IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 6 OF 2002

ANANIAS MTIVALE

Vs

THE REPUBLIC

CORAM: HON. JUSTICE A.C. CHIPETA
T.S. Chirwa, of Counsel for the Appellant
Chimwaza (Miss); Principal State Advocate, of Counsel for the Respondent
Kabvinya; Official Interpreter

JUDGMENT

The appellant, who initially stood charged with the offence of Armed Robbery contrary to Section 301 of the Penal Code (Cap. 7:01) of the Laws of Malawi before the court of the Chief Resident Magistrate sitting at Blantyre, was after full trial only convicted of the offence of Attempted Robbery contrary to Section 302 of the same Code and sentenced to 3 years imprisonment with hard labour. His appeal to this court is against both conviction and sentence.

The appellant is represented by Mr Chirwa, learned Counsel, who in the first three grounds of appeal attacks the conviction on basis that it can not be sustained having regard to the evidence and who in the fourth ground of appeal asserts that the sentence imposed on the appellant is manifestly excessive. The State opposes this appeal on both its fronts and is represented by the learned Principal State Advocate, Miss Chimwaza.

The Appellant's argument against conviction in this case is to the effect that he was merely a passive passenger on the car he is now convicted of having attempted to rob. A second passenger on the same car, whom he says he does not know, is the one he saw struggling with the driver as they travelled between Limbe and Blantyre to the extent that they ended up getting involved in an accident with the car. It was thus argued on the Appellant's behalf that on his part there is nothing he did either in preparation for the offence of robbery or to otherwise facilitate its commission.

It was further pointed out that although the driver said he was threatened with being shot at in order to surrender the car, he also said that he did not know whether in fact there was any gun around, and none was produced in court. Beyond this it was argued that the threats or actions of the other passenger towards the driver should not be extended to the appellant as he was not in that man's company and that the lower court erred in so attributing those threats to the appellant. It was also contended that the appellant having been a mere passenger the evidence did not show that he intended to steal the car and that this was well manifested by the fact that after the accident the appellant did not make any attempt to run away from the scene as the other passenger did.

In answer to the above arguments of the appellant, Miss Chimwaza took the view that the lower court had ample evidence on which to ground the conviction herein. She argued that the evidence of the driver of the car in question was that of the two people in the car one of them was struggling with him over the steering wheel while the other was threatening to shoot him if he did not surrender the car. When the car ended up being involved in an accident of these two people the driver arrested the present appellant and the appellant does admit having been in the car. One this basis Miss Chimwaza argued that it does not matter who uttered the threats or who struggled with the driver. She said what is clear is that the two were acting in concert and pursuing a common purpose. On

point of the appellant's arrest at the scene Miss Chimwaza refuted the argument of the appellant to the effect that he remained there because he was innocent. Rather she argued that if he had not sustained injuries in the accident the chances are that he too would have run away.

I have in this case carefully read the entire record of the lower court. During the hearing of the appeal I exercised like care in listening to all the arguments as advanced by both learned Counsel for the parties in the case. I have throughout been all too aware that appeals of this type come to this court by way of rehearing and I have thus felt at liberty to re-examine and re-assess all the evidence that was presented before the lower court so as to be in a position to better evaluate the judgment that resulted from it.

Let me observe that the lower court's record is not well arranged in its first part. If one reads it in a hurry one could easily get confused as to how the case started and progressed as pages in this section are just mixed up. My painstaking follow up through this thicket shows the following. On 27th July, 2001 plea was taken from three accused persons. The present appellant then appeared as 3rd accused. The incident giving rise to that charge just having occurred two days earlier the State obtained an adjournment of the case to complete investigations.

On 31st August, 2001 the State offered no evidence against Christopher Sesani who was second accused on the original Charge sheet and he was duly acquitted. Following this the State put in an amended Charge concerning two accused persons only and fresh plea was taken. In this fresh Charge sheet the present appellant who had hitherto been 3rd accused was the first accused and Joseph Manjawira who had been the first accused became the second accused. Trial proceeded with the accused persons occupying these two positions in the case. At the close of the prosecution case the second accused was acquitted on basis that he had no case to

answer and the present appellant remained as the sole accused in the case. I believe one needs to have this picture in mind in order to best appreciate which evidence touched the appellant in the lower court.

The record of the lower court shows it as the evidence of the man who arrested the appellant, who is a Reserve Bank of Malawi driver, that on the material day he was driving a Mitsubishi Colt registered No. BL 8497, property of his employer. He said that staff working at Malswitch knocked off late around 7.00 p.m. and after escorting some to Naperi, he had to escort a Mr Phiri to Namiyango. It was as he was returning from Namiyango to Blantyre, he said, that when he gave way to a certain truck coming from the direction of Universal Industries near the traffic lights at the Queen Elizabeth Central Hospital junction, from a group of about six youngmen hanging around there, two opened the doors of his car and entered the car. Immediately one of them grabbed him by the neck and threatened that they were going to shoot him if he did not surrender the car to them. Instead of complying with the demand he says he started driving the car at high speed and that near Tambala Food Products the two of them started beating him up with one of them pointing something like a gun at him threatening to shoot him. Next one of them got hold of the steering wheel and a struggle ensued. The driver's aim was to reach Blantyre Police but near ESCOM house due to the high speed and the struggling that was taking place the car hit a stationary vehicle and the ESCOM Bus Shelter before going through the ESCOM fence. This is where, after the accident, the driver said he arrested the appellant after the other assailant had escaped.

It is clear from the judgment of the lower court that the Magistrate believed this story and rejected the defence of the appellant that he was an innocent passenger on the car voluntarily taken on it from Limbe by the driver and that he was a mere observer over the activities of the other passenger.

The lower court heard all the witnesses in this case including the appellant. He had opportunity to see the witnesses and to assess their demeanour. Indeed using this very advantage he even ended up acquitting one of the accused persons in the case soon the prosecution case was closed. I have tried to follow the evidence tabled before the Magistrate and his analysis of it. I find nothing to fault his choice in believing the driver and disbelieving the appellant. I thus see no basis for disagreeing with his conclusions on that point.

The lower court having found that the appellant and the unknown man landed on the car driven by PW1, not by invitation, but through an ambush and that they immediately combined forces by grabbing the driver by the neck, beating him up, threatening to shoot him, and struggling with him for control of the car, I am well satisfied that in terms of S21 of the Penal Code, the lower court was well entitled to treat the appellant, who was arrested, as equally guilty of attempted robbery as the escapee offender. The appellant was one of the two persons who trespassed on the vehicle PW1 was driving. He was party to the assault on the neck that followed and to the beating up and to the threats and struggles that followed in a bid to steal the car away from the driver. The conviction the lower court entered cannot in the circumstances be faulted and so I dismiss the appellant's appeal against conviction.

On sentence as I earlier pointed out the argument of the appellant is that it is manifestly excessive. In the absence of production of the gun it was argued that no dangerous weapon was used and that the offence was therefore not an aggravated one. On this basis it was further argued that the maximum sentence under S302 of the Penal Code would have been 7 years and that to dish out 3 years out of this for a first offender was quite harsh.

The State, although it did not argue so vehemently on point of sentence, did point out that the attempted robbery herein was an aggravated one. Two persons were involved in

the attack on the driver. This feature, it was argued, thus puts the offence in the category that attracts a maximum of life imprisonment under the same S302 of the Penal Code and that a sentence of 3 years out of this cannot be considered manifestly excessive.

I must say, that for offences of Robbery and Attempted Robbery, it is quite clear from Sections 301 and 302 of the Penal Code, that if an offender, *inter alia*, embarks on them in company of one or more other person or persons, the offences become aggravated. As the State well observed in this case the highest penalty the appellant risked was not seven years imprisonment in this case but life imprisonment. Although the appellant is a first offender I think 3 years imprisonment with hard labour cannot in any way be described as an excessive sentence for the offence he committed. Strictly speaking I would tend to think that the sentence was inadequate. I take due account however of the fact that apart from the offence being his first his age is 27 years only and that in a way the appellant already reaped part of his punishment through the injury he sustained in the accident that was provoked by his offence. For these reasons I will most reluctantly not enhance his sentence. The sentence of 3 years imprisonment with hard labour imposed by the lower court thus stands confirmed and the appeal against sentence is also dismissed.

Pronounced in open Court at this 23rd day of April, 2001 Blantyre.

A.C. Chipeta
JUDGE