JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE No. 6 OF 2015
[Being Criminal Case No. 810 of 2014 from the Principal Resident Magistrate's Court Sitting at Blantyre]

BETWEEN

DZIWANI JASI ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Salamba, Senior State Advocate, for the State

Mr. Maele, of counsel, for the Appellant
Ms. A. Mpasu, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J.

Introduction

This is an appeal by Dziwani Jasi (Appellant) against the judgement of the Principal Resident Magistrate's Court sitting at Blantyre (lower court).

The Appellant was charged with robbery contrary to section 301 of the Penal Code. The particulars of the charge averred that the Appellant and Simeon Thom Salimu on 28th June 2014 at Manja location in the City of Blantyre robbed Ms Sally Alison Dasilva of a handbag and K2,000,000 cash and at or immediately before the time of the said robbery used or threatened to use actual violence to the said Ms. Sally Alison Dasilva in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained.

The Appellant was, after full trial, convicted on 20th January 2015 as charged and sentenced on 21st January 2015 to 15 years imprisonment with hard labour (IHL) with effect from the date of his arrest.

The Appellant is dissatisfied with the judgment of the lower court and appeals against it on the following grounds:

> *"2.1 The lower court erred in convicting the Appellant based on the identification parade sheet tendered by PW 3 when there is no law empowering the Police to hold the same.*
>
> *2.2 The lower court erred in convicting the Appellant based on the identification of contained on the identification sheet when the identification parade was a nullity as it did not follow the conventional guidelines of identification parades namely*
>
> *2.3 The sentence of 15 years IHL for robbery is manifestly excessive."*

Burden of Proof and Standard of Proof

It is trite law that the burden of proof in criminal cases rests on the prosecution. Lord Sankey in **Woolmington v Director of Public Prosecution [1935] AC 462** put the point in the following terms:

> *"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilty; he is not bound to satisfy the jury of his innocence … Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty"*

Burden of proof and standard of proof are very much interrelated. The standard of proof in criminal cases is proof beyond reasonable doubt: See **Rep v. Banda [1968-70] ALR Mal. 96** wherein the Court approved the statement of Lord Denning in **Miller v Ministry of Pensions [1947] 2 ALLER 372,** at page 373-

> *"That degree is well settled. It need not reach certainly, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

The principles guiding this Court in exercise of its power on appeal were laid down by the Supreme Court of Appeal in **Pryce v. Republic, [1971-76] 6 ALR (Mal) 6:**

> *"In our opinion the proper approach by the High court to an appeal on fact from a magistrate's court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, in the words of Coghlan v Cumberland (3) ([1898] 1 Ch. at 704 and 705; 78 L.T. at 540) must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong."*

Evidence before the lower court

The State paraded three witnesses. The first witness was Emmanuel da Silva (PW1). He told the court that Sally da Silva was his mother and she is now deceased. It was his evidence that on 28th June 2014 he was with his parents. They went to Terrastone in Chirimba where they got a cheque worthy K2,100,000.00. They took to the cheque to National Bank of Malawi, Head Office, to cash it. They were using a Terrastone pickup. He cashed the cheque and they left the Bank at noon for their home in Manja. They stopped over at Khwesi Bar where his father wanted to see another person.

As they were at Khwesi Bar, a Toyota Corolla, gold in colour with tinted glass, stopped in front of them. From there they proceeded to his father's office. They did not disembark from the pickup. His father chatted with his friend through the window. PW1 and his mother were seated in the front seat of the pickup.

As his father was chatting the Toyota Corolla he had seen at Khwesi Bar came and parked behind the pickup. About 5 people disembarked and came towards where they were. Two of the men stood by the driver's side whilst two of them stood by the passenger's side. One of those on the passenger's side produced a gun and pepper spray and demanded money from her mum. Those on his father's side produced a gun and ordered Mr. Banda to lie down. The man with the pepper sprayed her mum with it and took a handbag from her mother and cash that was behind the seat and they quickly ran away into the Toyota Corolla. His came out of out of pickup and followed the robbers. The driver of the Toyota Corolla shot at him and sped off. His father was rushed to hospital where he did not survive. They reported the matter to Police.

After sometime, PW1 was called at Police to identify suspects. He told the Court that he identified the Appellant because he was the one who came with a panga

knife and asked his mum to hand over the money. PW1 recognized him because on that day he looked straight into his eyes.

Later PW1 was called to Blantyre Police to identify the Toyota Corolla. He identified it although by then it was painted in silver colour. He concluded his evidence by stating that his mother died in a road accident.

PW2 was Mr. Felix Kumbweza Banda. He told the Court that he is a Quantity Surveyor and his offices are in Manja Light Industrial Area. It was his evidence that on 28th June 2014 he was at his office. Around past 12 o'clock, he came out of the office to bask in the sun. As he was there, his friend, Da Silva, saw him. Da Silva was in a pickup and they started chatting through the window as he did not disembark from the pickup. In the pickup, he was with his wife, Sally, and their son, Emanuel.

As PW2 was chatting with Da Silva, a Toyota Corolla gold in colour packed behind the pickup. People came out who quickly rushed to where they were. Others came to where he was. Others went to the passenger's side. One of the men with a gun ordered him to lie down and he obliged. He overheard the people demanding money. After a while, he heard a gunshot and saw Da Silva falling. The people rushed into the Toyota Corolla, which reversed into the main road and sped off.

PW2 further stated that later on, he was called to Blantyre and Soche Police to identify suspects which he failed to do. He was also called to identify the Corolla. He identified it even though it was painted silver. It had traces of gold colour.

When cross-examined, PW2 stated that he did not identify any suspects at Soche Police.

The final State witness was detective Sub Inspector Malanje based at Soche Police (PW3). He investigated the case after it was reported to his office. It was his evidence that in course of investigation he came across information that the Appellant was one of the people that had committed the robbery in Manja. The Appellant was arrested. When interviewed the Appellant denied the allegation. An identification parade was conducted and Mrs. Da Silva identified the Appellant as one of the people that robbed her.

PW3 told the Court that the vehicle which the robbers used was recovered although it was painted another colour. He tendered the action statement and evidence of arrest of the Appellant. He also tendered the statement which he recorded from

Mrs. Da Silva who is now deceased. Finally, PW3 stated that nothing was recovered.

During cross-examination, PW3 stated that the Toyota Corolla was not recovered from the Appellant. He denied to have quarreled with the Appellant at Peter's Bottle Store over a lady. He also denied having photographed the Appellant before the identification parade.

The above is a summary of evidence that came from the State.

On his part, the Appellant testified and called one witness. The Appellant told the lower court that he resides in Lunzu and he operates butchery. On 26th June 2014, which was a Thursday, he went to Pengapenga to buy cattle as every Friday is a market day at Pengapenga.

Whilst in Pengapenga, the Appellant received a phone call from officer Thavi from Blantyre Police CID section, who asked him to go to Blantyre on the issue of robbery in Manja where a person was killed on 28th June 2014. He told the officer that on that day he was in Pengapenga but nonetheless he would go to Blantyre. The Appellant then came to Blantyre where he met Mr. Thavi who handed him over to Soche Police where he was interviewed over the issue. He denied any knowledge. He stated that he was severely beaten so that he could confess but he maintained his innocence.

The Appellant told the Court that Police photographed him before he was taken for an identification parade. He stated that the complainant did not identify him. She just said that the robber looked like him.

DW2 was Superitendent Thavi from Blantyre Police. His evidence was that he assisted in the arrest of the Appellant in that he called the Appellant to report at l2Blantyre Police as there was an issue to discuss. The Appellant told him that he was in Ntcheu and promised to come which he did. DW2 then handed the Appellant to Soche Police who was handling the matter.

In cross-examination, DW2 stated that he did not tell the Appellant that he was wanted in connection with the Manja murder and robbery incident.

Appeal against Conviction

Ground of Appeal No. 1

The first ground of appeal is to the effect that the lower court erred in convicting the Appellant based on the identification parade sheet tendered by PW 3 when there is no law empowering the Police to hold the same.

Counsel Maele submitted that a perusal of all the laws of Malawi, including Criminal Procedure and Evidence Code and the Police Act shows that there is no law that mandates the Police to conduct an identification parade. Counsel Maele contrasted the Malawi situation from what obtains in other jurisdictions which have specific laws that empower the Police to hold identification parades. He gave the following examples to illustrate his point.

In Britain, there is the Police and Criminal Evidence Act, 1984, especially the Code of Practice for the Identification of persons by police officers CODE D made under the Act [hereinafter referred to as "CODE D"]. South Africa has section 37(1)(b) of the Criminal Procedure Act 51 of 1977 which gives the Police powers to conduct identification parades. The section provides as follows:

> *"Any Police official may...make a person referred to in paragraph (a)(i) or (ii) available or cause such person to be made available for identification in such condition, position or apparel as the Police may determine."*

In Kenya, identification parade procedures are contained in the Police Force Standing Orders (Form P156) of the National Police Service Act of 2011. With respect to India, section 9 of the Evidence Act is the governing law on identification of accused persons. Counsel Maele contended that the situation in India is rather very unique in that the police are prohibited from holding identification parades and the presence of a police officer at an identification parades vitiates the parade: **Oma @Omprakash & anr v State of Tamil Nadu Supreme Court of India Criminal Appellate Jurisdiction Criminal Appeal No. 143 of 2007.**

Turning to Malawian case law, Counsel Maele submitted that there are four reported cases on the issue of identification parades, namely, (a) **Rep. v. Ganeti 1 ALR (Mal) 34** which discusses identification but without making statutory references or case law references, (b) **Rep. v. Andrew** which refers to **Rep. v. Ganeti** as its authority, (c) **Rep v. Chibwana 10 MLR 162** wherein a conviction based on the identification of a witness was upheld even though the officer in charge of the parade was not called as a witness because the positive identification of convict in the parade was confirmed by another officer who was present, and (d) **Bonzo v. Rep [1997] 1 MLR 110 (HC)**. Counsel Maele contended that the

principles enunciated in **Bonzo v. R**ep emanate from English cases which were interpreting CODE D.

Counsel Maele concluded on this ground as follows:

> *"4.1.1.1 The foregoing it is clear that the Police in Malawi do not have any law that they can refer to as giving them the powers to hold identification parades. Notably all the reported cases are High Court cases meaning that they cannot bind any judge of the High Court. Furthermore, the Police cannot*
>
> *allude to a case as a source of their power to hold identification parades.*
>
> *4.1.1.2 This lack of legislation giving powers to the police makes this area extremely fluid and dangerous to be relied upon especially in cases of robbery that attract very long sentences under Malawian law upon conviction.*
>
> *4.1.1.3 This Court should, therefore, find that the Police in Malawi have no powers to hold identification parades as there is no law authorising them so to do."*

I have considered the submissions by Counsel Maele that the police lack statutorily power to conduct identification parade and I find the submissions to be misconceived. The fact of the matter is that the Police Act gives police officers power and authority to hold identification parades. Section 15 of the Police Act sets out general powers and duties of the Police officers. Subsection (4) of the said section is relevant and it reads:

> *"Except as otherwise provided by this Act or by the Criminal Procedure and Evidence Code, every police officer shall have all such rights, powers, authorities, privileges and immunities, and be liable to all such duties and responsibilities, as any police officer of or below the rank of sub-inspector duly appointed now has or is subject or liable to, or may hereafter have or be subject or liable to, either by common law or by virtue of any law which is now or may hereafter be in force in Malawi."* - Emphasis by underlining supplied

In terms of section 15(4) of the Police Act, a police officer may derive some of his or her powers from common law. Simply put, common law (also known as case law or precedent) is law developed by judges, courts and similar tribunals, stated in decisions that nominally decide individual cases but that in addition have precedential effect on future cases. In this regard, the four cases cited by Counsel Maele, namely, **Rep. v. Ganeti, Rep. v. Andrew, Rep. v. Chibwana** and **Bonzo v. Rep,** form part of the "common law", developed by the High Court, that expounds on the principles to be applied with respect to conduct of identification parade. This case law squally falls within the term *"common law"* as used in section 15(4) of the Police Act. In the circumstances, I am astounded by Counsel

Maele's assertion that *"the Police cannot allude to a case as a source of their power to hold identification parades"*.

Further, to my mind, the main English case on which the High Court has placed reliance in developing its jurisprudence on the conduct of identification parades is **R. v. Turnbull and another [1977] Q.B. 224** (**Turnbull Case**). The principles in the **Turnbull Case** were fully explained and applied with approval in **Anderson Loko Phiri, Lynoce Dick Tsabola & Joseph Saizi v R., Criminal Appeal No. 6 of 1996** wherein the High Court made the following instructive direction:

> *"The court must then take some time to weigh and consider the circumstances in which the identification was made. These will have a bearing on the quality of identification. The court has to regard the time of observation, the distance, the illumination, obstruction, whether the defendant was seen or known by the witness, reasons for remembering the recognition. The list is endless and depends on the particular case.*
>
> *Where the witnesses for the prosecution rely on recognition of the assailant, it is important to remind oneself that this is better than identification. The court must be aware that recognition of friends and relatives can also be mistaken. It is not unoften that people have thought that the person they saw in the streets was a friend or relation, only to discover at close range that they were grossly mistaken."*

It is clear from the citation of the **Turnbull Case** that this case predates the CODE D, which was enacted in 1984. In this regard, Counsel Maele's contention that the Malawian jurisprudence on the conduct of identification parades is based on English cases which were interpreting CODE D lacks merit.

In any case, as rightly stated by Du Toit et al (2006:11), an identification parade does not, strictly speaking, consist of rules of law, but there are, basically, rules of police practice based upon considerations of fairness and gleaned from reported cases. These police rules are merely guidelines to the police on the procedures to be followed in holding of identification parades. These rules do not create rights, and non-compliance with one or other of them will not result in a ruling that the parade is inadmissible. In short, subject to an accused person's right to a fair trial under section 42 of the Constitution, non-compliance with the rules goes to the probative value or weight to be placed on evidence of identification and not the admissibility thereof.

In conclusion on this ground of appeal, it is commonplace that reported cases by the High Court on the subject matter under consideration are legion. According to section 15(4) of the Police Act, these reported cases constitute valid source of authority for the police officers to conduct identification parades. In the circumstances, ground of appeal No. 1 has to fall by the wayside.

Ground of Appeal No.2

The second ground of appeal is to the effect that the lower court erred in convicting the Appellant based on the identification sheet when the identification parade was a nullity as it did not follow the conventional guidelines of identification parades. Counsel Maele submitted that the identification of the Appellant was riddled with so many irregularities and also violated acceptable international standards as follows:

> *"4.2.4.1 There was no legal practitioner or relation of the Appellant and the Appellant was not informed of this right by the Police.*
>
> *4.2.4.2 The identification parade was conducted by D/S/INSP Misomali yet it was D/Malange who testified on the case. Malange evidence would therefore be hearsay because he was not the one who conducted the parade. D/S/INSP Malange merely states that "we conducted an identification parade" he does not give any evidence of the role that he played in the identification parade. There being no such evidence it is difficult to rely on the evidence of PW 3 at all.*
>
> *4.2.4.3 DW3 D/S/Insp Malange testified that "**we** conducted an identification parade and Mrs Da Silva identified the accused person as one of the suspects. It is trite that an identification parade must be done by an independent Police officer other than the investigator. If by "we" PW 3 meant that he took part in the identification parade, then it follows this case erroneous as he was not supposed to take part in the conduct of the identification parade.*
>
> *4.2.4.4 PW 3 did not give any evidence relating to the make up of the parade i.e. the formation of the parade, whether the persons on the parade were of similar build, height and dress to the accused's, whether the accused person was allowed to choose his position on the parade, where the witnesses were kept while the parade was being formed and so on; without such evidence it cannot be said the parade was conducted fairly.*
>
> *4.2.4.5 The composition of the parade itself was clearly not proper. The purported identification parade report shows that two were aged 15, one aged 17, one aged 21, one aged 22 and another aged 39. It is very clear that these people were very young and very old to have made this identification parade fair. Only one person was aged 32 and the Appellant was aged 28. This kind of composition was disadvantageous to the Appellant to arrive at a proper and fair identification.*
>
> *4.2.4.6 There was no evidence as to the time that had passed from the day the robbery took place to the day the identification parade was conducted. PW*

3 did not give evidence of this and even the identification parade report does not show the date when it was conducted. Without such evidence it is difficult to make out the how the witnesses might have been able to make a positive identification.

4.2.4.7 The witness who allegedly identified did not give a statement detailing the basis of her identification namely the features of the person that robbed her."

In countering the arguments advanced by Counsel Maele, the learned Senior State Advocate in a concise statement of response submitted that the Appellant was ably identified by the witnesses:

- *She (the complainant) identified the Appellant three times at the identification parade on different positions, she was at the passenger seat and the robbers came to her seat, the incident happened in the afternoon, the appellant did not wear any masks, there was no distance between the robbers and the complainant as the robber came to where she was, there was nothing to distract the complainant from seeing the robbers.*
- *This evidence was not discredited by accused in cross examination. The lower court rightly decided that there was a case to answer that the appellant had to give evidence if he so wished.*
- *The appellant raised the defence of alibi but it was unsuccessful. He trashed the identication parade as a sham but again the court correctly decided that the identification was conducted properly.*
- *The identification was of good quality. The prosecution proved beyond reasonable doubt that the convict committed the offence of robbery."*

I have subjected the evidence on record to fresh scrutiny and considered the submissions made by Counsel Maele and the learned Senior State Advocate. I have also examined the judgment of the lower court.

It will be observed that the Ground of Appeal No. 2 attacks the identification parade. This is clear from paragraph 4.2.5 of the Appellant's Written Skeleton Arguments. In these circumstances, this grounds stands or falls on the question whether or not the Appellant was convicted solely based on evidence emanating from the identification parade. In this regard, the observations and findings of the lower court at pages 6 and 7 are relevant:

"From the identification parade sheet tendered she identified the accused person three times on different positions. According to PW1 at the time of robbery he was in the middle. His father was driving whilst his mother was on the passenger's seat. And some of the robbers came to the passenger's side where they demanded money from his mother. The incident happened around past 12 during day time. The robbers did not wear any masks. There was no distance between the robbers and the complainant as the robber came to where the complainant and they talked to each other. There was nothing to distract the complainant from seeing the robbers. In the circumstances I would find that the complainant correctly identified the accused personas one of the people that robbed her.

The accused trashed the identification parade as a sham in that he was photographed by police officers before the parade. I seriously doubt the accused person's allegations. If that were the case PW2 would have easily identified him. PW2 who was at the scene of the

robbery told the Court that when called to identify the suspects, he failed to identify any. Likewise PW1 the complainant's son would have identified the suspect if indeed he was prephotographed before the parade was professionally done.

The accused raised a defence of alibi that he was in Penganga Ntcheu at the time of the robbery. He did not call witness to substantiate that. The witness he called testified that he called the accused one week after the incident and the accused said he was in Ntcheu."

What comes out of the judgment of the lower court is that (a) contrary to the assertion of the Appellant, the conviction is not just based on the evidence relating to the identification parade, (b) the complainant identified the Appellant in all three phases of the parade, (c) the parade report was given to the Appellant who signed it and no evidence was adduced to contradict this fact, (d) the prosecutor tendered in evidence the identification report and there is no evidence that this piece of evidence was challenged, (e) there is evidence of personal interaction between the complainant and the Appellant, and (f) the incident happened at around midday at a public place which was fully illuminated.

In light of the foregoing and by reason thereof, the arguments raised by the Appellant are very lame and cannot form the basis for quashing the conviction of the lower court. The conviction of the Appellant is, accordingly, upheld.

Ground of Appeal No. 3

Sentence

Having found that the conviction was proper, I now turn to sentence. Counsel Maele argued that the sentence imposed by the lower court is manifestly excessive for a first offender.

Mr. Maele cited the cases of **R v. Patrick Gift Masamba, HC/PR Confirmation Case No. 441 of 2013(unreported)**, **R v. Banda, Kamete and Others, HC/PR Confirmation Case No. 359 of 2012(unreported), R v. Jafali Taulo and Others, HC/PR Confirmation Case No. 739 of 2009 (unreported)** and **R v. Twaibu Issa, HC/PR Confirmation Case No. 441 of 2013 (unreported) (unreported)** in support of his contention that the custodial sentence on the Appellant should not have exceeded 7 years.

In **Rep. v. Patrick Gift Masamba**, supra, the convict and another sizeable group of robbers raided the house of the Bishop of Chikhwawa Catholic Bishop. They demanded and left with a lot of property. The accused pleaded guilty to the charge. The court noted that that the fact that a group committed the offence; the victims were put in much fear and the non-recovery of the property aggravated the offence. On the other hand the plea of guilty, the fact that the convict was a first offender and

he was 28 years old mitigated the crime. The Court reduced the sentence from 10 years to7 years IHL.

In Rep v. Banda, Kamete and Others , supra, the three convicts together with others stormed into the house of the Nathanies in the city of Blantyre. They carried pangas and knives. They run away with cash and many household items. Mwaungulu, J. (as he then was) noted that the use of guns, the fact that five people were involved in the crime, denoting premeditation and planning; there was actual assaults and the victims were put in much anxiety, aggravated the offence. The sentence of 8 years IHL was reduced to 7 years IHL.

In **Rep v. Jafali Taulo and others,** the convict and three other, armed with guns, went to the house of the Chachias. They threatened the owner with the guns and they searched the house and stole K150, 000. They asked for the car keys and they drove away. They had an accident with the car. The first accused was arrested and he confessed the crime. The lower court sentenced them to 7 years IHL. On confirmation, the High Court confirmed the sentenced noting that it was in line with the sentencing guidelines on such offences.

In the last cited case of **Rep v. Twaibu Issa**, supra, the convict and his friend hacked the complainant with a panga knife and stole a phone from him. He was convicted of robbery and sentenced to 9 years IHL. The lower court considered the factors that the convict was a first offender and young and the aggravating factors that the convict inflicted actual injury, a weapon was used and there was more than one person to pass the sentence. On confirmation the sentence was reduced from 9 years IHL to 7 years IHL.

The learned Senior State Advocate took the view that the sentence imposed herein is appropriate and he buttressed his view by the cases of **Rep v. Wilson Misoya, HC/PR Confirmation Case No. 70 of 2008 (unreported)**, **Rep v. Stanley Dick and 2 Others, HC/PR Confirmation Case No. 451 of 2008(unreported),**

Kandula Sandramu v. Rep, HC/PR Criminal Appeal No. 31 of 2004 (unreported), Rep v. Kasonda, HC/PR Confirmation Case No. 447 of 2007 (unreported) and **Rep v. Solomoni Bakali and Another, HC/PR Confirmation Case No. 271 of 2004 (unreported) (unreported).**

I have considered the respective submissions by Counsel Maele and the learned Senior State Advocate. It is significant to observe **Rep v. Patrick Gift Masamba**, supra, is one of the recently decided cases which sets out sentencing guidelines with respect to robbery:

> *"sentencers at first instance must acquaint themselves with guidelines that superior or reviewing courts lay down. In the case of robbery, there are three guidelines. For robbery under section 301(1)the starting point is five year imprisonment with hard labour (Republic v Matetewu and Another (1995) Confirmation Case No. 1312 (unreported); for aggravated robbery under section 301(2), the starting point is eight years (Phiri v R republic (1996) Criminal Appeal No. 6 (Unreported) and for robbery where guns are involved, ten years is the starting point (Republic v Zoola (1995) Confirmation Case No. 276 (Unreported)."*

In terms of this authority, the starting point where guns are involved in a robbery is ten years. In the present case, the mitigating factors are that the Appellant is a first offender, who was 28 years old at the time of his conviction, and only the bag in which the stolen money was carried was recovered with no cash in it. On the other hand, there are several aggravating factors. Firstly, the offence was planned and committed by a gang with premeditation. Secondly, they robbers were armed with panga knives and guns which were used to subdue the complainants into submission. Thirdly, a life was lost in that the robbers shot to death Mr. Da Silva. Fourthly, the sum of K2,000,000.00 that was stolen was not recovered meaning that the complainants suffered total loss in respect of that money. Fifthly, the lower court also took into consideration the following relevant principles of sentencing:

> *"…offences of this nature have escalated not only in Blantyre but across the country. Citizens no longer feel safe. Robbers have created an atmosphere of insecurity by their ruthless and barbaric attacks. Deaths have been reported. Cars have been hijacked, and in some cases cash has been looted. Insecurity scares away investors and it is the nation that loses out at the expense of few greedy individuals who earn their living by reaping from where they did not sow.*

> *It is worthy mentioning that there has been an increase in mob justice being exerted on those caught stealing. People have resorted to take the law into their own hands. It is a sign that the citizenry has lost trust in institutions that administer criminal justice. It is against this background that I feel that the courts must mete out sterner sentences that would assure the public that courts are with them in the fight against violent crimes".*

By reason of the foregoing, the appeal against sentence must fail.

Conclusion

In the result the appeal is dismissed in its entirety.

Pronounced in Court this 15th February 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE