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REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
CRIMINAL APPEAL CASE N0. 94 of 2016
(Being Criminal Case No 140.of 2016 in the First Grade Magistrate Court sitting at Rumphi)

BETWEEN:

Medson Mwakilima ..... Appellant

-and-

The State.....Respondent

Coram:
The Honourable Justice D.A. DeGabriele

Mr. D. Shaibu	for the State
Mr. Ngwira	for the applicant
Ms. Munthali	Official Interpreter
Mrs. Chirwa	Court Reporter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The three appellants herein were charged, tried and convicted of the offence of breaking into a building and committing a felony therein contrary to section 311 (a) of the Penal Code. They were each sentenced to a prison term of 6 years and 6 months with effect from the date of arrest. The appellants are appealing against both the conviction and sentence.

There are no grounds of appeal stated but the appellants have brought two issues for the court to determine, namely;

1. Whether the conviction was safe in the circumstances?
2. Whether the sentences were excessive in view of the circumstances?

The Law

Section 311 of the **Penal Code** which states as follows;

"Any person who –

(1)Breaks and enters a schoolhouse, shop, warehouse, store, office, counting house, garage, pavilion, club, factory, workshop, or any building belonging to the Government, or to any Government Department, or to the Municipality, township or other public or local authority, or a building which is adjacent to a dwelling house and occupied with it, but is not part of it, or any building used as a place of worship and commits a felony herein.

(2)Breaks out of the same housing committed a felony therein, shall be guilty of a felony and reliable to imprisonment for ten years.

The Elements are that the person has to break and enter into a specific building, that the person formed an intention to commit a felony therein and that the person breaks out having committed any felony therein.

In any criminal law, the burden of proof lies solely with the prosecution, as stipulated in Section 187 of the Criminal Procedure and Evidence Code. The principle was able articulated in the case of ***DPP v Woolmington (1935) AC*** 481 -482 where it was stated as follows: -

"Throughout the web of the English Criminal law of golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to statutory exception. It at the end of and of the whole of the cased, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, the prosecution has to made out the case, the

prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England, and no attempt to whittle is down an be entertained."

The evidence before me shows that a building was broken into and 2 motor bikes were stolen. The evidence also shows that two motorbikes, similar to the ones stolen were seen being driven in Rumphi at night. The fact of breaking into a building, committing a felony and breaking out of the building after committing the felony were proved by these undisputed facts. The question that arises is whether the evidence then points out to the fact that it was the three appellants who had so broken into a building, committed a felony and then broke out of the building?

The evidence of PW1 was that on Friday 25th December 2015 he receivied a call that two motorbikes suspected to belong to Save the Children with a registration number starting with LL were seen being ridden elsewhere, he went to check the storeroom at Rumphi Hospital on Sunday 27th December 2015. He checked together with Mr Chirwa who was the custodian of keys and noticed that the door to the room was not fully closed and the motorbikes were not firmly locked. The matter was reported to police and the witness and 4 watchmen were arrested as suspects. While in custody they met a Godi Chavula and Paulos Msiska who told them that Zebron Mwagairo, Peter Kamwambi and Chikumbutso Mwamlima were the ones who committed the offence. He also stated he delayed reporting the matter because he was not so sure about it.

PW2 who told the court that he knew all three accused persons as they had all met together on a number of occasions. On one occasion the 2nd accused had stated that he wanted DT LL motorbikes and they would get them from the Hospital in Rumphi. PW2 and one Paul Msiska declined to join in. Later PW2 went to the house of the 3rd accused where he saw a big bag with an axe and a tam/bar which the 2nd accused had said he would use later. Later that day PW2 was arrested

together with Paul Msiska for being found in possession of stolen goods. PW2 did not witness the theft but believed that the three were responsible as they had planned the whole thing together with him.

Paul Msiska testified as PW4 and by then he was a convict. His evidence was that on the 23rd December, 2015 whilst in town with PW2 he was called by the appellants at a private place. The appellants asked them to offer assistance in finding a motor cycle and that in turn they will be given 1.5. Million. They declined the offer. The following day he was arrested with PW2 for being found in possession of stolen property. Whilst in custody he met PW1 and two watchmen who were arrested for the stolen motorcycles. He revealed to them and the CID that the appellants were the ones who were responsible for the stealing the motorcycles.

The evidence before this court is circumstantial. Where circumstantial evidence is entirely relied upon, the State must clearly show the various links in the chain of events and its cumulative effect must leave only one rational and logical conclusion that it is the Appellant who committed the crime and no one else. The circumstantial evidence before this Court is to the effect that the 3 appellants were connected to the commission of the offence by the evidence of PW2 and PW4. The evidence is strong in that at the time of the planning for the offence of stealing motorbikes at the hospital, both PW2 and PW4 were present. Further, the occurrence of the offence was as described by the 2 witnesses, that motorbikes would be stolen from the hospital.

The evidence shows that, the 3 appellants and the 2 witnesses knew each other well and there was no room for misidentification. The evidence shows that they did meet on the material day when the offence was planned.

The first witness stated that the door was broken and the lock was damaged. This statement, coupled with the evidence of PW2 who stated that he saw one of the appellants with weapons that can be used to break doors of buildings, makes it

hard for the Court to reach a conclusion other than that the appellants were involved in the commission of the offence. The appellants argue that the first witness did not inform the Court how the motorbikes could be operated without keys. It is a known fact that those who steal vehicles or motor-bikes are able to cross the wires and start the vehicle and move them away. The starter-motors are then replaced later. I find that there was no need to prove whether or not the keys were used by the thieves.

Therefore, after eliminating all reasonable hypothesis of innocence, this Court will arrive at one conclusion that it was the Appellants who committed the crime, Indeed, I concur with the words of Lord Denning in the case of, in the case of ***Miller v Ministry of Pension (1947) 2 All ER 373,*** where he said that

> *"... the degree is well settled. It need not reach certainty, but it must carry a degree of probability. Proof beyond doubt. The law would fail to protect the community if it admitted 'fanciful' possibilities to deflect the course of justice. If the evidence I as strong against a man as to leave only a remove possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

On inspecting the defense's evidence, I have not come across any evidence that creates a reasonable doubt that the 3 appellants were not the ones who committed the offence.

The appeal against the conviction therefore fails and the conviction is upheld.

The appellants have also appealed against the sentence that was imposed because they were first offenders. There is numerous case law that states that first offenders must be considered for non-custodial sentences unless if there is no other way to deal with them. The maximum sentence provided for by the law is 10 years. The High Court set out guidelines on sentencing offences of breaking into

a building and committing a felony as starting at 3 years, which can be enhance depending of the aggravating factors or reduced depending on the mitigating factors, see ***Rep v John Ayami, Confirmation case No. 660 of 2001***.

There was one mitigating factor, that the appellants were first offenders. The aggravating factors were that the value of stolen property was MK5, 400,000 and the property was not recovered, offence was committed in company of other people and at night, and the offence was premeditated and planned thoroughly. Having looked at the aggravating factors that outweighed the mitigating factors and the circumstances of the case, I reduce the sentence to a prison term of 54 months with effect from the date of arrest.

The appeal against the sentence succeeds in part.

Made in Chambers at Mzuzu Registry this 3rd day of January 2018

D.A. DEGABRIELE

JUDGE