IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 2 OF 2003

MPHATSO CHIMANGENI

Versus

THE REPUBLIC

From the First Grade Magistrate Court sitting at Ntcheu Criminal case number 179 of 2002 and Criminal case number 180 of 2002.

CORAM: MWAUNGULU (JUDGE)

Masiku, Legal Advocate, for the appellant

Kalaile, Senior Sate Advocate

Nthole, Official Interpreter

Mwaungulu, J.

JUDGMENT

The appellant, Mphatso Chimangeni, appeals against conviction and sentence. The Ntcheu First Grade Magistrate in two separate trials convicted the appellant of unlawful wounding and malicious damage to property, offences under sections 241 (a) and 344, respectively, of the Penal Code. In criminal case number 179 of 2002, the court below convicted the appellant of unlawful wounding of Mr. Watford and malicious damage to Mr. Watford's property. The court below sentenced the appellant to thirty-six and fifteen months imprisonment, respectively. The lower court ordered the sentences to run concurrently. In Criminal Number 180 of 2002 the First Grade Magistrate convicted the appellant of the unlawful wounding of Mr. Tambala and Mr. Guluka. The court below sentenced the appellant to forty-eight and twenty-four months imprisonment, respectively. The Court below ordered these sentences to run concurrently. The lower court ordered the sentences in the two natters to run consecutively. The appellant,

consequently, is serving seven years for offences the lower court. The appellant argues, on the evidence before the lower court, the convictions are improper and the sentence manifestly excessive.

The convictions are, in my judgment, impeccable. The appellant, at the police and in defense in all offences the appellant stood charged for in the lower court, admitted attacking the complainants, albeit not in the circumstances the complainant's allege. With this line of argument, the appellant has a difficulty under his hands.

The appeal court reviewing the decision of a court of instance, of course, proceeds by way of rehearing. The Court examines all the evidence in the court below, subjecting the evidence for relevance and admissibility and mindful that, unlike the reviewing court, the lower court has the advantage of seeing the witnesses and assessing credibility. Generally, where there is evidence to establish a fact one way or the other and a tribunal of fact, a judge or jury, as the case may be, decides one way, it is rare, and I think impossible, for an appellate court to reverse the finding of fact. A fortiori an appellate court will, as a matter of principle, reverse a finding of a tribunal of fact where there is no evidence to support a finding. There is no evidence to establish a fact where, for admissibility, weight or credibility, a tribunal of fact rejects the evidence. Generally, a court reviewing a tribunal of fact should reverse a finding of fact based on evidence that should be excluded subject, of course, to section 5 (2) of the Criminal Procedure and Evidence Code:

"The improper admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised – (a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction, or (b) it would have varied the decision if the rejected evidence had been received."

It was important to restate these principles, most of them established in this Court in Patel v R (1923) 1 A.L.R. (Mal) 894; and R v Mamanya (1964-66) 3 A.L.R. (Mal.) 271, in the Federal Supreme Court in Chipembere v R (1962-63) 2 A.L.R. (Mal) 83 and the Supreme Court of Appeal in Pryce v Republic (1971-72) 6 A.L.R. 65; and Idana v R (1964-66) 3 A.L.R. 59, because of matters Mr. Masiku, the appellant's legal practitioner, raises for the appellant on the conviction.

Foremost, if I understand Mr. Masiku's argument correctly, is his firm belief that the lower court erred on the findings it made on a number of facts important to the case. On the offence of unlawful wounding the lower court had, and this court has, to determine whether the appellant, by his actions, caused the unlawful wounds on the complainants. There was evidence, much of it damning, from the complainants and the appellant's own admissions at the police and in court as to the appellant's authorship of the wounds. Mr. Masiku submits that the lower court wrongly relied on the appellant's admissions. I was at pains to follow the argument at that point. First, there were the appellant's admissions

ex curia and in Court. The lower court, in my judgment, was well within its powers in considering that evidence (Useni v R (1964-66) 3 ALR (Mal) 250; and Day v R. (1923-61)1 ALR (Mal) 625). Admissions, whether at the time of the crime or later, are proof par excellence. In Useni v R (this Court approved this statement from R v Lambe (1791) 2 Leach 552:

"The general rule respecting this species of testimony is, that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are taking him to the magistrates… for the purpose of undergoing his examination… for the purpose of undergoing his examination…First then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner to any person, at any moment of time, and at any place … are at common law admissible in evidence as the highest and most satisfactory proof of guilt because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true. …"

Secondly, besides the admissions in court and outside court were the complainants' evidence which, clearly from the record, the lower court found credible.

Just as I have considerable difficulty appreciating the argument for the appellant that the complainants' testimony was hearsay. Hearsay evidence covers statements by another by a person giving evidence to establish the truthfulness of a fact. I, like Lord Havers in R v Sharp [1988] I WLR 7, adopt the statement in Cross on Evidence (6th ed), that "an assertion other that one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted". This formulation if the rule was also approved by Lord Canker in R V Kearley [1992] 2 AC 228. The complainants' testimony on what they experienced from all senses and faculties was admissible to prove any fact in issue. It was not hearsay, unless, again, if I understand the argument correctly, it is contended for the appellant that the medical statements, tendered by the complainants, are hearsay.

If the medical report was tendered to prove the wounds the complainants sustained, on the face of it, Mr. Masiku is right. Reports from experts and professionals are hearsay (and opinion) and generally excluded under the rule against hearsay unless admitted under the stringent provisions in Section 180 of the Criminal Procedure and Evidence Code. Section 180 (1) of Criminal Procedure and Evidence Code provides:

" When ever any facts ascertained by any examination, including the examination of any person or body, or by any process requiring any skill in pathology, bacteriology, biology, chemistry, medicine, physics, botany, astronomy or geography and the opinions thereon of any person having that skill are or may become relevant to the issue in any criminal proceedings, a document purporting to be a report of such facts and opinions, by any person qualified to carry out such examination or process (in this section referred to as an ("expert") who has carried out any such examination or process shall, subject to subsection (5), on its mere production be any party to those proceedings, be admissible

in evidence therein to prove those facts and opinions if one of the conditions specified in subsection 930 is satisfied."

Section 180 (3) reads:

The conditions referred to in subsection (1) are – (a) that the other parties to the proceedings consent; or [emphasis supplied] (b) that the party proposing to tender the report has served on the other parties a copy of the report and, by endorsement on the report or otherwise, notice of his intention to tender it in evidence and none of the other parties has, within seven days from such service, served on the party so proposing a notice objecting to the report being tendered in evidence under this section.

Although Mr. Masiku and Ms Kalaile, Senior State Advocate cited no authorities, this Court and the Supreme Court have considered section 180 of the Criminal Procedure and Evidence Code on which the lower court purportedly admitted the medical report. One matter in the Supreme Court of Appeal's decision on this matter needs clarifying. In Jafuli v Republic [1978-80] 9 A.L.R. 351, where the Supreme Court reversed this Court's decision sub nomine Jafuli v Republic [1978-80] 9 M.L.R. 241, Skinner, C.J., said:

"Section 180 is clear. In order for the report to be received by the court in evidence subs-s must be complied with. There must be consent by the accused. That consent must be given after he has received a copy of the report … We do not think that silence by the accused at the time of the report as put forward can be said to amount to consent, particularly in the case of an unrepresented accused."

The Honourable the Chief Justice is right that the prosecution or defense must, when relying on reports by experts or professionals section 180 of the Criminal Procedure and Evidence Code mentions, comply with section 180 (4) of the Criminal Procedure and Evidence Code and precisely because the reports are hearsay and opinion. Section 180 of the Criminal Procedure and Evidence Code should be understood as an exception to the rule against hearsay and opinion evidence. It is imperative to comply with the section's detail because the section is an exception to general rules of evidence.

Section 180, however, does not require a party's consent before the court receives the report in evidence. It is unnecessary to consider this Court's decisions. Jere, J., reviewed them in sub nominee Jafuli v Republic. In sub nominee Jafuli v Republic, as we see shortly, the question of consent never arose, the defendant having been served, in accordance with section 180 (4) of the Criminal Procedure and Evidence Code, with the report. The Chief Justice's statement is obiter. The report was admissible, as we see shortly, without the defendant's consent, as long as the defendant did not raise any objection within the time stipulated. The Supreme Court's decision that there must be consent in all cases was per in curium section 180 (4) (b).

Section 180 (3) of the Criminal Procedure and Evidence Code does not require that there must be consent in all cases. The section requires that either there be consent of the parties or service of the expert statement. There are two instances where, in my judgment, there would be consent between the parties. First, where, parties mutually agree either as a way of expediting the process or the usual rapport between parties, to tender the report without much ado. Secondly, where there was no prior arrangement before, a party never

served the other under section 180 (3) (b) of the Criminal Procedure and Evidence Code and parties agree to tender the document notwithstanding. Without such consent, the statements would still be admissible where the party tendering served the report on the other in accordance with section 180 (3) (b) of the Criminal Procedure and Evidence Code and the other party raises no objection within seven days of service. Consent is unnecessary where the party tendering served the report on the other in accordance with section 180 (3) (b) of the Criminal Procedure and Evidence Code and the other party raises no objection within seven days of service. Where, therefore, the tendering party never served the report on the other, in the absence of consent from the party that should be served, the statement would be inadmissible. A court must admit an expert report, without consent or objection, where a party has served on the other party the statement in accordance with section 180 of the Criminal Procedure and Evidence Code and within seven days of the service the served party does not raise objections to the statement.

Where, therefore, the tendering party never served the report on the other, in the absence of consent from the party that should be served, the statement would be inadmissible. Mr. Kapire is, therefore right that, the medical reports, being hearsay, and, I would add, based on opinion, are inadmissible because the prosecution never served the reports on the appellant. That, however, was not the only evidence of the injuries the victims sustained. There was oral testimony. Injuries a victim sustains are matters of fact and can be proved, without a medical opinion, by the victim or others who saw the injuries. Such evidence is not any less good than medical opinion. To insist for medical evidence in such cases is to strive for the best evidence rule. Except for statutory inroads, the best evidence is no longer a rule of evidence. Rejection of the medical report does not result in overturning the finding, particularly, in the face of other evidence. Section 5 (2) of the Criminal Procedure and Evidence Code covers the matter:

“The improper admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case, unless, in the opinion of the court before which an objection is raised

a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction, or

b) it would have varied the decision if the rejected evidence had been received

There was oral evidence to prove the injuries.

The other point argued for the appellant is that the lower court never considered the defenses the appellant raised in the defense. In Makonyola v Republic Criminal appeal number 13 of 2003, unreported, this Court said:

“A trial court must, however, be evenhanded in treating not only the defense evidence but the defenses the defendant raises. Failure to consider a possible defense is fatal to a conviction.”

The court below, on close reading of the judgments, considered the appellant’s evidence and defenses the evidence raised. The lower court, rejecting the appellant’s version of

events, thought, correctly on the evidence, that the defenses were unavailable to the appellant. The only defense the defendant's evidence disclosed was self defense, a defense only available to unlawful wounding. That defense collapsed with the lower court's rejection of the defendant's evidence. The appeals against conviction are, therefore, dismissed.

The appeals against sentence must, however, succeed. Ms Kalaile, Senior State advocate argues that, on the facts, the individual sentences are correct. She contends that the injuries in this matter are more pronounced than those in Likogwa v Republic Criminal Appeal case number 15 of 1997, unreported, and Banda v Republic Criminal Appeal case number 134 of 1996, unreported. Mr. Masiku thinks otherwise, relying, as he does, on Republic v Siyambiri Confirmation case number 375 of 1993, unreported, and Republic v Chiwoza Confirmation case number 958 of 1993, unreported, where this Court approved sentences of one year imprisonment. The cases scarcely provide a guideline. Definitely, a pattern of sentencing can be had from just a few cases. When citing previous sentences to influence a sentence in a particular case, a sentencing court draws much help from a previous decision proffering a guideline or an approach. Counsel may also refer to number of cases establishing a pattern. The cases cited are individuated and, as the disparity of the sentences demonstrates, do not proffer an approach. On the facts of this particular Mr. Masiku is right that the sentences are manifestly excessive.

Ms Kalaile, however, is right that, apart from the serious injuries the victims suffered, the sentence should be sterner because the appellant, albeit offending for the first time, went, in a short time, on a spree committing serious violent crimes. I cannot agree more. Where an offender commits several offences, the sentencing court should enhance the individual sentences to reflect that more crimes were committed if only to avoid the criticism from offenders committing fewer offences, particularly where the court orders the sentences to run concurrently, that the court treats offenders with less offences in the same way as those with more. These aspects can be addressed by ordering the sentences to run consecutively. The approach of the courts, sanctioned by the Supreme Court of Appeal in Kamil v Republic [1973-74] 7 M.L.R. 169 and this Court in Kumwenda v Republic [1993] 16 (1) M.L.R. 233, is to order concurrent sentences where the defendant, like here, commits a series of offences in quick succession. I find no reason why in this matter the sentences should not be ordered to run concurrently. I reduce the sentences in criminal case number 179 of 2002 to two years and half a year. I reduce the sentences in criminal case number 180 of 2002 to three years and one year. The sentences are to run concurrently. To that extent alone the appeal succeeds.

Made in open court this 28th Day of May 2003.

D F Mwaungulu

JUDGE