JUDICIARY
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NUMBER 33 OF 2015
[Being Criminal Case No. 156 of 2014 from the First Grade Magistrate's Court Sitting at Nsanje]

BETWEEN

CHARLES MUYAYA ..... **APPELLANT**
AND
THE REPUBLIC ..... **RESPONDENT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Salamba, Senior State Advocate, of counsel, for the State Mr. Maele, of counsel, for the Appellant
Ms. E. Chimang'anga, Court Clerk

JUDGEMENT

Introduction

The Appellant was charged before the First Grade Magistrate's Court sitting at Nsanje (lower court) with the offence of armed robbery contrary to section 301 of the Penal Code. The particulars of the charge averred that the Appellant and others at large on or about the 23rd September 2014 at Tengani Trading Centre in the District of Nsanje robbed Mr. Enoch Kanyimbiri cash amounting to K7, 419, 000.00 and 7 cell phones all valued at K7,633 ,000.00 . The Appellant was convicted of robbery and sentenced to serve 12 years imprisonment with hard labour (IHL).

The Appellant is dissatisfied with the judgment of the lower court and has filed the following four grounds of appeal:

> *"2.1 the identification evidence of PW 1 and P W2 was unreliable and the Court did not have regard to Turnbull Guidelines;*

2.2 the evidence of PW2 was largely hearsay and irrelevant and not connected to this case at all

2.3 the Prosecution failed to discredit the Appellant's defence of Alibi which created a reasonable doubt as to whether he indeed committed the offence

2.4 the sentence passed by the lower court is manifestly excessive. "

Burden of Proof and Standard of Proof

Before I deal with the grounds of appeal, I wish to deal with the legal burden of proof and the standard of proof in criminal cases like the one before this Court. It is trite law that the burden of proof in criminal cases rests on the prosecution: see section 187(1) of the CP&EC. Lord Sankey in **Woolmington v. Director of Public Prosecution [1935] AC 462** put the point in the following terms:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilty; he is not bound to satisfy the jury of his innocence ... Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty"

Burden of proof and standard of proof are very much interrelated. The standard of proof in criminal cases is proof beyond reasonable doubt: See **Rep v. Banda [1968- 70] ALR Mal. 96** wherein the Court approved the statement of Lord Denning in **Miller v. Ministry of Pensions [1947] 2 ALLER 372**, at page 373:

"That degree is well settled. It need not reach certainly, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause 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. "

The principles guiding this Court in exercise of its power on appeal were laid down by the Supreme Court of Appeal in **Pryce v. Republic, [1971-72] 6 ALR (Mal) 65**:

"Jn our opinion the proper approach by the High court to an appeal on fact from a magistrate 'scourt isfor the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, in the words of Coghlan v Cumberland (3) ([1898} I Ch. at 704 and 705; 78 L.T at 540) must then make up its own

> *mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.* "

Ground of Appeal No.1

The first ground raised by Counsel Maele is that, in his opinion, the identification evidence of PW 1 and PW 2 was manifestly unrealiable to base conviction upon and the lower court did not have regard to the Turnball guidelines.

Counsel Maele submitted that there are several critical areas of the evidence by the PW 1 and PW2 that make it very suspect. His first point is that whilst PW 1 stated that the Appellant had no torch and that he identified the Appellant from the light of the torches from the Appellant's friends, the record does not have a single reference to what the Appellant's friends were doing. Counsel Maele proceeds to argue thus:

> *"The record actually shows that the other robbers were moving about the warehouse into different rooms. It is therefore not clear how PW 1 was able to identify the Appellant from the torches of the people who were moving about. On page 11 of the record PW 1 stated that "they entered the room and took away the money which was kept in the bag under the bed". This clearly shows that the other robbers whom PW 1 claims had torches with which he identified the Appellant were not standing in one place.* " *...If the people that carried the torches that PW 1 claims gave the light that he identified the Appellant with were moving about how can we say with certainty that there was light enough to make a positive identification? In what direction were the torches shining? How long did the torches shine on the Appellant for PW 1 and 2 to identify him? In what position were PW 1 and 2 when they made the identification in relation to the Appellant? These questions put the identification in serious doubt.* "

I have examined the lower court's record and I am satisfied that the Appellant was properly identified. In his testimony from page 5 of the lower court record and also from page 69 in his testimony during the visit to the *locus in quo,* PW1 testified that he identified the Appellant as one of the robbers who came to his warehouse to rob him of his money. PW1 indicated that the Appellant stood close to him. The Appellant was assigned to guard PW1 during that robbery. PW1 stated that there was light all over in the warehouse. The robbers brought in torches which were very bright. One of the robbers carried a big torch which was very bright and, as such, the room was well lit with torch light. PW1 further stated that the Appellant stood close to him during the night until they left the room. From PW1's explanation of how the robbery was carried out, it is clear that the Appellant stood near PW1 for a long time.

Further, the Appellant walked with PW l from the house to his car to open the car boot in order to search for more money to rob and back to the house. This afforded PW l ample time to identify the Appellant as one of the perpetrators.

The evidence of PW1 is to a great extent corroborated by that of PW 2. The salient features of the testimony of PW 2 are that (a) he saw the Appellant that night, (b) the Appellant carried a pistol, (c) the Appellant was standing next to PW1 , (d) there was enough light all over the room, (e) the criminals carried torches and the room was bright because of these torches.

It is important to observe that there are no indications that the perpetrators of the crime wore masks or that they hid their faces with anything. It is also not in doubt that the events of the robbery could not have taken place in a split second. In light of the foregoing, I am satisfied that the Appellant was properly identified as one of the persons who committed the robbery.

Ground of Appeal No. 2

The second ground of appeal is to the effect that the evidence of PW2 was largely hearsay and irrelevant and not connected to the present case at all. Counsel Maele submissions had four strands. The first strand relates to his submission that there is no evidence of compliance with sections 113 and 113A of the Criminal Procedure and Evidence Code (CP&EC) in relation to the Warrant. The submission is premised on the evidence of PW 3 as recorded at page 38 of the record:

> *"I advised the complainant to buy/ bring (sic) a search warrant for us to assist on the matter. On 25109114 in the morning I surrendered to TNM office to assist.* "

Counsel Maele submitted that there is no evidence that a search warrant was obtained or who obtained it or which court gave the warrant, the premises to be searched and the articles to be searched. He contended that the lack of evidence relating to these critical areas makes this so called warrant irregular and the results thereof not legally admissible in a court of law.

The second strand pertains to evidence regarding recovery of phone from Grace Jumbe. Counsel Maele argued that as Grace Jumbe did not give any evidence in court, the evidence of PW 3 relating to the recovery of the phone from Grace was hearsay.

The third strand relates to the evidence of PW 3 with respect to a call log from TNM. Counsel Maele submitted that as PW 3 does not work at TNM, he was an

incompetent person to give evidence relating to the call logs. It was thus contended that all the evidence relating to the call logs should be disregarded.

The fourth and last strand has to do with the evidence that PW 3 gave relating to the first accused, Maxwell Francisco Jowadi, who admitted committing the offence with the Appellant. Counsel Maele submitted that an admission by one accused is not evidence against another accused unless that other accused adopts the confession as his own. In this regard, Counsel Maele submitted that as the Appellant had denied the offence, *"PW 3 could therefore not testify on the admission of another convict to have committed the offence with the Appellant herein.*"

I have considered the submissions by Counsel Maele. In my view, the question to ask is whether or not the conviction was based or influenced by the alleged hearsay evidence. A perusal of the judgement of the lower court shows that the Appellant was convicted because (a) he was positively identified by the prosecution witnesses at the scene of the crime and (b) the sequence of events as narrated by the Appellant in his caution statement was established to be materially true. In this Court's judgment, these pieces of evidence on their own clearly showed that the Appellant took part in the robbery.

Ground of Appeal No. 3

The third ground of appeal is to the effect that the lower court erred in requiring the Appellant to prove the defence of alibi.

The context to the alibi defence is as follows. In his testimony, the Appellant stated that on the material day of the robbery, he was in Chiradzulu where he had gone for a funeral of a fellow businesswoman who had died on 22nct September, 2014. He went to Chiradzulu on 23 September 2014 and slept there.

Counsel Maele submitted that where a defence of alibi is raised, it is for the prosecution to disprove it. He placed reliance on s. 193 (A) of the CP& EC and the decision in **Bonzo v. R [1997] 1 MLR 110** [hereinafter referred to as the **"Bonzo** Case"]

Section 193 (A) of the CP& EC provides as follows:

> "(1) *As early as is reasonably practicable and in any eventprior to the commencement of the trial, the defe nce shall notify the prosecution of its intent to enter the defence of alibi.*

(2) *The notification under subsection (I) shall specify the place or accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.*

(3) *Failure by the defence to provide notification of the defence of alibi as required by this section shall not limit the right of the accused at any time during trial to rely on such defence."*

The **Bonzo Case** was cited for the following statements at page 112 - 113:

"The defence of alibi in our law is just like any other defence that the defendant can raise to criminal charges. Once the premise has been laid by the defendant, the defence becomes part of the overall picture and the burden remains on the prosecution to prove the case against the defendant beyond reasonable doubt. The prosecution has to disprove the defence. This may entail calling evidence in rebuttal. Sometimes, however, all that the prosecution has to do is by cross-examination show that the defence, although raised, is untenable. It must never be thought that there is any burden on the accused to prove the alibi. Once the defendant raises it the prosecution must disprove it.

Counsel Maele submitted that the prosecution did not bring any evidence that can be said to have rebutted the defence of alibi raised by the Appellant.

I have examined the submission by Counsel Maele on the issue of alibi and I find this ground of appeal to be without merit. The lower court considered the defence of alibi. This is to be found at page 53 of the judgement:

"It might be true that during the month of September, 2014 he went to Chiradzulu to attend the burial ceremony of his fellow business lady. But he did not go there on the 23rd September, 2014. He went there prior to that time, had it been that he was in Chiradzulu he should not be found at Tengani where he committed the offence. His defence of alibi cannot succeed. It was just a scapegoat. "

It is important that the lower court's finding is not looked at in isolation. It is not uninteresting to note that the finding comes immediately after the lower court had reached the conclusion that what the Appellant stated in his caution statement was corroborated by the evidence of the prosecution. There is also the fact that the Appellant had not challenged the evidence of PW 1 and PW 2 who placed him at the scene of the robbery. The lower court deals with this issue at page 39 of the judgement:

"He (the Appellant) contradicted himself in cross examination by saying that he did not rebut the evidence of the complainant who stated that he (the defendant) was one of the robbers who held the gun when the money was being robbed at Tengani.

> *I do not understand what made him not to refute that allegation if he was not amongst the robbers neither carrying a gun"*

The aforementioned contradiction is one example of the "pointers" in the evidence of the prosecution which corroborated the Appellant's caution statement. As was aptly put by Mwaungulu J, as he then was, in **R v. Namame [1995] 1 MLR 220 at** 224- 226:

> *"Where a confession has been properly admitted in court a conviction could be had if, after considering all the evidence, that confession is possible. In other words, the confession must be considered in light of all the evidence that is before the court. Moreover, a confession is subject to the same scrutiny like any other item of evidence. In Rep v Nalivata and others (1971 - 72) 6 ALR (Mal) 101, Skinner CJ cited with approval the statement of law in the case of R v Sykes [1913] 8 AC 233. This approach was confirmed by a majority of the Judges in Chiphaka v Rep (1971 - 72) 6 ALR Mal 214. In R v Sykes, the court said:*
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> > *'A man may be convicted on his own confession alone, there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved, the jury may, if they think fit, convict him of any crime upon it.* '"

All in all, I am satisfied that the lower court was entitled, on the totality of the evidence before it, to find that the defence of alibi raised by the Appellant was untenable.

In the circumstances and by reason of the foregoing, I uphold the lower court's conviction of the Appellant and I, accordingly, dismiss the Appellant's appeal against conviction

Sentence

Having found that the conviction was proper, I now tum to sentence. Counsel Maele argued that the sentence imposed by the lower court is manifestly excessive for a first offender.

Mr. Maele cited ss. 339 and 340 of the CP&EC and a host of cases such as **R v. Chitseko 1997 (2) MLR 83, R v. Pearson [1995] 1 MLR 230, R v. Henderson Kufandiko, HC/PR Confirmation** Case **No. 126 of 2009** and **Maguta v. The Republic, HC/PR Criminal Appeal** Case No. **29 of 2011** on the procedure a court has to follow when faced with a first offender. For example, in the case of **R v. Chitseko,** supra, Mtambo J stated as follows at page 84:

> *"Let me also take this opportunity to remind magistrates of the provisions of sections 339 and 340 of the Criminal Procedure and Evidence Code. It is wrong to sentence a person, against whom no previous conviction is proved, to undergo imprisonment unless it appears to the court, on good grounds (which ought to be set out in the record), that*

there are no other suitable ways of dealing with him. The record does not show that the magistrate considered these sections, and it seems to me that had he done so he would have reached the conclusion that there were other appropriate means of dealing with the accused person. "

Counsel Maele submitted that the lower court erred in not having recourse to the mandatory provisions of ss. 339 and 340 of the CP& EC. This submission lacks merit in that the lower court gave reasons why an immediate custodial sentence was appropriate for the Appellant. This is to be found at pages 61 and 66 of the lower court's judgement:

At page 61:

"Those who terrorise innocent people in such a way must be separated with the community for a long period so that peace should be restored where the offence was occurred. "

At page 66:

"Even though he is a first offender, he deserves a stiffer custodial sentence. He forgot his responsibility to his family members ... "

Counsel Maele conceded that custodial sentences were called for but argued that the same should not have exceeded 7 years:

3.2.1.1.1. They were charged and convicted or simple robbery hence sentence of 12 years is manifestly excessive.

3.2.1.2. Going through the statement of the offence it was drafted as Robbery contrary to section 301 of the Penal Code

3.2.1.3. The particulars of the charge on the other hand state that Charles Kusanama and Alfred Mataka on the night of the 81h February 2014 at Mphera Village in the District of Phalombe, robbed Fiby Ester Kl 50,000 cash Nokia Cell Phone, wrist watch, three pairs of shoes, salter scale, LG speakers, Aiwa MP3 radio, Six pillow cushions, one carton of ufulu soap, one carton of shuwashuwa soap, one carton of nirma soap, one unit of sobo, one dozen glycerine, 13 bottles of mahewu, tnm units all valued at K475, 000.00 and at or immediately before and immediately after the time of the said robbery used or threatened to use actual violence to the said Fiby Ester in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained.

3.2.1.4. Robbery is defined under section 301 of the Penal Code, Section 301 of the Penal Code creates two different modes of robbery. Section 301 (1) creates a simple robbery whilst section 301(2) creates an aggravated form of robbery.

It is therefore imperative that a charge sheet should specify under which section the accused person has been charged.

3.2.1.5. In the case at hand there is merely mention of section 301 without stating of it is under subsection 1 of 2. The doubt can only be resolved infavour of the Appellants. Apart from this the statement of the offence is clear that the offence charged is the offence of robbery simpliciter. The particulars do not aver that there was an aggravated robbery at all.

3.2.1.6. In convicting the Appellants the court convicted them under section 301 without specifying of it was section 301 (1) or 301 (2) of the Penal Code. The maximum sentence under section 301(1) is 14 years. The maximum sentence under section 301(2) is death or life imprisonment.

3.2.1.7. The sentence of 12 years IHL leans on the higher side for robbery simpliciter. The sentence should therefore be substantially reduced. "

It was also the contention of Counsel Maele that the sentence of 12 years IHL is out of tune with sentencing trends in similar case of robbery such as **R v. Patrick Gift Masamba, HC/PR Confirmation Case No. 411of 2013, R v. Banda, Kamete and Others, HC/PR Confirmation Case NO. 359 of 2012, R v. Jafali Taulo and others, HC/PR Confirmation Case No. 739 of 2009, R v. Twaibu Issa, HC/PR Confirmation Case No. 1056 of 2009.**

In **R v. Patrick Gift Masamba**, **supra**, the convict and another sizeable group of raided the house of the Bishop of Chikhwawa Catholic Bishop. They demanded and left with a lot of property. The accused pleaded guilty to the charge. The court noted that that the fact that a group committed the offence; the victims were put in much fear and the non recovery of the property aggravated the offence. On the other hand the plea of guilty, the fact that the convict was a first offender and he was 28 years old thereby he had lived a lived a greater part of his life without trouble mitigated the crime. The court reduced the sentence of ten years and passed a passed the sentence of 7 years IHL.

In R v. Banda, Kamete and Others, supra, the three convicts together with others on the 20th November 2012 stormed into the house of the Nathanies in Mudi in the city of Blantyre. They carried pangas and knives. They run away with cash and many household items. Mwaungulu J noted that the use of guns, the fact that five people were involved in the crime, denoting premeditation and planning; there were actual assaults and the victims were put in much anxiety. This aggravated the offence. The court set aside the sentence of 8 years IHL and passed a sentence of 7 years IHL.

In **R v. Jafali Taulo and others, supra,** the convict and three others went to the house of the Chachias. They were armed with guns. They threatened the owner with the guns and they searched the house and stole K l 50, 000. They asked for the car keys and they drove away. They had an accident with the car. The first accused was arrested and he confessed the crime. The lower court sentenced them to 7 years IHL. On confirmation, the High Court confirmed the sentence noting that it was in line with the sentencing guidelines on such offences.

In **R v. Twaibu** Issa, **supra,** the convict and his friend hacked the complainant with a panga knife and struggled with the complainant and stole a phone from him. He was convicted of robbery and sentenced to 9 years IHL. The lower court considered the factors that the convict was a first offender and young and the aggravating factors that the convict inflicted actual injury, a weapon was used and there was more than one person to pass the sentence. On confirmation the sentence was reduced from 9 years IHL to 7 years IHL.

I have considered the submissions by Counsel Maele and I am very much persuaded by his reasoning. Firstly, the Appellant was charged and convicted of robbery simpliciter whose maximum sentence is 14 years IHL. The sentence of 12 years is too close to the maximum for a first offender.

Secondly, and perhaps more importantly, the sentence of 12 years imposed by lower court on the Appellant falls very much outside the Magistrates' Court Sentencing Guidelines. In terms of the Guidelines, the starting point for robbery simpliciter is five years.

All things considered, the sentence imposed by the lower court is manifestly excessive. The sentence is, accordingly, reduced from 12 years IHL to 8 years IHL.

Pronounced in Court this 13th day of January 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE