IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NO. 106 OF 1996

FRANCISCO MACLOUD NGOZO

VERSUS

THE REPUBLIC

From the Second Grade Magistrate's Court at Blantyre/Limbe
Criminal Case No. 198 of 1996

CORAM: MWAUNGULU, J

Mwenelupembe, State Advocate for the State
Chipeta, Representing the Appellant
Chilunga, Official Interpreter
Mwenyeidi, Recording Officer

Mwaungulu, J

JUDGMENT

This is an appeal by Francis Macloud Ngozo. He was convicted by the First Grade Magistrate at Blantyre of causing grievous bodily harm contrary to section 238 of the Penal Code. He was convicted with his sister. His sister has not appealed. The appellant was sentenced to four and half years imprisonment with hard labour. The sentence had to be served immediately. His sister was sentenced to two years imprisonment with hard labour. That sentence was suspended for two years. The appellant appeals against the conviction and sentence.

The appellant and his sister were not represented by counsel in the Court below. On this appeal the appellant is represented by the Chief Legal Aid Advocate, Mr. Chipeta. Mr. Chipeta decided to use the same grounds of appeal that the appellant had lodged with this Court.

The grounds are not elaborate but the Chief Legal Aid Advocate did not want to make them any better. Mr. Chipeta, however, tried to summarize them for what they are worth.

Mr. Chipeta submits that most of the grounds relate to the sentence but there is only one ground that touches the conviction. Mr. Chipeta submits that the defence of self defence is open to the appellant. Against the sentence there is the question of provocation. It is submitted that the sentence of four and half years imprisonment with hard labour is manifestly excessive because the complainant was treated and has covered.

The prosecution's case was that on the night of the 17th of June 1995 the complainant came to his house at around 7.00 o'clock in the evening. His mother told him that the defendant had been at the house. The complainant did not want to go to the appellant's house thinking that the appellant would come again if he wanted the complainant. That same evening the appellant and his sister who has not appealed went to the Village Headman to request him to arrest the complainant in relation to a matter that the appellant had reported to the police. Apparently the complainant, who married the appellant's sister, the defendant who has not appealed, was accused at the police of setting on fire the appellant's house when children were sleeping. That matter had not been resolved by the police. So when the appellant and his sister went to the Village Headman and requested him to arrest the complainant, the Village Headman agreed to the request but said that should be done the next morning because it was late to organise party echelons to arrest the complainant. The appellant and his sister left.

The prosecution case is that at around 2.00 o'clock a.m. that night the appellant and his sister came to the complainant's house. The appellant carried a Panga knife. The appellant's sister carried a hoe handle. The appellant entered the house. He hacked the complainant. The complainant's mother could hear the hacking. The complainant came out of the house. The appellant hacked the complainant again.

The appellant's version of events in the Court below is that, apart from the house burning incident, that afternoon he had arrived to be told that his mother had been beaten by the complainant earlier. He admitted that he had been to the party officials at that night to secure the arrest of the complainant that night. When this failed, he went back to the house. They were Virgil in case the complainant would come to brew trouble again.

In the night, the complainant came to the house with a Panga knife. When he saw the appellant, the complainant retreated and run back to his house.

The appellant followed him to his (the complainant's) house. The complainant threw the Panga knife at him. It missed him. The appellant went on to hack the complainant on the arms, the legs and everywhere.

The Court below found as a fact that the complainant was actually injured at his house. It is not clear what version the Court below took. The prosecution's case centered on the fact that the appellant and sister sought the complainant at his house after they failed to secure his arrest that night. This version is fortified by the complainant's story and that of his mother. The defence version is that the complainant actually came to their house that night and only retreated when he found the appellant. The Court below having not decided on the matter this Court should accept the appellant's rendition of the events.

There is still one aspect of the trial Courts findings which has caused me concern. When resolving the issues between the parties the trial Court states in its judgment that when party officials refused to arrest the complainant that night, the appellant and his sister had said that the party would hear what would happen. This is not on the record of the Court.

Now it is time to consider the defence of self-defence. This defence was considered by the Court. It was rejected. The trial Court thought that the defence was not available to the appellants because the complainant was injured at his house. Obviously, it is not correct that the defence would not be available to the appellant because the complainant was injured at his house. The defence is wider than that. The defence is based on necessity to protect ones limb or body or that of another. Such necessity can arise anywhere even in the victim's house.

The defence, however, is based on principles, which if applied to the facts as have been established here, would nonetheless make the defence not available to the appellant. It is not for the defendant to show that he was acting in self-defence. Once the defence has been raised and there is some evidence, it is for the prosecution to show that the defendant was not acting in self-defence. The prosecutions are not supposed to give evidence in chief negating self-defence. They are not even obliged to give any evidence at all on the matter. If on the totality of the evidence the Court is convinced of the innocence of the prisoner or is left in doubt whether the defendant was acting in self-defence, it must acquit. The Court must look at the whole evidence(**R v Lobell** 41 Cr. App. R. 100). The modern statement on the law relating to self-defence is by the Privy Council in **Palmer v R** [1971] A.C. 814. This was followed by the Court of Appeal in England in **E v MacInnes**,55 Cr. App. R. 551. In **Palmer's case** Lord Morris of Borth-Y-Gest said:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these the jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action.

Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If the attack is serious that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the concept of necessary self-defence. If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defencive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary that would be the most potent evidence that only reasonable defencive action had been taken.... But their Lordships ... that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as defence it is rejected."

It is quite clear for **Palmer's case** that if the person assaulted falls over the victim when the victim is running away, that is revenge, not self defence.

Here, on the appelant's own evidence, when the complainant came to that place at night, he fled back to his house when the complainant noticed them. The complainant went and hid himself in the house. The appellant sought him right into the house. This was not self defence. Moreover, when the complainant got in his house, according to the appellant himself, the complainant aimed at them by throwing away his panga knife. It missed. The complainant was, therefore, helpless. The appellant, at this stage set out to maim him to the extent he did. This was revenge. No one can consider justifiable or reasonable the injuries which the appellant inflicted.

In considering the defence under discussion the Court has to consider whether the force used was reasonable. The test is not purely objective. One has to look at what the defendant thought **(R v Shannon** 71 Cr. App. R. 192, **R v Whyte** (E) {1981] 3 All E.R. 416). Here the appellant's thoughts were clearly bent on revenge not self-defence. In the caution statement the appellant said:

"I chased him with my sister Elita following us. He run to his place where he got into his house. I also got in at the same time. He threw his panga and it missed me and it got stuck on the wall. I at the same time hacked him on both hands with my panga knife. He came out of the house and ran to his mother's house. I followed him there when I found him I hacked him on both legs.

My aim was that he should not be able any more to walk to my house. For the arms, I hacked them my aim was that he should not be able to burn my house again."

In the face of this evidence there can be n o defence of self-defence. This ground of appeal is untenable. It is rejected.

The second line of defence to the conviction suggests provocation. This defence, however, is only available to a charge of murder. Even there, it is not to excuse the crime, but to reduce the crime to manslaughter. The defence is not available on a charge of causing grievous bodily harm. Provocative acts of a victim are however, taken as circumstance in which the offence is committed and hence have a bearing on the sentence which a Court will pass in a particular case.

This leads me, therefore, to the second aspect of the appeal, the appeal against a sentence. The Court below took a very serious view of the offence. It bore in mind that the complainant had been incapacitated for the rest of his life. There was no medical report on the injuries. The report was not necessary. Obviously the complainant had been in a hospital for a long time because of the injuries. The complainant had been before the Court in the course of the hearing. The Court's conclusion on the injuries cannot be controverted. It is suggested in the grounds of appeal that the complainant has fully recovered and he is normal now. That as it may be, one has not to lose sight of the injuries actually inflicted and the pain that the victim had to go through.

Causing grievous bodily harm is a serious offence as the Court below observed. What happened to the victim raises vulgar emotions. He was hacked on all limbs. He was almost left for dead. It shocks me that anyone would expect a short prison sentence for what happened in this matter.

This Court has been invited to consider the provocative acts of the complainant in burning the house and victimising the appellant's mother. The arson case was already with the police. In fact the police had already ordered the complainant's arrest. The letter had already been handed over to party officials to have the complainant arrested the next day. The episode about the appellant's mother occurred sometime before the event. The complainant's coming again in the night was provocative enough in view of the accumulation of other provocative acts. All this, however, has to be weighed against the injury actually caused. If this is done, one would think that the sentence of the Court leaned more toward leniency.

The appeals against conviction and sentence are dismissed.

Made in open Court this 31st day of January 1997 at Blantyre.

D.F. Mwaungulu

JUDGE