Ref. No. MG/CR/72/12/90

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 25 OF 1993

SAMSON KANYEMBA

VS.

THE REPUBLIC

From the First Grade Magistrate's court at Mangochi
Criminal Case No. 4 of 1991

CORAM: MTAMBO, J.

Appellant present/represented by Kadzakumanja of Kumange and Company

For the State, Nyirenda, Assistant Parliamentary Draftsman

Law Clerk, Chilongo

Machine Operator, Mtunduwatha

J U D G M E N T

The appellant was brought before the First Grade Magistrate at Mangochi on an indictment which charged him three counts; the first and second counts of common assault contrary to s.253, and the third count of malicious damage contrary to s.344 (1), both of the Penal Code. He was convicted on the first and second counts, but was acquitted on the third count, and was sentenced to concurrent prison terms of one month with hard labour the operation of which was suspended for six months on condition that he did not commit a similar offence within that period. He has appealed to this court essentially against conviction on two grounds as follows:

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"1. The trial proceedings were a nullity by reason of the fact that a written order of the Inspector General which is required by s.47 of the Police Act had not been obtained before the commencement of the trial.

2. The Learned Magistrate erred in Law in convicting the Appellant in that there was no sufficient evidence to support the conviction and as such the conviction has to be quashed and the sentence set aside".

The particulars of offence in the first count alleged that the accused unlawfully assaulted one Bwanali Mkwanda (PW2), and one Ralph Amidu Kawatila (PW1), in the second count. The two were master and servant.

One day in the month of December 1990 Kawatila's wife intercepted two letters from the appellant's daughter, Prisca, who was then at Police Secondary School in Zomba, addressed to her husband. These were tendered in evidence. Upon reading them, it became obvious to her, as it would to anybody, that the two were up to some mischief. She handed the letters to the appellant's wife who in turn showed them to him. He was not amused. He invited Kawatila to his house at police lines, Mangochi, to ask him about the letters. Incidentally, the appellant was a police officer at the time. Kawatila obliged and drove there with his wife and servant (Mkwanda).

During discussion, a belt was produced which had been given to Prisca by Kawatila through Mkwanda. When Mkwanda was asked about it, he kind of prevaricated and this annoyed the appellant who got up and slapped him and he ran away. Kawatila too received a slap when in answer to the question why he was chasing after a school girl he said - "it happens". He too left hurriedly and as he reversed his car he collided with some object whereupon the other police officers became aware of his presence in the compound, hence the charges.

Such was the material evidence which was before the trial court. I have already reproduced the two grounds of appeal. The first ground of appeal is obviously on a matter of law and I think that is the one I should begin with.

Section 47 of the Police Act provides for the procedure to be followed where a police officer is charged with an offence against discipline. The officer investigating any such offence is required, if he sees it fit so to do, to report the matter to the Inspector General who may, among other things, by order in writing, require the police officer so charged to be taken before a magistrate to be dealt with in accordance with the Act. And it is on this basis that it is contended that the proceedings in the trial court were a nullity because the Inspector General did not make the order requiring the appellant to be taken before a magistrate. In his submissions counsel appeared to proceed from the premise that a police officer may not be tried for crime without there first being the Inspector General's order to try him. With respect, that cannot be correct for the obvious reason that it would be usurpation of the powers of the Chief Public Prosecutor. In any case s.47 is concerned, and concerned only, with offences against discipline, which are specified in s. 39 of, and punishable under, that Act. In other words, it does not apply where the offence charged is not one of those offences. Accordingly, I disagree that the proceedings were a nullity.

That, however, is not the end of the matter because the question arises whether the offences can also be said to be against discipline. Let me just mention here, for the sake of clarity, that what the appellant did is assault in law and that that is not in question but rather whether the matter, on its own merit, could have been dealt with under the Police Act if that were considered.

Under s. 39 (37) it is an offence against discipline if a police officer:

> "is guilty of an act, conduct, disorder or neglect to the prejudice of good order and discipline ...."

The evidence shows that the appellant slapped the two complainants in his house which was within the police lines or compound. I have already said that this is assault in law. But it can also be said to be conduct to the prejudice of good order and discipline and, therefore, an offence against discipline within the meaning of that section. In other words, I am saying that if the matter had first been considered whether it fell within the Police Act, it would have been dealt with under that Act, and the considerations in favour of this point of view are many. Look at the circumstances that led to the commission of the offences, the triviality of the offences themselves, the consequences of conviction to the appellant himself, his family of eleven children and the other dependants, the number of year (27) of clean record to service which might be thrown away, and so on and so forth. In addition, I am myself quite sure, from reading the record, that the matter would not have been reported to police if it were not for the accident to which I have already referred above. Alternatively, I think this is a proper case in which the court should have ordered the proceedings to be stayed or terminated under s. 161 of the Criminal Procedure and Evidence Code, just in case I am wrong in the former point of view.

In the circumstances, I think the justice of the matter would be to allow the appeal, and I do so. I have not considered the second ground of appeal specifically as such because I think it is unnecessary to do so in view of what I have already said in this judgment - it is covered.

PRONOUNCED in open court this 22nd day of April, 1994 at Lilongwe.

I. J. MTAMBO
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