

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL APPEAL NO. 34 OF 2002**

**WILSON MANGWIRO**

**VERSUS**

**THE STATE**

From the Second Grade Magistrate's Court Sitting at Mulanje  
Being Criminal Cause No. 71 of 2002

**CORAM: THE HON. MR JUSTICE F.E. KAPANDA**

Mr Chinangwa, of Counsel for the State

Mr Msiska, of Counsel for the Appellant

Mr Chisi, Official Interpreter/Recording Officer

Date of hearing: 11th April 2003

Date of judgment: 11th April 2003

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**Kapanda, J**

**REASONS FOR JUDGMENT**

**Introduction**

The appellant, Wilson Mangwiro, appealed against the conviction that was entered against him. He also appealed against the sentence imposed on him by the court below. This court dismissed his appeals on 11th April 2003. We promised to give our reasons for dismissing the appeal in a written decision. This judgment is now being delivered so that the full reasons for refusing the appeal should be given.

In the court below the State had preferred two counts of arson against the appellant. He pleaded not guilty to the allegations made against him. Following his plea of not guilty the State called witnesses to prove the case against him.

At the closure of the prosecution's case the court found that the appellant had the two cases of arson to answer. The appellant chose to exercise his constitutional right and remained silent. He elected not to testify in his defence. Further, the appellant opted not to call any witnesses to testify on his behalf.

The court found him guilty of the offences of arson and convicted him accordingly. He was then sentenced to three(3) years imprisonment on both counts.

### **The appeal**

As mentioned earlier, the appellant is dissatisfied with the decision of the court below. Hence, he appealed against both the conviction and sentence. To this end he filed with the court some grounds of appeal. We do not intend to set out in full the said grounds of appeal but we will only set a sketch of same.

In a nutshell, the appellant criticises the court in the way it handled the evidence that was offered by the State. It is his

argument that the conviction cannot be sustained on the totality of the evidence that was adduced by the State.

The appellant further accused the court below of not taking into account his defence of automatism that was raised in his caution statement tendered in court by the State. Moreover, the appellant attacks the court below for finding him guilty albeit the State failed to call material witnesses. The appellant further alleges that there were material contradictions in the testimony of the witnesses thereby rendering his conviction a miscarriage of justice.

The petitioner is also of the view that the sentences meted out on him are manifestly excessive.

### **Issues arising in this appeal**

From the grounds of appeal set out in the petition of appeal the following are the issues that must be decided by this court:-

- (a) Whether or not there was sufficient evidence to support the convictions;
- (b) Whether or not the court failed to recognise the defence of automatism;
- (c) Whether or not the court refused to allow the appellant to call witnesses;
- (d) Whether or not the court failed to adequately explain to the

appellant the purpose of the right to remain silent as enshrined in the constitution;

- (e) Whether or not there were inadequate investigations by the police;
- (f) Whether or not the State failed to call material witnesses;
- (g) Whether or not the prosecution failed to establish the value of the property that was destroyed in the houses of the two complainants;
- (h) Whether or not the sentence that was imposed on the appellant is manifestly excessive in the circumstances of this case and those of the appellant.

The issues stated above can only be meaningfully answered by first revisiting the facts of the case as established by the evidence on record.

### **Fact of the case**

It is now necessary that we set out the facts of this case. The said facts, as gathered from the testimony of the witnesses, are as follows:-

During the night of 23rd July 2002 the appellant went to the houses of the complainants and threatened them that he was going to set their houses on fire. The houses were indeed set on fire and property valued at MK7,820.00 was destroyed.

Naturally, the appellant was suspected of having been the culprit. He was arrested and later taken to police. On being cautioned, the appellant admitted to have set the two houses on fire. He said that it was in revenge for what the son of one of the complainants allegedly did in assaulting him. The appellant did not retract this confession.

### **Consideration of the grounds of appeal**

Having given the summary of the facts of the case we will now, without delay, proceed to consider the questions for determination in this appeal.

### **Defence of automatism**

We find that the court did not err in not taking into account the alleged defence of automatism. This defence can only be successfully raised where the person pleading it demonstrates to the court that he/she was in a state of unconsciousness. In the instant case the evidence does not support the appellant's contention that he was unconscious at the time he set the two houses on fire. If anything the record shows that he was drunk at the time he torched the two houses. Now, drunkenness which was self induced cannot be a defence to the crimes that he committed.

### **Alleged contradiction in the testimony of the witnesses**

We did not see the contradiction counsel for the appellant was alluding to in his argument. What we know is that the testimony of the witnesses was in many material respects complimentary. Indeed, the totality of the evidence on record is that the appellant was the person who set the two houses on fire. It is also important to remember that the appellant admitted that he set the two houses on fire. Consequently, there could have been no miscarriage of justice on the bases of the supposed contradiction.

### **Failure to call material witnesses and inadequacy of investigations**

The allegations that the State failed to call material witnesses and that the police investigations were inadequate are without merit. We say this in view of the know fact that appellant admitted setting the two houses on fire. In point of fact there was adequate and sufficient evidence on which to charge the appellant with the two offences of arson. There was nothing to be investigated further when the appellant had confessed to setting the two houses on fire.

### **Refusal by the court to allow the appellant to call witnesses and explanation on the right to remain silent**

The record does not support the contention by the appellant that the court refused him the opportunity to call

witnesses. As a matter of fact, our reading of the record has revealed that the appellant elected not to testify in his defence as well as not to call witnesses to testify on his behalf.

Further, the record shows that at the closure of the prosecution's case the magistrate explained to the appellant that he had a right to remain silent. Furthermore, the court informed the appellant that he was free to call witnesses to testify on his behalf. The appellant chose to remain silent and not call witness. The court cannot be blamed for the choices that the appellant made.

The short of it is that the magistrate did not err in any way. The appellant, upon being advised that he had a right to remain silent and call witnesses, opted to remain silent and not to call witnesses.

### **Value of property**

Just like the other grounds of appeal this ground of appeal is without merit. There was evidence offered by the complainants as regards the value of the property that was destroyed by the fire. The appellant did not challenge the testimony of the complainants in this regard.

### **Sentence**

We reject the appellant's contention that a sentence of

three(3) years is manifestly excessive in view of the fact that the offence of arson carries with it a maximum sentence of life. There is no doubt in our mind that the appellant deserved an immediate custodial sentence. We say this because we are alive to the fact that in one of the houses there were people actually sleeping. Further, there is evidence showing that the appellant premeditated to commit these offence. It is well to remember that the appellant had earlier in the day threatened to set the houses of the complainant on fire.

A sentence of three(3) years for each of the counts does not appeal to us to be excessive. The appeal against sentence therefore fails.

### **Conclusion**

It is because of the reasons given above that the appeal against both conviction and sentence failed.

**Made** in open Court this 11th day of April 2003 at the Principal Registry, Blantyre.

F.E. Kapanda

**JUDGE**

