IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL REVIEW CASE NO. 9 OF 2022

(Being Criminal Case No. 475 of 2022 before the Senior Resident Magistrate Court sitting at Limbe-Dalton)

REPUBLIC

V

MUSSA JOHN

Coram: Justice Vikochi Chima

Chikondi Chijozi, counsel for the applicant
Ruth Kaima, counsel for the applicant
Alexious Kamangira, counsel for the applicant
Gift Msume, Senior State Advocate, for the respondent
Mrs Moyo, Court Clerk

ORDER ON REVIEW

1. Mussah John was on 20 June 2022 charged with being found in possession of Indian hemp contrary to 'Regulation 4 (a) as read with section **16** of the Dangerous Drugs Act'. He was convicted on a plea of guilt and sentenced to eight years imprisonment with hard labour. On 27 June 2022, the Chief Resident Magistrate, acting under section 361 of the Criminal Procedure and Evidence Code, forwarded the present record for purposes of review. On 7 July 2022, the applicant also filed an application for review of the record under sections 25 and 26 of the Courts Act. The applicant raised a number of issues for consideration. One of the things was the assertion that the applicant is aged 17 years and not 19 years as appears on the court record. The applicant thus filed an affidavit from the applicant's mother in a bid to establish this fact. As regards this matter, the court ordered that the applicant bring a formal application to adduce fresh evidence. The applicant, however, decided not to pursue the application for adduction of additional evidence.

2. Aside the introduction of new evidence of the applicant's age, the applicant's grounds for review were: that the charge was defective; that the applicant had a defence; that the trial court did not afford the applicant the protections under sections 127 and 183 of the Child Care, Protection and Justice Act; that the court did not inform the applicant of his right to legal representation; and that the sentence imposed by the trial court was excessive.
3. Since what the court would have paid attention to as regards the review on its own motion is not much different from the areas raised by the applicant, the court will also be guided by the same segments.

I. DEFECTIVE CHARGE

4. Counsel for the applicant has argued that even though the applicant was charged with contravention of Regulation 4 (a) as read with section **16** of the Dangerous Drugs Act, he was convicted of contravention of Regulation 4 (a) as read with Section **19 (1) (a)** of the same Act. It is argued that the applicant was convicted of a charge he never pleaded to.
5. Regulation 4 (a) of the Dangerous Drugs Regulations states that:

> No person who is not an authorised or licensed person shall—
>
> (a) acquire or possess a Part I drug…

6. Section 16 of the Dangerous Drugs Act states that:

> '(1) Any inspector shall, for enforcing this Act, have power at all reasonable times to enter the premises on which any chemist and druggist, general dealer, or licensed manufacturer of any drug to which this Act applies carries on business, and any premises owned or occupied by any person authorised to be in possession of any such drug, and to enter any other premises in which he has reasonable cause to suspect that an offence against this Act has been committed, and in either case shall have power to make such examination and inquiry and do such other things, including the checking of stocks and the taking, on payment therefor, of samples as may be necessary for ascertaining whether this Act is being complied with.
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> (2) All books, records, and documents required to be kept by any person under this Act shall be open to inspection by any superior police officer or by any other police officer authorized in writing by a magistrate or by a superior police officer.
>
> (3) If any person wilfully delays or obstructs an inspector or a police officer in the exercise of his powers under this section, or refuses to allow any sample to be taken in accordance with this section, or fails without reasonable excuse to give any information which he is duly required under this section to give, he shall be guilty of an offence.'

7. Section 19 (1) (a) of the Dangerous Drugs Act reads:

> '(1) Any person—
>
> (a) who acts in contravention of or fails to comply with any provision of this Act…shall subject to subsection (2), be liable to a fine of K500,000 and to imprisonment for life.
>
> (2) No person shall, on conviction for any offence or contravening or failing to comply with any provisions of this Act relating to the keeping of books or the issuing or dispensing of prescriptions containing any drug to which this Act applies, be sentenced to imprisonment without the option of a fine or to pay a fine exceeding K2,000 if the court dealing with the case is satisfied that the offence was committed through inadvertence and was not preparatory to, or committed in the course of, or in connexion with, the commission or intended commission of any other offence against this Act.
>
> (3) Any drug or other article forfeited under this Act shall, unless the court otherwise directs, be burned or otherwise destroyed in the presence of a police officer of or above the rank of sergeant, who shall transmit to the court a certificate under his hand stating the circumstances in which the forfeiture took place, the quantity forfeited, and other particulars showing his compliance with the Act.'

8. In support of the submission that the applicant was convicted on a charge he never pleaded to, the applicant has cited the High Court case of *Rep v Nazombe*.[1] In that case, there was before the magistrate court, a charge containing two counts, a count of burglary contrary to section 309 of the Penal Code and a theft count contrary to section 278 of the Penal Code. At plea taking, the trial court noted that the proper charge was supposed to be that of breaking into a building and committing a felony therein contrary to section 311 of the Penal Code. The trial court substituted the burglary count with the breaking into a building count. The court, however, did not call upon the accused to plead to the amended charge. On confirmation, it was held that under section 151 of the Criminal Procedure and Evidence Code, the altered charge should have been read over to the defendant and he should have been allowed to plead to it despite the substituted charge of breaking into a building being a minor offence to burglary. Mwaungulu J stated that:

> 'The lower court should not have done what it did after accepting the amendment. The lower court knew that the amended charge should have been read for the accused to plead to it. Instead, the lower court took the view that because the amendments were not substantial, it was not necessary to let the defendant plead to the amended charge. The amendments were substantial. They introduced a different offence, albeit a minor one [The judge quoted section 151 of the Criminal Procedure and Evidence Code] The lower court approached the matter from [sic] that the amended charge should not be read to the defendant because the amendments were not consequential and the defendant would not be prejudiced. The section just quoted makes no distinction like the one the lower court introduces. The section is mandatory when there is an amendment. Every such new or altered charge must be read for the defendant to plead to it. The question is not whether any prejudice would follow from not reading the amended charge. The question is whether there has been an amendment to the offence charged. Where there is amendment to the offence, a plea to the original charge is not plea to the offence as amended. The amended charge must be read to the defendant so that he pleads to the new offence.'

9. In the above cited case, the result was that the conviction on the breaking into a building was quashed. The present case is different from the one cited. In the present case, there was a mistake in the charging provision in that instead of it being stated as 'section **19**', it was cited as 'section **16**'. While at plea stage, the charging section was read as '**16**', when the sentence was pronounced, the penal provision was correctly put as '**19**'. Now as shown above, Regulation 4 deals with the offence charged (possession of unlawful drug) while section 19 provides the punishment for the offence. Section 16 deals with a totally different offence of obstructing an inspector or police officer from inspecting premises. Now in the charge sheet, the statement of the offence is very clear that it is possession of Indian hemp and so are the particulars. The charging provision of illegal possession is aptly 'Regulation 4'. The fact that there was a mistake in the penal provision would not have prejudiced the accused in the present case. This case is very different from the case cited above whereby there was a change in the offence charged and which requires a new plea to be taken under section 151 of the Criminal Procedure and Evidence Code. The present case was merely a correction of the penal provision by the magistrate when writing the sentence. Sections 3 and 5 of the Criminal Procedure and Evidence Code are to the effect that substantial justice ought to be done without

[1] Confirmation Case No. 687 of 2000

undue regard to technicalities and that a finding of a trial court cannot be overturned on appeal due to an error that happened in the trial court unless it can be demonstrated that such error occasioned an injustice. The present defect is curable under these provisions.

II. THAT THE APPLICANT HAD A DEFENCE

10. It is argued that the lower court accepted a plea of guilty in circumstances where it contradicted his caution statement which stated that the Indian hemp was found at the applicant's friend's house. It is submitted that the magistrate ought to have entered a plea of not guilty in light of the apparent defence. The applicant has referred the court to Regulation 35 of the Dangerous Drugs Regulations for the definition of 'possession'. It states:

> 'A person shall be treated as in possession of a drug for the purposes of these Regulations if that drug is in his actual custody or is held by some other person subject to his control or for him or on his behalf.'

11. Another general definition of possession is to be found under section 4 of the Penal Code which states:

> '"possession", "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them..."

12. In making his plea, the accused had said:

> 'I understand the reading of the charge. I admit. I understand that a plea of guilt can lead to my conviction and a sentence of imprisonment being imposed on me. Upon learning the consequences of the plea of guilt, I still uphold it. I admit that I was found in possession of Indian hemp. I admit that I did not have a licence to possess it'

13. Thereupon the magistrate entered a plea of guilt. The prosecutor then presented the facts. The facts stated that the police received a tip that the accused and his accomplices were keeping Indian hemp at their house in Kachere township. Detectives raided the house and found the accused and the Indian hemp. The accused's accomplices fled the scene.
14. The accused's caution statement was also read and tendered in evidence. He stated that he stays with his parents at Kachere and that he does piece works of carrying bags of merchandise for traders in Limbe. He continued to state that on the day he was arrested, he was at his friend Maurice's house. While they chatted, the police came upon them. His friend Maurice ran away. The police searched the house and found Indian hemp and also arrested him. When he was questioned as to the source of the Indian hemp, he states that he told the police that it was his friend who would have such information.
15. Counsel for the applicant have cited a number of cases from outside the jurisdiction to illustrate the point that where there is more than one person who occupies certain premises, the issue of possession of a particular article on the premises by a particular occupant or a number of them involves not just knowledge of its presence but also control over that object.

16. In the Irish case of *Minister for Posts and Telegraphs v Campbell*,[2] the defendant was charged, before the District Justice, with unlawfully keeping or having in his possession certain apparatus for wireless telegraphy, namely a televison set, without having a licence for it. The evidence was that an inspector in the Department of Posts and Telegraphs had called at a cottage. He met a woman there and having spoken to her, he entered the cottage and inspected it. He found a television set. A certificate of valuation was put in evidence and showed the occupier of the cottage as Christopher Campbell. The inspector also testified that no licence had been issued in favour of anybody in the name of Christopher Campbell in the area of the location of the cottage. At the conclusion of the prosecution case, the District Justice was not satisfied that the complainant had established a prima facie case sufficient to warrant a conviction and he stated a consultative case for the opinion of the High Court. In agreeing with the District Justice's opinion, Davitt P stated that:

> 'A person cannot in the context of a criminal case, be properly said to keep or have possession of an article unless he has control of it either personally or by someone else. He cannot be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in actual possession of some other person over whom he has control so that it would be available to him if and when he wanted it. Normally speaking, a person can properly be said to be in possession of the contents of his own dwelling-house, but only if he is aware of what it contains. He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge. Assuming, for the sake only of argument, that the evidence established that the cottage was the defendant's dwelling-house, there is in this case no evidence as to how the television set came to be there, how long it was there, or whether the defendant was ever at any time aware of its presence or existence. There is therefore no evidence that it was ever actually in his control or possession. There is no evidence as to who was the woman who was present in the house on the occasion of Mr Brown's visit, or as to what was her relation, if any, to the defendant. There is nothing to indictate that he had any control over her actions. There are therefore no grounds for concluding that he had constructive possession of the television set. As far as the evidence goes, the set may have been placed in the cottage without his knowledge or consent.'

17. In *State of Iowa v Dale Lee Shorter*,[3] the defendant appealed against his conviction of having been in possession of cocaine base. The defendant was arrested at a house that the police had raided. The house belonged to Randolph. There were three people who lived at the house: Randolph, Cole and Les Broom. Randolph's house was known as a drug house. Shorter had gone to the house to see Les Broom. When the police searched the house, they found a plastic bag which contained cocaine in the toilet. At the time, they also found Randolph, Terrance (Randolph's son), Cole and the defendant at the house. Randolph and Shorter were charged with possession of the cocaine. Randolph pleaded guilty. Shorter's case proceeded to trial and he was convicted. On appeal, the prosecution argued that Shorter's possession of the cocaine in the toilet could be inferred from his presence in the hallway, his proximity to the bathroom and his flight when he saw the police. The appellate court acquitted Shorter for there was no direct evidence to establish that Shorter, who did not live at the house, was in possession of the cocaine base prior to the raid and no police officer had observed the cocaine being thrown into the toilet. The court quoted from *State v Reeves*,[4] where the court had said:

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[2] [1966] IR 69
[3] No. 9-581/ 08-0913
[4] 209 N.W.2d

> 'Where the accused has not been in exclusive possession of the premises but only joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substances on the premises.'

18. The *Shorter* case also held that where circumstantial evidence is relied on for an essential element of a possession charge, 'the circumstances must be entirely consistent with the defendant's guilt, wholly inconsistent with any rational hypothesis of his innocence, and so convincing as to exclude any reasonable doubt that the defendant was guilty of the offence charged'.
19. It is indisputable that where there are several occupants of premises, legally one can only be held to be in possession of an article if there is proof that he has knowledge of its presence on the premises as well as control of the object. However, the present matter proceeded on a plea of guilt and it is that plea which I have to examine in light of the fact that the contents of the accused's caution statement negated possession of the illicit drugs by the accused.

III. PLEA OF GUILT

20. Section 251 of the Criminal Procedure and Evidence Code states 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:
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> 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.

21. In *Rep v Benito*,[5] Chatsika J states as follows:

> 'It is trite law which has been emphasised 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 done 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.'

22. When the accused was asked to plead to the charge, the accused said that he understood the charge and that he admitted it. The magistrate warned him of the effect of pleading guilty, that it would culminate into a conviction, and that he may end up in being imprisoned. To this, he replied that he had understood and maintained his plea. Thus the trial magistrate proceeded to the stage of the prosecutor giving an outline of the facts of the case.

IV. STATEMENT OF FACTS AND AMBIGUOUS PLEAS

23. In *Cliff Njovu v Rep*,[6] Mwaungulu J stated thus:

> 'The facts the court takes in support of the plea are important. They help the court to appreciate whether the defendant really wants to plead guity 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

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[5] [1978-80] 9 MLR 211
[6] Crim. Appeal No. 7 of 2010

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 particulars' 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 places a variance on the date the offence was committed [sic] can and should be cured by an 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.'

24. For purposes of illustration and throwing light on the effect of a statement of facts on a purported plea of guilt, the English cases that follow will illucidate the point. In *R v Ingleson*,[7] the prisoner pleaded guilty at the Quarter Sessions to an indictment which charged him with stealing horses and receiving them knowing them to have been stolen. When asked whether he had anything to say why the court should not pass sentence upon him he replied: 'No, Sir,' but handed to the recorder a written statement which, so far as material, was: 'I am guilty of taking the horses not knowing them to be stolen.' He subsequently said to the recorder: 'This is my first offence.' The recorder said: 'I know, but you have pleaded guilty to stealing these horses.' The prisoner replied: 'I pleaded guilty to taking the horses out of the field, not knowing they were stolen.' The recorder responded: 'You have pleaded guilty to stealing them, plainly enough.' He was then sentenced by the recorder to four months' imprisonment with hard labour. On appeal, Coleridge J. delivering the judgment of the court in which the conviction was quashed and a rehearing ordered, said:

> 'In this case there was a mistake. The prisoner was charged with stealing and receiving horses; he pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation and which concluded with the words "I am guilty of taking the horses not knowing them to be stolen." If the recorder had read that it would be his duty to explain to the prisoner that his proper course was to plead not guilty and to have that plea entered. We presume that the recorder did not read to the end of the statement. It is most important that a prisoner should not be misled by the plea of guilty. He clearly thought he was guilty without having any felonious intent to steal. The absence of felonious intent is inconsistent with a plea of guilty either to the stealing or receiving. In those circumstances it is quite clear that the plea of guilty was wrongly entered and all proceedings consequent on that plea are bad.'

25. In *R v Durham Quarter Sessions ex parte Virgo*,[8] the defendant, one Bruce, was convicted by a court of summary jurisdiction of having stolen a motor cycle. When he was charged with the said offence before the court of summary jurisdiction, he pleaded guilty. A solicitor who

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[7] [1915] KB 512
[8] [1952] 1 All ER 466

appeared for the prosecution made a statement of the facts to the bench, none of which was disputed by the defendant, who was not represented. At the end of that statement, when asked whether he had anything to say, the defendant said:

> 'It was a mistake, I thought it was my mate's cycle. My mate said, "Take it home". My mate's bike is identical.'

26. The court of summary jurisdiction convicted him. He appealed against conviction to quarter sessions. The prosecution contended that, as the defendant had pleaded guilty before the court of summary jurisdiction, quarter sessions had no jurisdiction to entertain the appeal in so far as it purported to be an appeal against conviction. The defendant contended that his plea, when considered with a statement he made to the court of summary jurisdiction, did not amount to a plea of guilty. Quarter sessions remitted the case to the court of summary jurisdiction with an expression of their opinion that the statement made by the defendant should have been interpreted and accepted as a plea of not guilty. The prosecutor then moved for an order certiorari to quash the decision of the Quarter Sessions. Goddard CJ said that that was really a plea of not guilty since if his mate had asked him to take his bicycle home and he had taken the other bicycle by mistake, he was not guilty of lacerny. He stated thus:

> 'Where the question in the case is whether or not the plea which was put in by the prisoner at the hearing before the justices amounted to a plea of guilty or not guilty, that is a matter which the court can entertain. It would be putting it too high against an unrepresented prisoner who, when first charged, had said that he pleaded guilty, but before being sentenced, had made to the court a statement which showed that he meant to deny that he acted feloniously or criminally, to say: "You said you were guilty and, therefore, there is an end of it"...This is not a case of a defendant who unequivocally pleaded guilty and then said: "I made a mistake". It is a case in which at the trial the defendant said: "Guilty, but..." and added a statement which showed that he was really pleading not guilty. Every judge and most magistrates know that it is quite a common thing for a prisoner arraigned at assizes or quarter sessions, when the charge is put to him, to say he is guilty, but so-and-so and so-and-so, and the clerk of assize always says: "That is a plea of not guilty. Enter a plea of not guilty".

27. In *R v Blandford Justices, ex parte G. (an infant)*,[9] the applicant, a fifteen-year-old girl, was on an apparent plea of guilt, found her guilty of lacerny as a servant and lacerny in a dwelling-house on an allegation of her having stolen jewellery belonging to her employer and her employer's guest. When she appeared before the justices, the charge was read out and she pleaded guilty. She was unrepresented. The plea of guilty was entered and a police officer read her statement. This was a statement she had earlier made to the police in which she admitted taking the jewellery and added that she had intended to keep it only for a short while and then return it. In the course of the hearing, one of the justices had asked her what she intended to do with the jewellery and she had replied that she intended to put it back on Friday. She was convicted of the offences and then remanded in custody. She applied for an order of certiorari to quash, among others, the decisions made by the Blandford magistrates of finding her guilty of the offences and remanding her in custody. One of the grounds for the application was that notwithstanding that she said in mitigation that when she took the articles allegedly

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[9] (1967) QB 82

stolen she intended to return them later, and notwithstanding that her statement to the police, which contained a like averment, was read to the justices, she was not invited to change her plea. Widgery J. delivering the judgment of the court stated that facts of the present case were similar to those in *R v Durham Quarter Sessions ex parte Virgo*. He said that:

> 'It is to be observed at once that the facts of that case are very similar to the present. One has there initially an apparently unequivocal plea of guilty; this is followed by an outline of the facts by the prosecution, an invitation to the person charged to say what he has to say, and then from the accused's own mouth words which indicate that he really has a defence which he wishes to raise.

28. The case at hand, however, is distinguishable from the cases cited. After the facts were given, the trial court asked the accused what he had to say to the facts. He stated that:

> 'I understand the facts as narrated by the state. The facts are true. I have nothing to add to or subtract from whatever the state has said.'

29. This shows that he never made any statement before the court to reiterate his apparent defence that was contained in the caution statement. This must signify to a trier of facts that he accepted the prosecution's assessment of the facts that he had knowledge and control of the prohibited drugs, for, that is exactly what the police had stated. He had made the caution statement to the police a few days before he was brought to court. Naturally, the conclusion one would come to, is that, the accused now having come to court decided to abandon his earlier utterances contained in the caution statement, which is very much open to an accused person to do. This case is dinguishable from the earlier decisions whereby, the accused, when he appeared before the court, uttered words which negated his supposed plea of guilt. I thus hold that summing up the earlier unequivocal plea and the subsequent statement of the facts yielded an incontrovertible plea of guilt.

V. TREATMENT OF THE ACCUSED AS A CHILD AND THE RIGHT TO LEGAL REPRESENTATION

30. Counsel for the applicant have contended that the magistrate ought to have taken into account the provisions of sections 42 (1) (c) and 42 (2) (f) (v) of the Constitution and sections 127, 140 and 183 of the Child Care, Protection and Justice Act in the way he dealt with the accused. Section 42 (1) (c) and 42 (2) (f) of the Constitution guarantees the right of every detained person and accused person to consult with a legal practitioner of his choice; and if the interest of justice so requires, to be provided with a legal practitioner at the state's expense. Section 127 talks of legal representation being provided to a child (the ordinary definition of 'a child' in the Act is a person below the age of sixteen years) at the state's expense if the conditions that are set out in the said provision are applicable to his or her case.
31. Counsel for the applicant have cited the Seychellois case of *Pillay v R*[10] as regards the duty of a magistrate to inform an unrepresented accused of his right to legal representation and other rights. Dodin J stated in that case stated that:

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[10] (2013) SLR 249

'No hard and fast rules can be laid down as to when or to what extent a court should intervene on behalf of accused persons. Each case depends upon its own circumstances. Judicial enabling is a settled practice especially in the magistrates' court. In this regard, a magistrate would ask the unrepresented accused pertinent questions and also give the accused an opportunity to speak. However one should keep in mind that the magistrate cannot act in a different capacity such as advisor to an accused as stated in the case of *Sunassee v State* [1998] MLR 84. The court rightly stated thus:

> "The accused in a criminal case certainly has a number of rights and is entitled to take several courses of action as the trial proceeds. When an accused person is *inopsi consilii*, it is the court's duty to offer him a certain amount of guidance in order to help him not to miss important opportunities which are open to him, under the existing procedure, to challenge the evidence of the prosecution or to present his own defence...It stands to reason, however, that whilst the essential stages of the procedure are to be brought home to an accused who is unrepresented by counsel, the court cannot act as an advisor to the accused as to various tactical possibilities open to him as the trial unfolds, nor can the court indicate to him all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused."

Hence a magistrate should as much as practicable follow the following simple rules to ensure that an accused person who is unrepresented receives as fair a trial as possible:

(a) Advise an unrepresented accused person at the onset of the constitutional and legal rights to legal representation at the accused person's own expense or available from state funds;
(b) Advise an unrepresented accused person of the right, purpose and meaning of cross-examination;
(c) Advise an unrepresented accused person of any special statutory defence available to him or her.
(d) Advise an unrepresented accused person of the right to address the court at the close of the trial or in mitigation if necessary;
(e) Advise an unrepresented accused person about exceptional circumstances in the case of compulsory sentences; and
(f) Advise an unrepresented accused who wishes to plead guilty to a charge, the consequences of such plea, the range of sentences that the law provides and if the facts known to the court already allows, an idea of the sentence likely to be imposed in the particular accused person's circumstances.

This list is by no means exhaustive as each case may require the presiding magistrate to advise the unrepresented accused according to the perceived abilities and understanding of that particular accused person at different stages of the proceedings.'

32. Malawian courts have also made the same pronouncement that courts have a duty to inform unrepresented accused of their right to legal representation.[11] Failure to do so, without more, is not always fatal to a conviction,[12] just like failure of the state to provide an appellant with a legal practictioner, even though it breaches their right to fair trial, does not in all cases amount to a miscarriage of justice.[13] Concerning the duty of the court to inform accused persons of their right to a legal practitioner, Nriva J in *Willias Daudi v Rep*, stated as follows:

> In short, accused persons have a right to be informed of the right to legal representation. Courts have a duty to inform accused persons of the right to legal representation. I know that courts inform homicide suspects, on referral to the High Court, of the right to legal representation, even at the expense of the

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[11] *Willias Daudi v Rep* Constitutional Case No 1 of 2018; *Rep v Jackson* [2003] MWHC 111 (2 April 2003); *Rep v Lemani* [2000]
[12] Ibid
[13] *Nthala &others v Rep* [2000-2001] MLR 356

> state. I believe that, in similar fashion, the courts should inform other suspects appearing before them, of the right to legal representation and the court must particularly record that advice…I therefore suggest that magistrates develop a habit of informing accused persons of this right at the start of criminal processes. I also suggest that arresting and investigating officers of criminal enforcement and prosecuting agencies should inform suspects and detained persons of these rights.

33. In the present case, counsel for the applicant argue that the magistrate only brought to the attention of the applicant the right to legal representation after he had already taken plea. That is definitely not the case. The statement from the magistrate informing the applicant about his right to legal representation, appears in the record at the beginning of the trial, before plea took place.
34. Section 140 states that no child shall be imprisoned for any offence. Section 183 provides that:

> 'A court may, on application or on its own motion, extend the application of this Act to persons that are above sixteen years of age but below twenty-one years of age.'

35. Thus for the accused to have benefited from the provisions of sections 127 and 140 in the absence of specific application under section 183, would have depended on the exercise of the trial court's discretion on its own motion. Counsel for the applicant contend that if the magistrate had considered the provisions of section 183, he would not have sentenced the accused to a custodial term. I do not think it lies in counsel's mouth to conclusively say what the magistrate would or would not have done if he had brought to bear the provisions of section 183 on the facts in the present case considering that discretion is discretion--provided it is exercised judiciously, it cannot be challenged. The lawmakers may just as well have legislated that no person under the age of twenty-one shall be imprisoned for any offence, if that had been the intention of Parliament. But it does not say that. I would, however, strongly encourage magistrates to consider extending the protections of the Child Care, Protection and Justice Act to accused persons who are above sixteen years but under twenty-one years of age in appropriate cases.

VI. PROPRIETY OF THE SENTENCE

36. The maximum stentence for the offence, according to section 19, is a fine of K500, 000 and life imprisonment. When the Fines (Conversion) Act is applied to the maximum fine, the maximum fine comes to K20, 000, 000. The accused was found in possession of 134 kilograms of Indian hemp which was packed in seventy-eight black bags. The magistrate considered the case of *Rep v Wilson; Rep v Khapuleni*,[14] which I believe is very instructive in the matter. The learned Chief Justice, Banda CJ, was seized with these two matters by way of review on confirmation. In both cases, both accused persons had been convicted, on their own pleas of guity, of unlawful possession of Indian hemp. Both cases had come before the same magistrate and were heard on the same day. Both accused were first offenders. In one case, the accused who had been found with 60 kilograms of Indian hemp was sentenced to 48 months' imprisonment with hard labour. In the other case, the accused was found with 117.5 kilograms

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[14] [1995] 2 MLR 567

and was sentenced to 18 months' imprisonment with hard labour. The learned Chief Justice lamented the unexplainable disparity of the sentences in these words:

> 'I have already pointed out in this judgment that these two cases were brought before the same magistrate and on the same day...It is difficult to find any basis why a case which had less quantity of Indian hemp should have attracted a more severe sentence. It is clear to me that the learned magistrate did not make any attempt at considering the relevant factors which a court must consider before passing a sentence. **Where all things are equal, as they were in these two cases, the case which had a greater quantity of Indian hemp should have attracted a heavier sentence.'**

37. The learned Chief Justice then went on to give guidance on sentencing in these offences and said:

> 'While it is true that there can be no uniformity in sentencing, there certainly must be uniformity of approach in sentencing. Our system of justice does not fix a sentence for a particular crime but imposes a maximum sentence and leaves it to the discretion of the court to determine, within that maximum, what is an appropriate sentence for the particular prisoner having regard to his peculiar circumstances. And in determining what sentence is appropriate a court must consider the following factors: whether the prisoner is a first offender or not; his age; the nature and quantity of the drug found in the prisoner's possession; the intended use of the drug and the possible dangerous effect the drug might have on society; whether the prisoner was in possession as mere carrier or owner. As a general rule, it is not proper that a first custodial senetnce should be very long and disproportionate to the gravity of the offence and it should not be imposed as a general deterrent sentence. The first custodial sentence must be aimed at the deterrence of the particular prisoner. It must be a sentence which will teach the particular offender, appearing before a court, a lesson, *vide R v Curran* 57 Cr App R 945. An offender must be sentenced only for the offences of which he has been convicted or which he has admitted either by his plea of guilty or by asking the offences to be taken into consideration.'

38. Taking heed of the maximum imprisonment term which at the time was ten years, the learned Chief Justice expresssed these sentiments:

> 'Dangerous drugs are becoming prevalent and from the quantities that are being peddled there can be no doubt that they pose a serious danger to our community. It is the duty of the courts to play their part in ensuring that the danger to society is reduced, if not eliminated completely, by imposing sentences of sufficient severity in order to deter those that might be tempted to engage in similar trafficking. I would, therefore, suggest that quantities of dangerous drugs from one to 50 kilograms should attract a sentence not exceeding five years' imprisonment with hard labour and quantities from 50 kilograms to 250 kilograms should attract a sentence not exceeding eight years and quantities over 250 kilograms should attract a sentence of nine years and over...When the quantity of Indian hemp is less than one kilogram, courts should seriously consider suspending a sentence where a prisoner is a first offender'

39. The learned Chief Justice, taking cognisance of the fact that the drugs were intended for trafficking, enhanced the sentences; in the case of the 60 kilograms, the sentence was enhanced to five years' imprisonment with hard labour; and in the case of 117.5 kilograms, it was enhanced to seven years' imprisonment with hard labour. The judgment also recommended to the Attorney General and Minister of Justice to consider increasing the maximum penalty in section 19 in view of the large quantities of Indian hemp being found in unlawful possession of persons. That same year, the maximum penalties were revised to what they are today.

40. In the latter case of *Rep v Chilenje*,[15] the accused was convicted in the magistrate court of possessing Indian hemp. She was found with 18 kilograms of the drug. She was sentenced to two years' imprisonment with hard labour. On review, it was submitted that the accused was to be given the option of a fine or a suspended sentence because she was a first time offender. The High Court upheld the sentence and stated that the guidelines in *Wilson* case were still applicable despite the change in the law. Mwaungulu J stated thus:

> 'The defendant here was found with 18 kilograms of Indian hemp. This is the sort of amount where imprisonment should be imposed without option of a fine. Recently the Honourable Chief Justice has issued a guideline in *Wilson v Rep*...The guideline is still appropriate despite the change in the maximum sentence that came after the guideline. Although the new guideline does not determine at what stage the sentencer should consider imprisonment without the option of a fine, this court has said several times that it must be what the Acting Chief Justice Benson said it should be in *Timoti v Rep* [1966-68] 4 ALR Mal 459, namely, half a kilogram. The amount of the drug that the defendant had in her possession was so large that a prison sentence should have been imposed. The First Grade Magistrate was right to impose a custodial sentence. According to the guideline in *Wilson* case the sentence should be up to five years. This sentence is appropriate...The last matter raised by the Judge is that the sentence should have been suspended because she is a first time offender. At this level of possession the offence is very serious. The sentence can be suspended only on proof of exceptional circumstances.'

41. In *Edison Manong'a Gondoloni and another v Rep*,[16] the appellant who had been convicted of possession of Indian hemp, the amount being 136.9 kilograms, had been sentenced to eight years' imprisonment with hard labour. On appeal, Mwase J applying the guidelines in *Wilson* case and weighing both the aggravating and mitigating factors in that case, reduced the sentence to five years' imprisonment with hard labour.
42. In the matter at hand, the learned magistrate took his cue on the sentence from the *Wilson* case that has been discussed above. I think that case and the *Chilenje* one offer useful guidelines. If anything, a case can properly be made that the prison terms correspondent to the quantity ranges of the drugs in the *Wilson* case should be increased upwards in light of the fact that the maximum sentences were revised upward. There have been sentiments expressed that it is not beneficial to lay down sentence ranges based on quantity of drugs since there are other factors that need to be taken into account in coming up with the sentence apart from the quantity, such as were expressed by Singini J in *Farook Patel v Rep*,[17] and where the judge quoted the dictum of Mead J from *Rep Longwe*[18] that Jere Ag CJ had quoted in *Rep v Mponya*[19] which stated that:

> 'There cannot be a scale commensurate with the quantity of the drug found in the convicted person's possession. Factors in deciding whether the sentence should be by way of a fine or imprisonment, and if imprisonment its length, are whether the convicted person is a first offender, his age, the nature and quantity of the drug found in the convicted person's possession, and the intended use of the drug by the convicted person, if known.'

43. I would urge that that dictum needs to be understood in the context that Jere Ag CJ quoted it. In that case, the accused had been convicted, on his own plea of guilt, of being found in possession of Indian hemp. The quantity of the drug was 7.5 kilograms. He had been

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[15] [1996] MLR 361
[16] [2012] MLR 97
[17] Criminal Appeal No. 81 of 2007
[18] Confirmation Case No. 372 of 1977
[19] 9 MLR 275

sentenced to three and a half years imprisonment with hard labour. The High Court set down the case to consider if the sentence was manifestly excessive. Before quoting the above dictum, Jere Ag CJ expressed this opinion:

> 'We have a wealth of decisions on sentencing on the above section. For the past 10 years the court's sentences have been largely based on a dictum of Benson, Ag CJ in *Rep v Timoti* where he stated:
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> > If a person is found in possession of a large quantity of Indian hemp, and I would consider a large quantity to be anything, say, from one pound upwards, then a prison sentence without the option of a fine would be perfectly appropriate. If a person is found in possession of 20 to 30 pounds of Indian hemp, that would justify a sentence of about two years' imprisonment.
>
> This has been the guideline to the courts. It has been a kind of scale where the courts have carefully watched the weight of the Indian hemp that the accused has possessed. The smaller the quantity of the hemp the less chance the accused would have of entering the prison gates. But if he possessed, a large amount he would be sure of being sent to prison. As Mead J has corerctly stated in *Rep v Longwe*, things have changed since then. The circumstances under which Benson Ag CJ gave his famous dictum have widened. **He was in fact only considering possession of the Indian hemp. However, with the economic development of the country so have grown the appetites of all concerned, not least the possessors of Indian hemp. They have thought of making a profit out of selling Indian hemp. So it cannot be said that the dictum of Benson Ag CJ is of much help in present circumstances...'**

44. I believe what Jere Ag CJ was saying was that the dictum of Benson Ag CJ was fine when the matters to be considered were mere possession but where the issue became trafficking, actually the scale could be found to be lenient. It has to be understood that this was at a time when the maximum prison term for the offence was ten years. Thus the High Court had to rationalise its punishments to fit both traffickers and those who possessed it for personal use within the limited range of ten years' imprisonment. In the final analysis, in the stated case, Jere Ag CJ stated that considering the weight of the drug which was 7.5 kilograms, the sentence of three and half years' imprisonment did not appear manifestly excessive and he confirmed it. I doubt Jere Ag CJ would have been against guidelines premised on a scale (based on a revised law which sets the maximum sentence as life imprisonment) and which allow the sentencer to consider all the other mitigating and aggravating factors to come up with the right punishment for a particular offender.
45. The learned magistrate having in mind that the amount of drugs was 134 kilograms and having considered that it was for trafficking arrived at a sentence of eight years. He had stated that:

> 'I have imposed this sentence because the convict is young and a first offender but also pleaded guilty to the offence thereby not wasting the court's time which was put to good use in other equally important matters. These factors have compelled this court to grant him a discount on the sentence. However, the quantity itself and the manner it was found, that is, it was already packed in black bags raising the presumption that it was ready-made for dispatch to be sold aggravates the offence thereby compelling this court to enhance the sentence to that level.'

46. The quantum of sentence itself is quite in line with the quantity of drugs that the accused was found in possession of, as by *Wilson* and *Khapuleni* cases, and also considering that the guideline in those cases was made when the maximum sentence was ten years' imprisonment. In mitigation, the accused stated that he does piece works to assist his mother in taking care of the family since his father died. He also stated that he has a young sister who heavily relies on him. He also said that he desires to go back to school as he is still young.
47. Concerning family responsibilities and imprisonment of offenders, Lord Widgery CJ said:

> 'So it is not altogether an easy case, but of course this always happens, time and again, that imprisonment of the father inevitably causes hardship to the rest of the family. If we were to listen to

> this kind of argument regularly and normally in the cases that come before us, we should be considering not the necessary punishment of the offender but the extent to which his wife and family might be prejudiced by it. The crux of the matter is that part of the price to pay when committing a crime is that imprisonment does involve hardship on the wife and family, and it cannot be one of the factors which can affect what would otherwise be the right sentence.'

48. It is only in exceptional circumstances that family responsibilities will be considered in mitigation. The sentence imposed by the learned magistrate would have stood but for one major mitigating factor, which is that the accused is quite young, being only nineteen years of age, which factor the learned magistrate took account of but not enough. There are several authorities to the effect that young offenders should not be sentenced to long custodial terms when circumstances are such that imprisonment is inevitable. Though the offender cannot escape a custodial sentence because of the seriousness of the offence and the large quantity of the drugs, on the basis that he is a teenager, the sentence must be reduced to three years' imprisonment with hard labour. He is thus sentenced to that term with effect from the date of arrest.

Made in open court this day the 1st **of September 2022**

V. Chima

Chima J