IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 46 OF 2001

BETWEEN:

GUNDE KAMANGA & FOUR OTHERS.....APPELLANTS

- and -

THE REPUBLIC.....RESPONDENT

CORAM: TWEA, J.

Makhalira, Counsel for Appellants

Kamwambe, State Advocate, for the State

Ngwata, Court Interpreter

Kabvina, Operator

JUDGMENT

This is an appeal by the two appellants against both conviction and sentence from the judgment of the First Grade Magistrate in Limbe.

Counsel for the appellant argued that the trial magistrate misdirected himself on the evidence in that he ignored the unchallenged evidence of the defence and also that he came to a wrong conclusion when he found that the appellants had a common intention to rob the complainant.

I have examined the record. It was the evidence of the complainant, who was PW1, that as he was walking and was about to overtake the appellants, who were in a group of others, the 1st appellant blocked his way and when tried to use the other side the 2nd appellant blocked him too and then assaulted him. He fell down and dropped the two jumbo carrier bags which he had. He got up and picked his carrier bags but the 2nd accused took one away. He decided to run away because he was further assaulted by the two appellants. The 1st appellant gave a chase but he managed to get away. Be this as it may be, he followed the appellants to a bar and then the house of 1st appellant in order to identify who they were and where they lived. He then reported the incident and the appellants to a local party Chairman and the Police.

This evidence was not contradicted by the appellants during cross-examination.

The case for the appellants is that the complainant bumped into the wife of the 1st appellant. When he was confronted about this, he became uncooperative and one of the appellants took away his jumbo carrier bag to make him cooperate.

The evidence in defence run parallel to that of the State. However, during cross-examination by the State, the appellants conceded that they did not challenge the prosecution evidence; that there was an assault and a chase on the complainant and that the carrier bag was snatched from the complainant, the 2nd appellant in defence told the court that it was the 1st appellant who was fighting the complainant. It is further noted that on the other hand the 1st appellant placed the blame on 2nd appellant. Both however conceded in cross-examination by the State that they never rebutted the complainants evidence. There was no evidence in defence that they returned the carrier bag which was snatched from the complainant.

The last issue I will look at is that the appellant did not cross-examine the other prosecution witnesses as to what happened.

All in all, it is my view that the appellants evidence in defence, is very inconsistent and contradiction of each other. I am aware, and I remind myself, that each not having been represented gave evidence on his own behalf. This being the cases the lower court was entitled to use the evidence in evaluating the defences of each of the appellants at trial level. I find that he did so, properly, in my view the defence evidence was clearly an after thought. It is clear from the defence evidence that 1st appellant and 4th accused's wife, placed the blame on 2nd appellant and the 2nd appellant placed the blame on 1st appellant. In arguing their appeal, they did so jointly. It is not clear which defence, of the two inconsistent defences, the appellants were relying on. In my view their defences were not reconcilable. Looking at the arguments before this court I find that they can only partly support each appellants' case. In my view there is no merit in the appeal against conviction and I accordingly dismiss it.

As to the appeal against sentence, I will allow it. Clearly, the appellants are young persons. This offence was not premeditated. It all started as a joke, blocking a fellow pedestrians way and eventually, they took one of his jumbo carriers after pushing him and assaulting him and chasing him. I do not condone such wayward behaviour by young people, but I am of the view that the sentence is excessive in the circumstances. I therefore set it aside and substitute it with a sentence of 2½ years each from the date of the committal.

PRONOUNCED in open court this 28th day of February, 2002 at Blantyre.

E.B. Twea

JUDGE