



REPUBLIC OF MALAWI

MALAWI JUDICIARY

**IN THE HIGH COURT OF MALAWI**

**MZUZU DISTRICT REGISTRY**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL CASE NO. 03 of 2015**

*(Being Criminal Case No. 153/2014 in the FGM Court at Karonga)*

**JAMES MWALILINO**

- VS -

**THE STATE**

**CORAM: Honourable Mr. Justice D. Madise**

Mr. W. Chirwa Counsel for the for the Appellant

Mr. W. Nkosi Counsel for the State

Mr. I.Z. Bondo Official Interpreter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

**1.1** The Appellant in this matter was charged, tried and convicted of the offence of burglary and robbery contrary to section 309(a) and 301 of the Penal Code. He was sentenced to 42 months imprisonment with hard labour on the first count and 96 months imprisonment with hard labour on the second count. The sentences were ordered to run concurrently. Being unsatisfied with the decision of the trial court he now appeals to this court against both conviction and sentence.

## **2.0 Grounds of Appeal**

The Appellant did not file any grounds of appeal. He just filed an appeal against the whole judgment.

## **3.0 Appeals in the High Court**

**3.1** I'm mindful that appeals in the High Court are by way of re-hearing of all the evidence and all that took place in the court below. My duty in this regard is to check the correctness of the proceedings in the trial court and the final determination.

## **4.0 The Issue**

There are two issues for our consideration in this matter.

- 1) Whether the conviction was safe.
- 2) Whether the sentence was reasonable regard being had to the circumstances of the offence and the offender.

## **5.0 The Evidence**

**5.1** The facts of the case are as follows. Mr. Raziur Rachman from India stated that he was in Room 14 at Hotel Taj (Mufwa Lodge) in Karonga on 20 September 2014. At around 11 pm he heard a knock. Then the door

was unlocked open from outside. Six people entered the room. One had a gun while the others had panga knives. They demanded money. Mr. Rachman had a bag which he handed over to the attackers. They took K287,000.00, a blanket, a lap top, Galaxy Samsung phone among other items.

**5.2** The attackers demanded a pick up vehicle and as they were leaving they locked the Victim inside. After about 10 days he was informed by the police that his phone was found. He did not identify the attackers as they all wore face masks. Daudi Phiri a Manager at the Hotel confirmed the version of events as narrated by the Victim.

**5.3** D/Sergeant Yotamu Banda arrested the Appellant on other offences on 4 September 2014. He was found with a phone which was stolen from Mr. Rachman. It was positively identified. The Appellant stated that he bought the phone from Makhwira who repairs phones in Mzuzu Market. When the police confronted Makhwira, he was found selling phones and not repairing them. In fact his ID showed his name was Mohammed Mweheme. That is how the Appellant was arrested and charged with the present offence.

**5.4** In defence the Appellant stated that he bought the phone in Mzuzu on his way to Karonga from a person who told him he was Makhwira who repairs phones in Mzuzu Market. When he went there with the police Makhwira produced an ID which showed that his name was Mohammed Mweheme. He denied committing this offence in Karonga. That marked the end of the defence's case.

## **6.0 Law and Evidence**

### **6.1 Burden and Standard of Proof**

**6.1.1** The burden and standard of proof in criminal cases lies with the State through the duration of the trial. The standard is beyond a reasonable doubt. This is settled law in this Republic.

### **6.2 The charge sections**

Section 309, Any person who –

- a) Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein or
- b) Having entered any building tent or vessel used as a human dwelling with intent to commit a felony therein or having committed a felony in any such building tent or vessel breaks out thereof

Section 301 Any person who commits the felony of robbery shall be liable to imprisonment for 14 years.

If the offender is armed with a dangerous weapon and in the company one or more people and uses violence the punishment shall be death or life imprisonment.

## **7.0 The Finding**

**7.1** In this matter there is no evidence that the Appellant was present during the attack. The Victim stated he did not see the attackers' faces. The only evidence available is that he was found with a phone which was stolen from the Victim at Hotel Taj. His explanation is that he bought it from a phone repairer. So how come he was convicted.

## **7.2** The doctrine of recent possession

**7.2.1** The doctrine operates on the premises that an accused's handling of the goods is disproved, thus he offers no reasonable explanation for his being found with the goods shortly after they were reported missing in offences of burglary, theft and similar offences.

**7.3** In this matter the Appellant was found in possession of a phone which was stolen from the Victim. The question is whether his explanation is reasonable or it is based on falsehood which leads fairly to an inference of guilt.

**7.4** In my considered opinion I find that the Appellant failed to give a reasonable explanation as to how he was found with a stolen phone immediately or soon after it was reported stolen.

**7.5** The State in my view managed to prove the case beyond a reasonable doubt. I see nothing wrong with what transpired in the court below. This appeal was a waste of the Court's time and resources and I dismiss it.

**7.6** The appeal on sentence must similarly fail. The sentences of 42 months and 96 months to run concurrently were fair in my view. It is not the business of the Appellate Court to tamper with sentence unless it can be shown that the same was excessive. Looking at the way the offence was committed I find that there a lot of aggravating factors. The attackers had a gun and panga knives and there were 6 of them. I therefore uphold the conviction and confirm the sentence.

**Pronounced** in Open Court at Mzuzu in the Republic on 3<sup>rd</sup> April , 2017.

A handwritten signature in dark ink, appearing to be 'Dingiswayo Madise', written in a cursive, flowing style. The signature is positioned above the printed name and title.

Dingiswayo Madise  
**JUDGE**