IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 267 OF 2005

BETWEEN:

WATER PATEL ……APPELLANT

AND

THE REPUBLIC …… RESPONDENT

CORAM: HONOURABLE JUSTICE M. L. KAMWAMBE

M/S Ng'ong'ola of Counsel for the State

Mr Kamkwasi of Counsel for the Appellant

Mr Kamanga Official Interpreter

JUDGEMENT

Kamwambe, J

The appellant has appealed to this court from the decision of the lower court sitting at Blantyre Magistrate's court before the Senior Resident Magistrate. The appellant was charged and convicted of being found in possession of prohibited weapon contrary to section 16(1)(a) of the Firearms Act Cap. 14:01. He was sentenced to 12 years I.H.L. It is alleged that the applicant conspired with other two persons to buy the gun and own a gun. They bought the gun which was kept at the premises of the principal offender from where it was retrieved by the police upon being directed by the appellant.

The appellant is relying on mainly two grounds in his appeal. The first ground is that the trial magistrate erred in law to find that the State had proved beyond reasonable doubt the fact that the 1st accused (the appellant) co-possessed the gun with PW2 (the prosecution key witness who is also an accomplice) in that:

a) It was PW2, one Wells Chimpeni who was found with the gun at his house and it was his testimony that the gun belonged to one Masalimo.
b) The trial magistrate did not analyse evidence to discuss and give reasons for finding the 1st accused guilty of co-possessing the gun with PW2. The trial magistrate purported analysis of the testimony is only contained on part II of the hand written court record in 18 lines. The trial magistrate ought to have relied more on section 4 of the Penal Code rather than section 22 of the Penal code.

The second ground of appeal is that the sentence imposed of 12 years I.H.L. is manifestly excessive owing to the circumstances of the case in that it was not the appellant who was found with the gun and that the appellant co-operated with investigating officers.

Let me put it clear that Masalimo is the one who possessed the gun originally from who the appellant, Mamba 2nd accused and Chimpeni (PW2) acquired the gun. After their acquisition of the gun they agreed that it be kept by PW2. PW2 put it clearly that the two accused (appellant inclusive) knew that he, PW2 was in custody of the gun and that they agreed to sell the gun.

Even if section 4 of the Penal Code was not mentioned the facts show that appellant possessed the gun in the spirit of section 4. He did not have physical possession but he knew who possessed the gun and under what circumstances. In his own words the appellant says before he was arrested he saw the gun and that when he saw it he knew that the gun was a prohibited weapon. It is important to note that the appellant did not challenge the evidence of PW2 at all who said he got the gun from Masalimo and that the appellant told PW2 to keep the gun because it was not possible for him to keep the same.

In my view it was necessary for the lower court to refer to section 22 of the Penal Code not in substitution for section 4 of the code but in dealing with the issue of common design or joint enterprise in prosecuting an unlawful purpose. This nicely captures the circumstance of the appellant, Mamba and PW2 in that PW2 kept the gun on his own behalf and on behalf of the others.

It is argued that the lower court relied on accomplice evidence. The State argues that even if conviction should not be grounded on accomplice evidence but by looking at the whole evidence, there was corroboration of such accomplice evidence, hence the conviction. Firstly it was evidence of PW1 the policeman that he was tipped that the appellant wanted to buy a rifle from someone and after inquiries appellant was arrested. Secondly it was appellant himself who led the police to the house of PW2 who had custody of the gun. When PW2 testified that he had the gun which belonged to all three, the appellant never challenged it. It is a matter of practice and not law that corroboration is required hence section 242 of the Criminal Procedure and Evidence Code states that an accomplice shall be a competent witness against an accused person; and a conviction shall not be set aside merely because it proceeds upon the uncorroborated testimony of an accomplice. In the case of ***Decoy and Karan v The Republic*** [1971 – 72] ALR vol 6 p 223 it is stated that it is generally unsafe to convict an accused on the uncorroborated evidence of an accomplice; but if it concludes that the evidence is true, then even though it is uncorroborated it may be used as the basis of conviction.

In respect of sentence the appeal must succeed as the sentence of 12 years I.H.L. is grossly excessive and I do not think that the appellant was the worst offender to warrant such an atrocious sentence. Of course the aggravating factors are that the offence was committed by a group of persons or in the company of others and that he pleaded not guilty. The principal offender who pleaded guilty to the offence was sentenced to 4 years I.H.L. The appellantcannot deserve less than that. I have looked at the case of ***The Republic v Tione Chavula*** Criminal Appeal No. 93 of 2005 where the sentence of 6 years imprisonment was reduced to 4 years. The maximum sentence for this offence is 14 years imprisonment. It is observed that there is proliferation of firearms around the territory of Malawi and beyond. This poses a scare to society. A meaningful sentence ought to be meted on the appellant. In the case of Tione Chavula

(supra) the appellant had pleaded guilty. In this case he had not. I therefore set aside the sentence of 12 years imprisonment and substitute it with one of 5 years imprisonment. It is so decided.

Made in Chambers this 29th March 2007 in Blantyre.

M L Kamwambe

JUDGE