IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 93 OF 2005

Being Criminal Case No. 111 of 2005 in the Chief Resident Magistrate Court at Blantyre

The Republic

-VS-

Tione Chavula

CORAM: **KATSALA J**
M. Hara, of counsel for the appellant
P. Chimwaza (Miss) Deputy Chief State Advocate for State
Mr Ngwale– official interpreter

JUDGMENT

Katsala J,

The appellant Tione Chavula was sentenced by the Chief Resident Magistrate Court, Blantyre to 12 years imprisonment following his plea of guilty to a charge of armed robbery contrary to Section 301 of the Penal Code. He also pleaded guilty to a charge of possession of a prohibited weapon contrary to Section 16(1) and (2) of the Firearms Act and was sentenced to 6 years imprisonment. He now appeals to this court against both sentences. It is his argument that these sentences are manifestly excessive and ought to be reduced.

Seven grounds of appeal were filed and argued at the hearing of the appeal. The grounds are as follows:

(a) The learned magistrate failed to give sufficient consideration to the appellant's youth when he imposed a sentence of 12 years' imprisonment with hard labour for armed robbery and 6 years imprisonment with hard labour for possession of prohibited weapon

(b) The circumstances in which the offences were committed did not justify the imposition of a sentence of 12 years imprisonment with hard labour for armed robbery and 6 years imprisonment with hard labour for possession of a prohibited weapon, which were excessive in the circumstances.

(c) The learned magistrate failed to give sufficient consideration to the fact that the appellant was a first offender when he imposed the said sentences

(d) The learned magistrate failed to give sufficient consideration to the fact that the appellant had the potential to pursue further education and become a useful citizen.

(e) That the learned magistrate failed to give sufficient consideration to the medical condition of the appellant, namely, the epileptic condition of the appellant.

(f) The learned magistrate failed to give sufficient consideration to the fact that the appellant had pleaded guilty.

(g) In all the circumstances of the case the sentences of 12 years imprisonment with hard labour for armed robbery and 6 years imprisonment with hard labour for possession of prohibited weapon were excessive and wrong in principle.

The facts of the case are that on 23rd September 2005 the appellant in the company of two colleagues, and armed with an AK47 rifle and 10 rounds of ammunition went into D. J. Glass and Glazing shop at Ginnery corner in the City of Blantyre. This was towards noon. They closed the entrance door and the appellant pointed the rifle at a Mr Bhatt who was manning the shop and demanded money. They searched Mr Bhatt and took away the sum of K25,000.00 and his mobile phone. They also took the sum of K10,000.00 from a customer who was in the shop at that time. Mr Bhatt attempted to shout for help but the appellant shot at him but missed him. They took his car keys and driving licence, went out of the shop and got into Mr Bhatt's motorcar and attempted to drive away but the motorcar fell into a drain and they could not drive off. They then took to their heels. The shop assistants chased after them. The appellant was arrested at Electricity Supply Corporation of Malawi premises after a security guard had aimed a gun at him and threatened to shoot. His two colleagues escaped and were still at large at the time of trial.

I do not intend to deal with each one of the grounds of appeal separately since in my view they all boil down to one ground, that the sentences are manifestly excessive.

Counsel for the appellant argued that since the appellant is a first offender the learned

Chief Resident Magistrate should have had regard to Sections 339(1) and 340(1) of the Criminal Procedure and Evidence Code in that he should not have sentenced the appellant to a custodial sentence unless he was satisfied that there was no other appropriate means of dealing with the appellant. He cited the case of *Rep v Matindi,* conf. case number 1699 of 1976 (unreported) and referred to the dictum of Jere J, where he said:-

> "The philosophy behind this legislation is that first offenders should be kept out of prison because contact with hardened criminals might have a bad influence on them, and, secondly, they should be given a chance to mend their ways but with a real threat that if they commit another offence during the period, the suspended sentence will be revived. In this way therefore, the suspended sentence provides an incentive to first offenders to keep the law".

It was also argued that the learned magistrate failed to take into account the many mitigating factors when coming up with the sentences. The appellant is a young man aged 19 years. He was a Form 4 pupil at Soba Private Secondary School. There was no loss of life or injury in the course of the crime. In mitigation of sentence he alleged to be epileptic. The loss occasioned to the victims was not huge. And most important of all he pleaded guilty to the charges thereby saving the courts resources.

Counsel for the appellant submitted that the mere fact that the appellant had pleaded guilty meant that his sentence should have been reduced by at least one third (⅓), which doesn't seem to have been the case in the instant case. He cited the case of *Rep –vs- Joseph Mpasu, Yusuf Sanudi and Clive Macholowe*, Criminal Case Number 44 of 2004 (unreported) in support of his submission. In counsel's opinion a sentence of 6 years on the armed robbery charge would be appropriate in these circumstances.

On the other hand Miss Chimwaza appearing for the State argued that the offence of armed robbery is very serious and it would be inappropriate for a court to suspend a sentence. She cited the case of *Rep v Chibwinja*, 7 MLR 411 where it was held that a suspended sentence is not appropriate on a charge of burglary because it is a serious offence. She wondered what more with armed robbery, which is a more serious offence than burglary.

Miss Chimwaza further submitted that the lower court record shows that there was lack of remorse on the part of the appellant. The appellant shot at the complainant and it was by the grace of God that the bullet did not hit the complainant. She distinguished the appellant's position from that of Sanudi and Mpasu in *Rep v Mpasu, Sanudi & Macholowe* (supra) on grounds that the appellant herein carried the rifle and fired a shot at the complainant, that is, he was the main actor, while Sanudi and Mpasu were not the master minders of the crime nor did they carry the gun used in the robbery. She therefore submitted that the appellant could not be treated or dealt with as Sanudi and Mpasu were. However, she acknowledged that the sentence of 12 years for the armed robbery is on the higher side. She cited the case of *Rep v Phiri,* Conf. Case number 999 of 1999 where the High Court reduced a sentence of 10 years to 8 years for armed robbery for a young convict. She therefore urged the court to consider reducing the sentences herein.

There is no dispute that robbery is a very serious offence. The maximum sentence for robbery is 14 years. Armed robbery is an aggravated robbery. This is by far a much more

serious offence than robbery. Our legislature confirmed this by prescribing that the offender is liable to be punished with death or with imprisonment for life. This is the punishment that the appellant was liable to upon conviction.

The appellant has relied so much on the sentences passed in *Rep v Sanudi, Mpasu and Macholowe* (supra) in arguing for the reduction of the sentence on the armed robbery charge. The court in that case emphasized that armed robbery is a serious offence and that it calls for a heavy sentence. However, with due respect, the sentences passed (6 years for Sanudi, 7 years for Mpasu and 11 years for Macholowe) are excessively lenient in view of the circumstances of the case. There is no doubt that the convicts were grossly under sentenced. This view is shared by many of my colleagues on the bench. I would therefore dare say that it would be unsafe to rely on the case as guidance when sentencing similar offenders.

Admittedly, a plea of guilty warrants a reduction in the sentence. In Archbold Criminal Pleading Evidence & Practice, 1993 ed. Vol. 1 para.5-153, such reduction is said to be between one-fifth and one-third of the sentence which would be imposed on a conviction by a jury. I would not disagree. However, it should be borne in mind that such discount is strictly as a matter of public policy, *R. v. Sullivan*, 9 Cr.App.R.(S.) 196. There is no law that prescribes that whenever there is a plea of guilty there has to be a reduction in sentence. The granting of a discount is a matter for the discretion of the court. Such discretion is to be exercised depending on the circumstances of the case and only if the circumstances warrant it. In appropriate circumstances the court can perfectly withhold the discount and impose a sentence which fully reflects the gravity of the offence. In this respect, I would therefore say that the cases of *Rep v. Mtenje*, Conf. Case Number 133 of 1995 (unreported), which recommends a reduction of one sixth of the sentence, and *Rep v. Mtaya*, conf. case number 98 of 1995 (unreported), which recommends a "meaningful and tangible reduction in sentence" on pleas of guilty, and many others that follow them should be understood in this context. It is not mandatory that once there is plea of guilty then a discount in sentence is earned. Courts should always bear in mind that "there are the serious of offences committed in the most odious of circumstances which such a plea will not avail much", per Mwaungulu J. in *Rep v. Mtaya* (supra).

The purpose of a sentence is first of all to punish the defendant for his crime, secondly to mark the disapproval of the community for the criminal actions which the defendant has committed, and thirdly, to act as a deterrent in future to this man and anyone else who might be minded to commit this sort of crime, *R v. Hitchcock* (1982) 4 Cr.App.R.(S) 160, *R v. Bibi* (1980) Cr.App.R.(S) 177. This in my view means that courts must pass meaningful sentences, which will not generate contempt in the eyes of the public or indeed even in the eyes of the defendant. Courts must pass sentences that will fit the crime, the defendant and also satisfy the legitimate expectations of the public. Where a crime is rampant and the security of the public is compromised, it would be ridiculous for the courts to mete out lenient sentences on the grounds that the defendants pleaded guilty or that they are first offenders, or even that they are young, just to give examples. As I have already said courts should bear in mind that there are times, depending on the seriousness and or prevalence of the offence, when the protection of the society becomes paramount, such that these so called strong mitigating factors do not mean much, *R. v. Stabler*, 6 Cr.App.R.(S) 129.

In *Khloud Al-Mograbi and Thomas Cull v. R.* (1980) 70 Cr.App.R. 24, at 26 the Court of Appeal said:

> "This court on previous occasions has had to deal with cases where girls and boys below the age of 20 have been involved, sometimes quite deliberately by organisations in these terrorist activities in the hope that they will be punished less severely than older people. We have said on more occasions than one, and trial judges have also said, that youth cannot be allowed to mitigate sentences in these terrorist cases. If people come into this country with the intention of committing murder or engaging in other terrorist activities, then, as the learned judge said, the courts in this country have no alternative but to punish rigorously. Excuses about age or the possibility that a shorter sentence might achieve the same deterrent effect or as Mr Kennedy said, to be more likely to make her see the error of her ways more quickly than a longer sentence, cannot be allowed to mitigate against a longer sentence being passed".

Likewise in the instant case the fact that the appellant is a first offender and only 19years old, excited about life and susceptible to peer pressure, is in secondary school and epileptic (assuming it is true since no evidence was produced to support the allegation) cannot be allowed to mitigate against a longer sentence being passed. As the courts always say the appellant should have thought of those matters before he embarked on his criminal activities. If people indulge in these serious crimes it is inevitable that long prison sentences must follow. This is the only way we can deal with offences of this kind. And it should be remembered that the only weapon the courts have are long terms of imprisonment and those must be and will be inflicted. This is a fact which is and must be known by everyone that indulges in serious crime.

The observations made by Jere J in *Rep v. Matindi* (supra) on the philosophy behind sections 339 and 340 of the Criminal Procedure and Evidence Code are very correct. However, where the offence is serious, like in the instant case, it is not appropriate to suspend the sentence. An immediate custodial sentence is the appropriate way of dealing with the offender. See *Rep v. Chibwinja*, 7 MLR 411, *Rep v. Kampango*, [1991] 14 MLR 432, among others. In my view it would be an affront to the concept of justice to suspend the sentence in a case like this one.

A court on appeal will not interfere with a sentence except where the sentencing court has erred in principle or the sentence is manifestly excessive or inadequate as to involve an error of principle, *Rep v. Mtenje*, (supra), *R v. Mamanya*, 1964-66 ALR Mal. 271, *Clark v. R.*, 1961-63 ALR Mal. 538. The appellant is a young man of 19years; he pleaded guilty and is a first offender. He was still in secondary school at the time of the crime. No physical injury was inflicted on the complainant. These are very strong mitigating factors that weigh heavily in favour of exercising leniency to the appellant. On the other hand the appellant seems to be bent on embarking on a criminal career. On the material day he abandoned classes and teamed up with colleagues to perpetrate the crime. He carefully planned for the crime. He sourced the AK47 rifle and ammunition in readiness for the crime. He carefully chose his target, a commercial enterprise, and also when to strike-sometime towards noon, that is, after morning sales and before the money was taken to

the bank for banking. He fired the rifle at the complainant (and not in the air) in order to overcome resistance. He was thus prepared to kill or inflict grievous harm on anyone who would stand in his way. And it took another person armed with a rifle to apprehend him. In short, in my view the appellant displayed the characteristics of a dangerous criminal. The learned Chief Resident Magistrate took into account all these factors and came up with a sentence of 12 years on the armed robbery charge.

There can be no doubt that for a first offender 12 years imprisonment with hard labour may look heavy. Nevertheless, I do not think it can be said that such a sentence is manifestly excessive or that it is wrong in principle as to warrant interference by this court. As we look at this sentence it must also be borne in mind that the legislature has prescribed death or imprisonment for life as maximum penalty for this offence. From my experience as a high court judge I am well aware that this type of offence has been regrettably prevalent in this country during the past 10 years or so resulting in a general feeling of insecurity in the members of the public. This is also a consideration which can be legitimately borne in mind. People are no longer free to walk about or do their day-to-day business because of fear being attacked by criminals like the appellant. People have stopped enjoying peaceful sleep in their houses. Those that have had the misfortune of being attacked testify of the agony of seeing guns pointed at them or held to their heads by criminals displaying absolute contempt for human life and dignity; of the pain of coming face to face with the likelihood of loosing their lives at the hands of these criminals who seem to value money and items of property more than human life; of the horror of imagining their bodies lying dead in pools of blood; of the helplessness and desperation they are forced to endure as a result of the terror inflicted by these desperados; of the grief and sadness that beholds them at the prospect of their families facing the world without them. In short they speak of very sad experiences.

It is therefore a consolation to such people when the culprits are apprehended. And their hope and expectation are that the courts will deal with the culprits appropriately. It would thus be irresponsible and insensitive if the courts were to mete out lenient sentences to these offenders on the ground that they are first offenders, and/or that they have pleaded guilty, and/or that they are young or old and/or that they ought to be given a second chance in life (as if that chance will not be available after serving a long sentence).

Consequently I can see no reason for interfering with the sentence of 12 years imprisonment with hard labour imposed by the learned Chief Resident Magistrate. I accordingly confirm it. The appeal against sentence on the first count therefore fails.

Coming to the sentence on the second count I would agree that it appears to be on the higher side. The maximum sentence for this offence is 14 years. This means that even if one were found in possession of one hundred prohibited weapons the sentence would not exceed 14 years. In *Kataya v. Rep.* Crim. App. No. 12 of 2000 (unreported), the appellant was found in possession of an AK47 rifle and six rounds of ammunition. He pleaded guilty to a charge of being found in possession of a firearm without a licence contrary to section 7 of the Public Security Regulations and was sentenced to 3 years imprisonment with hard labour. On appeal this sentence was reduced to two years imprisonment with hard labour. It should be noted that under these regulations the maximum sentence is 10 years imprisonment. I have seriously considered the circumstances of the present case. It

is clear that the appellant's possession of the rifle was for criminal purposes. An AK47 is an assault rifle. It is a dangerous weapon. It is my considered view that a sentence of four years imprisonment with hard labour would be appropriate. I therefore set aside the sentence of 6 years imprisonment and substitute therefore a sentence of 4 years imprisonment with hard labour. To this limited extent the appeal on the second count is allowed.

Pronounced in open court at Blantyre this 1st day of December 2005.

J. KATSALA
JUDGE