

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal Number 33 of 2002

Between

WILLIAM SAMANYIKA

And

THE REPUBLIC

In the Second Grade Magistrate Court sitting at Zomba Criminal Case number 324 of 2002

CORAM: D F MWAUNGULU (JUDGE)

Dokali, Legal Advocate, for the appellant

Mwenelupembe, Deputy Chief State Advocate, for the respondent

Nthole, Official Court interpreter

Mwaungulu, J

JUDGEMENT

William Samanyika appeals from the judgment of the Zomba Second Grade Magistrate. The Zomba Second Grade Magistrate Convicted the appellant of unlawful wounding. Unlawful wounding is an offence under section 241 (A) of the Penal Code. The magistrate sentenced the defendant to one-and-a-half years' imprisonment. William Samanyika, unrepresented in the court below, now appeals through counsel against the conviction and the sentence.

Mr. Dokali, appearing for the appellant, raises four matters: the magistrate erred in concluding the appellant committed the offence; the magistrate erred in disregarding the enormous doubt created by the evidence; the prosecution, on the evidence before the lower court, failed to prove

the case beyond reasonable doubt; and, the sentence had no legal basis and was manifestly excessive. Mr. Mwenelupembe, the Deputy Chief State Advocate, does not support the conviction.

On the evidence in the lower court, Mr. Dokali and Mr. Mwenelupembe are right. We now know that a man injured the complainant in the night when the complainant was policing his maize garden. This man wounded the complainant to rescue a lady the complainant arrested with a bag of maize. The lady dropped a wallet and a piece of cloth. The owner of the wallet up to the time of the trial remained unknown. The prosecution called a witness who identified the cloth as the appellant's wife's. This witness' identification of the cloth was, by all descriptions, inapt and precarious. She did not describe the cloth in any way. In this Court I am unsure about the nature of the cloth or the basis of this witness' recognition of the cloth. On this description the lower court thought this woman's husband was with this woman, assuming, of course, this woman was the appellant's wife. The lower court convicted the appellant because, thinking that the cloth belonged to the appellant's wife, he was the one with the woman at the time of the offence.

There was no direct evidence connecting the appellant with the crime. The state sought to prove facts on which the lower court could infer the appellant's guilt. Where there is direct evidence, evidence of a witness' experiences with the senses, subject, of course, to credibility, a court will accept it as proof of a person's guilt. Often the prosecution establishes guilt by circumstantial evidence: the prosecution proves other facts from which the court must infer guilt. The force in proving guilt attaching to both species of evidence is the same.

Concerning circumstantial evidence, the burden of proof operates at two levels important for proof of guilt. First, the prosecution must establish beyond reasonable doubt the facts for the court's inference of guilt. Consequently, the prosecution fails to discharge the burden always on it to prove guilt beyond reasonable doubt by not proving beyond reasonable doubt facts it wants the court to infer guilt. On the other hand, although established to requisite standard, proven facts may be insufficient to establish guilt beyond reasonable doubt. The Supreme Court of Appeal in *Jailosi v Republic* (1966-68) ALR (Mal) 494 stated that each link in the chain of evidence must be unassailable and the cumulative effect must be inconsistent with any rational conclusion other than guilt. In *Nyamizinga v Republic* (1971-72) ALR (Mal) 258 this Court held that the prosecution must establish beyond reasonable doubt that guilt is the only inference. In *Director of Public Prosecutions v Kilbourne* [1973] AC 729 at 758, Lord Simon said circumstantial evidence 'works by cumulatively, in geometric progression, eliminating other possibilities. There must, in the words of Pollock, CB., in *Exall* (1866) 4 F & F 922:

"... be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit."

The prosecution must establish beyond a reasonable doubt all facts on which the court must infer

guilt; the circumstantial evidence must establish guilt beyond a reasonable doubt.

Applying these principles to the present matter, the prosecution did not establish beyond reasonable doubt that the cloth belonged to the appellant's wife. In *Guza v Republic* (1961-63) 2 ALR (Mal) 136 this Court held that where goods are mass-produced and in common use, simple recognition without detailed identification is insufficient. We do not have any description of the property in terms of us knowing whether it was clothed with uniqueness which justified the witness' inference it belonged to the appellant's wife. Equally, we do not have any details of the witness' identification of the cloth. These aspects are sufficient to cast doubt on proof of a fact on which the prosecution wanted the lower court to infer guilt. Even if the cloth belonged to the appellant's wife, it is extremely dangerous to think that only a husband can accompany a married woman to a crime.

This appeal must succeed for reasons expressed and grounds counsel raised for the appellant and the Deputy Chief State Advocate accepts.

Made in open court this 3rd of October 2002

DF MWAUNGULU

JUDGE