

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case Number 452 of 2002

THE REPUBLIC

Versus

ABASI SILAJI

In the First Grade Magistrate court sitting at Blantyre Criminal case number 196b of 2002

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 sentence the lower court imposed. The court below convicted the defendant, Abasi Silaji, of burglary and theft. Burglary and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendant to eight years and five years imprisonment, respectively, for the burglary and theft. The judge, correctly in my view, thought the lower court's sentences manifestly excessive.

On the night of 16th May 2002 the complainant, Ms. Fitzesimons, who before sleeping secured the house, woke up at night when intruders broken into the house. The intruders broke the locks and entered the house. Ms Fitzesimons does not walk. She only phoned the police. The intruders

stole property valued at over K60, 000 from the house. The complainant is elderly and lives alone. The defendant admitted the charge at the police. He pleaded guilty in the lower court. The defendant is 27 years old. He is a first offender.

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 mental component comprising 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 not simple. It involved breaking locks. The trespass was not forceful or serious. It did not involve serious damage to premises. The complainant was however in real fear and anxiety, given, as the lower court observed, Ms Fitzsimons cannot walk. The defendant is offending for the first time. He is young and pleaded not guilty. Moreover, the victim, a woman living alone, was vulnerable. This aspect puts the matter above the threshold case deserving a sentence of three years imprisonment. The sentences of eight and six years' imprisonment are manifestly excessive. Two aspects make this case out of the threshold cases of burglary: the victim is elderly and does not walk and that she was disturbed during the crime. Although, the property stolen is worth over K60, 000, the sentence imposed for theft is the maximum. The maximum sentence is reserved for the worst offence. I set it aside the sentences. The defendant will serve four years and one year for the burglary and theft. The sentences shall run concurrently.

Made in open court this 3rd Day of October 2003

D F Mwaungulu
JUDGE