# IN THE HIGH COURT OF MALAWI
**PRINCIPAL REGISTRY**

CRIMINAL CASE NO. 49 OF 2007

SHUMBA ZAMBIA

VERSUS

THE REPUBLIC

**CORAM: HON. JUSTICE E.B. TWEA**
J. Phillipo, State Advocate for the Respondent
Accused, present unrepresented
Mrs Mangison - Official Interpreter

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## J U D G M E N T

**Twea, J.**

This is an appeal against both the conviction and sentence.

The appellant appeared before the First Grade Magistrate Court sitting in Chikwawa on a charge of attempted rape. When called upon to plead to the charge, he admitted and alleged that he was very drunk. The trial magistrate did not put the elements of the offence to the appellant, but proceeded to enter a plea of "***Guilty".***

The facts of the case were that on the day in issue the complainant was traveling from a maize mill. She had a basket in her head. On the way she met the convict who demanded to have sexual intercourse with her. She refused. The convict then grabbed her and the basket fell down. He struggled with her. She shouted for help and this dissuaded the convict. He ran away and hid in the bush. He was later arrested and charged. The

convict admitted the truth of the facts after they were narrated to him in court.

The appeal is on the ground that the plea was equivocal because he had pleaded drunkenness. The point raised by the appellant is quite valid. Before a court enters a plea of guilty it must ensure that the accused person admits all the ingredients of the offence without equivocation. When ever there is equivocation the court must enter a plea of not guilty.

Be this as it may, after a plea of guilty has been entered, the prosecution outlines the facts that constitute the offence. The accused person is asked if he admit the facts outlined to be true. This is the only way that the court can ascertain that the offence was committed by the accused person in a particular manner. When the accused person admits the facts, this would cure an otherwise defective plea: ***R v. Jailosi 1964-1966 ALR (m) 219***. In the present case therefore after the appellant admitted the facts, I would have found that this cured the defective plea.

This notwithstanding, I have examined the facts and I find that they do not support the charge of attempted rape. The appellant met the complainant and demanded to have sexual intercourse with her, which she refused. He then grabbed her and struggled with her with intention to forcibly violate her. He did not go beyond making his indecent intent known to her and grabbing her. What he had done did not constitute the ingredients of the offence of attempted rape. In my view, his actions constituted the offence of indecent assault. 'Indecent' should be taken to bear its ordinary meaning: 'any behaviour, talk, conduct that offends against accepted standard of decency or morality; or that which is obscene'. It is not acceptable behaviors to demand sexual intercourse and then grab the woman when she refuses.

I find that had the court directed its mind to this, it would have informed the prosecution that the facts do not disclose the offence charged. It would have been open to the court to inform the prosecution of the offence disclosed. The prosecution would have duly amended the charge and the convict would have been called upon to plead to the charge as amended: ***R. Jacob S/O Luwemba (1923-60) ALR (m) 258 .*** I do not think it is now open to this court to enter a conviction for a lesser offence.

I therefore quash the conviction and set aside the sentence. I would have directed that the State should retry the accused, however, in view of the

fact that he bas been in custody since he was convicted on 12 June 2006, I refrain from doing so. I therefore, order that the accused be released from custody forthwith unless he is held for other lawful reasons.

***Pronounced in Open Court*** this 3rd day of June, 2008 at Blantyre.

E.B. Twea
**JUDGE**