IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO 4 OF 2001

SULULU TWAIBU MPALUME

VERSUS

THE REPUBLIC

In the Second Grade Magistrate sitting at Liwonde Criminal Case No. 287 of 2000

CORAM: **D F MWAUNGULU (JUDGE)**
Manyungwa, State Advocate for the State
Mwala, representing the Appellant
Kachimanga, official court interpreter

Mwaungulu, J

JUDGMENT

Mr Mpalume appeals against the Liwonde Second Grade Magistrate's judgment. The Second Grade Magistrate convicted the appellant of unlawful wounding. Unlawful wounding is an offence under section 241 of the Penal Code. The Second Grade Magistrate sentenced the appellant to two years imprisonment with hard labour. The sentence was to be served immediately. Mr Mpalume appeals against conviction and sentence.

Mr Mwala, who appears for the appellant only in the appeal, raises four grounds of appeal against conviction. There is a single ground of appeal against the sentence. First, Mr Mwala argues the verdict is against the weight of evidence.

On appeal to this Court, this Court proceeds by way of rehearing. This court examines all the evidence in the court below. This Court seldom interferes with a finding of fact if there is material on which the court below could have found that fact. It

does not matter if there was contrary material except, of course, where the lower court never considered and made a finding on the contradictory evidence. This Court will, therefore, follow a lower court's finding, if, having considered the contradictory evidence, the lower court rejects it and finds a contrary fact on the evidence before it. A trial, court is better poised to settle matters of credibility. This Court normally respects a trial court's assessment of credibility. This assessment is not sacrosanct. It is not where it is unsupported by all material before the trial court.

The evidence in the court below needed circumspection. Both sides suggested the wounding was caused because of another's advances on the other's spouse. The appellant, at the police and in court, admitted wounding the complainant. His defence was he acted in self-defence and in defence of his wife. Mr Mwala contends that, despite evidence raising it, the trial court never considered it in the judgment.

The trial court's evaluation of the evidence was unsatisfactory. The complainant said that the appellant attacked him because the complainant found the appellant with his wife. The complainant's wife, called for the prosecution, denied the occasion. She was adamant the event never occurred. The trial court's finding on the evidence is surprising. Contrary to the evidence on the record, the trial court held her evidence supported the complainant's case. The trial court could have rejected her evidence. The matter was not as simple, if the court rejected the evidence. The court had to resolve an apparent contradiction in the prosecution case. There was no explanation for this apparent contradiction except, may be, that it was in the wife's interest to conceal the affair, if it was one.

Contradiction in evidence, however, does not justify rejection of all the evidence. Many factors may cause discrepancies in evidence or the witness or witnesses. Witnesses testify from recollection of past events. Memory and oversight of minute detail affect the quality of evidence. There might be other reasons as Davies, J, said in Parocjic v. Parocjic, [1959] 1 All ER 1, 1 cited with approval by this court in Mahommed Nasim Sirdar v. Republic. Davies, J., in Parocjic v Parocjic:

> *"It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of*

their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case."

Serious contradictions however must be explained. The trial court must make a specific finding on the contradicting evidence. The trial court can neither, as happened here, ignore the contradictory evidence nor find support not supported by the evidence. The court's approach affected evaluation of the prosecution and the defence case.

This leads to the second ground of appeal. It is contended that the trial court erred in law in holding that the defendant's defence that he wounded the complainant by protecting his wife was not supported. It is necessary to detail the lower court's actual wording on the finding.

"The accused admitted to have stabbed the victim with a razor blade. The rationale being that his wife was dragged by the victim into the bush. This alone this court can no believe because there is no witness who supported the claim of the accused. If the accused had witnesses who could establish that indeed the complainant dragged the wife of the husband into the bush. The accused could have escaped from the conviction".

Section 212 of the Criminal Procedure and Evidence Code provides that it is not necessary for proof of any fact that there be more than witness. A fact can be proved by testimony of a single witness. The lower court's assertion misstates the law. On the particular case, moreover, the appellant's wife's evidence supported the appellant's. The trial court, made no finding on the appellant's wife evidence. That doubt must be resolved in the appellant's favour. The trial court, however, made a finding on the appellant's evidence.

The trial court disbelieved the appellant's evidence. The basis of that disbelief is questionable. The trial court disbelieved the appellant's evidence because it was not supported. It need not have been. It stood alone. The court's approach to it should have been what was stated in Republic v. Gondwe, (1971 – 72) 6 ALR (M) 33:

"As in every case where an accused person gives an explanation, in this case its application required that the court's approach to the

appellant's story should not have been what it evidently was: "Is the accused's story true or false?", resulting, if the answer were "false," in a finding that the appellant must necessarily have had a fraudulent intent. The proper question for the court to have asked itself was- "Is the accused's story true or might it reasonably be true?"- with the result that if the answer were that the appellant might reasonably have been telling the truth, the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law."

The appellant's evidence stood. The evidence showed a possible defence, self defence or defence of a person.

This leads to the appellant's third ground. Mr Mwala argues that the trial court should have considered the possible defence raised by the evidence, self defence or defence of a person. There is a duty on a court to consider a possible defence raised by the defence or prosecution evidence. This is because the onus is upon the state to prove the case against the defendant beyond reasonable doubt. That standard is scarcely achieved where there is a possible defence. The overall duty for the prosecution to prove the case against beyond reasonable doubt means that, once the defence or prosecution raises a possible defence, the onus is upon the state to prove beyond reasonable doubt that the offence was committed without the defence. It is not for the defendant to prove the defence. It is up to the prosecution to negative the defence, to show that the offence was committed without the defence.

The evidence, as Mr Mwala argues, raised a possible defence. The appellant and his wife gave evidence to that effect. The evidential burden was discharged. The onus was upon the prosecution to prove that the offence was committed without the defence. The lower court never considered the defence at all. Failure to consider a possible defence may be fatal to a conviction. It will be where the evidence clearly established the defence. The court on appeal must evaluate all the evidence. If the defence is clearly established the conviction is unsatisfactory.

In this case there was more to suggest that the appellant acted in self defence or defence of his wife, the appellant's wife testified to that effect. The complainant's wife refused that the assault was on account of her. The defence case is that the complainant was dragging the appellant's wife and fell to the ground. The complainant stabbed the appellant who intervened

for his wife. The appellant in defence attacked him with a razor blade. The court below did not consider a possible defence. The conviction is unsatisfactory. The assistant chief state advocate agrees.

I allow the appeal. I quash the conviction. I set aside the conviction.

Made in open court this 13th day of March 2001.

D F Mwaungulu
JUDGE