The High Court of Malawi
Zomba
DOCUMENTARY
HIGH COURT OF MALAWI
DISTRICT REGISTRY
13 JUL 2016
P.O. BOX 159, ZOMBA

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

REVIEW CASE NUMBER ...58..... OF 2016

(BEING DEDZA FOURTH GRADE MAGISTRATE CRIMINAL CASE NO.142 OF 2016 BEFORE H/W KALAKO)

BETWEEN

THE REPUBLIC
AND

SKELETON ARGUMENTS

STATE ADVOCATE CHAMBERS
SERVICE ACCEPTED BY ...
ON 14/7/16 ... TIME 14:00 pm

FILED BY FOSTINO Y. MAELE LEGAL PRACTITIONER FOR THE APPELLANT PO BOX 51551 LIMBE . CEL: 0999 747 747

1. BACKGROUND

1.1. The convicts stood before the Dedza 4th Grade Magistrate Court charged of the offence of living on the earnings of prostitution contrary to section 146 of the Penal Code.

1.2. The particulars of the charge averred that Pempho Banda and 18 others on or about the 24th day of February, 2016 at Dedza District Assembly in the District of Dedza knowingly lived wholly or in part on the earnings of prostitution.

1.3. They all pleaded guilty to the charges and they were convicted upon those pleas and sentenced to a fine of MK7, 000.

1.4. The convicts would like the court to review the propriety of their conviction on the grounds set out hereunder.

2. THEGROUNDS FOR REVIEW

2.1. The Fourth Grade Magistrate had no Jurisdiction over the offence of living on the earnings of prostitution under section 146 of the Penal Code.

2.2. The particulars of the charge were bad for misjoinder.

2.3. The plea was wrong in law as the court recorded a unanimous plea.

2.4. The particulars of the charge were bad in law as they did not capture the essential elements of the offence.

2.5. The charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself.

2.6. 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 Penal Code.

3. THE GROUNDS, THE LAW AND THE ARGUMENTS

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.

3.1.1. Section 13(4) of the Criminal Procedure and Evidence Code 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).

3.1.2. 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.

3.1.3. The offence of Living on the earnings of prostitution in section 146 of the Penal Code is a misdemeanor and in terms of section 34 of the Penal Code has a maximum sentence of 24 months.

3.1.4. It would thus follow that since the maximum sentence for the offence of living on the earnings of prostitution is 24 months and yet the court of the 4th Grade has a maximum jurisdiction of 12 months, this court cannot try offences under section 146 of the Penal Code.

3.1.5. PART B of the Second Schedule lists offences triable by the Courts of the Fourth Grade. Perusing through that list, section 146 of the Penal Code does not appear as one of the offences triable by the Courts of the Fourth Grade. In fact, section 146 is included in PART A of the Second Schedule as an offence triable by subordinate Courts of the Third Grade.

3.1.6. The record clearly shows that it was a court of the Fourth Grade Magistrate that tried the charges herein. The court therefore had no powers to try this offence at all. The trial was therefore a void and of no legal effect. The convictions are equally wrong in law and must be set aside and the fines paid by the convicts returned to them forthwith.

3.2. The particulars of the charge were bad for misjoinder

3.2.1. The particulars of the charge averred that

> P B and 18 others on or about the 24th day of February, 2016 at Dedza District Assembly in the District of Dedza knowingly lived wholly or in part on the earnings of prostitution.

3.2.2. By including all the 19 convicts in the same count, the impression that one gets is that the accused persons jointly committed the alleged offences.

3.2.3. However when one reads the caution statements it is very clear 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)**, the twelve accused persons were arrested at three different locations and accused in one charge of being rogue and vagabond. The court held this to be a misjoinder.

3.2.4. This court should therefore find that he charge was bad for misjoinder.

3.3. The plea was wrong in law as the court recorded a unanimous plea

3.3.1. The record shows that the plea went as follows

Mag: Do you admit or deny

All 19 acc: admitted the charge

plea of guilty

3.3.2. 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.

3.3.3. Where there were 19 accused persons, the court had to obtain separate replies for each of the accused persons.

3.3.4. In this case the court recorded a unanimous plea for all the 19 accused person. The elements of the charge were not even put to the accused persons. This was clearly wrong. The court had to take an individual reply for all the 19 accused persons.

3.3.5. In **Republic v Foster and Others [1997] 2 MLR 84(HC)**, the court held that the acceptance of guilty pleas can only be made where each accused person admitted all the essential elements of the offence.

3.3.6. 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.

3.4. The particulars of the charge were bad in law as they did not capture the essential elements of the offence.

3.4.1. Section 146 of the Penal Code provides that

> 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 or compelling her prostitution with any person, or generally, shall be guilty of a misdemeanor.

3.4.2. The 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 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.

3.5. The charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself.

3.5.1. The particulars of the charge averred that

P B and 18 others on or about the 24th day of February, 2016 at Dedza District Assembly in the District of Dedza knowingly lived wholly or in part on the earnings of prostitution.

3.5.2. Section 146 of the Penal Code Provides that

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3.5.3. Reading section 146 on the face of it, it is clear that one can read that it captures 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 Blackstones 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*

3.5.3 Section 145 is similar to section 146, but refers to men living on the earnings of prostitution. The differentiation between the two sections will become clear when looking at the history of the offence.

3.5.4 Both sections 145 and 146 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 colonies. Thus, the actual provisions were never debated in the Malawian parliament and originate from debates in the English Parliament.

3.5.5 To understand the meaning of sections 145 and 146 of the Penal Code, we should accordingly look at their history, including the debates in the English Parliament, which motivated the creation of these offences.

3.5.6 In 1898 an amendment to the Vagrancy Act was passed that intended to protect sex workers by criminalising persons who made a living on the earnings of a prostitute. Speaking about the object of the 1898 amendment, the Secretary of State for the Home Department 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."[House of Commons Debate on the Vagrancy Act Amendment Bill, 14 March 1898, Hansard]

3.5.7 Section 1 of the Vagrancy Act of 1898 stated that "(1) Every male person who – a) knowingly lives wholly or in part on the earnings of prostitution; or b) in any public place persistently solicits or importunes for immoral purposes," shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act of 1924, and may be dealt with accordingly. In terms of section (3), "where a male person is proved to live with or to be habitually in the company of a prostitute [or

is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally], he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution." This wording mirrors that of section 145 of the Malawi Penal Code.

3.5.8 The origin of section 146 of the Malawi Penal Code can be traced back to 1912, when English lobbyists sought to deal with sensationalist and unsubstantiated allegations of white women being trafficked to colonies for the purpose of prostitution. 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. On numerous occasions, however, 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.

3.5.9 It is however clear that the introduction of an offence of living on the earnings of prostitution was not aimed at sex workers, but rather at those who exploited them. Discussions in the House of Lords on the Bill emphasised that "immorality is not a crime in the eyes of the law, prostitution is not a crime in the eyes of the law, and this Bill does not seek to suppress either the one or the other . . . It merely seeks to amend in certain respects the law as it exists today." [House of Lords Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 28 November 1912, Hansard]. The discussion in the House of Lords noted that the Bill was aimed at amending the crime of living on the earnings of prostitution: "With the immoral man and immoral woman 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."[House of Lords debate on the Criminal Law Amendment (White Slave Traffic) Bill, 9 December 1912, Hansard].

3.5.10 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 [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 [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.

3.5.11 It is clear that the section was aimed at women who exploited sex workers, not at sex workers themselves. The application of the living-on-the-earnings offence to women was premised on stories circulating at the time about women's involvement in trafficking and procuring other women for the sex trade.

3.5.12 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. Section 31 of the Sexual Offences Act of 1956 dealt with a "woman exercising control over a prostitute." In terms of this section it is an offence for a woman for purposes of gain to exercise control, direction or influence over a prostitute's movements in a way which shows she is aiding, abetting or compelling her prostitution. In effect, the same offence fell under different sections depending on whether the perpetrator was a man or a woman. In both cases, the offence related to a person living on the earnings of a sex worker and was intended as a measure to protect sex workers from exploitation. Both 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.

3.5.13 Sections 145 and 146 of the Malawi Penal Code, similar to historical English law, separate the offence of living on the earnings of prostitution into two offences:

one pertaining to men and the other to women. The rationale for this differentiation was comparable to that which had applied in England, and therefore the Malawi Penal Code included corporal punishment as a punitive option for men under section 145, but not for women under section 146. Reference to corporal punishment in Malawi was eventually deleted by the Penal Code (Amendment) Act 1 of 2011. Thus, these offences in sections 145 and 146 are now essentially the same. Indeed, in many countries, "living on the earnings" offences were combined into one provision referring to "every person".

3.5.14 Judicial interpretation in the case of **Shaw v DPP1962 AC 269-71, 263-4; STEWART 83 CR App r 327**has defined living on the earnings of prostitution as encompassing "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**

3.5.15 Similarly in the Canadian Case **of R v Downey [1992] 2 S.C.R 10,** it was held that the offence of living on the earnings of prostitution targets parasitic relationships. The 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. [p. 32]

3.5.16 In that case it was stated in paragraph 141 that

> 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.

3.5.17 **In Public Prosecutor v Quek Chin Choon [2014] SGHC 268** (Singapore) the court agreed with the approach taken in the case of **DPP v Shaw.**

3.5.18 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". Despite the Canadian prohibition of living on the earnings of a person engaged in prostitution, the court observed that "Parliament has chosen not to criminalise 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 criminalised 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.

3.5.19 Section 146 of the Penal Code was derived from an English law and it would thus follow that the interpretation of this provision should be in accordance with the interpretation that obtains in English Criminal Law. See section 3(b) of our Penal Code.

3.5.20 In English Criminal Law from where the current section 146 of the Penal Code was

derived, "living on the earnings of prostitution" was interpreted to apply to parasitic relationships in which there was exploitation of the prostitute. It did not apply to the sex worker herself. It would thus be an affront to common sense for the provision be interpreted otherwise in Malawi.

3.5.21 It would thus follow that 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.

3.5.22 Section 146 of the Penal Code applies to women who live parasitically on prostitutes. This position is also discernible from the marginal notes of section 146 of the Penal Code where it is provided that *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.

3.5.23 It was therefore wrong in the case to charge the accused herein with the offence of living on the earnings of prostitution when the particulars made reference to their own prostitution.

3.5.24 From the legislative history it is abundantly clear that the provision relating to criminalisation of living on the earnings of prostitution were intended to protect sex worker from exploitation. It would thus be unreasonable to charge sex worker 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.

3.5.25 In terms of section 42(2)(f)(vi) of the Constitution, 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. The conviction herein is therefore unconstitutional.

3.5.26 The conviction herein is unsustainable and it must be quashed.

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 Penal Code.

3.6.1. Section 251 of the Penal 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.

3.6.2. In the case of Michael Iro v R [1966] 12 FLR 104 (FIJI) it was stated that

In our view 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.

3.6.3. In the case of *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."

3.6.4. In Botswana In ***Mmopi and Another* v *The State* [1986] B.L.R. 8.31** Murray J had this to say:

"When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result."

3.6.5. 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.

3.6.6. The proviso to section 251 of the Criminal Procedure and Evidence Code (CP

and EC) 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. It would follow that a court cannot enter a plea of guilty before it ascertains that the accused understand the nature and consequences of the plea of guilty.

3.6.7. The provisions of section 251 of the CP and EC are applicable whether the accused is represented or not. It is trite that when taking plea an accused must plead personally. Where the accused is unrepresented like in this case, it become imperative that the court should explain the charges to the accused and where the accused pleads guilty , to ascertain if the accused person intends to plead guilty to the charge and if he understands the consequences of the plea.

3.6.8. The proviso to section 251 is there to make sure that apart from understanding the charge itself, 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.

3.6.9. **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. Most of all a plea of guilty means the case will end there and then and he will be convicted and sentenced there and then. An accused person must therefore be aware of these things before a court can accept a plea of guilty.

3.6.10. 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.

3.6.11. 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.

3.6.12. 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 (Judges Cassese, McDonald, Stephen and Vohrah) to one (Judge Li) the court 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 replead in full knowledge of the nature of the charges and the consequences of his plea. In paragraph 15 of the judgment of the court it was 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.

3.6.13. It should be understood that 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. 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.

3.6.14. 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.

3.6.15. The plea of guilty herein is therefore wrong in law and it must be quashed. This is not an error that is not curable by section 3 and 5 of the CP and EC, as the proviso is a mandatory requirement before the plea is entered. This conviction must be quashed.

4. SUBMISSION

4.1. It is submitted that this court finds that

4.1.1. The Fourth Grade Magistrate had no Jurisdiction over the offence of living on the earnings of prostitution under section 146 of the Penal Code.

4.1.2. The particulars of the charge were bad for misjoinder.

4.1.3. The plea was wrong in law as the court recorded a unanimous plea.

4.1.4. The particulars of the charge were bad in law as they did not capture the essential elements of the offence.

4.1.5. The charge was wrong in law as living on the earnings of prostitution does not target the sex worker herself.

4.2. It is further submitted that

4.2.1. The arrest and trial of the convicts herein was unconstitutional as they were arrested and tried for conduct which was not criminal at all.

4.2.2. It is illegal to arrest any prostitute for living on the earnings of her own prostitution.

5. PRAYER

5.1. From the foregoing, the accused prays that the convictions for living on the earnings of prostitution contrary to section 146 of the Penal Code must be quashed.

5.2. The fines that were paid by the accused be returned to them forth with.

5.3. An order that the order of this court be forwarded to the DPP, the Dedza Police Station and Dedza Magistrate Court

Dated this 8th July, 2016

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FOSTINO Y. MAELE
LEGAL PRACTITIONER FOR THE CONVICTS