IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 458 OF 2003

The Republic

Versus

William Moses Kayange

From the Third Grade Magistrate Court sitting at Chikowa in Blantyre, Criminal case number 68 of 2000.

CORAM: D F MWAUNGULU, (JUDGE)

Kalaile, State Advocate for the State

Defendant, present, unrepresented

Kamanga, Recording Officer

JUDGMENT

Mwungulu, J

The judge who reviewed this matter set it down for this Court to consider the propriety of combining the theft count in an indictment for breaking into a building and committing a felony there, an offence under section 311 of the Penal Code. The reviewing judge also thought that the sentence should have been enhanced. When I heard the matter on the 29th of May 2003, the defendant had already served the sentences of 10 months imprisonment, ordered to run concurrently, which the lower court imposed. The sentence should therefore be confirmed and I may have to make a comment as a way of guidance to the lower court for sentences for this kind

of offence. The graveness of the reviewing judge's comment is that the lower court should not have accepted an indictment where the defendant has been charged with the offence of breaking into a building and committing a felony therein with another charge of theft. There are three decisions of this Court that have to be considered, decisions of considerable antiquity. I have to depart from them and for that reason I have to give reasons for my opinion.

The factual complexion of this case is not of much consequence. It is unnecessary therefore to recount all the evidence that there was in the court below. For our purpose if suffices to say that on the 19th January, 2000 the defendant broke and entered Mrs Jambo's saloon. He stole 2 driers, some mesh and beverages all valued at K14,495. the prosecutor preferred two counts in the charge. The first one was breaking into a building and committing a felony therein contrary to section 311 (1) of the Penal Code. The second count related to theft, an offence under section 278, again of the Penal Code. When the defendant appeared in the court below he pleaded guilty to both counts. He had admitted the offence before the police. The lower court sentenced him to 10 months imprisonment with hard labour on the theft and the breaking into the building and committing a felony therein offences.

The reviewing judge's remarks must be based on the case of R v Louis (1961 – 63) 2 ALR (Mal) 67, the first reported case on the matter. In that case …… acting J., followed the earlier unreported cases of R v Jali Cr. Revision Cas. 255 of 1957 and R v Jackson Cr. Revision Cas. No. 18 of 1961. Both these cases are not reported. I have not had a chance to read them. My not reading the two unreported cases might cause prejudice my reason on the matter. ……. Acting J., put his reasoning subsequently in the passage that I should quote:

"The first comment I want to make in this case is that, on the first count, no intent was alleged in the charge, but there is a much more serious criticism to be made. It has been laid down time after time by this Court that the offence of breaking into a building and committing a felony therein is laid down in 309 of the Penal Code as one offence and that practice whereby burglary and house breaking followed by theft is to be laid as two separate charges does not apply to offences under section 309. I refer the learned magistrate to R v Jali and R v Jackson. In the later case it was clearly laid down that the breaking whether in or out and the felony within the building, constituted by offence which cannot be split up into two counts"

There is a problem with the reasoning, which I consider latter.

The same principle seems to have been laid in the case of Regina v Thomas (1964 – 66) 3 ALR (Mal) 408. this was the decision of ……J., ……..J., never referred to Regina v Louis, Regina v Jali and Regina v Jackson referred …….. On this point…….. said and I quote;

"It must be observed that the second count in this case was misconceived. Section 309 of the

Penal Code Cap.23, unlike the section relating to house breaking, creating an omnibus offence, namely, breaking into a building, e.g. a school house, warehouse, store, office, garage, etc, and committing a felony therein. In this instance the felony specified was the theft of a bicycle. It was squafluous. Therefore, and illogical to include a second count the particulars of which …….. the theft of the very same machine. It is clear in other ways that the accused should have been charged on the first count only."

The most recent decision on the matter is a case of Republic v Kaliyande (1990) 13 MLR 391. this was a decision of Unyolo J., as he then was. The learned judge did not refer to Regina v Louis, Regina v Jali, Regina v Jackson and Regina v Thomas the cases referred to then. The judge however said in passing and I quote;

"It was not disputed a grocery was broken into a bicycle was stolen therein. Actually the facts disclose a single offence of breaking into a building and committing a felony therein contrary to section 311 (1) of the Penal Code. It was therefore not quite in order to charge the accused with two offences as was done namely the offence under section 312 …….as read with section 278."

Before resolving the issue that the reviewing judge raised, it might be useful to give the history of this species of offence. The offences of breaking into a building and committing a felony therein, housebreaking, and burglary have in interesting history. It is clear that both in the Penal Code ,Cap. 23 of the Laws of Nyasaland, 1957 the precursor to the Penal Code, Cap. 8:01 of the Laws of Malawi, house breaking and burglary were defined as they are defined in the Penal Code. Burglary or house breaking is defined in terms of actual trespass to the dwelling house with intent to commit a felony. Consequently, the prosecution charge the offender for both the trespass, namely the house breaking or burglary, with the particular felony that was committed in the dwelling house. Both codes, in relation to breaking and entering into buildings other than dwelling house retain the distinction between the breaking and entering and committing a felony therein and breaking and entering without committing a felony therein but with intent to commit a felony. On this premise, a further rule of procedure developed by this Court in R v Manda (1964 – 66) ALR (Mal) 99, requiring the prosecution specify, on charge under section 311 (1) of the Penal Code, the nature of the felony, that the defendant committed when he broke and entered into the dwelling house.

Reading all these judgments together, it seems the prosecution is discouraged from charging the offence committed in the building together with the offence under section 311 (1) of the Penal Code because section 311 of the Penal Code creates one offence. The gist of reasoning is that the offence cannot be split into two. The suggestion being that a prosecutor who charges under section 311 and the offence which was committed in the building splits the offence under section 311 into two. There are problems with this reason. The illogicality and superfluosity which Lord ……. Attributes to the practice rejected are more pronounced in the contrary suggestion. In my judgment there is no split. The fallacy in the contrary suggestion is that the defendant has not actually committed the other offence in the building. The defendant has

actually committed the other offence in the building. The prosecutor could choose to charge the particular offence committed in the without a recourse to section 311 of the Penal Code. There is no obligation on the prosecution to charge the breaking into the building and committing the felony therein offence. Just as there is nothing to bar the prosecutor from charging the defendant with the offence actually committed. The question therefore is whether there is any principle in which the prosecutor can be barred from charging the defendant with the offence under section 311 and the actual offence committed.

The answer to the question we have just posed depends on the role and powers of a prosecutor on preferring charges and the role of the court faced with an indictment from the prosecutor. In my judgment what offences an offender will be prosecuted for before our courts is a matter entirely in the discretion of the prosecutor. Equally, subject to the powers of amendment, and the need for certainty, clarity and the desire to do justice, matters of indictment are entirely in the purview of the prosecutor. The courts only require as a matter of duty that the indictments be accurately and reasonably drafted. Consequently, setting aside for a moment situation where the offence has not actually been committed, there are several scenarios that could be analysed and a distant rule be made for each one of them. The reason for excluding the scenario where the offence has actually not be committed in the building is that the offence under section 311 of the Penal Code requires that such an offence be committed in the building. Where therefore it is clear to the prosecutor that the offence has not been committed, the prosecutor cannot charge the defendant with breaking into a building and committing a felony therein or the offence allegedly committed in the building. There are therefore several scenarios where the prosecutor is sure that the offence was committed.

The first situation is where the prosecutor decides to charge the defendant with the offence actually committed in the building. One of the reasons for this would be a rule expressed by Lawton LJ. In R v Ambrose 57 Cr. App. R 538 at 540 where he said and I quote:

“The court wishes it to be clearly understood that those who draft indictments should use common sense and should not put into indictments charges which are of a trivial nature. Not only is it unfair but it also tends to impede the doing of justice on more important aspects of the indictment.”

The Prosecutor, where the offence committed in the building is more serious than breaking into a building and committing a felony therein, may decide to charge the substantive offence committed in the building. There matter is entirely in the prosecutor’s discretion. The court has no power, subject maybe in the magistrate courts to section 254 of the Criminal Procedure and Evidence Code to interfere with the prosecutor’s decision. In that scenario the court during trial on all on appeal cannot fault the trial court’s decision to proceed on the charge of the offence committed in the building on the basis that the defendant committed an offence under section 311 of the Penal Code irrespectively of whether the offence actually charged is minor or greater than the offence under section 311 of the Penal Code.

The second scenario is where the prosecutor weighing everything else decides that he will only charge the defendant with the offence of breaking into a building and committing a felony therein. Once again in this respect it is the matter entirely within the discretion of the prosecutor. If the court convicts or acquits on this charge the court cannot interfere with the discretion on the basis that a minor or greater offence would have been charged instead of the offence under consideration. Just as in relation to the first case, the defendant can properly plead convict or auterfois acquit in case the prosecution decides latter to try the defendant for an offence, not earlier joined, which could have been charged on the same facts. The prosecutor will be held to his election.

The third scenario, which is the one that occurred in this case and all the other cases cited earlier, is where the prosecutor decides to charge both the offence under section 311 (1) and the distinct offence committed in the building. The decisions of this court, decisions spanning about four decades, are to the effect that this is impermissible. There are a lot of difficulties of course to differ with a rule of such a pedigree. On the other hand the fact that the situation rears means that, whatever rule is postulated, the rule must be based on principle and practicality. It is the illogicality of the rule as stated, which has caused me concern and necessitated re-examination of all the previous decisions.

The matter, in my judgment, should be approached from three premises. The first premise is the de minimise principle from Lord Justice Lawton in R v Ambrose mentioned earlier. The effect of this rule is to require a measure of circumspection on the part of the prosecutor when preferring a charge. The rule requires the prosecutor to apply the de minimise principle. The rule requires the prosecutor to evaluate where, like here, so many crimes are possible from the factual complexion, to weigh and vet the offences to be charged in a way in which there is no injustice resulting thereby not only to the defendant but also to the public interest which wants those who offend to be brought to book. In the context of an offence under section 311 this requires a consideration of whether the offence under discussion is more serious in complexion when seen from the perspective of section 311 or the particular offence. One would lay a rule of thumb, a rule of prudence that it is a more serious offence that should be preferred to the trivial offence. Where for example the offence committed in the building can properly be accommodated in terms of punishment under section 311, the prosecutor must exercise his election in favour of proceeding under section 311 without recourse to the offence actually committed in the building. The election no doubt will depend on the nature of the offence and the evidence in support of the case. The evidence might turn out to be the critical consideration in a particular case. The prosecutor must be able to anticipate where he charges the offender under section 311 the situation where the breaking and entry is not proved and the court will be called upon to consider the offence that was committed within a building. Where the evidence shows that the offence was not committed, no doubt a conviction under section 312 of the Penal Code would still be minor to the offence under section 311. The court can properly convict of that offence if the evidence shows that offence suggested in the indictment under section 311 is not proved. There will be practical difficulties where prosecutor has not charged the offence that was committed in the building separately where evidence to the court shows that there was no breaking and entering but the offence was committed. At that point it will be more difficult for the court to convict of the offence actually committed where in law and in fact that offence is not

minor to the offence under section 311 of the Penal Code. A typical example is where the defendant was charged under section 311 and the offence is rape or some other offence attracting life imprisonment or the death penalty. In those circumstances it will be very difficult for the court to convict on the offence actually committed if it was not included in the charge. The matter is therefore of serious consideration for the prosecutor. On that score a rigid rule as suggested by the authorities may work out injustice to the victim and the public interest.

The second premise in which this matter might be answered is by looking at the powers of the court faced with an indictment like the one here. While under section 254 of the Criminal Procedure and Evidence Code at the close of the prosecution case the court could introduce minor or greater offences than the one actually in the charge, generally courts have very little power, unless of course the indictment is frivolous and vexatious to interfere with the offences the prosecutor raises in a charge. Generally, courts, however, also have power to ensure that there is no injustice arising from the form and content of a charge. Where, however several offences are created by the same factual situation, Court has been reluctant to interfere with the crimes the prosecutor prefers against the defendant. On a robbery, for example, the prosecutor can in one charge include the offence of possessing a firearm, grievous bodily harm and robbery. That is a discretion that the court seldom interferes with. Thirdly the defendant has committed an offence under section 311 he will also have committed the particular offence mentioned in the indictment. To suggest that because the defendant has committed the offence under section 311 therefore he cannot be charged with the distinct offence would also suggest that the other offence has not been committed. I prefer to think that the other offence has also been committed albeit in the building. It is a matter entirely in the discretion of the prosecutor whether he will charge a particular offence or a combination of offences. While as courts, as these previous decisions shows, deprecate the practice, there is nothing in the Criminal Procedure and Evidence Code or in the inherent powers of the court where a factual complexion raises multiple offences for a court to interfere with the prosecutors election of the offences he wants to prefer against a defendant. It would be up to the court at a sentencing stage to consider either by way of ordering the sentences to run concurrently or using alternative sentences or alternative imprisonment to deal with the situation.

In a situation where the defendant breaks into a building and commits a felony therein it is in the discretion of the prosecution whether or not to include the crime actually committed in the building. It is not an abuse of the process of the court to include the substantive offence with breaking into a building and committing a felony therein. Where the offence is so included the court must try the charge and deal with the sentence as justice requires.

Made in Open Court this 4th day of August, 2003

D F Mwaungulu

JUDGE