IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL CAUSE NO. 71 OF 2007

BETWEEN

JOSEPH NJOBVUYALEMA …………………………………………………………… APPELLANT

AND

THE REPUBLIC ……………………………………………………………………….. RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Mvalo, Counsel for the Applicant

: Mr. Mulinde, Counsel for the Respondent

: Ms Mthunzi, Court Reporter

: Mr. Kaferaanthu – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is an appeal against the judgment of the Senior Resident Magistrate sitting at Lilongwe convicting the Appellant of assault occasioning actual bodily harm contrary to Section 254 of the Penal Code and sentencing him to 3 months imprisonment suspended for 12 months and a further order to pay K20,000.00 compensation to the victim within 14 days. There is a challenge to the appeal.

The charge particularized that the Appellant on the 9th day of February 2007 at around 10.00 hours at Blantyre Newspapers Offices in Area 4 in the City of Lilongwe unlawfully assaulted Dickson Kashoti occasioning him actual bodily harm. The appellant pleaded not guilty to the charge. He was found guilty and convicted after full trial and was sentenced as stated above. This was a 2007 case. Judgment was delivered on 1st August, 2007 and notice of appeal was filed on 8th August, 2007. No grounds of appeal were filed as of 21st August, 2008 and the Respondent took out summons to dismiss notice of appeal returnable on 17th September, 2008. On 5th September, 2008 the Appellant filed grounds of appeal and as affidavit in opposition to summons to dismiss notice of appeal. On the return date of the summons the Respondent failed to appear and the summons was dismissed for want of prosecution. On 18th September, 2008 the Respondent filed summons to restore application. It was restored on 28th January, 2009.

Meanwhile the date for hearing the appeal was fixed by the Registrar on 15th April, 2009.

The grounds of appeal were as follows:

1. *That the finding of the court below, which resulted in the Appellant's conviction, was against the weight of evidence.*

2. *That it was unsafe and unproper for the learned magistrate to convict the Appellant instead of resolving in his favour the doubt created by the inconsistency in the prosecution evidence.*

3. *That the learned magistrate erred in law in admitting the medical report in evidence when the provisions of Section 180 (1) of the Criminal Procedure and Evidence Code as read with Section 180 (3) thereof were not complied with.*

As of the date of filing these grounds the court record had not been made available to the Appellant more than a year after the judgment was delivered. The Appellant therefore prayed for leave to file additional grounds of appeal upon sight of the court record.

In arguing ground 1 of the appeal counsel said that there were serious inconsistencies in the evidence of the prosecution witness. While PW 1 said that the Appellant punched him three times in his office in the presence of his workmates, PW 2, Debora Nyangulu, PW 3, Maxwell Ngambi, and a Mr. Jacob Nankhonya, PW 2 said although she saw the Appellant raise his hand, she did not see where it landed and she had no evidence of what caused injury to PW 1's eye. This contradicted the evidence of PW 1 that Appellant assaulted him in the presence of and in full view of PW 2. The evidence of PW 3 was that there was no swelling on PW 1's eye or face and there was no bleeding or broken shin. This contradicted the evidence of PW 5, Woman Detective Inspector Banda, who said PW 1's eye was swollen.

Again PW 4, Rephalia Chibwe, an expert witness who was a Clinical Superintendent at Kamuzu Central Hospital examined PW 1's eye and found both

the lower and upper lids normal. The Iris he found to be normal, intact and with no injury. He also told the court that a fist cannot enter the eye although something might have entered the eye. PW 4 frequently described the injury as soft tissue injury, quite minor and whose cause he did not know.

Counsel contrasted the inconsistent evidence of the prosecution with what he described as solid and consistent evidence of the Appellant. According to the Appellant's evidence, he did visit the Daily Times Newspapers Offices on the material day in his capacity as Chairman of the Public Appointments Committee of the National Assembly, to deliver a Press Release for publication. Thereat he met PW 1 whom he asked about an article he wrote in the Daily Times of the previous day. PW 1 apologized for having reported that the Appellant had been seen at Lilongwe Police Station over his brother's arrest. PW 1 said he would report to his editor to issue a correction in the next day's issue of the newspaper. PW 1 having so apologized the Appellant had no reason to assault PW 1. He denied punching PW 1, saying it would have been abnormal for him to do so when PW 1 had apologized and promised to issue a correction in the newspaper. Counsel submitted that on the totality of all the evidence the scales tilt more in favour of the Appellant. Out of six witnesses who testified including the Appellant, three were in favour of the Appellant being PW 2, PW 4 and the Appellant himself while three were in favour of the Respondent being PW 1, PW 3 and PW 5. This split of witnesses should have resulted in a finding of not guilty.

In arguing ground two of the appeal counsel said that in view of the serious inconsistences or serious contradictions in the evidence of the prosecution, the

prosecution failed to discharge the burden of proof to the requisite standards. Any doubt should have been resolved in favour of the appellant. The evidence of PW 2 saying she did not see where the hand of the Appellant landed should be taken to mean that she did not see the Appellant punch PW 1. The evidence of PW 4 who examined PW 1 should be interpreted to mean that the eye injury is inconsistent with a fist punch as a fist cannot enter an eye. It is an injury not caused by the *Appellant*. As in _Kafwa v Rep_ *14 MLR 138* contradictory evidence by witnesses for prosecution must mean that doubt raised by it should be resolved in favour of the accused. Again the cases of _Idana v Rep_ *3 ALR (Mal) 59 and* _Rep v Msosa_ *16(2) MLR 734* state at the end of a trial the judge must look to and subject the whole evidence to scrutiny to see if the important elements of the offence have been proved beyond reasonable doubt. If, as in _Gondwe v Rep_ *6 ALR (Mal) 33*, the accused person offers an explanation for his behavior which if true would establish his innocence, the court should ask itself if it might reasonably be true. If it might be true, the prosecution would have failed to establish its case beyond reasonable doubt. Counsel also cited the case of _Abdul Hassani v Rep_ *Criminal Appeal No. 40 of 1989* and the case of _Richard Banda v Rep_ *Criminal Appeal No. 32 of 1990*. In the former case Kalaile, J. as he then was, quashed a conviction for common assault on the ground that the assault was not proven although the complainant had a swollen wrist which he alleged to have been as a result of the assault. The same could well have been the result of the complainant banging his hand against the body work of the car.

In _Richard Banda v Rep_ *(Supra)*, Kalaile, J. as he then was, quashed the Appellant's conviction for assault occasioning actual bodily harm on the ground that the

evidence of prosecution witnesses was conflicting and thereby failed to prove the prosecution case to the requisite standard of proof beyond reasonable doubt. Counsel therefore argues that in the present case the prosecution failed to prove the case beyond reasonable doubt.

On the third ground it is argued that the court wrongfully admitted in evidence the medical report which was Exhibit P 1. The prosecution failed to comply with the provisions of Section 180(3) of the Criminal Procedure and Evidence Code on the pre-requisites to be satisfied before any report of an expert may be admitted in evidence. Section 180 (3) of the Criminal Procedure & Evidence Code makes any report of an expert inadmissible in evidence if the safeguards mentioned therein are not satisfied. The requirements are that the party against whom the report is to be produced must consent to the production of the report, and the party must be served with a copy of the report and the party must be given notice of intention of the prosecution to produce the report. The case of *Livingstone Nkhata and Frank Yiwombe v Rep* *Criminal Appeal No. 29 of 1993 (Lilongwe) (Unreported)* was cited in support. It was argued that in the present case the requirements of Section 180 (3) of Criminal Procedure & Evidence Code were not complied with and the conviction ought to be quashed. The Appellant never consented to the production of the medical report, nor was there notice of intention by the prosecution to tender the medical report in evidence served on the Appellant.

I have examined the skeletal arguments by the State. Most of the skeletal arguments are devoted to the requirements of Section 180 (1) and Section 180 (3)

of the Criminal Procedure & Evidence Code. As to grounds one and two of appeal the State argues that the prosecution proved beyond reasonable doubt that the Appellant intentionally and recklessly caused the complainant to apprehend immediate infliction of unlawful force and that the prosecution proved beyond reasonable doubt that as a result of the assault the complainant occasioned actual bodily harm. As to the third ground the State argue that the court properly directed itself to the provisions of Section 180 (1) as read with Section 180 (3) of the Criminal Procedure & Evidence Code in admitting the report. The State quoted in extensio the judgment in *Rep v Zobvuta* *1994 MLR 317* where it discusses the applicability of Section 180 of the Criminal Procedure & Evidence Code. That case also refers to the case of *Jafuli v Rep* *1978-80 ALR (Mal) 351 and* *Mapwesera va Rep* *1984-86 11 MLR 190.* The State argued that the requirements in Section 180 (3) Criminal Procedure & Evidence Code operate in the alternative and the Appellant had not indicated specifically which provision Section 180 of Criminal Procedure & Evidence Code was not adhered to. The fact that the Appellant was shown the medical report at police and he signed it and that the report had been served on the Appellant more than seven days before the date of its being tendered means that the provision had been complied with. The Appellant never served any notice as to his rejection of it being tendered.

This being an appeal from the subordinate court to this court, it is by way of rehearing. This means that this court will subject the evidence to fresh scrutiny and is free to make its own findings which may not necessarily correspond with the findings of the lower court. This court will not be constrained to overturn any findings of the lower court found not to be supported by the evidence. I have

subjected to the evidence on record to fresh and careful scrutiny. I have also read the judgment of the lower court. It is very clear on the record that the trial was tainted with political overtones, with accusations that the trial was politically motivated as the media was being used to destroy the Appellant's political career. In this judgment I will steer clear of such political overtones and focus on the facts and the applicable law. I will examine the grounds of appeal on the basis of the facts. This appeal will fall or succeed only if the grounds of appeal or any of them is made out provided that it will be sufficient if a reasonable doubt is raised on my mind regarding the guilt of the Appellant for the appeal to succeed.

As to the first ground of appeal the Appellant highlighted inconsistencies in the evidence of the prosecution. Indeed the lower court did observe some inconsistencies in the evidence of the prosecution. However the lower court minimized the importance of some such inconsistencies. At page 36 of its judgment the lower court observed as follows:

"Although there are incongruities as to what time the assault occurred, with the time range being over 2 hours, and the time the complainant went to hospital, it does not change the fact that the assault took place. In short, capitalizing on incongruities of the time does not put reasonable doubt to the case for the prosecution."

This observation by the lower court would certainly not be true if the time and factual differences are huge. I have read the entire record with utmost care. It is

clear to me that PW 1 was not consistent in his evidence. At page 7 of the handwritten record PW 1 said:

"He sat to my left, he rose and … me and landed right fist on my eye. Then he whipped me twice with the newspaper."

Yet at page 16 during re-examination he said *"I was beaten 3 punches and 3 times with a newspaper"*

The question then is how many times, if at all, was PW 1 whipped with a newspaper. PW 1 gave a statement to police at the time he made the report and before he was sent to hospital. In that statement he told the police as at page 12 of the handwritten record that:

> *"Yes in the statement I said he slapped me."*

A slap and a punch cannot mean the same thing. Although he said that he did not include the injury in the statement because he thought he would say it at hospital, it becomes difficult to accept that PW 1 could choose not to report about an injury to police. Instead report only of a slap. PW 1 also said that he could not read the report but the doctor told him that he had a fractured membrane yet at page 16 he concedes that the report talks of the membrane being lightly bruised. Again at page 7 of the handwritten record PW 1 said:

> *"He whipped me with the paper on the head."*

This statement tends to be consistent with the statement PW 1 made that he was seated while the Appellant stood. It seems even the punching should also have been on the head. Indeed if the evidence of PW 2, Deborah Nyangulu, is anything to go by that the Appellant lifted his hand three times. It must be that the hitting would have been on the head for the Appellant was standing while PW 1 was seated. PW 1 said at page 11 that:

> *"Yes the time I was punched I was seated on a chair."*

It is also interesting to imagine how three blows, not one, not two, but three, could be administered with pin point accuracy to hit the same eye spot, and violently so, only to result in light bruises.

PW 2 stated in her evidence stated that when the Appellant arrived at their office he spoke to her in a normal way. He asked after PW 1 who had previously written a story making certain imputations about him. When he was told that PW 1 would be arriving at the office shortly he began to speak in unfriendly manner, saying that the article was unprofessionally done. The appellant was raising his voice although he was seated. However when PW 1 sat down less than a metre from the Appellant, it seems at that point the Appellant had returned to a normal position, before he turned violent against PW 1 even though PW 1 had said that he understood the Appellant's complaint and would inform the editor about it. According to her testimony at page 21. *"The accused then rose from his char to where PW 1 sat. I saw him raise his hand and hit Kashoti. He hit PW 1 three*

times. I never saw where exactly he hit." Down the page she said *"I saw the accused raise his hand. Could be in the face, but in that direction. Mr. Kashoti was just calm. The blows were delivered fast. They were in quick succession, rapidly. They were very close to each other. The accused moved from his seat to where Kashoti sat.*"

It is clear from the evidence of PW 2 that at the time the Appellant stood and raised his hand PW 1 remained seated. It is hard to imagine that a raised hand of a person standing would land on the face of another who is sitting, unless the one sitting is looking up. PW 2 herself was not sure where the hand landed and simply said *"Could be in the face, but in that direction.*" That statement shows doubt on the part of PW 2 whether the punch by the Appellant landed on the face of PW 1. The Appellant who had sat less than a meter away from PW 1 is said to have moved closer, although it is not clear how closer. PW 2 was also very close when the alleged incident took place, about two metres away in front of her and yet she could not fully perceive the critical event of an assault. PW 2 could not say whether PW 1 was hit in the eye or on the cheek or on the head (See page 25 of the court record). Indeed she said that *"No, I do not know what caused injury to Kashoti's eye*" and that *"No I have no evidence on the cause of injury to Kashoti.*"

Although during re-examination she said one can raise the hand in as many directions, one would imagine that the direction of raising remains upwards and not in any other direct. I do not imagine that a thing can be raised sideways. She remembered telling Kashoti that the red eye was because of the beating that he

wanted to cry. This she said despite saying that she had no evidence on the cause of injury to PW 1's eye.

The evidence of PW 3 was that he found the Appellant in Blantyre Newspapers Newsroom on the material morning. PW 1 and the Appellant were discussing a previous article. All of a sudden PW 3 saw the Appellant punching PW 1 on the face, on the right hand side of the face, particularly on the eye. The Appellant used a folded hand and punched PW 1 three times. PW 1 remained seated as the Appellant punched him. It was PW 3 who stopped the fight but according to the evidence at page 31 he said:

> *"I do not recall the newspaper being used to hit PW 1."*

Surely if a newspaper was used to hit Pw 1 three times, as was alleged by the other witnesses, PW 3 should have recalled. Thus there is inconsistency in the evidence of the prosecution on this point. Having said PW 1 was punched on the face, PW 3 later changed his statement at page 38 of the handwritten record and said:

> *"Yes the accused punched the said PW 1 and it happened at BNL editorial on the right hand side of head particularly on the head."*

Thus having first said PW 1 was punched on the face and on the eye, PW 3 later said the Appellant punched PW 1 on the head. Surely to punch on the head does

not mean the same thing as to punch on the face. Indeed at the same page 38 PW 3 said:

> *"He did not complain that the eye was troubling him other than from the assault."*

Yet earlier PW 3 had said:

> *"After the assault, Kashoti's 2 eyes never looked the same.*
> *… My understanding of that day was that the red eye was caused because of the incident."*

There were inconsistencies in the evidence of PW 3 and between the evidence of Pw 3 and the other prosecution witnesses.

PW 4 was the deputy head of the eye department at Kamuzu Central Hospital. He is a Clinical Superintendent. When PW 1 was referred to him on an allegation of assault affecting the right eye he made a thorough examination of the eye. He examined each and every structure of the eye and the lid. He found both the lower and upper lid normal, the conjunctiva normal, the cornea normal, the iris was normal and intact, the pupil was normal. The only part he found to be either bruised or red was the membrane. In cross-examination however he said at page 51 that:

> *"Yes I found the lower and upper lid damaged."*

This despite his earlier evidence at page 41 of the record that:

> *"After looking at it thoroughly I discovered that both lower and upper lid were normal."*

This is in complete contradiction of his own evidence. According to PW 4 if someone hits another on the eye, what will be damaged will be the lids and the part of the conjunctiva. Yet his thorough examination revealed that both the upper and the lower lids were normal, just as the conjunctiva was normal. PW 4 said that the soft tissue injury to the eye was consistent with something having entered the eye and a fist having a surface could not enter the eye (See page 52 of the handwritten court record). He said that apart from the membrane he saw nothing else damaged and he did not know what damaged the membrane. He described the soft tissue injury he treated PW 1 for as *"quite minor."* What is clear from PW 4's evidence despite inconsistencies is that he ruled out any suggestion that the injury to the eye could have been caused by fist. This despite the evidence of Pw 1 and PW 3 that the eye was punched three times by the Appellant.

Pw 5 Detective Inspector Banda said that when PW 1 reported to her about an assault on him by the Appellant PW 1's eye was red with blood clot. Yet all the other four prosecution witnesses said the eye never bled. PW 5 sent PW 1 to Kamuzu Central Hospital for examination and treatment. According to PW 5 when PW 1 appeared to her at 10.00 am to report he had a swollen right eye yet PW 4

found no swelling and she conceded that the doctor who examined PW 1 found no swelling on the right eye. (See page 58 of the court record). In arguing against the first ground of appeal the State argued that in its reading of the court record from the lower court it saw no inconsistencies in the prosecution evidence as alleged by the Appellant. The State argued that when the evidence is considered as a whole it will be observed that each witness said what they actually saw. This, according to the State, should not be viewed as inconsistency but progression of the evidence for the prosecution. PW 2 did not see the part hit but PW 3 did, so the State argued. Regarding the evidence of PW 4 relating to the conjunctiva, the State argued that it was immaterial whether the punch caused a bruise on the conjunctiva or not. The State relied on the English case of R (T) v DPP *2003 Criminal Law Review 622* that the extent of the injury is immaterial such that bruises or minor cuts may satisfy the test of causing actual bodily harm.

I must say with respect that inconsistencies in the prosecution's case are not in short supply. I have demonstrated through detailed scrutiny of the evidence of each witness for the prosecution that a witness would not only contradict himself or herself, but would also contradict the other prosecution witness. Again reliance on R (T) v DPP *2003 Criminal Law Review 622* is misplaced because the inconsistencies in fact raise the question whether the bruised eye membrane was caused by the Appellant or not. The medical expert having ruled out that the bruise or red eye would have been caused by a fist, but rather something having entered the eye, puts into question whether the appellant's fist, if at all, caused the said "*quite minor*" injury. That can not be a small matter to be overlooked merely on the basis that the prosecution evidence demonstrated progression of

evidence. Contradictory statements discredit a witness *(See R v Richard 2 ALR (Mal) 1; Karima v Rep 4 ALR (Mal) 601; Rep v Chanache 7 MLR 385)*. Also see *Nkata v Rep 4 ALR 52.*

In *Kagwa v Rep 14 MLR 138* the law was restated that where prosecution witnesses gave contrary evidence on a particular issue, any doubt raised by such contradiction must be resolved in favour of the accused. It is an essential element of the offence of assault occasioning actual bodily harm that the alleged assault must have occasioned actual bodily harm. If there is doubt that actual bodily harm was as a result of the alleged offence such doubt will be resolved in favour of the accused.

I must now turn to the second ground of appeal that it was unsafe and improper for the learned magistrate to convict the Appellant instead of resolving in his favour the doubt created by the inconsistency in the prosecution evidence. It is trite that the burden of proof in a criminal trial rests on the prosecution who must discharge that burden on a standard of beyond reasonable doubt. The learned magistrate was alive to this principle of law and he referred to it at various points in his judgment. Section 254 of the Penal Code provides that:

> *"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor, and shall be liable to imprisonment for five years with or without corporal punishment."*

In order for the offence to be established the State had to prove beyond reasonable doubt that:

1. The Appellant assaulted PW 1 and
2. That the assault occasioned actual bodily harm.

Both elements must be established beyond reasonable doubt if the charge is to be proved. It will not be sufficient to prove just one of the elements. As both counsel rightly observed the second ground of appeal is closely linked to the first. I have highlighted the various inconsistencies and contradictions in the evidence of the prosecution witnesses when I dealt with the first ground of appeal. PW 1 himself reported to police that he had been slapped although the eye witnesses said he had three punches. The eye witnesses were present in the same room and very close to each other when the alleged incident took place. PW 3 never recalled that newspaper was used to hit PW 1 on three occasions. In other words some witnesses spoke of six hits while PW 3 spoke of three punches. PW 4 who examined the eye ruled out that a fist could have caused bruises to the membrane which he described as *"quite minor"* tissue injury. According to PW 4 such injury would only have been caused by something entering the eye and a fist would not enter an eye. It is unimaginable that three violent fists hitting one eye is quick succession and with pin point accuracy would result in *"quite minor"* injury in the form of a bruise inside the eye. Indeed it is clear that the learned magistrate was in doubt as to whether the attack was through blows or slaps. Nonetheless he concluded at page 35 of the typed judgment that:

"It does not matter whether the attaché was through blows or slaps."

On the contrary it did matter to establish how the attack was and whether it was that attack which resulted in actual bodily harm. The learned magistrate fell into serious error in concluding as he did. The learned magistrate also made some startling observations. At page 34 of the typed judgment he records:

"He there and then punched the complainant three times to the face without necessarily directing the assault on the eye."

On the next page the learned magistrate records that the complainant's eye then turned red and PW 2 joked that the complainant wanted to cry as a result of the assault. Surely if the assault and the injury were a serious matter as is being portrayed by some of the evidence it could not have been a joking matter. This notwithstanding that the medical expert considered the bruise as *"quite minor"* and not caused by a fist but by something entering the eye. It is also interesting that at page 28 of the typed judgment the lower court said:

"I suppose that when PW 1 got to hospital he met two medical experts per the evidence before me. At first he met Dr. Owen Musopole who conducted the history on the said PW 1."

To begin with it is not for a magistrate to suppose the evidence in a matter. It is not for a magistrate to fill up gaps in the prosecution evidence so as to improve the prosecution case. At page 29 of the Judgment the learned magistrate made

an observation that PW 4 was acquainted with the handwriting Dr. Musopole when none of the witnesses raised the point or brought the question of handwriting in issue. The significance of the observation by the magistrate is reflected in his later finding that:

> *"Therefore the statement produced in court by PW 4 that he knew of the history to be done by Dr. Musopole is a relevant fact and therefore could completely state that the first page was written by Dr. Musopole."*

Having made this finding the court observed that "Interestingly, PW 4 did not testify on the history." One then wonders why in the first place the magistrate found the history to be a relevant fact not having been testified to by either Dr. Musopole or PW 4.

Now this court is aware that a court of first instance has the advantage of observing the witnesses as they testified and to form its opinion on the truthfulness of the witnesses based on their demeanour as did the learned magistrate in this case.

I am also aware that the fact that a witness who is untruthful on one point is not to be disbelieved on everything the witness says. A witness may be disbelieved on one point and yet believed on another point. (See *Purmessur v Rep 16 (1) ALR 458; Mahomed Nasim Sirdar v Rep 5 ALR 212)*. In the present case however there are material contradictions in the prosecution evidence which cannot be cured

merely by alluding to the demenour of the witnesses. Certain critical questions relating to the alleged assault remain unanswered even after the close of the prosecution case. Was the complainant hit on the right eye, on the face or on the head? Was it a fist or a slap used? What must have entered the eye to cause the injury in the light of the medical experts evidence that it could not have been caused by a fist? Can it be said with certainty that the alleged injury to the complainant's eye was caused by the Appellant in the light of the material contradictions in the prosecution evidence?

In *Abdul Hassani v Rep* *Criminal Appeal No. 40 of 1989*, Kalaile, J. as he then was, quashed a conviction of common assault even though the complainant had said that he had a swollen wrist as a result of being hit with a blunt instrument being a metal bar. The court could not presuppose evidence to establish the assault. The appeal court disagreed with the trial magistrate's finding that a blunt or metal object was used by the Appellant in assaulting the complainant. The conviction was quashed because the offence was not established beyond reasonable doubt.

In *Richard Banda v Rep.* *Criminal Appeal No. 32 of 1990*, Kalaile, J. as he then was, quashed a conviction for assault occasioning for assault occasioning actual bodily harm because of material contradictions in the prosecution evidence resulting in the offence not being proved beyond reasonable doubt. The State sought to distinguish the present case from that of *Richard Banda v Rep.* *(Supra)* on the ground that the evidence in that case was hearsay while the present case is not based on hearsay. While it is true that there were four eye witnesses in the present case, three of whom testified, both cases refer to contradictions in

evidence of prosecution witnesses. At page 5 of the typed judgment in *Richard Banda v Rep.*, Kalaile, J. said:

> *"Moreover, there are the conflicts which counsel for the Appellant made reference to us between the testimony of the complainant and his younger brother."*

The principle remains that contradictions in the evidence of witness lower the credibility of the evidence and the witnesses themselves. Any doubt resulting from the contradiction must be resolved in favour of the accused. The material contradictions in the present case create reasonable doubt about the state's case which must be resolved in favour of the Appellant.

I now turn to the third and final ground of appeal. It relates to the admissibility of report of medical expert under Section 180 of the Criminal Procedure and Evidence Code. The Appellant's contention is that the medical report tendered in evidence was not properly received by the court, in contravention of Section 180 of the Criminal Procedure and Evidence Code. I agree that Section 180 of the CP & EC constitutes an exception to the hearsay rule. That is to say a report of an expert may be admissible on the mere production of it by any party to proceedings and be admissible in evidence therein to prove the facts and opinions of the expert if one of the conditions specified in Section 180 (3) is satisfied. To my mind it cannot be hearsay if the maker of the document testifies in court on the contents of the document he or she made. This is why Section 180 (1) speaks of proving the facts and opinions of the expert *"on the mere production"* of the

report of the expert. I am aware of the principle of law in <u>*Hassan v Rep.*</u> *(1990) 13 MLR 151* where Kalaile, J. as he then was, stated that a report by a medical expert is of little weight when its maker is not called to testify. That principle however must be confined to the circumstances of that particular case where the Appellant had refused to sign the medical report while in custody. I doubt if where the maker of a medical report testifies to it in person, the report would still be categorized as hearsay evidence, requiring the aid of Section 180 of CP & EC as an exception to the rule against hearsay. I have addressed my mind to the long line of case authorities on the applicability of Section 180 of CP & EC. These include the cases of <u>*Jafuli v Rep.*</u> *[1978-80] 9 MLR 351* and <u>*Mapwesa v Rep.*</u> *11 MLR 190.* In <u>*Livingstone v Rep*</u> *Criminal Appeal No. 29 of 1993 (Unreported)*. Mtambo, J. as he then was made the following pertinent observation:

> *"There is one more comment which I feel impelled to make. It relates to Section 180 (3) of the Criminal Procedure and Evidence Code. That Section makes any report by an expert, such as the medical report in the instant case, inadmissible in evidence if the safeguards contained therein are not satisfied. These are that the other party to the proceedings must consent to the production of the report and that a copy of it should be served on the other party who should be given notice of the intention of the prosecution to produce it. There is nothing on record to show that that section was complied with. The appellants were, therefore, denied the opportunity, in terms of that section, to either object or consent to the reception of*

the medical report. This in appropriate cases would lead to the quashing of conviction.”

This dictum emphasizes the importance of complying with Section 180 (3) of the CP & EC whenever there is mere production of a report of an expert such as a medical report. Failure to comply with Section 180 (3) of CP & EC may in appropriate cases lead to the quashing of a conviction. This would be the case where the evidence when examined as a whole would not support the conviction if the report of the expert improperly tendered is excluded. Section 180 (3) of the CP & EC on conditions for admissibility of the reports of experts provides that:

“The conditions referred to in subsection (1) are –

(a) That the other parties to the proceedings consent; or

(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 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.

The provisions of Section 175 (5) shall apply to service under this Section.”

To my mind the conditions set out above must be read disjunctively in that one or the other need to be satisfied. It is not that both conditions must be satisfied but there is no harm if both are satisfied.

In the case of requirement for consent it will be appreciated that the object of the law is to enable the parties to accept the undisputed evidence without calling the maker of the report mainly because the attendance at trial of experts may not always be procured without such delay or expense as the court may consider unreasonable. Prior to the enactment of Section 180 of the CP & EC in 1969 it was a rule of procedure that an expert should give evidence *Viva voce.* In the case of *Jafuli v Rep 9 MLR 241, High Court*, and *of Jafuli v Rep 9 MLR 351, Malawi Supreme Court of Appeal* it was recognized that the appellant had not been asked by the magistrate court whether he consented to the admission of a medical report or not. It was also recognized that he had not objected when the prosecution had tendered it in evidence and he had stated that a copy had previously been served on him although the report had not been endorsed as required by Section 180 (3) (b) of the Criminal Procedure and Evidence Code. The appeal in that case was based on the premise that;

(a) The medical report should not have been admitted as the magistrate had failed to ascertain whether the appellant consented to its admission as required by Section 180 (3) (a) of the Criminal Procedure and Evidence Code.

(b) The appellant had not been given a copy of the medical report or notice of the prosecution's intention to produce it in evidence and the report had not been endorsed as required by Section 180 (3) (a) of the Criminal Procedure and Evidence Code.

(c) The imposition of the maximum sentence was manifestly excessive, given the accused's previous good character.

The High Court was of the view that despite not complying fully with Section 180 (3) of the Criminal Procedure and Evidence Code there was no miscarriage of justice. According to the High Court, by signing the medical report and by not objecting to its being tendered, the Appellant had consented to its being tendered. The Malawi Supreme Court of Appeal disagreed and held that the medical report should not have been admitted in evidence even though the appellant had not objected as he had not specifically consented to its admission, nor had a copy of the report been served on him as required by Section 180 (3) of the CP & EC. According to the Malawi Supreme Court of Appeal the admissibility of such expert reports was a derogation from the ordinary rules of evidence and the conditions in Section 180 (3) were safeguards both of which were strictly to be observed, particularly in the case of an unrepresented accused. The Malawi Supreme Court of Appeal found that even without the medical report the charge had been proved. It had been proved that the appellant fearing failure in a driving test stabbed the motor examiner several times who was later admitted to hospital. The medical report was given to the complainant upon discharge from hospital.

The State has drawn my attention to *Rep v Zobvuta [1994] MLR 317* which discussed extensively the applicability of S 180 of CP & EC. I must say I have not been able to access the report. The Sate favoured this court with a long quotation from that case dealing with the point. Regarding the issue of consent I can only say that it is a condition for admitting a report of an expert in evidence that there be consent unless the other condition is satisfied. Perhaps it is correct to say that it is requiring too much to say the report must be received first before it is consented to. However it is absolutely important that the consenting party be fully aware of not just the existence of the report but also its contents. Only then would the consent be valid. In the alternative the report must have been served on the accused with an endorsement that it is intended to be produced in evidence. If there is no such endorsement that it is intended to be produced in evidence. If there is no such endorsement then there must be credible evidence to prove that the accused was notified of the intention to produce the report in evidence. It cannot be assumed that by merely serving the report on him, the accused becomes aware of an intention to produce the report in evidence. In the present case the Appellant admitted that he was served with a copy of the report and he endorsed on it:

> *"I have seen it but unable to read the contents."*

Clearly the Appellant was aware of the existence of the medical report but was unaware of its contents. He cannot be said to have consented to it. In fact he objected to its being tendered in evidence. Secondly although the report is signed

it is not endorsed with notice to produce in evidence. Nor is there evidence that such notice was otherwise given. In these circumstances I hold that the provisions of Section 180 (3) of the Criminal Procedure and Evidence Code were not complied with and the lower court erroneously admitted the report in evidence. That report cannot be relied on in this case.

Having earlier observed that there are material contradictions in the prosecution case and having found that these material contradictions create reasonable doubt in the evidence for the prosecution, I find that the conviction herein was unsafe. It must be quashed and sentence set aside. The appeal succeeds.

PRONOUNCED in Open Court this 13th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E