# IN THE HIGH COURT OF MALAWI
# LILONGWE DISTRICT REGISTRY
# CRIMINAL APPEAL NO. 13/2005

## BETWEEN

CHARLES CHILEDZELERE .....APPLICANT

-AND-

THE REPUBLIC .....RESPONDENT

**CORAM : HON. I.C. KAMANGA(JUDGE)**

DPP, Absent
Appellant, present/unrepresented
Mrs Namagonya, Court Reporter
Mrs Nakweya, Court Interpreter

## JUDGMENT

The appeal in this matter is against conviction and sentence. The appellant is Charles Chiledzelere. He appeared before the Magistrate in Dedza charged with the offence of Attempted Rape which he denied but was convicted after full trial, and sentenced to five years imprisonment with hard labour.

The appellant filed his grounds of appeal which were as follows:-

1. *The learned Magistrate erred in law in convicting the appellant in that there was no evidence to support the conviction.*

2. *In the circumstances of the case, the sentence of 5 years imprisonment with hard labour was manifestly excessive.*

Section 134 of the Penal Code defines the crime of Attempted Rape in the following manner:-

> *"Any person who attempts to committee rape shall be guilty of a felony and liable to imprisonment for life."*

The definition of rape is in the following manner as per section 132 of the Penal Code.

> *"Any person who has unlawful carnal knowledge of a woman or girl, without her consent shall be guilty of the felony termed rape."*

In the matter at hand the elements that need to be established if one is to be found guilty of the offence of attempted rape including the following:

1. *A male person must have desired and intended to have sexual relationship with a female person.*
2. *The male person must have tried to put his intention into action by approaching the female person and expressed his intention either through*

*words or action to have the sexual relationship with her.*

3. *The female person must have expressed her refusal to undergo such a relationship with the man.*

4. *Despite the female's refusal, the male must have acted in such a way that he could still have had sexual intercourse with the female if it were not for some other circumstances that prevented the male from achieving his goal.*

This was the evidence that was in court in the matter at hand:

On 8th October, 2004, Mrs Ethel Office Jackson, sent her ward to a maize mill. As it was approaching evening without the ward coming home, she decided at follow the ward to the maize mill. She did not find the ward to the maize mill. As she was going back home, she met the appellant on the way. The appellant was on his bicycle. He offered Mrs Ethel Office Jackson a lift on the bicycle but she refused the offer. The place was deserted at the time. Appellant made an offer to sexually know her and the complainant told him that she was a married woman and would not indulge in such activity with him. He tried to persuade the complainant to no avail and left the complainant. The appellant rode his bicycle a while and

when he got to a bush near the path-way, he parked his bicycle near the pathway and hid in the bush. When the complainant got to the place, the appellant got hold of her hand and started proposing again. He was rebuffed once more. The appellant thereupon decided to force himself upon the complainant. They started struggling. The appellant managed to fell the complainant down. Then he struggled with her to undress her. In the process, the appellant's petticoat was torn. As they continued to struggle, the appellant managed to touch the complainant in her private parts. The struggle continued and a Samaritan came to scene.

This was the Samaritan's evidence, who is also the complainant's brother-in-law. On the material day he was going to his own frolic minding his business. He suddenly heard a cry for help in the direction that he was heading and rushed to the scene. From distance he saw some two people struggling. When he approached the scene he saw that it was the appellant struggling with his sister in law. He asked them on what was happening and the appellant asked him for forgiveness and proceeded to where he had parked his bicycle.

The appellant told the witness that the two had agreed to have a sexual encounter. The witness asked the appellant on why then they had engaged in a struggle, to wit the appellant sought the witness's forgiveness and left the place. The

complainant told the witness that the appellant had been forcing her to have a sexual encounter with him. The two went to report the matter to the village headman who after a full hearing and advising the appellant to pay compensation advised that matter he reported to police. These are the undisputed facts of the case as per evidence of the complainant and the eye witness.

From the evidence that was tendered in the trial court, the magistrate found that there was overwhelming evidence that the appellant made an attempt to have sexual intercourse with the complainant and infact fondled her in her private parts.

I can only endorse the learned magistrate's finding. There is overwhelming evidence against the appellant that he made an attempt to rape the complainant.

Applying the elements in the matter at hand, the appellant is a male who by his word made that proposal to the complainant that the two engage in that sexual activity with each other. The complainant refused. The appellant laid ambush on the complainant who is a female and tried to force her down. A struggle ensued. The appellant was so intent to achieve his goal to such an extent that he tore the complainant's underwear. Not only that, he had the audacity to fondle the female that was not consenting in her private parts. If it were

not for the female's struggle and the Samaritan hearing the cry for help, the appellant would have perhaps achieved his purpose.

As this is the offence of attempted rape, it did not matter that the appellant never achieved his goal of carnally knowing the complainant. As long as it was established that after forming the opinion that he would carnally know the woman, he conducted himself in such a manner that despite the woman's refusal, he would achieve his purpose; the crime of attempted rape was committed. In fact, taking all factors into consideration, the action of struggling and fondling the woman and the tearing of her underwear are serious actions on the appellant's side to achieve his intention. Hence prosecution proved beyond reasonable doubt that the appellant had the requisite form of mind and intention to commit a crime which he ultimately put into action by fondling the woman and struggling with her against her will.

The conviction is hereby confirmed. Then there is the sentence. The appeal is against the five years. The maximum sentence of this offence is death or life imprisonment. In fact in fondling the woman in her private parts, the appellant was committing an offence that can stand on its own under section 137 of Indecent Assault which has a maximum sentence of 14 years imprisonment. In the matter at hand, the action was

merely treated as one of the ways that the appellant exhibited that actually shows that he had intended to rape the woman. This action on its own, when it was not welcomed, was a demeaning experience to the woman. In fondling her, the appellant was actually assaulting the complainant. The demeaning behaviour bears an aggravating factor when this appellant was not only told that knew that in fact she was a married woman. Then there is the struggle that ensured as well as the tearing of the woman's underwear which are also traumatizing events to the woman.

Let me observe that a reading of the events in the lower court as well as documents that appear on the record in from of the appellants caution statement and the appellant's case indicates that the appellant is aggrieved with the conviction because, the village headman had asked him to compensate the complainant's husband in money form amounting to K6,500.00 which the appellant duly fulfilled. It would appear that the appellant is now aggrieved on the ground of *autre fois convict*, on the autre fois convict. I found that the same does not arise in the matter at hand for whatever hearing the appellant underwent at the village headman's place was a civil/customary issue i.e. his attempting to carnally know a married woman. In that scenario the wrong that the appellant had committed was not to the complainant per se, the wrong that the complainant had committed was against the

husband. To that extent that the compensation that he forwarded to the husband was an apology to the husband and not the complainant. The issues that two forums (the traditional court and the magistrate court) were addressing were different much as issues arise from some circumstances. Furthermore, a traditional court setting as the one that the appellants refers to in his caution statement and his defence does not have jurisdiction to resolve serious criminal matters like the one at hand. Hence it was in order and appropriate for the village headman, when he tool care of the traditional aspect of the appellant's conduct towards the complainant and her family to refer the matter to the police for the State to take care of its interests in the matter.

It is in that vain that I find that the conviction as well as the sentence were in order and adequate and I confirm them both. The appeal against conviction and sentence is dismissed in its entirety.

**MADE** in Open Court this 28th day of March, 2007.

I.C. Kamanga(Mrs)
**JUDGE**