



**IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
CRIMINAL APPEAL NO. 142 of 2017**

(Being Criminal Case No 72 of 2015 before the Senior Resident Magistrate Court sitting at Mzuzu)

Mphatso Nyirenda

v

The Republic

Coram:

Honourable Justice DeGabriele

Mr. D. Shaibu

Counsel for the Republic

Mr. N. Ndazizira

Counsel for the Appellant

Mr. C. Chawinga

Court Clerk

Mrs. R. Luhanga

Court reporter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The Appellant herein was arrested, charged and tried before the Senior Resident Magistrate Court sitting at Mzuzu, for the offence of theft contrary to section 278 of the Penal Code. He was found guilty and was sentenced to 18 months imprisonment with hard labour. He is now appealing against both the conviction and sentence.

Grounds of Appeal

The grounds of appeal are as follows;

1. That the learned Magistrate erred in the law when he shifted the burden of proof to the Appellant when it is required by law to remain on the prosecution throughout the case.

enable any person to give evidence of another fact is on the person who wishes to give such evidence. A court of law will, on being satisfied that the case has been proved beyond reasonable doubt, convict a person charged with a crime. Failing to prove a criminal matter to the requisite standard of proof beyond reasonable doubt will lead to an acquittal, see ***DPP vs Woolmington (1935) A.C. 462***

The Brief Facts

The evidence of PW1, a security guard supervisor saw a man, Malani Mweso, carrying a bag enter the Pharmacy, a place he was not authorised to enter. PW1 informed his colleagues to search the bag of this man, who was wearing a yellow shirt as he exits the hospital premises. Following the search, the bag had different types of drugs. In explanation, Malani Mweso stated that he had been sent by the doctor, who is the Appellant. PW1 also stated that he had met the Appellant at the Pharmacy on that day and that the man was the one who linked the Appellant with the drugs. The evidence of PW2 was similar to that of PW1, save to add that first they reported to the Hospital Administrator and then went to confront the Appellant who had been mentioned and linked to the drugs by Malani Mweso, and that the Appellant was alone in his office. The evidence of PW3 was that the drugs that were found had been packed by herself in the Pharmacy where the Appellant worked. The witness also stated that the amount of drugs found were too much for one person.

The evidence of PW5, the investigator was that He had received a report and investigated the matter. He stated that the Appellant was working as a Pharmacy technician. He also stated that Malani Mweso had a health passport and that the Appellant had admitted that he had prescribed drugs to Malani Mweso and had also given other drugs to Malani Mweso. The evidence of PW7 was to the effect that he had gone to the hospital and met the Appellant and told him he was sick. The appellant took him to a doctor but kept an empty laptop bag belonging to the witness. PW7 then stated that on return to the Pharmacy, he was given drugs for his prescription which he put in his pocket and carried the bottle in his hand, he collected his bag from the appellant who then told the witness that he had some properties in the bag which he would collect later. The witness was cross examined by Counsel and he stated that he had met the Appellant at the Place where numbers were registered and the Appellant had taken him to his office. Later the Appellant took the witness to the computers for registration of details after the witness had left his bag in the office of the

town. The evidence of PW2 shows that the Appellant was alone in his office, at the time PW1 saw Malani Mweso an unauthorised person enter the Pharmacy. Further, there is no evidence or no mention of this Brian Mgwede in the evidence by anyone. The lower court had actually stated that the Appellant needed to lead evidence to prove on a balance of probability that there was another person and also that Malani Mweso was only known to him through the other person Brian Mgwede. The first ground of appeal was that the learned Magistrate erred in the law when he shifted the burden of proof to the appellant when it is required by law to remain on the prosecution throughout the case and the prosecution ought to prove the case beyond reasonable doubt. The issue of the burden moving to the accused was discussed in the case of *Republic vs. Msosa 16 (2) MLR 734*. The Court stated that,

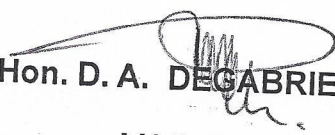
"Being a criminal case, the burden of proving the guilty of the accused person beyond reasonable doubt remains with the prosecution through the trial. The charge of theft by a person employed in the public service under section 283 (1) of the Penal Code is in a special category in so far as the burden of proof is concerned. All the prosecution is required to prove, and so prove beyond reasonable doubt is that (a) he the accused was employed in the public service (b) by virtue of that employment he received or had in his custody or under his control certain property (c) he was unable to produce to his employer such property or make due account thereof. When these elements are proved beyond reasonable doubt by the prosecution against the accused person, a legal presumption is created that the accused person has stolen the property unless he satisfies the court to the contrary. The standard of proof laid on the accused person in leading evidence to satisfy the court to the contrary is not beyond reasonable doubt but on a balance of probability."

In this case, it was essential that the Appellant call Brian Mgwede not to prove his innocence, but to show that there was another person in the Pharmacy and also that Malani Mweso was known to him only on that date through the same Brian Mgwede. The Appellant did not do so. The question before this Court would then be, by failing to do this, would the conviction on theft of drugs stand. The answer is in the affirmative. The evidence of PW1, PW2 and PW7 was central to this case and it clearly showed that the theft of the drugs was committed by none other than the Appellant himself. It is

Indeed the policy of the law is that first offenders should be sent to prison as a last resort and for reasons to be indicated in the court record. Like the court below, I am of the view that theft of drugs is very serious and it warrants a custodial sentence because it is an aggravated theft. Under section 339 f(1) of the Criminal Procedure and Evidence Code the sentencing court is encouraged to impose non custodial sentences to first offenders and young offenders. As stated above, even though the Appellant was a first offence, the theft was aggravated and he deserved a custodial sentence.

Having looked at the record of the lower court as regards the sentencing, it is the finding of this Court that the sentence meted against him is not manifestly excessive in these circumstances. It is the opinion and finding of this Court that based on the evidence recorded in the lower court record, the Appellant deserved a custodial sentence. It is further the view of this Court that the Appellant deserves a higher sentence and I accordingly increase the sentence from 18 months to 24 months custodial sentence with effect from 28 March 2017.

Made in Chambers at Mzuzu Registry this 12th day of September 2018


Hon. D. A. DEGABRIELE
JUDGE