IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 794 OF 2000

THE REPUBLIC

Versus

1st FRANCIS MAWAYA

2nd PATRICK NYAPUWA

3rd CHARLES SINGANO

4th LIMBANI MAFULI

5th RABSON YAKWANA

6th HENRY SINGANO

7th ENOCK MIKA

From the Second Grade Magistrate's Court Sitting at Phalombe Criminal Case No. 318 of 2000

CORAM: HON. JUSTICE F.E. KAPANDA

Miss Chimwaza, Principal State Advocate for the State

Accused, present but unrepresented

Kamanga, Official Interpreter/Recording Officer

Kapanda, J.

ORDER IN CONFIRMATION

Introduction

On 14th September 2000 the Second Grade Magistrate's Court at Phalombe, after convicting the 1st Defendant of the offence of Rape, it sentenced him to three (3) years imprisonment with hard labour. I wish to observe that in the same case the 3rd and 5th Defendants, who were jointly charged with the 1st Defendant, were sentenced to a custodial imprisonment of ten (10) months. Unfortunately, at the time this matter was called for confirmation hearing the 3rd and 5th Defendants had served their sentences and had since been released from custody. Thus even though the Reviewing Judge had indicated these sentences of ten (10) months should be enhanced this court could not do so in view of the said release from custody of the 3rd and 5th Defendants. I have no doubt in mind that had it been that these Defendants were brought before me I would not have hesitated to enhance the sentences as recommended by the Reviewing Judge.

The offence of Rape is provided for in Section 133 of the Penal Code (Cap 7:01) of the Laws of Malawi and it carries a maximum sentence of death or life imprisonment. The sentence meted out by the Second Grade Magistrate was made subject to confirmation by the High Court. Upon being brought before the High Court the judge who reviewed this case set it down for consideration of the sentence. It was the view of the Reviewing Judge that the sentence of three (3) years, for this offence of Rape, was manifestly inadequate due regard being had to all the circumstances of the case. For reasons that will appear later in this judgment I wholly agree with the sentiments of the Reviewing Judge. I must point out that the State also agrees with the views of the Reviewing Judge.

Facts

The prisoner pleaded not guilty to the charge of Rape and was convicted after a full trial. It was noted by the Reviewing Judge, and I am in agreement with him, that the issue that ought to be dealt with at the review of this case is that of sentence. As such this court has convened to consider the inadequacy of the sentence.

In so far as it is the relevant to the question, of sentence it is a fact that at the commission of this offence there was more than one person involved. There was the 1st Defendant and other two Defendants. Finding of guilt was entered in respect of the other Defendants and the court below made a probation order. This the court did because these other Defendants are juveniles. Further, it is a fact that on this day the convict had unlawful sexual intercourse with complainant for more than once moreover this particular convict was a leader of the group of that gang who raped the complainant.

Regarding the conviction of the 1st Defendant I have no doubt in my mind that he was properly convicted.

Sentence

It is trite law that Rape is a capital offence which carries a maximum sentence of death or life. As noted earlier the court below sentenced the prisoner herein to a term of imprisonment of three (3) years for gang raping the complainant. Indeed, the prisoner was given this sentence after the court found that one this single day he more than once raped the complainant.

Learned Counsel has submitted, on the authority of the case of Rep -vs- Ganizani Layelo being Confirmation Case No 577 of 2000 (unreported), a sentence of three (3) years in the circumstances of the present case is manifestly inadequate. In Layelo's case two convicts who gang raped a complainant were sentenced by the lower court after a full trial, to five (5) years imprisonment with hard labour. On confirmation the High Court, with Honourable Justice Chipeta presiding, the sentence was enhanced to seven (7) years imprisonment with hard labour. The sentence was enhanced because more than one person was involved in raping the complainant.

In my view the case of Ganizani Layelo, cited above, is relevant to the instant case. It is pertinent because there are some similarities viz in both cases more than one person was involved in the commission of the offence; and just like there was a plea of not guilty in Layelo's case there was also a plea of not guilty in the case under consideration. Further, it is observed that in the two cases being compared the convicts took turns in forcibly having unlawful sexual intercourse with their victims.

I should point it out that I called upon the prisoner to show cause why the sentence should not be enhanced. Instead of addressing me on the relevant issue he purported to attach the finding of guilty by the lower court. Unfortunately, upon reading the record this court has found out the conviction can not be faulted. It is therefore confirmed.

For the reasons given above I am inclined to enhance the sentence, as intimated by the Reviewing Judge, and it is hereby enhanced. The sentence of three (3) years imprisonment with hard labour is increased to seven (7) years imprisonment with hard labour. It is so enhanced so that the court must be seen to be consistent in sentencing prisoners who have committed similar offences in similar circumstances. It is for this reason that I do not wish to depart from what my learned brother judge observed in Layelo's case.

Made in open Court this 12th day of April 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE