IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 78 OF 2008

BETWEEN

MATILDA LUKA ZULU …… APPELLANT

AND

THE STATE …….. RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Mtupila, Counsel for the Applicant
: Mr. S. Kayuni, Counsel for the Respondent
: Mrs. Namagonya, Court Reporter
: Mr. Kafotokoza, Court Interpreter

JUDGMENT

The appellant appeared before the Principal Resident Magistrate sitting at Lilongwe on a charge of doing acts intended to cause grievous bodily harm contrary to section 235(b) of the Penal Code. It was particularized that the appellant on 4th March 2008 at Mpingu Trading Centre in the district of Lilongwe, with intent to disfigure or disable Eliza Luka unlawfully cast or threw boiling water on the said Eliza Luka. She pleaded not guilty to the charge. She was found guilty and convicted after full trial. She was sentenced to 48 months imprisonment with hard labour. She now appeals against both conviction and sentence.

The facts of the case were that the appellant was a third wife of the victim's father. The victim and six other children were from the first wife, while three other children were from a second wife. The appellant lived in her own house with the victim's father. On the material day at around 4.00 pm according to the State witnesses or 8.00 pm according to the defense the victim together with the rest of the children from the previous two marriages visited the appellant's house with a view to get assistance from their father. They did not find the father although they found the appellant. According to the State evidence the children were told to wait for their father. Then they noticed that the appellant was restless as she walked in and out of the house and changed clothes. As the children bid farewell and began to walk away the appellant poured boiling water on the victim. She also pulled a penis of one of the male children. The victim sustained burns and collapsed. The victim was hospitalized for two and half weeks but the father refused to provide money for hospital expenses. The victim now has impaired hearing. The father had on the material day also threatened to beat up the victim's mother. The matter was reported to police who subsequently arrested the appellant.

The defense story on the other hand was that the appellant poured the hot water on the victim in self-defense as she was insulted and was hit with a bottle. She said that the victim and her siblings went to her home on the material day with the aim of fighting her as they had done previously from time to time. On the material day the victim had come to the house with four other kids and they all swore at the appellant. The appellant's husband gave evidence for the defense

but his evidence was substantially hearsay because he was not present when the incident in question took place.

There are eight grounds of appeal.

1. That the learned magistrate erred in concluding that the appellant had committed the offence charged.
2. That the learned magistrate erred in law in conducting the trial in an unfair manner to the prejudice of the appellant in view of the reasons she did not allow the appellant to produce a medical report to vindicate her contention that the children including the victim had battered her with class bottles and thrown stones at her.
3. That the learned magistrate erred in not taking into consideration the issues of self-defense and provocation which the appellant had successfully raised in her defense.
4. That the learned magistrate erred in not making a specific finding on the evidence led by the appellant which on a balance of probabilities should have been believed by the learned magistrate.
5. That the finding of guilty against the appellant in respect of the charge was against the weight of the evidence.
6. That the magistrate erred in disregarding the enormous doubt created by the evidence.
7. That the sentence lacks legal basis and if any, does not tally with the circumstances of the present case and it is manifestly too excessive in view of the mitigating factors.

8. That the learned magistrate erred in law in not suspending the sentence that he passed on the appellant considering the mitigating circumstances and the fact that the appellant is a first offender.

As to the first ground of appeal counsel for the appellant argued that the learned magistrate in the court below erred in law in that she erroneously concluded that both the *actus rens* and the *mens rea* of the offence under section 235(g) of the Penal Code had been proved to the requisite standard. In citing the case of *Republic v. Samuel 9 MLR 285*, a case concerning unlawfully doing grievous harm contrary to section 238 of the Penal Code, counsel for the appellant submitted that *mens rea* for doing grievous harm means intention to injure or reckless disregard of possibly injurious consequences. Mere negligence as to consequences is insufficient proof of the requisite *mens rea*. Counsel submitted that in the case at hand the requisite mens rea was not proved. There was no proof that this pouring of boiling water on the victim was premeditated, so counsel argued. He submitted that the appellant's action of pouring boiling water on the victim was a response to a provocation she was subjected to. On the other hand the Counsel for the State argued that the appellant's conduct of pouring hot water on the victim was premeditated and was not response to any provocation as the children had done nothing wrong except to visit their father's house and ask for assistance.

A point to be cleared on the first ground of appeal relates to the charging section. According to the charge sheet the appellant was charged under section 235(B) of the Penal Code. That provision is to be found nowhere in the Penal Code. There

does exist section 235(b) of the Penal Code. In provisions of law there is a big difference between capital “B” and small “b”.

However, section 235(b) of the Penal Code makes it a crime to unlawfully attempt in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon. The facts in the present case involving use of boiling water do not seem to fit within the ambit of section 235(b) of the Penal Code. Whether inadvertently or by design counsel for the appellant argued that the appellant had been charged under section 235(g) of the Penal Code. According to that provision any person who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person… unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person shall be guilty of a felony and shall be liable to imprisonment for life. The facts of the present case involving use of boiling water appear to fit within the ambit of the provision. I have no doubt that the correct charging section should have been section 235(g) of the Penal Code. This is also the provision the appellant believed all along to have been charged under. There was no miscarriage of justice occasioned as the appellant was never misled. There was an irregularity which is cured by the provisions of sections 3 and 5 of the Criminal Procedure and Evidence Code. Suffice it that the point must be emphasized that where an accused is charged under a section which has several subsections, the prosecution should specify the subsection under which the charge is laid and needless to say, the prosecution should cite the correct subsection (See *Lungu v. Republic 7 MLR 413)*.

It seems to me that for an offence charged under section 235(g) of the Penal Code the mental element is the intent to maim, disfigure, disable or to do grievous harm to any person. In the case at hand it is admitted that the appellant did cast boiling water on the person of the victim. In dealing with the issue whether the appellant had the requisite mens rea the lower court made some observations. The lower court considered the evidence of the appellant that she cast the hot water in self-defense and rejected that piece of evidence. The lower court also noted that the appellant had earlier told the police that she poured the hot water on the victim accidentally but that she offered no first aid. Again the evidence of the prosecution was that it was largely the back part of the victim that the hot water landed and burnt. As the lower court observed the hot water must have been cast at the time the child victim was going away from the house of the appellant and this raises serious doubt that the appellant was re-acting to any grave danger directed at her. The second ground of appeal makes reference to the appellant having been battered with glass bottles but there is no evidence to suggest that this indeed happened. The lower court rejected the defense evidence that the children, 10 of them, were at the appellant's house fighting with her. There is uncontroverted evidence of PW1 and PW2 that while they were at the appellant's house waiting for their father, the appellant walked in and out of the house, changing clothes in the process. That behavior is inconsistent with that of a person responding to the type of provocation that the appellant would want this court to believe was present. The first ground of appeal has not been made out.

As to the second ground of appeal counsel for the appellant argues that the learned magistrate conduction the trial in an unfair and prejudicial manner. The lower court, so counsel argues, did not allow the appellant to produce a medical report to support her claim that the victim and the other children had beaten her up with glass bottles and showered her with insults which led to her loss of self-control. In the lower court the appellant was unrepresented. There is nowhere in the record to show that the appellant had a medical report at any time during the trial which report she intended to produce in court. Counsel argues that the court should have gone out of its way to assist the appellant who was unrepresented. It is difficult to see how the court could have known of the existence of a medical report on the part of the appellant. There was no mention of her having visited a hospital for treatment following the events of the material day. While it is true that a court has a duty to ensure that the position of an unrepresented accused person is not worsened by the fact of not being represented, it is certainly not the duty of a court to search for and fish out evidence which would better the accused's case. A presiding officer should not be seen to take sides in a matter before him or her otherwise the status of a neutral arbiter will be lost. I am unable to appreciate how counsel expected the court to have assisted the appellant in the cross examination of the witnesses. While it is correct that the court should have considered an application to recall a witness, the matter still remains in the discretion of the court whether to grant or refuse such an application. In the present case it was within the discretion of the court whether to allow a question in cross-examination or not and the fact that the court ruled against the appellant's oral application is no indication of unfair trial process or

prejudicial trial process. Counsel's arguments have not advanced the second ground of appeal in any way.

As to the third ground that the lower court never took into consideration issues of self-defense and provocation, I need only say that the same analysis that went into the first ground of appeal applies here. Issues of self-defense and provocation were dealt with as ground one of appeal was being considered. This same reasoning applies to grounds four and six of the appeal which have not been made out.

As to ground five that the finding of guilt was against the weight of evidence counsel argued that the lower court disregarded the erroneous doubt that the appellant created in the prosecution evidence. According to counsel the learned magistrate did not comply with the celebrated case of *DPP v. Woolmington* the burden of proof was not properly discharged. He further argued that the learned magistrate admitted hearsay evidence contrary to section 184 of the Criminal Procedure and Evidence Code. Counsel cited as an instance of hearsay evidence that the medical report Exp 1 was exhibited by the victim rather than the person who compiled it. Again PW3, the police investigator expressed opinion evidence that the appellant purposefully cast the not water on the victim. It is true that section 184 of the Criminal Procedure and Evidence Code provides that hearsay evidence is not admissible. In particular section 184(d) of the Criminal Procedure & Evidence Code provides for the exclusion of expert evidence unless it is given by the expert who holds the opinion. However, there is a provisio to the section which provides that opinions of expert expressed in any treatise commonly

offered for sale and the grounds upon such opinion is held may be proved by the production of such treatises in certain circumstances. In the case of medical report, there are circumstances when it can be admitted without its maker being called. Section 180 of the Criminal Procedure and Evidence Code provides for the admissibility of reports of experts including medical reports so long as certain conditions are specified in section 180(3) of the Criminal Procedure and Evidence Code are satisfied (See the cases of *(Mapwesa v. Rep. 11 MLR 151; Republic v. Phiri 12 MLR 374)*. Of course as *Kalaile, J.* as he then was, observed in *Hassain v. Rep. 13 MLR 151* where the maker of a medical report is not called to testify and where the conditions of section 180 (3) of the Criminal Procedure and Evidence Code are not complied with a court will be entitled to attach little weight or discount the medical report. It is therefore not enough to simply argue that a medical report introduced in evidence by a person other than its maker amounts to inadmissible hearsay. In the case at hand it was admitted that it was the appellant who cast the hot water on the victim and as a result the victim suffered extensive burns which could be observed even by non-experts. Again there is overwhelming evidence that it was the appellant who threw the hot water cast on the victim caused the injuries on the victim. There was ample evidence implicating the appellant even if the medical report were excluded. While on the same issue of medical report a question may be posed as to what distinguishes an offence under section 235 of the Penal Code which is doing acts intended to cause grievous harm from an offence under section 238 of the Penal Code which is doing grievous harm. It seems to me that the real distinction between the two lies in section 235 of the Penal Code focusing more on the actions of the accused

and section 238 focusing more on the consequences of the actions of the accused person.

Thus as long as there is ample evidence that the accused was responsible for doing the actions prohibited by section 235 of the Penal Code, with the necessary mens rea of course, the issue of medical report of the victim would play a significant role only in sentencing and not so much as to conviction. As regards the evidence of the police investigator, it is true his duty to court was to present the findings that he made in the course of the investigations and that it is for the court to consider those findings in the light of the other evidence and draw its own conclusion. An expression of an opinion as to the mens rea of the appellant was something the police investigator could not competently do, but in my view it did not prejudice the appellant in the light of the overwhelming evidence earlier given by the witnesses and the court findings as outlined when dealing with ground one of appeal. The short of it is that this court finds that there was overwhelming evidence on which the conviction was grounded. Grounds one to six of the appeal have not been made out and they are dismissed. This means that the appeal against conviction has not been made out and it is dismissed.

I now turn to the appeal against sentence. The maximum sentence for an offence under section 235(g) of the Penal Code is imprisonment for life. That in itself reflects the seriousness with which the law views the offence. Ground seven of the appeal is that the sentence of 48 months herein lacks legal basis and does not tally with the circumstances of the present case. It is argued that the sentence is manifestly excessive. And ground eight also relating to sentence is that the lower

court erred in not suspending the sentence considering the mitigating circumstances. Counsel referred to the provisions of section 340 of the Criminal Procedure and Evidence Code. I have gone through the record relating to the sentencing process. Following the pronouncement of a conviction by the learned magistrate, the prosecutor informed the court that the appellant was a first offender. The prosecutor also informed the court that the victim continued to nurse the burns she sustained from the hot water cast on her six weeks after the event, that her buttocks, back and neck had soars and that the victim had been traumatized. In mitigation the appellant stated that she looked after her blind father, a small child of her own and two orphans. She also looked after her old mum. She suffered from peptic ulcers. She also had a loan of K100,000.00 to settle with FINCA. In passing sentence the lower court observed that the appellant premeditated committing the offence in that she boiled the water in advance and waited for the opportunity to scald the victim. It is also observed that the injury caused to the victim was massive in that her body, especially the back, neck and buttock sustained 2° burns, that the victim was nursing the wounds six weeks after the incident. The scalding had affected the victim's hearing and mobility. The court also noted that the appellant was a step-mum to the victim and as such was supposed to protect the victim. Yet she harmed her in a heartless manner. Then the court stated that with all the aggravating factors the appellant was sentenced to 48 months imprisonment with hard labour with effect from the date of arrest.

I would like to observe at once that the lower court never considered factors mitigating in favour of the appellant. The court does not appear to have taken

into account the fact that the appellant was a first offender, among other mitigating factors. It is correct to say that the cases of *DPP v Phiri*, *10 MLR 202* and *Sitole v. Rep*, *4 ALR (Mal) 506* recognise provocation in an offence relating to grievous harm as a mitigating factor. In the present case though provocation was not established. Even if it was there, it would not significantly affect the sentence considering the nature of the injuries sustained by the victim being located at the back, neck and buttocks. This suggests an attack from behind. Be that as it may the seriousness of the offence and the circumstances had to be balanced against the mitigating factors in favour of the appellant. Had the lower court paid attention to the mitigating factors it would have passed a lower sentence than it did.

Let me however observe that section 340 of the Criminal Procedure and Evidence Code recognizes that in certain circumstances sentences on first offenders may not be suspended and that in the case of where a court is minded of not suspending a sentence for a first offender, it must give its reasons. In the present case the seriousness of the offence and the circumstances in which it was committed would compel a court not to suspend the sentence. The suffering, the body and the physical trauma on the part of the victim were grave indeed. For these reasons I would set aside the sentence of 48 months imprisonment with hard labour and instead impose on the appellant a sentence of 30 months imprisonment with hard labour effective from date of arrest. The appeal succeeds only to this limited extent.

PRONOUNCED in Open Court this 21st day of August 2008 at Lilongwe.

R.R. Mzikamanda

J U D G E