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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CRIMINAL APPEAL CASE NO. 11 OF 2021

BETWEEN:

PETER MWEREKA.....APPELLANT

-and-

THE STATE.....RESPONDENT

CORAM: **THE HONOURABLE JUSTICE J. M. CHIRWA**

Mr. Kulesi, Counsel for the State

Mr. Sitolo, Counsel for the Appellant

C. Ng'ambi, Official Court Interpreter.

M. Chirwa, Court Marshall

JUDGMENT

1. Introduction:-

Before this Court is an appeal by **Peter Mwekera** ("the Appellant") against the sentence of 7 years' imprisonment with hard labour imposed on him by the Senior Resident Magistrate's Court sitting at Blantyre Central on the 24th day of September, 2020.

The grounds of appeal are as follows:

(a) The learned Magistrate erred in law in failing to adequately consider alternative non-custodial sentences before imposing a sentence of imprisonment on the Appellant, who has not previously been convicted of any offence, and the learned magistrate thereby failed to comply with Section 340 of the Criminal Procedure and Evidence Code.

(b) The learned Magistrate erred in law in failing to comply with the requisite procedure before imposing a sentence of preventive imprisonment, by reason of the fact that the Appellant was not given an opportunity to show cause why a sentence of preventive imprisonment should not be awarded.

(c) The learned Magistrate acted out of emotions and coupled with lack of medical expertise when he declared that the burns which the complainant had suffered were fatal when there was no medical report or opinion to support the assertion before imposing a custodial sentence.

(d) The learned Magistrate erred in failing to take into account and sufficient consideration to sentencing guidelines and the Appellant's mitigating factors, namely, the Appellant was a first offender, he pleaded guilty to the offence charged and therefore showed remorse and did not waste the Court's time when imposing a custodial sentence of seven (7) years' imprisonment.

(e) The circumstances in which the offence was committed, namely, that the Appellant was intoxicated and he fell on a chips fryer 'chiwaya' belonging to the victim and a fight ensued and as a consequence of the fight, the Victim sustained burns (scalds) and therefore, the holding that the Appellant had pre-meditated the offence was wrong and did not justify the imposition of seven (7) years' imprisonment term on the Appellant.

(f) The learned Magistrate erred in law in failing to give sufficient consideration to the Appellant's prime age when he imposed a custodial sentence of seven (7) years' imprisonment with hard labour.

(g) That all in all the circumstances of the case, the sentence of seven (7) years' imprisonment with hard labour is manifestly excessive and wrong in principle.

2. Background:-

The Appellant was charged with the offence of acts intended to cause grievance harm contrary to Section 235(a) of the Penal Code (Cap.7:01 of the Laws of Malawi) in a Criminal Case No. 627 of 2020 in the said court. He was convicted upon his own plea of guilty to the charge and upon conviction sentenced to serve a custodial term of seven (7) years' imprisonment with hard labour.

Being dissatisfied with the said sentence he has appealed to this Court.

3. Issue for determination:-

The issue for determination by this Court is whether or not on the circumstances of the present case the custodial sentence of seven (7) years' imprisonment with hard labour was appropriate.

4. Determination:-

This being an appeal from the subordinate court, this Court is mindful that such an appeal is by way of a re-hearing (see: **Mulera v The Republic** [1997] 2 MLR 60 at p. 63). It is however, trite that a re-hearing by an appellate court does not mean that the court looks at the record of evidence in isolation and makes its own mind as if there were a trial on the record alone. It must take into account so many other factors such as, that the magistrate had the opportunity of observing the demeanour of the witnesses, and must also recognise that it is in a position of disadvantage as against the magistrate who heard the case (see: **Pryce v The Republic** [1971-1972] 6 A.L.R. 65 at p. 72.

The wording of Section 235(a) of the Penal Code is as follows:

> *"Any person who with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-*

(a) unlawfully wounds or does any grievous harm to any person by any means whatever;

shall be guilty of a felony, and shall be liable to imprisonment for life."

The fact that the maximum sentence reserved for an offence of acts intended to cause grievous harm or prevent arrest under Section 235 of the Penal Code is imprisonment for life, in this Court's view, signifies the gravity or seriousness of this offence. This offence ought, however, to be contrasted with the offence of grievous harm under Section 238 of the Penal Code whose maximum sentence is 14 years.

Now, given that the maximum sentence reserved for the offence of acts intended to cause grievous harm or prevent arrest under Section 235 of the Penal Code is imprisonment for life, can it be properly contended that a sentence of 7 years' imposed on the Appellant herein is excessive in the circumstances of this case? This Court prefers to answer this question in the negative.

It is observable from the judgment of the lower court on sentence at pages 3 and 4 that the said court had considered all the circumstances of the case before coming up with a sentence of 7 years' imprisonment with hard labour. The said court had considered the circumstances of the Victim, the circumstances of the Appellant and even those of the offence itself. For the avoidance of doubt this Court now proceeds to reproduce part of the lower Court's said judgement as follows:

"The scalds herein are fatal. As much as the court does not have the medical expertise nor does it profess to have proficiency to declare the fatality of an injury, it suffices to state that the Court, having exercised the power under Section 260 of the Criminal Procedure and Evidence Code to assess the impact of the offence to the Victim, observed that the Victim was in great agony. He struggled to rise and walk from where he sat to the front of the Court. He could not wear normal clothes for men but wrapped himself in a chitenje, the traditional clothes for women. The sight of the scalds was that which cannot be stood by the feint-hearted. Almost the whole torso was in scalds down to the private parts and the legs. He hardly stood erect. He struggled to speak and all he said was that he was not feeling well. Much as the sight of the scalds could easily lead the Court to an emotional laden sentence, this Court desisted from that. The Court considered all the circumstances of the offence including the aggravating and mitigating factors. The Court also considered the maximum punishment of life imprisonment as against that of fourteen (14) years in ordinary cases of acts intending to

cause grievous harm under Section 238. This is a serious offence where this Court is at liberty to even pass a sentence of 21 years, the maximum this Court can impose. It all depends on the circumstances of the case at hand. The Court considered imposing the maximum sentence within its powers. A sentence of twenty-one years cannot be said to be the maximum punishment for the offence herein.....

Considering the mitigating factors which include that the convict is a first offender and he pleaded guilty, this Court held the view, in exercise of its discretion that a sentence of seven years imprisonment is befitting in this case."

It should be evident from the foregoing quotation that the lower court had indeed considered all the circumstances of the within offence.

This Court is mindful of the principle laid down in the case of **Mahomed v The Republic** [1971-1972] 6 A.L.R. (Mal) 16 quoted with approval in the case of **Republic v Banda** [1993] 16 (1) M.L.R. 467 at p.469 that *"an appeal court does not alter a sentence merely on the ground that it would have passed a different sentence itself. An appeal court only interferes if the sentence passed is manifestly excessive in all the circumstances of the case or if the sentence is wrong in principle".*

This Court has considered the cases cited by the Respondent in its Skeleton Arguments in the erroneous apprehension that the Appellant had been charged with the offence under Section 238 of the Penal Code as opposed to the offence under Section 235 of the Penal Code. It is observable that in the case of **Naison Lucius v The Republic**, Criminal Case No. 46 of 2008 where the Appellant had been charged with the offence of grievous harm contrary to Section 238 of the Penal Code and on conviction was sentenced to 8 years' imprisonment with hard labour. On appeal the court reduced the sentence of 8 years to 5 years on the ground that the sentence of 8 years was more than half the maximum sentence of 14 years reserved for the offence under Section 238 of the Penal Code. The facts of the case being that the Appellant hacked the man friend of his ex-wife with a metal bar as a result of which the victim sustained an injury on the right cheek and broken collar bone.

Now, if the court on appeal in the **Naison Lucius** case could find a sentence of 5 years to fit the circumstances of an offence under Section 238 of the Penal Code whose maximum sentence is 14 years would a sentence of 7 years for an offence under Section 235 of the Penal Code whose maximum sentence is imprisonment for life and given the circumstances of the within offence can it be properly

contended by the Appellant herein that the same was excessive? This Court again prefers to answer this question in the negative.

This Court has further considered the Appellant's contention that as a first offender he ought to have been spared from a custodial sentence. The case of **Republic v Makanjila**, Confirmation Case Number 597 of 1996 (unreported), cited in the Appellant's own Skeleton Arguments, seems to be on the point here. In response to a similar plea made by the convict in the just cited case the Court had this to say:

> *"I have always agreed with the observation of **Edward J.** in **R v Richardson and Another**, The Times 10 February, 1988, that there are some crimes so heinous that a plea of youth, a plea that a crime was a first offence or that the prisoner has not been to prison before are of little relevance. Those who participate in them, even if they pleaded guilty, even if they were young, even if they had no previous convictions, even if the witnesses [were] not brutalized in the presence of young children, should know that they will eventually, be subjected to long and immediate custodial sentences."*

This Court fully subscribes to **Edward J's** observations in the just cited case authority. It is the fortified view of this Court that albeit the Appellant herein might have been only 27 years old when he committed the offence, he pleaded guilty to the charge and thus did not waste the court's precious time and resources and is a first offender, the seriousness of the within offence coupled with the fact that the Appellant committed the offence in the company of his colleagues necessitated the imposition of an immediate custodial sentence on him.

This Court has also considered the Appellant's contention that at the time of the commission of the offence he was intoxicated and hastens to state that there is nothing in the facts of the case which the Appellant admitted to be correct to suggest that the Appellant herein was at the material time intoxicated. Even during his plea in mitigation, the Appellant never made any mention of being intoxicated at the time of commission of the offence, his only plea in mitigation being that he has two children and his parents were old.

And contrary to the Appellant's assertion that he was intoxicated at the time the offence was committed, the facts of the case as narrated by the prosecution show that the commission of the offence was pre-meditated because after the Appellant had quarrelled with the Victim when he went to the place where the Victim was frying chips on a 'chiwaya' in the company of a lady, he left the place only to return later on in the company of his other friends and started assaulting the Victim. It is at this time that the Appellant is alleged to have thrown the hot cooking oil at the Victim and ran away. The facts of the present case do not, in this

Court's view, support the Appellant's contention that he was intoxicated at the time when he committed the offence.

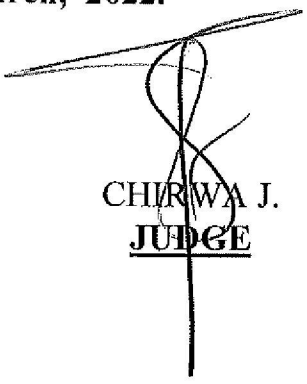
Turning to the nature of the injuries sustained by the Victim, it is important to note that the lower court had the opportunity of seeing and appreciating the nature and extent of the injuries sustained by the Victim who was in court during the hearing of the case, an opportunity which this Court has not had. It does not, necessarily, need a medical expert to appreciate the nature and extent of the injuries which can be seen physically. And having carefully reviewing the observations made by the lower court in the passage quoted earlier in this judgment it is the view of this Court that the circumstances of the within offence deserved a sentence even stiffer than the seven (7) years imposed on him by the lower court. This Court is, however, constrained from interfering with the said sentence by the principle laid down in the case of **Mahomed v The Republic** (*supra*) because the said sentence is neither excessive nor wrong in principle.

In the premises, this Court resolves not to interfere with the sentence of 7 years' imprisonment with hard labour imposed on the Appellant by the lower court but allow the same to stand.

5. Conclusion:-

In conclusion, this Court having decided not to interfere with the sentence of 7 years' imprisonment with hard labour imposed by the lower court on the Appellant now proceeds to confirm the same. It is so ordered. The Appellant's within appeal ought, consequently, to be dismissed for lack of merit. It is further so ordered.

Dated this Eight day of March, 2022.



CHIRWA J.
JUDGE