IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 39 OF 2008

BETWEEN

WILLIAM MANDA …… 1ST APPELLANT

AND

THE REPUBLIC ……. RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA
: Kumange, Counsel for the Applicant
: Kayuni, Counsel for the Respondent
: Mrs. L. Munyenyembe, Court Interpreter

JUDGMENT

The appellant, William Manda, appeared before the Second Grade Magistrate sitting at Lilongwe where he was jointly charged with seven others on three counts. The first count was illegal possession of fire arm contrary to Section 16(1) of the Firearms Act Cap 14.08. The second count was being found in possession of property reasonably suspected of having been stolen or unlawfully obtained and failing to satisfactorily account for the same contrary to Section 329 of the Penal Code. On the third count he was answering a charge of conspiracy to

commit a felony contrary to Section 404 of the Penal Code. The appellant denied all the three charges. He was found guilty on all three counts after full trial. He was convicted and sentenced to 24 months imprisonment with hard labour on 1st count, 9 months imprisonment with hard labour on 2nd count and 18 months imprisonment with hard labour on the 3rd count. These sentences were ordered to run concurrently. The lower court also ordered forfeiture of the goods the subject matter of 2nd count and forfeiture of the rifle, the subject matter of 1st count. He appeals to this court against both convictions and sentences.

There are three grounds for the appeal. These are:

1. That the learned magistrate erred in law by convicting and sentencing the appellant herein for a case which was not proved beyond reasonable doubt.
2. That the learned magistrate erred in law by dwelling on concocted evidence provided by the police without exercising her mind.
3. That the convictions were not safe for want of proof and the sentence therefore is wrong.

In the lower court the charges were particularized, on the first count, that William Manda and seven others on 19th September 2007 at Mtandire Location in the City of Lilongwe were found in possession of prohibited weapon, namely, a greener type of rifle without permit or licence to possess the same. The particulars on the second count were that William Manda and seven others on the same time and place as stated in the first count were found with three mattresses of ¾ six inches

each, one bicycle, four blankets, one duvet, one bed sheet, one sweater, two pieces of lace curtains, a pair of shoes, one jug, one basin, ten plates, five tea cups, fifteen plastic pegs, five long sleeved shirts, two dodly suits, three national wears, one pair of slippers, reasonably suspected to have been stolen or unlawfully obtained does not give an account to the satisfaction of the police on how they came by the same. The particulars on the third count were that William Manda and Seven Others at the same time and place as stated in the first count conspired together to be stealing within Lilongwe using a greener rifle.

The case for the State was that on 19th September, 2007 the police at Lilongwe Police Station received information from their informants that some nine persons at Mtandire Location were organizing themselves to engage in a spate of armed robbery within the City of Lilongwe beginning the very night of 19th September, 2007. The information was that the robbers had assembled at the house of William Manda, the appellant. PW1, Detective Constable Mwahara and others rushed to Mtandire and at 19.00 hours lay in ambush at the house of William Manda. The Police then moved in and arrested five persons who were eating nsima at the Verandah. The police also saw some suitcases, mattresses, a bicycle, a decorder and other properties put at the sitting room of the house. The police seized the properties suspecting that they had been unlawfully obtained. At the time of arresting the five, William Manda, the appellant was not present. The police learnt that he and three others had gone out to hire a vehicle to be used in their operations. The police then split into two teams with one team following up on the appellant and his three colleagues. The team returned and rejoined the other police officers saying that the appellant and his colleagues had escaped

when the police smashed the hired car. The five people arrested at the house of the appellant said they did not know each other and that each had gone to that house for their own different reasons. Yet further investigations revealed that the 2nd and 4th accused person lived at one plot, yet they said they did not know each other. It took five days before the appellant as well as the 7th and 8th accused were arrested following tip-offs that the police had. The 8th accused was arrested while in possession of a short gun rifle which he said belonged to the appellant and was to be used in robberies. It was the 8th accused who led the police to the house where the appellant was hiding at Muzu Village in T/A Njewa's area. The appellant had thus moved from the house where the first arrests were done. Even in the new area where the appellant had moved to the police recovered a lot of groceries awkwardly packed in sacks and hidden under dust ridden counters in the house where the appellant stayed. The groceries were mixed up in sacks and the sacks were covered by sofa sets. The police suspected these goods to have been unlawfully obtained and seized them. The appellant said that all the items belonged to him. He then said he did not know the people who were found eating nsima at his house on the night of 19th September, 2007 except for 4th accused who was his brother-in-law.

Following further tip-offs the police arrested the 7th accused person at Tsabango. In a statement the appellant made at police he said that he lived at Mtandire where he did a business operating a grocery shop. He said that all the properties found on him were his and that he knew nothing about the rifle. He kept the person on whom the rifle was found for two months. He had left his brother-in-

law at his house to cook nsima for children but he did not know the other people found at his house.

During his defense he called one witness, being his wife. He said that on 19th September, 2007 he left his house for marriage discussions. He left Maxwell Mkandawire at his house. Maxwell Mkandawire was his brother-in-law. He also left in his house his properties which he had brought from the house of his second wife. He returned to his house at 9.00 pm and found no one. He suspected that Maxwell Mkandawire had robbed him. He reported to the local Chairman. The following day he went looking for his brother-in-law. He ended up at Muzu village where his niece brought properties. The police found him at Muzu Village and arrested him. The police also took grocery items from the house which items had been brought by the niece. In the vehicle he found Anthony James, the 8th accused person. He found his brother-in-law in police cell. He was informed that the other accused were also found at his house from where the police took more properties. He learnt about the gun for the first time from 8th accused person.

In arguing this appeal counsel for the appellant states that the conviction was not proper. Counsel noted that the appellant had denied all the charges and at that point it was the duty of the prosecution to prove the whole case. He argued that the appellant had his own goods rolled up and kept in his house and that that could not have been an offence. The appellant had no duty to prove his innocence. Counsel also observed that there was nothing wrong for a group of people to take a meal in a house. Counsel argued that the fortieture order made by the learned magistrate had no basis in law and had no justification. As for the

gun counsel argued that the appellant never possessed it and the gun was not used to commit offences. Any evidence tending to connect the appellant with the gun was circumspect. Counsel also referred the court to the skeleton arguments that he filed in this court.

On behalf of the State counsel argued that the convictions were proper as the case had been proved beyond reasonable doubt. The facts of the case were incompatible with the innocence of the appellant, so he argued. He further argued that the evidence was incapable of any other inference but the guilt of the appellant. Counsel went through the evidence, identifying points that indicated the appellant's involvement in the commission of the crimes. He capitalized on the point that although the accused were found eating food together at the house of the appellant they did not know each other. He observed that this was strange and could possibly not be true. He also observed that the property found in the house of the appellant was arranged in an awkward way and it had all the signs that it was not for that house. Even when the appellant learnt that the police had taken the property he did not go to reclaim it. Instead he waited until the police arrested him at a different place, not being the home where the property had been taken from. Counsel argued that the fact that the appellant never returned to his house, but went to some other place to stay, meant that he was avoiding the police whom he knew had taken the property from the house.

Such are the material arguments in this appeal. It is indeed trite law that in a criminal prosecution it is the duty of the prosecution to prove a charge beyond reasonable doubt. The standard of proof that must be met is very high indeed

and if in trying to discharge the burden of proof the prosecutions leave some reasonable doubt then that reasonable doubt must be resolved in favour of the accused person. Yet we know that proof beyond reasonable doubt is not the same thing as proof beyond a shadow of doubt. The doubt if it exists must be reasonable doubt. If there is some doubt which is not reasonable or which may be dismissed by the statement " of course it is possible but not in the least probable" then the case will have been proved beyond reasonable doubt. (See *DPP v Woolmington* and a litany of local cases on this point.)

It also must be noted that it is not every case that will be proved through direct evidence. In fact a majority of cases will be proved, not by direct evidence, but by circumstantial evidence.

For circumstantial evidence to be relied upon as proving the charge it must be incapable of any other conclusion but the guilt of the accused and it must not be compatible with the innocence of the accused person.

The judgment of the lower court is detailed and analytical. It analyses the evidence and the law in a very sucinct manner. The learned magistrates remained alive to the principle of law that the burden of proof throughout a criminal trial rests with the prosecution and that the prosecution must prove a case against an accused person beyond reasonable doubt. This court is fully aware that an appeal from the subordinate court to this court is by way of rehearing. What this means in practical terms is that this court is at liberty to subject the evidence on record to fresh scrutiny and come up with its own conclusions which might be different

from the conclusions arrived at by the lower court. As earlier noted, the appellant was found guilty and was convicted on all three counts. The evidence tending to connect the appellant with the charge of illegal possession of a firearm first came from PW3 who said that the police were alerted of the presence of a group of people at the house of the appellant, ready to embark on a spree of breakings within the City of Lilongwe. According to PW3, the police were warned that the group was armed with a firearm. Thus the police had to manage their ambush well to avoid being targeted with the firearm. At the house of the appellant, the police found that the appellant and others of the group had gone to hire a vehicle in that night while five others remained at the appellant's house. Subsequent arrests included the arrest of an 8th accused person who had in his actual possession a firearm. PW1 and PW2 who arrested the 8th accused person said that the 8th accused told them that the firearm belonged to the appellant. The 8th accused person in fact led the officers who arrested him to the house of the appellant as the owner of the firearm. The police managed to arrest the appellant. It must be noted that the house to which the 8th accused person led the police is a different house from the one where a group of the other accused person was arrested from. The appellant had relocated to a different house following the police invasion at his other house. Having had the appellant arrested and in a subsequent interrogation the 8th accused changed his story and said the firearm belonged to him. The 8th accused person had retracted his statement. The lower court also drew a distinction between ownership and possession. The lower court further, and correctly so, observed that a person would be said to be in possession of a firearm even if he or she is not in actual possession. Where there is no actual possession, knowledge of possession by

another would provide sufficient connection with the offence. The court found that the appellant had guilty knowledge of the 8th accused person of the firearm. The 8th accused was the appellant's tenant who lived closely with him. The court then considered all the above circumstances and came to the conclusion that the circumstances point to nothing else but the guilt of the appellant on this charge. I am unable to differ with the conclusion of the learned magistrate in all the circumstances of the case.

As regards the conviction on the charge of being found in possession of property reasonably suspected of having been stolen or unlawfully obtained and failing satisfactorily to account for the same, the lower court again engaged in detailed analysis of the law and the evidence. There is no doubt that the property, the subject matter of Count 2, was found in the house of the appellant. Mattresses were rolled up and suitcases awkwardly packed and some items hidden under a table. Also found were grocery items awkwardly packed in sacks but there were no signs that the appellant had been running a grocery shop in the recent past. When the appellant's second wife, from whom the appellant alleged he brought the items, appeared in court and testified in defense. She denied knowledge of most of the items except a small suitcase which contained some of her items of clothing. When the police seized the property, and the appellant came to know about it, he never went to police to reclaim it. Instead he changed homes and went into hiding. The night the police recovered the properties from the house of the appellant, the appellant had gone out with others to hire a vehicle apparently for purposes of transporting the properties to an unknown destination, apart from using the vehicle for conducting raids on homes. All these circumstances are not

compatible with the appellant's innocence. In fact the conclusion by the lower court that they point no where else but to the guilt of the appellant on the charge is apt. These are the properties the appellant said he brought from the house of his second wife following marriage disagreements, and yet the said wife denied knowledge of those properties. These are the properties which when the police seized, the appellant avoided to lay any claim on them. Stories told by the appellant regarding his possession of the goods were unsatisfactory and were contradicted by the evidence.

The third count is of conspiracy to commit a felony. Having examined the law and the evidence the lower court found that the charge had been proved beyond reasonable doubt as against the appellant. What was interesting, and what the lower court rejected, was the argument by the persons arrested in the house of the appellant that they were all strangers to each other and had found themselves at the house for different reasons even though they shared in the evening meal. Again the appellant's argument that he never knew the people who were at his house that night and having a meal was rejected as being lacking in truth. In one breath counsel for the appellant argued that the police should have stayed put for the accused persons to execute their intention before intervening. If that was the case then the conspiracy charge would have been followed by another charge on substantive offence. However I am unable to agree with a suggestion that the police should not engage in prevention of crime. Even without the commission of the substantive crime, the charge of conspiracy to commit it has been well and truly established by the evidence herein. I would uphold the finding of guilt as

against the appellant and the conviction thereon in respect of the third count. This means that the appeal against conviction fails in its entirety.

I must now consider the appeal against sentences. The appellant was sentenced to 24 months imprisonment on the first count, 9 months imprisonment on the second count and 18 months imprisonment on the third count. The court then ordered that all recovered items be forfeited to the Malawi Government with the exception of one small checked suitcase identified by the appellant's wife which would be returned to the said wife. It was also ordered that the firearm be forfeited to the Malawi Government. Now the maximum penalty for an offence under S16(1) of the Firearms Act, Cap 14:08 of the Laws of Malawi is imprisonment for fourteen years as provided for in Section 16(2) of the same Act. In arriving at the sentence of 24 months' imprisonment on the first count the court took into account mitigating factors present. However the court also noted that the Firearms Act is a public policy statute for purposes of ensuring public safety and security. Citing the case of *Republic v Toleza [1996] MLR 339*, the lower court noted that when sentencing for unlawful possession of firearms the court will consider the type of the firearm, the number of firearms found in the possession of the convict, the circumstances of possession, purposes and reasons for possession whether the firearm was used or was in usable condition. Keeping a serviceable and usable firearm is an even more serious matter (See also *R v McRae [1987] 9 Cr. App...)*.

Clearly the lower court gave careful consideration of the sentence it imposed and there is no doubt in my mind that the sentence imposed for the first count is

neither wrong in principle or manifestly excessive. It does not warrant interference by this court. The same is true for the sentences in the second and third counts. The second count is a misdemeanor while the sentence for the third count is imprisonment for up to seven years.

Counsel for the appellant challenged the forfeiture orders made by the lower court. For firearms, section 22(b) of the Firearms Act Cap 14:08 provides for the making of a forfeiture order. Forfeiture of firearms is discretionary and according to *Lumbe v Rep 9 MLR 52* the court must consider the circumstances of the case and give reasons for the exercise of the discretion. Although the lower court did not give specific reasons for ordering the forfeiture of the firearm herein, it is clear that the proper thing to do in this case was to order such forfeiture for public safety. This was a serviceable and usable firearm which clearly was to be ready to be used in a spate of breakings within the City of Lilongwe during the material night. Counsel also challenged the forfeiture of the property in connection with the offence under Section 329 of the Penal Code. These are properties reasonably suspected to have been illegally come by. It is true that section 329 of the Penal Code does not make specific provision for forfeiture. Section 30 of the Penal Code makes provision for forfeiture in relation to specific offences, which offences do not include an offence under Section 329 of the Penal Code. Even Section 31 (1) of the Penal Code which makes reference to offences in Chapter XXXII of the Penal Code, of which Section 329 of the Penal Code is one, only makes reference to suspension or forfeiture of the right to carry on business. There are also certain specific provisions of forfeiture relating to specific categories of offences such as Section 315 of the Penal Code and Section 317 of the Penal Code. The question

though is how may property suspected of having been illegally comeby be disposed of. Cram J had occasion to deal with this question in *R v Anyilwesye 1964 – 66 ALR Mal 367* and *Regina v Jenitala 1964 – 66 ALR Mal 392*. In the former case the court noted that no order for restitution was made by the lower court regarding the bicycle the subject matter of an offence Under Section 329 of the Penal Code. Cram J observed that the court should have made an order that the bicycle be advertised and sold under police powers as found property, unless the owner be sooner found, and the proceeds paid into the general revenue. The Judge proceeded to make the order. Such an order is not made in the nature of a forfeiture order but ultimately has that effect if the owner of the property is not sooner found. It certainly would be inappropriate to restore the found property to the convict as that would amount to rewarding the convict for his or her illegal behavior. In circumstances, I set aside the forfeiture offer in respect of the property the subject matter of the second count. Instead I order that these properties be sold by public auction as found property, unless the owner be sooner found, and the proceeds be paid into the general revenue of the Malawi Government.

It is so ordered.

PRONOUNCED in Open Court this 16th day of December 2008.

R.R. Mzikamanda

J U D G E