REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY: CRIMINAL DIVISION

CRIMINAL APPEAL CASE No. 1 of 2017

(Being Criminal Case No 70 of the 2015 in the First Grade Magistrate Court sitting at Chitipa)

BETWEEN:

Ausward Simkonda .....Appellant

-and-

The State.....Respondent

Coram:
The Honourable Justice D.A. DeGabriele
Mr. D. Shaibu — for the State
Mr. C.Ng'ambi — for the applicant
Ms. Munthali — Official Interpreter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The appellant was charged, tried and convicted of two counts of offences; malicious damage contrary to section 344(1) of the Penal Code on the 1st count and theft contrary to section 278 of the Penal Code on the 2nd count. He was sentenced to 3 years IHL on the 1st count and 4 years IHL on the 2nd count. The appellant is now appealing against both the conviction and the sentence.

The grounds of appeal

There are four grounds of appeal filed, namely,

1. The lower court erred in convicting the Appellant when the prosecution did not prove all elements of the offences charged beyond reasonable doubt.
2. The lower court erred in convicting the Appellant on a defective charge.
3. The court totally misled itself by giving different types of sentences to convicts who committed the same offence under the same circumstances and the same set of facts.
4. The court erred in giving manifestly excessive sentences to the Appellant without regard to the fact that the Appellant is a 1st offender and in total disregard of sentencing principles

Issues for determination

1. Whether or not the prosecution proved all elements of the offences charged on the appellant beyond reasonable doubt.
2. Whether or not the lower court convicted the Appellant on a defective charge.
3. Whether or not the court by giving 3 different of sentences to the convicts who were charges with the same offences under the same set of facts fell into error as regard the sentencing principles
4. Whether the sentences are manifestly excessive under the circumstances.

Appeals to the High Court

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, in the light of all that took place during trial, consider whether the court below was within jurisdiction in coming to its conclusion. This

Court is mindful of the approach to be adopted, which was outlined by Skinner J in the case of ***Pryce v The Republic (1971 72) 6 ALR (Mal) 65***

> *"In our opinion, the proper approach by the High court to an appeal on fact from a magistrate 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; 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".*

In terms of treating the evidence record, Skinner J went on to state on pages 71 to 72 that,

> *"It is always important for the appellate court to know that the magistrates have lived with the case in the course of the trial and account should be taken of this factor. In making up its own mind the court must remember that it has neither seen nor heard the witnesses and that the view of the magistrate on credibility, whether stated in express terms or seen from the judgement by necessary inference, is entitled to great weight. ... A rehearing by the appellate court does not mean that the court looks at the record of evidence in isolation and makes up its own mind as if there were a trial on the record alone. It must take into account the other factors which we have referred to, and it must recognise that it is a position of disadvantage as against the magistrate who heard the case".*

The State was duty bound to prove each and every element of this offence and the standard required by the criminal law is beyond a reasonable doubt. Section 187(1) of the Criminal Procedure and Evidence Code provides that,

> *"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".*

Under section 187 of the Criminal Procedure and Evidence Code, the law stipulates that the burden of proving that a person who is accused of an offence is guilty of that

offence lies upon the prosecution. Further, under sub-section (2) the law places the burden of proving any fact necessary to be proved in order to enable any person to give evidence of another fact is on the person who wishes to give such evidence. A court of law will, on being satisfied that the case has been proved beyond reasonable doubt, convict a person charged with a crime. Failing to prove a criminal matter to the requisite standard of proof beyond reasonable doubt will lead to an acquittal, see ***DPP vs Woolmington (1935) A.C. 462***

Indeed, it is essential for the court to scrutinize all evidence and ensure that all elements of the offence are proved. I echo the sentiments of Chimasula Phiri J (as he was then, in the case of ***Republic v Chimbelenga (1996) MLR 342*** at ***p345***, where he stated that,

> *"...in proving the guilty of the accused beyond reasonable doubt.....(the) court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecution by the substantive law are proved. If it is not so satisfied, the accused person must be acquitted"*

While direct evidence is more accurate and preferable in criminal cases, the law allows the use of circumstantial evidence by the prosecution to prove a case beyond reasonable doubt, see ***Viyaviya R rep (2003-2003) MLR 423 (SCA)*** that circumstantial evidence is allowed in criminal cases. Where the evidence is circumstantial, the accepted and logical approach is by way of discounting all possible hypothesis of innocence. The prosecution must show how the circumstantial evidence is connected and how it would lead to the logical conclusion that the accused person is the one who committed the offence. In an appeal case, the High Court has to scrutinize circumstantial evidence as recorded to reach a verdict which is supported by the law.

The evidence in the lower court

It is the evidence of PW1, the complainant stated that he and his son were cultivating in a garden close to their house on the 9th November 2015 at around 8 o'clock in the morning. He saw a group of people led by the appellant heading towards his house.

The people in the group were armed with *pangas* and stones and were singing songs. PW1 saw the appellant throwing a stone at the door of his house. It is his evidence that part of the group started coming toward him and he ran away fearing for his life. PW1 reported the incident to police and on his way back he found that a lot of his household properties had been destroyed and stolen. PW1 further alleged that the whole incident was masterminded by the appellant, a village headman, who had lost a land dispute against PW1 before the Chief and before the Magistrate Court. PW1 also stated that his neighbor had informed him that the appellant had convened a meeting at around 6:00 am where he had agreed with his subjects to attack PW1.

DW1 was the appellant and he denied that he had committed the offence. He claims that on the material day he left his house early in the morning to a certain place to have his bicycle repaired. He did not find the bicycle repairer and he started playing *bawo* as he was waiting for the bicycle repairer. DW1 further stated that around 8 am he saw a lot of people at PW1's house making noise, and he was informed that people from his village had destroyed PW1's property. DW1 stated that he had visited the scene and he personally saw people damaging the said properties.

THE LAW

The offence of malicious damage is outlined in section 344(1) the Penal Code which states as follows:

> *"Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanor and shall be liable if no other punishment is provided to imprisonment for five years"*

In defining the word 'willfully' the court held in the case of ***Chimwemwe Gulumba v Rep Msc Criminal Application No 51 of 2003***

> *"The understanding of the word 'willfully' under section 344 and, indeed, under other provisions in the Code, is informed, under section 3 of the Code, by the meaning of the word under English Criminal Law. The word there is not understood only to mean 'deliberately' or 'voluntarily'. It covers both intention and recklessness. One, in my judgment, acts willfully not only where what one does is as result of his volition but*

also, where the immediate acts is as a result of one's volition, the consequence of his willful act are matters known by all reasonable men and women to follow naturally from his act of volition. If a man intends to shoot an attendant inside a shop through a glass window, destruction to the window, even though not the immediate concern, is a result of his willful act and therefore acts willfully in destroying the window".

The court went on discuss that malice is part of the elements of the offence of malicious damage. It stated that,

"The offence however is 'malicious' damage to property. Malice is therefore part of the crime. In English law the Court of Appeal in ***R v Cunningham [1957] 2 QB 396:*** *"malice must be taken ... as requiring either (1) An actual intention to do the harm ...; or recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular type of harm might be done and yet has gone on to take the risk of it)". These principles apply to understanding malicious damage under section 344 (1) of the Penal Code. The defendant did not intend to damage the complainant's shirt. He knew or ought to have known that, in attacking the complainant like the defendant did, his action, albeit directed to the person, would damage the complainant's shirt. That, in my judgment, is enough to bring the defendant's action s in the purview of section 344 (1) of the Penal Code".*

As regards the offence of theft, section 271 states that,

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing"

Section 278 of the Penal Code outlines the general punishment of theft, stating that

"Any person who steals anything capable of being stolen shall be guilty of the felony termed theft and shall be liable unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for five years".

The prosecution had to prove that property was damaged, and the property was so damaged willfully and unlawfully by the accused person. The appellant herein argues

that no one saw the appellant damaging property, especially in the circumstances that the victim ran away when the people were approaching. He further contends that even if the victim stated that he saw the appellant throw a stone against the door of the house, there was no evidence that the stone damaged the door. The appellant claims that he was convicted on circumstantial evidence which did not point to the fact that he alone committed the offence.

Circumstantial evidence is evidence tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue. Circumstantial evidence has been discussed in numerous cases in our court and the position is now settled as reflected by the sentiment of the Malawi Supreme Court of Appeal in the case of ***Viyaviya v The Republic [2002–2003] MLR 423 (SCA), that;***

> *"... where the evidence is circumstantial the accepted and logical approach is by way of elimination that is by negative all possible hypothesis of innocence. In order to justify from circumstantial evidence, an inference of guilt the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. A court of law can only convict an accused person if one inference and one inference only, is possible. Where several inferences are open, some consistent with innocence and others consistent with guilt, it is not open to a court, in the absence of any other evidence, to choose the inferences consistent with guilt and to reject inferences consistent with innocence"*

It is not in dispute that property was destroyed and was found piled outside the damaged house of the victim and some money and produce was missing. It is not disputed that the damage to the property was done by an angry mob, led by the appellant as stated in the evidence of PW1. This Court is led to believe the version of PW1, because the appellant does not deny to have been at the scene of crime and that he does not deny having occupied the land that belonged to PW1 until a court order forced him out. Further, the evidence discloses that a number of people were arrested, tried and convicted while others are still at large. The appellant is therefore placed directly on the scene of crime and his motive is for malicious damage is

supplemented by circumstantial evidence, that he had lost a land dispute to PW1. The lower court did not need numerous links to link the circumstances, nor was the prosecution required to prove the case beyond a shadow of doubt. I find that the lower court was right to convict as the circumstantial evidence was sufficient to enable the prosecution prove the case beyond reasonable doubt.

The evidence of PW1 shows that he did see the appellant throwing a stone against the door of his house. Whether or not the stone damaged the door is immaterial, because the appellant himself verifies that PW1's property was destroyed. Even if the stone he threw did not damage the door, his action was intentional, reckless and with malice; and the mob then followed his example. The appellant himself states that he visited the house and saw that the property was destroyed. The explanation that he had gone to a bicycle repairer, and had seen the mob at the house of the appellant and had gone to inspect the damage does not ring true. As a village headman, if he had seen the crowd, how come he did not attempt to quell the situation. It is true that many people came to the house of the victim, but the victim was able to identify the appellant, who is the village headman as the leader of the mob. The presence of the appellant at the scene and his being a village headman who had lost a land dispute to the victim linked the appellant to the damage of the property.

It is true that the victim stated that he ran away for fear of his life. I am sure anyone who is approached by a belligerent armed mob of people will equally take to flight. It really did not matter whether or not the appellant shouted orders, and whether or not the orders were heard by the mob, what is sufficient is that he threw the first stone and the mob followed. I am convinced that intention to cause damage was well addressed by the fact that the appellant who is a village headman, led a mob to the house of the victim and cast the first stone. Why would he throw the stone against the door of the victim's house in front of an angry mob if he had had no intention to damage the property?

It is not disputed that property in terms of money and produce that went missing was stolen and removed from the complainant's house. The question that arises is who

had stolen the property of the victim. As discussed above and in accordance to the description of malicious damage in the case of ***Gulumba v The Republic*** (above), the appellant by his reckless action ought to have known that a deranged and belligerent mob, incited to violence almost always destroys, loot or steal property. It really does not matter who actually stole the money and property. The appellant ought to have known that his action as a leader would lead to a result of theft.

Indeed, as decided in the case of ***Mapopa Nyirenda v The State Criminal Appeal No. 6 of 2011 (unreported)*** which was cited by the appellant, there was the taking of property capable of being stolen, without consent, with the view to permanently deprive the owner of the property. Based on the evidence and circumstances of the case, the appellant is said to have taken the property or caused to have the property taken by the mob that he had led on a rampage. As seen in the case of ***Gulumba v The Republic*** (supra) malicious intention covers both intention and recklessness and a person is guilty where the immediate acts are as a result of one's volition and the consequence of his willful act are matters known by all reasonable men and women to follow naturally from his act of volition. As argued by the State, the doctrine of recent possession does not apply here as the offence was committed in concert after a very clear and elaborate plan. It is enough that the malicious actions of the appellant were such that they resulted in consequences any reasonable man would have foreseen.

The appellant claims that the charge was defective because the theft of money and the damage to property was all included in the 2nd count of theft. The appellant argues that there should have been a separation of property and money, and went on to quote the words of Chatsika J to this effect without citing the case where the words were said; thereby depriving this Court of the chance to distinguish or agree with the sentiments. The appellant argues that by not specifying the property stolen, the appellant was seriously prejudiced, especially when it came to sentencing because the value of MK2,500,000 stated led to an excessive sentence. He further argues that the prosecution had evidence of property damage but none on theft.

The State has argued that the alleged defective charge did not prejudice the appellant. The State argues that section 3 of the Criminal Procedure and Evidence Code directs that that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code. Consequently, under section 5 of the Criminal Procedure and Evidence Code states that no finding or decision of a court will be set aside or reversed on ant technicalities unless such technicality occasions a failure of justice. The appellant herein was legally represented in the lower court by counsel who is also representing him in this Court. Counsel never raised the issue of defective charges in the lower court. This is an issue that should have been raised in the lower court. However, looking at the evidence before this Court, it is not disputed that damage and theft occurred. As already indicated above, the appellant ought to have known that his actions would cause thefts and damage. The irregularity complained of, that the charge sheet did not separate the two, did not occasion a failure of justice.

The appellant has claimed that he was treated unfairly by being sentenced to a stiffer punishment than the rest of convicts. The other three persons he was convicted together with were sentenced differently and with lower prison terms and a non-custodial sentence. The State submits that the lower court was justified because the appellant was the masterminded of all the offences. He is the one who wanted a piece of land from the complainant. He is the one who lost a land dispute against the complainant. He is the one who mobilized the rest of the convicts. He was the first to hit the door of the complainant's house. I have read the lower court record and establish that the sentencing done the lower court was not offensive to sentencing principle. The convicts were all considered for their role in the offense, their age, whether or not they were first offenders and were sentenced accordingly. I am convinced that the lower court, after weighing all the mitigating and aggravating factors, a custodial sentence was the appropriate sentence to be passed. The reasons given by the lower court were such that there was no other appropriate way to deal with the appellant.

While it is true that as far as it is possible, joint offenders ought to suffer the same punishment, the law recognizes that sometimes different sentences are imposed depending on the circumstance of the case, see ***Rep v Zimba and Others (1971-72) 6 MLR (Mal) 409***. The evidence in this case shows that the appellant was the leader and mastermind of the offence and as such, he needed to be sentenced differently. Even if he was a first offender, his actions as a village head were such that the sentence imposed had to reflect all the objectives of punishment, which range from retribution, deterrence and rehabilitation.

In the case of ***Chimwemwe Gulumba v Rep*** (supra) the High Court discussed the following as the factors which the court should take into account in passing the sentence:

> *"The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest. Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and mental component comprising the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence".*

This Court agrees fully with these sentiments. In the matter herein, the history of the matter and position of the appellant did play a major role in what sentence the lower court had to be imposed. It is, therefore, my judgment that the decision of the trial magistrate was well supported by the entirety of the evidence. The conviction of the appellant cannot be faulted. I therefore dismiss the appeal against conviction.

The appellant argues that the sentences passed by the lower court were manifestly excessive. The State conceded that the sentences were slightly on the Higher side. Having looked at the whole record of the lower court, the only notable mitigating factor herein is that the appellant was a first offender. The aggravating factors were numerous and can briefly be sated as follows: that the appellant was a village headman who mobilized people to attack the complainant, after a meeting he had convened to plan the said action; that he took the law in his own hands as he had lost a land dispute at both the Chiefs level and the Magistrate court; that the estimated value of damaged and stolen property was very high for a villager and in the year 2015 (MK2, 500, 000) and would take a long time to recover; and that the appellant instilled a sense of fear in the complainant as evidenced by the fact that during trial the complainant had fled his house and was sleeping in another area for the fear of being attacked again. Bearing in mind the reasons given by the lower court for imposing a custodial sentence, I find that the sentence imposed on the 1st count was appropriate regardless of the fact that the State avers that the sentences were slightly on the higher side. I therefore confirm the sentence on the first count of 3 years in hard labour. I find the sentence on the 2nd count of offence to be on the higher side and I reduce the same to 36 months IHL. The sentences will run concurrently with effect from the date of arrest which was 18th November 2015.

Made in Chambers at Mzuzu Registry this 6th day of December 2017

D.A. DeGabriele

JUDGE