the charge was wrong.

3.7 The lower court record shows that the magistrate did not comply with proviso of section 251 of the Criminal Procedure and Evidence Code. It was their submission that the anomaly was not curable under section 5 of the Criminal Procedure and Evidence Code. In conclusion, they further submitted that the case should be retried before a competent court. However, if the court disagrees with the State's assessment, then it should consider quashing the convictions and setting aside their sentences.

4.0 THE LAW AND COURT'S DETERMINATION

4.1 By law, under sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well as 362 of the Criminal Procedure and Evidence Code, this court is seized of this case for purposes of review. In reviewing, this court is requested to examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

4.2 Firstly in dealing with this matter, I would like to highlight a fundamental principle of Malawian criminal law which is provided for in section 3 of the Criminal Procedure and Evidence Code –

> The principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code.

4.3 Furthermore, I am duty bound to ensure that whatever finding by a lower court which results in a failure of justice, such failure must be rectified. The rectification should done at the earliest possible time. Section 5 of the Criminal Procedure and Evidence Code is clear on this -

> 5.(1) Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.

(2) In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings.
(3) The important admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised—

(a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction; or

(b) it would have varied the decision if the rejected evidence had been received.

4.4 With respect to section 26 of the Courts Act it has been stated by Justice Mwaungulu (as he was then) in ***Republic v Genti*** **(2000-2001) MLR 383** that it is a general supervisory and superintendence provision applicable to criminal matters still pending in subordinate courts. It has to be read with sections 70, 74 and 75 of the Criminal Procedure and Evidence Code.' However, section 25 of the Courts Act gives the High Court specific powers of review. It is this aspect that covers the review of the subject matter of these proceedings as it concerns the review of decisions by magistrates at first instances. It is also pertinent to note that on review the High Court under the Criminal Procedure and Evidence Code can alter a conviction or sentence passed by a subordinate court at first instance but not acquittals into convictions as the ***Genti*** case**.**

4.5 Another relevant provision on high court reviews is section 362 of the Criminal Procedure and Evidence Code which provides as follows -

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by sections 353 (2) (a), (b) and (c), and 356.
(2) No order made in exercise of the powers conferred in this section shall be made to the prejudice of an accused unless he has first had an opportunity of being heard either personally or by a legal practitioner in his own defence.
(3) The proceedings by way of review may take place notwithstanding—

(a) That an appeal lies from the finding made, or sentence imposed, in the proceedings under review; and
(b) That the time limited for the bringing of such appeal has not elapsed—

(i) the time limited for the bringing of an appeal against the finding made, or the sentence imposed, in such proceedings has elapsed; or
(ii) the accused has declared in writing that he does not intend to appeal against either such finding or such sentence.

(4) The exercise of the High Court of its powers of review under this section in relation to any proceedings shall not operate as a bar to any appeal which may lie against the finding made, or the sentence imposed, in such proceedings:

> Provided, however, that such review shall operate as a bar to such appeal if the proceedings by way of review took place in open court and the accused had an opportunity of being heard either personally or by a legal practitioner.

4.6 What follows is that after exercising the review powers the same will not be a bar to an appeal unless the review took place in an open court where both parties had an opportunity to be heard. In addition, it is provided that on review the court exercises the same power as the powers of appeal provided under section 352 of the Criminal Procedure and Evidence Code. It is thus apparent that the two concepts are related to each other.

4.7 Furthermore this court is mindful of the Constitutional tenets of a right to a fair trial as espoused in section 42. This court is ever so mindful that throughout the process of trial, an accused person's rights should be considered and where possible upheld. Consequently, the court recognizes that in meting out justice, it should do so by taking into account fairness and equity in all aspects.

4.8 Therefore, this court is cognizant that as a reviewing court it should examine all issues on the court record. This court has taken note that it is the entire trial process which should be examined. This court reminds itself that the law on framing of charge sheets is laid down in section 128 of the Criminal Procedure and Evidence Code.

4.9 The court also notes that for plea taking, the procedure is laid down in sections 251 and 252 of the said Code. Furthermore, the courts have also laid down that each and every element of the offence must be read to the accused person and thereafter the court should record a reply for each count separately as pronounced in ***Magwaya v Republic***, 8 MLR 323. Furthermore, the plea taken should ensure that it passes the equivocal test.

4.10 The trial court can only obtain an unequivocal plea. The trial court must proceed to trial if the plea is equivocal and in ***Republic v Benito*** (1978-80) 9 MLR 211, 213, Chatsika, J (as he then was) said -

> *"It is trite law which has been emphasized many times in this court that before a plea of guilty is entered all the ingredients of the offence must be put to the accused person and he must admit each and every one of those ingredients. It is only when this has been that a plea of guilty may properly be entered. If the accused person in making his replies to the charge modifies his admission by stating some justification, a plea of guilty should not be entered."*

4.11 In the same ***Benito*** case, Chatsika, J., followed O'Connor, J's statement in ***P. Foster (Haulage) Ltd v Roberts*** [1978] 2 All ER 751, 754-755 -

> *"In my judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court's jurisdiction to permit a defendant to change an unequivocal plea of guilty at later stage. A court cannot accept an equivocal plea of guilty: it ... must either obtain an unequivocal plea or enter a plea of not guilty. For a plea to be equivocal the defendant must*

add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged."

4.12 Secondly, an important aspect of the plea taking after the charge has been read out especially where a guilty plea has been recorded are the facts of the crime. The importance is placed to ensure that, to the knowledge of the court, an accused adequately understands the charge they are pleading to. Generally in the case of an unrepresented accused, to ensure that they understand the charges and unequivocally plead to those charges. It is necessary that the court state the substance of each offence to the accused and take separate pleas for each. Further it ensures that the admission to the offence is without limitations or qualification. Remarkably Mwaungulu J's (as he was then) emphasized this point in ***Cliff Njovu v Republic,*** Crim. Appeal No. 7 of 2010 -

> *"The facts court take in support of the plea are important. They help the court to appreciate whether the defendant really wants to plead guilty to the charge. This is important. The court can only accept an unequivocal plea. The plea is equivocal if facts the court accepts fail to raise sufficient material to account for the elements of the offence or raise a reasonable defence to the charge. Moreover the facts together with what the defendant raises in mitigation are significant for sentence.*
>
> *The prosecutor, in the supporting facts, establishes both the ingredients and the elements of the offence and the particulars in the count. If the facts undermine an ingredient or element of the offence or show a different factual complexion from the one in the particulars the court should consider changing the plea.*
>
> *The facts the prosecutor presents may render a guilty plea unsustainable. They may differ substantially from the particulars or fail to establish critical particulars. The trial court, in that case, until sentence, can and should alter a guilty plea to a not guilty plea. The particular's importance determines the trial court's course. If the variance is deminimis it may be unjust to the prosecution and the defence to go to a full trial. All will turn out on the facts before the trial court. For example, for a defendant who agrees committing an offence on a particular victim and place a variance on the date the offence was committed can and should be cured by amendment rather than a full trial. Where however the facts establish the defendant could not have committed the crime and an alibi emerges from the facts presented by the prosecutor the date of the offence is important. The matter can only be resolved by trial. The trial court must alter the guilty plea to one of not guilty where the doubt in the particulars can only be resolved by trial of the issue."*

4.13 Upon examining the court record herein, it is obvious that the plea taken in regard to the convicts herein was unequivocal. Nonetheless, it was noted that the lower court did not make any efforts to explain the ingredients of the offence when taking plea. The court merely asked the 19 accused, 'do you admit or deny' after which recorded All 19 accused admitted the charge. Furthermore, the record further shows that the facts narrated by the State were grossly inaccurate and not applicable to all the convicted persons due to the various places they were arrested. This court in good conscience cannot uphold the plea recorded in the lower court because per law such would be an injustice.

4.14 The second issue would be to determine if the magistrate had jurisdiction to try the case. Notably, the offence of living on the earnings of prostitution is a misdemeanor. It is also noteworthy to mention that section 146 of the Penal Code does not provide for punishment. Accordingly, for the punishment the relevant provision is section 34 of the Penal Code which provides that the sentence should be twenty four (24) months. Incidentally, the convicts were tried by a magistrate of the Fourth Grade. Undeniably under section 14 (3) of the Criminal Procedure and Evidence Code, a court of a magistrate of the fourth grade cannot try an offence whose maximum sentence exceeds 24 months imprisonment. Accordingly, by trying the offence of living on the earnings of prostitution the magistrate acted in excess of his jurisdiction.

4.15 Borrowing from the civil case of ***Hetherwick Mbale v Hissan Maganga,*** MSCA MISC Civil Appeal Cause No 21 of 2013, the Supreme Court of Appeal in a unanimous decision delivered by the late Mbendera, JA, held that where proceedings are conducted by a court without jurisdiction they are and should be declared null and void. This court therefore finds that the proceedings of the lower court herein were completely null and void.

4.16 Incontrovertibly since the lower court had no powers to try this offence at all, the trial was therefore void and of no legal effect. This is a procedural irregularity and it is my determination that this court cannot cure such as it did prejudiced the accused persons and this court is aware that it should not to tamper with the magistrate's finding unless it is to ensure justice. The lack of jurisdiction in itself is so glaring and the same cannot be cured by sections 3 and 5 of the Criminal Procedure and Evidence Code. The conviction is blatantly wrong in law and so too the sentences.

4.17 Based on the court's findings on the defective plea as well as the lack of jurisdiction which are the fundamental areas for my determination, I was not sure whether I should proceed to handle the other grounds for review. However I note that it is imperative that I do so because of the prevalent misuse of section 146 by law enforcement in Malawi. Firstly, I find it very frustrating that this court should be dealing with a fundamental issue which the prosecution should be very conversant with, that is, joinder of charges. I must state that Malawi law has simplified a lot of things for criminal justice practitioners. Clarity is present in section 127 of the Criminal Procedure and Evidence Code. The parameters for how people can be joined in a charge sheet have been clearly spelt out. Somehow these 19 individuals arrested at different places and time as indicated in their caution statements were tried and convicted in one case. It is trite law that where it is noted by an appellate, confirming or reviewing court that the circumstances of the offences were committed at various times or places and do not form a series of the same or similar offence for each party such would be declared a misjoinder to charge of the offences in the same count. In this case, this misjoinder further led to the defective plea taken which this court has already declared on. A misjoinder can warrant the setting aside of a conviction if it does occasion a failure to justice.

4.18 Similarly, on the issue of a unanimous plea of guilt being recorded by the lower court with regard to the convicts herein? This court finds that highly

irregular.

It is this court's view that the same principles apply as determined on the fact that each accused's plea must individually be responded and recorded and more so after ascertaining the facts. Let me at this point turn to the Magistrate, His Worship Kaliko. It is the duty of the court to ensure that all matters before it are handled fairly and with justice. It is evident that the charges in this case regarding the 19 were neither founded on the same facts nor formed or were part of a series of offences of the same or a similar character. For the former part of founding on same facts, such does not need to be explained to the magistrate. However, maybe one can try to argue that they fall within the later part's ambit. It is trite law that for two offences to belong to a series of similar offences there must be a nexus between them. For that reason for a nexus to exist, the offences must be similar both legally and factually. It is trite law that two offences by one or two accused do not form a series merely because evidence relating to one offence is uncovered during the investigation into the other which in this case it was not. It is my judgment that the magistrate was duty bound and have severed the charges and tried the accused separately especially since they could not have raised these fundamental issues being unrepresented.

4.19 On the issue that the charge was bad in law as it did not capture the essential elements of the offence; it is trite law that a charge sheet or indictment must contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be essential for giving reasonable information as to the nature of the charge. The form and content of the charge or indictment is governed by section 128 of the Criminal Procedure and Evidence Code. It is my view that in terms of the charge sheet highlighting the statement of the offence, this court cannot fault such. However what the court faults is the particulars of the offence as they were not clear in terms of each of the accused person who were arrested and were individually cautioned and charged.

4.20 I now turn to consider the offence of living off the earnings from prostitution as provided for in section 146 of the Penal Code. The convicts through their Counsel argued that the offence is not placed to target prostitutes themselves but to protect them from exploitation. The Penal Code in Malawi was passed into law on 1st April, 1930 and has undergone various amendments throughout the year with the last one being in 2011. I have deliberately indicated the history of the Penal Code to take into context the issues that I would highlight subsequently.

4.21 The Constitution under section 9 has tasked the judiciary with the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law. It further stipulates in section 10 that –

> (1) In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.
> (2) In the application and formulation of any Act of Parliament and in

> the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.

4.22 Turning to the Penal Code apart from ensuring that its application and interpretation is in line with sections 9 and 10 of the Constitution, its own section 3 stipulates that it should be understood according to English common law and statutory interpretation. Malawi law is subject to various statutory construction however it has through most of its history followed the English law construct of either taking the literal meaning or what mischief was meant to be cured and lastly the golden rule of interpretation.

4.23 Coming to the issue of section 146 of the Penal Code not targeting the prostitute, this court has taken note of the history of the section as having emanated from the British Colonial Office Model of Criminal Code which was indeed a direct importation of English law referring to prostitution as initially found in the Vagrancy Act, 1824. The English law changed in 1885 after the editor of *the Pall Mall Gazette* published a report about an alleged organized prostitution ring in London. The 1885 law intended to prevent the procurement and detention of women by third parties for the purpose of prostitution. The law prohibited the management of premises as a brothel and a tenant or landlord of such premises was liable to a fine or imprisonment. The prohibition on brothels limited the places where sex workers could work and increased their reliance on third parties, such as pimps and taxi drivers, to find customers for them. It was later discovered that third parties increasingly exploited and abused sex workers. Thus, in 1898 an amendment to the Vagrancy Act was passed with an intention to protect sex workers by criminalizing persons who made a living on the earnings of a prostitute. It is this 1898 Act as amended in 1912 to include women which brought about section 146 of the Penal Code.

4.24 Let me take this opportunity to make a comment on the issue of prostitution in Malawi. Malawi has had plenty of opportunity to fully review the Penal Code and see if it is in tandem with the world we are living in due to the various changes which have taken place. This would include whether the language used is legally sound as well as to see if some of the offences have changed over time and so too their dimensions like the issue of prostitution. It remains evident that the issue of prostitution in Malawi continues to be a sensitive subject however the law has since the passing of the Penal Code not criminalized the actual act of prostitution, that is the selling or purchase of sex. Obviously, the country mostly legislated for prostitution related activities as evidenced by sections 145 to 147A or 180 of the Penal Code.

4.25 Some countries in the world have taken the bold steps and openly discussed and changed their laws on prostitution. Some countries have criminalized or decriminalized aspects of prostitution. What is evident and should be acknowledged is that prostitution remains a subject that gives rise to intense debate with no agreement on how it should be responded to or tackled. Malawi like many countries have realized that the hot 'potatoness' is due to questions regarding what causes prostitution, issues of legislating people's sexuality, high levels of organized crime especially trafficking, public health concerns due to

the HIV/AIDS pandemic or rise in sexually transmitted illnesses, public safety, the exploitation of vulnerable people like women, persons with disabilities or children, continued inequality between men and women and human rights concerns to mention a few.

4.26 It should be noted that there is a lot of material in Africa and worldwide on the issue of prostitution which covers the common prostitution on the street to the organized and technologically advanced prostitution on the net. It is also notable that there are a lot of players aside from the prostitute himself or herself , that is, those who control prostitutes (pimps and madams), customers, owners of premises used for trading sex to mention a few.

4.27 All the above being said, having noted the history and noting the selective use of prosecution in terms of prostitution, in that, the courts constantly only deal with the women not the other players, it remains for me to determine that the offence of living on the earnings of prostitution in Malawi was not aimed at prostitutes or sex workers, but rather at those who exploited them. Further, taking into account the dictates of section 3 of the Penal Code as wee as the historical development of section 146 equivalent in England before its transplantation, I will consider to render a meaning to the words used in that section and give the same its natural meaning unless the same leads to an ambiguity then I will turn to interpret the provision purposively.

4.28 Section 146 of the Penal Code reads

> Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, shall be guilty of a misdemeanour.

4.29 It is my considered view that the section does raise two (2) distinct offences with one targeting the prostitute herself and the other targeting the persons having control over the prostitute. In law, the State has every right noting that there has been an offence committed to try anyone of the said offence as long as their evidence meets the required standard of proof. This however does not take away from the fact that history of the provision nor that was its initial intention to only target the persons exercising control.

4.30 I would observe however that although the first part of section seems to cover the prostitute herself, it is couched in a fashion that is overboard and it can catch within its web many innocent women including the dependants of the prostitute. The result is that the provision is ambiguous and or equivocal amenable to constitutional challenge.

4.31 All in all, the case herein is very shoddy at best for the initial part of the offence. It is manifestly obvious that the arrests of the 19 emanated from a police raid. These are the same police raids which Malawian courts have always grappled with. Justice Chinangwa (as he was then) in ***Bridget Kaseka and Others v R*** [1999] MLR 116 (HC) at p. 118 in an offence dealing with section 180(f) of

the Penal Code stated that booking a room at a rest house and having sexual intercourse, of its own, would not make one an idle or disorderly person. The State has to prove that one is a common prostitute and was soliciting. Arresting a woman alone without her male counterpart constitutes discrimination. He went on to state -

> *"What exercised my mind was the assumption that because they were in rest houses therefore they were there for immoral purposes. The nature of the immoral activity has not been expressly stated. It is wrong to think that because they were found in rest houses that constituted immoral activity. A rest house is a business premises open to the public to stay both during the day or overnight on payment of a prescribed amount. It is further observed that some of the appellants are alleged to have had male companions who were not arrested and the State has not given reasons why they were not prosecuted. Rest houses, motels, inns, and indeed hotels are not exclusively for men to stay in or spend overnights. Both men and women have a right to stay there provided that they do not breach the law. The Constitution asserts the right of women*
>
> *It seems to me that the police action was rather discriminatory because only the appellants were arrested leaving their male companions free. Even those who had no male companions were not to be arrested just because they were suspected to be there for purposes of immoral activity."*

4.32 Further, noting that the evidence in the lower court failed to meet the elements of the offence despite the plea of guilt and further failed to reach the evidential burden of proof beyond a reasonable doubt after the narration of facts. Amazingly that by merely being found in a resthouse, the 19 were women knowingly earning money through prostitution and were living on those earnings. It is obvious that the conviction on its face would have still been unsafe because the evidence through the narrated facts was below the required standard of proof in criminal matters. Therefore, despite the State's request for a retrial because it was their view that an offence had been committed, such cannot be entertained looking at the case herein. It is clear that the lower court record discloses that there was no evidence as thus to do so would be perpetuating a gross injustice on the 19 women.

4.33 A case analysis has clearly shown that section 146 provisions in some of the common law jurisdictions where it has been challenged has narrowly been interpreted not to apply the prostitute. Courts in interpreting have maintained that the mischief that it was curbing was protecting prostitutes from those who exploit them. The ***Bedford*** case clearly highlighted the contradictory nature of some of the offences in the Penal Code relating to sex work. The Court of Appeal for Ontario dealing with a similar situation as here where their law also does not criminalize the selling or buying of sex held that the offence of living off the earnings of prostitution should apply in circumstances of exploitation only. Similarly, the Court found that living on the avails of prostitution is grossly disproportionate to the extent that it criminalized non-exploitative commercial relationships between prostitutes and others and particularly those who may enhance prostitutes' safety. The Court's finding was based on the fact that sex work itself is legal as such they could not treat it as a crime that which the legislature has deliberately refrained from making a crime. This court does very much agree with the convicts and the State that

the section was mainly

meant to protect. However, this court advises that the initial part is an area which will continue to be used by the State to arrest and prosecute sex workers unless steps are taken.

4.34 It is noteworthy to note that after hearing the parties the magistrate had the following to say at page 3 of the judgement, ***after hearing all the parties and according to the saying of the State the 19 accused were women who lived on earnings from prostitution contrary to section 146 of the Penal Code and all the 19 have admitted to the charge. So according to this section say if any woman if found doing this is liable to pay a fine or in default 6 months imprisonment with hard labour. So you have been found guilty.*** Evidently, the magistrate laboured under the impression that section 146 of the Penal Code imposes a fine or in default an imprisonment. No doubt under this impression he was led to proceed to hear the case despite his lack of jurisdiction. As already indicated, I do not find any evidence to support that the convicts indeed lived off earnings from prostitution. What is revealed is that they were prostitutes but I am very concerned with how such was revealed especially after reading the caution statements. Accordingly, as pointed above section 146 of the Penal Code does not target prostitutes. In absence of evidence showing that the convicts lived off earnings from prostitution, I also find that the convicts were wrongly charged.

4.35 My final sentiments on the issue is that as long as the subject of prostitution remains a difficult or vexing matter but realizing that prostitution shall remain an ever present, tenacious and ancient institution which has survived centuries of attack and criticism and condemnation. In Malawi, women working in the trade will continue to face discrimination and abuse at the hands of law enforcement because despite having sections in the Penal Code that apply to both men and women, it is the latter that are ever present in the court system. I am not here to advocate for criminalization or decriminalization of commercial sex work or prostitution but only to highlight that prostitution related offences in Malawi shall remain an area of blatant discrimination, unfairness, inequality, abuse as well as bias from law enforcement as well as the courts as evidenced in this case. I seriously believe, Malawi does need to have a frank discussion on the same or our courts will be plagued in dealing with such cases.

4.36 Lastly, on the issue that the arrest and trial was unconstitutional as the 19 women were arrested and tried for conduct which was not criminal at all. Let me emphasize and state that since the passing of the Constitution in 1994, Malawian courts have guarded jealously the tennets under the Bill of Rights and more so provisions dealing with the life and liberty of a person. For instance in the South African case of ***Theobald v Minister of Safety and Security and Others*** 2011
(1) SACR 379 (GSJ), at 389F, the court stated –

> *"It has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful."*

4.37 It cannot be disputed that an unlawful interference with a person's right to personal freedom amounts to a violation of their right to liberty and can be an

affront to their dignity. It can be argued and rightly so that looking at the evidence herein that section 44(2) of the Constitution was infringed by the arrest of the 19 women herein. It is therefore my finding that the manner in which the 19 women were arrested and tried was unconstitutional as such was based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such the charge but was done merely to embarrass, label and harass the 19 women.

5.0 ORDER

5.1 From the foregoing discussion it is the finding of this court that the proceedings in the lower court were characterized by gross procedural irregularities and to a large extent unfairness and bias and an affront to justice. I take cognizance that section 5 of the Criminal Procedure and Evidence Code enjoins the court not to alter decisions on review or appeal unless the irregularities have occasioned a failure of justice. In the present case, the irregularities indeed occasioned a failure of justice in that had the trial Magistrate put the elements of the offence charged to the 19 women as conceived under section 251 of the Criminal Procedure and Evidence Code and explained to them, they would have pleaded otherwise. Further it was found that the lower court itself lacked jurisdiction to try the offence under section 146 of the Penal Code.

5.2 I therefore make the following orders -

5.2.1 The conviction and the sentence imposed are hereby set aside.

5.2.2 The fines ordered by the lower court are hereby declared to have been wrong and shall accordingly be returned to the 19 women.

Made in open court this 8th day of September, 2016

Z.J.V. Ntaba
Judge