IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 21 OF 2007

BETWEEN:

FLORENCE CHIPALA ..... 1ST APPELLANT

ESNAT CHIPALA ..... 2ND APPELLANT

AND DOLLA KAFERAKASO.....3RD APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

CORAM: **HON. JUSTICE POTANI**
Kayuni, Senior State Advocate, Counsel for the State
C. Chiphwanya, Counsel for the Appellant
Malani, Court Clerk
K. Chiphwanya, Secretary/Typesetter

JUDGMENT

This is an appeal by Florence Chipala, Esnat Chipala and Dolla Kaferakaso, the 1st, 2nd and 3rd appellant in that order. The appeal is against the decision of the First Grade Magistrate's Court sitting at Balaka. That court convicted the appellants of the offence of assault occasioning actual bodily harm contrary to section 254 of the Penal Code. The all encompassing ground of appeal as set out in the petition of appeal is that the conviction is against the weight of the evidence. The specific grounds of appeal are as follows:

1. ***The learned Magistrate erred in failing to give the appellants the benefit of all the doubt existing on the facts of the case, and in failing to properly balance the evidence of the State and as against that of the appellants***

2. ***The Learned Magistrate erred in convicting the appellants without even weighing and assessing the prosecution evidence showing that he trampled upon the appellants' right to be presumed innocent until proven guilty by treating them as guilty through and through.***

3. ***The Learned Magistrate erred in disbelieving the defence evidence when there was no sufficient reason for doing so.***

4. ***The Learned Magistrate erred in-***

    (i) ***lending undue weigh to the proposition that the police were faced with an affray that needed investigation and prosecution to find the truth of what happened; and***

    (ii) ***taking the said proposition as an admission of guilt when it was raised merely to show that the police should have done more and to show that the police were through and through acting in a biased manner.***

The court has had the benefit of well presented written and oral arguments and submissions by counsel for the appellants, Mr Chiphwanya and counsel

for the State, Miss Kayuni.

The court has considered all the arguments and submissions presented in the light of the grounds of appeal advanced on behalf of the appellants. Above all the court has gone through all the evidence proffered by both the prosecution and the appellants in the court below. Indeed the court has also read through the lower court's judgment. At the end of it all this court finds no basis for faulting the lower court's decision in rejecting the defence story and proceeding to convict the appellants. Put simply, it is the considered view of this court that allegation against the lower court that it was all bend to convict the appellant without sufficient ground is unfounded in view of the overwhelming evidence the prosecution adduced against the appellants which established the charge against the appellants beyond reasonable doubt as it shall shortly be demonstrated.

To begin with, the prosecution witnesses gave a clear and vivid account of the events on the day of the alleged offence. The events leading to the case started at Mlambe Motel at which there was some sort of an engagement ceremony. According to PW1, as corroborated by PW2, they saw the 1st appellant pushing and slapping the complainant right in the Hall where the ceremony was taking place. It had to take some people to rescue the complainant. Later after the ceremony, as the complainant was on her way home on a hired bicycle, she was literally waylaid by the 1st appellant in the company of the 2nd appellant who heavily assaulted her. This incident is well supported by the evidence of Charles Kalua PW4 who had carried the complainant on the hired bicycle and that of Mathews Charles Magombo PW5 another operator of a bicycle for hire. It is significant to note that according to PW4 and PW5, they know both the complainant and the appellants as their regular customers. One would therefore suspect no reason for the two to concoct a false allegation against the appellants. It should be noted that in their respective testimonies, these witness gave a very vivid account on how the appellants ambushed the complainant as she was being ferried home on PW4's hired bicycle. Surely faced with the prosecutions evidence as just briefly stated, no reasonable trial court properly directing its mind to the burden and standard of proof could have found the appellants' defence story to have been reasonably true. It is to be noted that on pages 104 to 107 of the lower court's record, the court went into great detail in articulating the burden and standard of proof. It is true

as argued by counsel for the appellants that articulating the burden and standard of proof is one thing and applying them is another. In that regard, counsel has argued that the lower court although it articulated the burden and standard of proof did not in fact apply them as it should have done resulting in a miscarriage of justice. Specifically, it is counsel's assertion that the lower court did not weigh the prosecution's evidence but instead simply disbelieved the defence evidence without any sufficient reasons. This court does not at all agree with such an allegation. As earlier stated, the prosecution's evidence against the appellants as is on record is very overwhelming so much so that even if looked at in the light of the defence evidence, the prosecutions case stands firm as to sufficiently prove the charge against the appellants to the requisite standard. Indeed as was held in ***Miller v Ministry of Pensions*** (1947) 2 All ER 372 referred to by the lower court regarding standard proof.

> "That degree is well settled. It need not reach certaininty but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

Applying the above dictum to the present case, the lower court's finding on the guilty of the appellants on the totality of all the evidence cannot be faulted.

It is in the light of the foregoing that the appeal must be abortive. It is dismissed.

PRONOUNCED in Open Court this day of July 2008 at Blantyre.

H.S.B. POTANI

JUDGE