



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CRIMINAL APPEAL CASE NO. 75 OF 2011

(Being Criminal Case Number 75/2011 FGM Court Rumphi)

INNOCENT BANDA

Versus

THE STATE

Coram : Honorable Mr. Justice D.T.K. Madise
Mr. C. Ghambi Counsel for the Appellant
Mr. Makato/Nchawani Counsel for the State
Mrs. P.F. Msiska Official Interpreter
Mrs. F. Silavwe Court Reporter

Madise, J

JUDGMENT

Introduction

The Appellant herein Innocent Banda was charged with the offence of demanding property by written threats contrary to section 304 of the Penal Code. He pleaded not guilty and after a full trial the Appellant was found guilty and convicted and sentenced to 4 years in prison.

Brief Facts

The allegations were that the Appellant and another between 27 and 31 March 2011 at Rumphu Boma with intent to extort money from Bill S.J. Mhango caused the said Bill S.J. Mhango to receive phone messages demanding the sum of R22,000 (K528,000) from the said Bill S.J. Mhango without reasonable or probable cause such phone messages containing threats that the said Bill S.J. Mhango's son (Mafaniso Mhango) would be killed if he did not pay the said sum, the said Innocent Banda and Gracious Kumwenda, knowing the contents of the phone messages.

The second accused was found with no case to answer but the 1st accused our Appellant herein was found guilty and convicted and sentenced to 4 years. Being unsatisfied with the decision of the lower court he now appeals to this Court against both conviction and sentence.

Appeals

It is settled law that appeals in this Court are by way of rehearing. When this Court is considering an appeal from the court below, it proceeds by way of re-hearing of all the evidence that was before the court below, the findings of fact and the law applied and then consider in the light of all that took place during trial whether the court below was within jurisdiction in coming to its conclusion.

Grounds of Appeal

The Appellant through his lawyer the Chief Legal Aid advocate who was represented by Mr. Christon Ghambi filed two grounds of appeal which we reproduce as filed.

1. The subordinate court erred in law to convict the Appellant on the charged offence while all the elements of the offence were not proved beyond a reasonable doubt.
2. The sentence was manifestly excessive in the circumstances.

The Issues

There are basically two issues for determination before this Court.

1. Whether the evidence presented warranted a conviction on the charged section.
2. Whether the sentence was within jurisdiction regard being had to the circumstances of the offence, the offender and the entire case.

The Evidence

PW1 was Bill Mhango. He told the court below that on 21 March 2011 his son Mafaniso left Karonga where he was staying with his younger brother for Mzuzu. Mhango stated that his son passed through Rumphu where he met his mother. In Mzuzu Mafaniso phoned his younger brother in Karonga alerting him that he had arrived safely. Mafaniso thereafter phoned his younger brother in Karonga that he had left Mzuzu for Karonga.

Mafaniso was expected to arrive in Karonga on the evening of 21 March 2011 but never did. On 22nd March 2011 there were no signs of Mafaniso. The younger brother then phoned his parents in Rumphu to inquire the whereabouts of his elder brother.

PW1 stated that during the same time there was a fatal road accident at Jalawe and he suspected Mafaniso had been involved in that fatal accident. In that accident bodies had been burnt to ashes and were placed in body

bags and taken to Rumphu District Hospital mortuary. PW1 with the aid of friends and family tried to identify the burnt bodies but with no success.

PW1 decided to engage a prophet to assist in finding his son. Esnart Nyasulu PW4 suggested the name of the Appellant who was using cellular phone number 0999172777. PW1 met the Appellant at Yagontha Rest house at Rumphu Boma and he explained about the missing of Mafaniso.

The Appellant arranged prayer sessions in an attempt to allocate the whereabouts of Mafaniso. At that prayer session the Appellant told the congregation that Mafaniso was alive and well and was staying at Mwafilaso Village in Karonga. PW1 surrendered his vehicle and K35, 000 to allow the Appellant go to Karonga to bring back Mafaniso home.

The Appellant and some family members left for Karonga. The 2nd accused who was acquitted was also part of the Appellant's prayer team. He had also joined the team that went to Karonga. The team that went to Karonga returned the same evening without the missing person. The Appellant requested for another trip to Karonga and PW1 released K31, 000 for the trip. Again the team returned from Karonga without the missing person. PW1 was frustrated and became suspicious of the Appellant. PW1 then started receiving sms (short message service) message asking him to pay R22, 000 by a certain date failing which PW1's missing son will be killed. The messages were being sent using a cellular phone number 0991453379.

PW1 reported the matter to the police. PW1 stated that he continued to receive the messages and the latest message was sent on 0881577738 in which the sender said the missing person was in Kyela, Tanzania. PW1 suspected the Appellant had a hand in all this because the Appellant had encouraged PW1 to release the said amount of money so that the Appellant should pray for it before it was handed over.

PW2 was Mrs. Joyce Mhango, the wife to PW1 and a mother to the missing person. Her testimony was not different from what PW1 had told the court.

PW3 was Jailosi Mhango the younger brother to PW1. He told court he was part of the team that had tried to identify the remains of the people who had burnt to death in a road accident but to no avail. He told court how the Appellant made the two failed trips to Karonga to look for the missing person. He had actually joined the Appellants to Karonga on these two trips. PW3 stated that he also received an sms message from a number 0991453379 that the missing person was going to be killed if PW1 did not pay the money as demanded. PW3 then forwarded the sms message which was demanding K528, 000 by a certain date to PW1.

PW4 was Esnart Nyasulu a friend to the Mhango family. She stated that she had encouraged PW1 to consult the Appellant about his missing son. She had also attended the prayer sessions conducted by the Appellant. She also joined the team that went to Karonga twice with the Appellant. She further stated that the Appellant had announced during prayers that there was an sms message for PW1.

PW5 was Detective Inspector Ndala. He told court that on 30 March 2011 he had received a complaint from PW1 about the sms messages he was receiving which were demanding the sum of K528, 000. The sender's number was 0991453379. PW5 decided to flash the number and he too received the same sms message demanding money. PW5 briefed Detective Contable Kasinja about the developments. PW5 then used his colleague's phone after placing two detectives near Rehan Bakery. By mere chance when PW5 called the alleged number he saw the Appellant who was near him, responding to the phone call. PW5 then concluded that it was the Appellant who was the sender of those sms messages.

PW5 then called the Appellant to the police. Investigations revealed that the Appellant had borrowed a phone which had the same number from Mrs. Simwaka a teacher at Rumphu F.P. School. When asked both the Appellant and Mrs. Simwaka admitted that the phone the Appellant was using had been borrowed from Mrs. Simwaka. After the Appellant was arrested the sms messages stopped coming.

PW6 was Detective Constable Kasinja. He stated that he saw the sms messages Inspector Ndala had received on his phone concerning the missing person and a demand for money. PW6 stated that on the material day he saw the Appellant move out of a group of his followers to answer a call which was made by PW5. The Appellant was arrested, cautioned and later charged.

The State then closed its case and the court below found that there was sufficient evidence to call upon the Appellant to make a defence. However the lower court acquitted the 2nd accused.

Defence

When called to his defence the Appellant under the advice of counsel decided to invoke the provisions of section 42(2) (f) (iii) of the Republican Constitution and decided to remain silent. The court below then proceeded to give its judgment based on the evidence as presented by the State regard being had to the strength of the evidence, and the issues raised in cross examination. In Rep vs. Msosa [1993] 16(2) MLR. P. 734, learned judge Chatsika J. stated that;

'.....At the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied beyond reasonable doubt that important elements of

the offence are proved. Even where the prosecution proves beyond reasonable doubt all elements of an offence, the court must consider the defence evidence. If the defence evidence creates a reasonable doubt as to guilt. The court must resolve the doubt in the favour of the accused,'

Submissions

Although the Appellant did not lead any evidence in defence, his lawyer filed submissions stating that the State had failed to prove the case against the Appellant beyond a reasonable doubt and prayed for his acquittal. The State on the other hand told court that there was enough evidence to convict the Appellant.

Law and Evidence

Burden and Standard of Proof

It is settled law that in criminal cases the State is duty bound to prove each and every element of this offence and the standard required is beyond a reasonable doubt. The relevant provision is section 187(1) of the Criminal Procedure and Evidence Code.

The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution

Our own local case is Namonde vs. Rep. [1993] 16(2) MLR 657 in which my late elder brother Chatsika, J. as he was then called, in affirming Lord Sankey views in Woolmington vs. Director of Public Prosecution [1935] AC 462, summed up the law as follows.

“It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case.

Offence, Section and Law

The charge section is 304 of the Penal Code. It provides:

Any person who with intent to extort or gain anything from any person and knowing the contents of the writing, causes any person to receive any writing demanding anything from any person without reasonable or probable cause, and containing threats of injury or detriment of any kind to be caused to any person, either by the offender or any other person, if the demand is not complied with shall be guilty of the felony and shall be liable to imprisonment for 14 years.

The Elements

For the State to secure a conviction they must prove the following:

- a) With intent to extort or gains anything.
- b) Knowledge of the contents of the writing
- c) Causes any person to receive any writing
- d) With demand of anything
- e) Coupled with threat of injury if demand not complied with

f) Without reasonable/probable cause.

The SMS Messages

The state alleged that the Appellant wrote several sms messages which among others contained the following written words;

“We are kidnappers. We give you until tomorrow to pay. You take us like fools.”

In the other sms messages the State alleged the Appellant demanded the sum of R22, 000 and failure to pay was going to result in the death of the missing person. Unfortunately these other sms messages were not presented before the trial court. The Appellant argued that failure to adduce such evidence was fatal to the success of the prosecution’s case.

There is no doubt in my mind that what the Appellant did after Mafaniso Mhango went missing was out of order. He fooled the parents of the missing person that he was still alive and that he, the Appellant was going to bring back the missing person to his parents. As a result PW1 spent a lot of money and surrendered his vehicle to enable the Appellant go to Karonga to look for Mafaniso. All this was a lie. The Appellant took advantage of the desperation of the Mhango family and instead of feeling sorry for them he decided to abuse his position as a “prophet”. However the State did not charge the Appellant with any offence on these bogus Karonga trips. The charge is under section 304 of the Penal Code.

There is no dispute that the Appellant had encouraged PW1 to pay ransom money to the kidnappers and that he needed to pray for the money before it was passed on to the kidnappers. There is no dispute that the bogus Karonga trips were all intended to obtain money from PW1 using false pretences. There is no dispute that there is connection between the bogus

Karonga trips and the demands for ransom of R22, 000. It is in evidence and I therefore find that indeed PW1 did receive those sms messages which contained writings that if R22, 000 was not paid to an unknown sender, Mafaniso Mhango was going to be killed. But that is not enough. The State must not only prove that an offence was committed but that it was the Appellant who committed.

When PW5 called the alleged sender of the sms messages on cellular number 0991453379, the Appellant answered the phone. When he was confronted he admitted that he had borrowed the phone from Mrs. Simwaka. The lady also admitted giving the Appellant her phone. The Appellant apparently did not want to use his phone. He knew it was going to be traced. He decided to use someone's phone to send those threatening sms messages knowing very well that he was committing an offence. The State in their submissions on appeal does not support the conviction. This is such a rare case where I disagree with them entirely on the propriety of a conviction.

Conclusion

The story as told by PW1 has been corroborated by the other witnesses to wit PW2, PW5 and PW6. Suffice to say that the evidence in this matter is circumstantial. _

Circumstantial evidence

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. Therefore after eliminating all possibilities of innocence what must remain is the guilty of the Appellant. In this case before me, can it be said that after eliminating all reasonable hypothesis of innocence, the Court will arrive at one logical conclusion that it

was the Appellant who committed the crime? In answering the same, we must have recourse to the evidence.

There is no doubt in my mind and the evidence is clear that it was the Appellant who had sent those threatening sms messages demanding R22,000 or else Mafaniso was going to be killed. He was so desperate for money and seeing that the Karonga trips had been a flop he decided to use other tricks. It is not correct that failure to present the actual phone messages was fatal to the case and the appeal Court should quash the conviction.

It should be mentioned that what the Appellant did was out of order taking into account the pain and emotional suffering the Mhango family was going through. I see nothing wrong with the findings of the court below. The conviction was safe and we do not wish to tamper with it.

Sentence

The Appellant is of the view that the sentence was on the higher side. I do not agree. I actually find that the sentence was on the lower side and if this Court were sitting as a court of first instance I could have passed a much stiffer penalty. However it is not up to this Court on appeal to impose what it thinks was the right sentence or what it could have passed if it were sitting. I therefore confirm the sentence of 4 years as ordered by the court below.

This appeal was ill conceived and must fail.

Pronounced in Open Court at Mzuzu in the Republic on 20 November 2012.

Hon Justice D. Madise
JUDGE