IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 84 OF 2008

BETWEEN

THE STATE

-VS-

MATHEWS NJOLOMOLE
JAMES CHIPANDA

CORAM : HON. JUSTICE MZIKAMANDA

: Unrepresented, Counsel for the Applicant(s)
: Miss K. Jere, Counsel for the Respondent
: Mrs. Mbewe – Court Reporter
: Mr. Gonaulinji – Court Interpreter

JUDGMENT

This is an appeal against the decision of the Principal Resident Magistrate sitting at Lilongwe convicting the Appellants of what was termed armed robbery contrary to Section 301 of the Penal Code and sentencing him to 6 years imprisonment with hard labour.

In this case the Appellant Matthews Njolomole was jointly charged with James Chipanda on an offence termed armed robbery contrary to Section 301 of the Penal Code. It was alleged that the two in the company of unknown persons on or about the 2nd day of November 2007 at Chinsapo 1 in the City of Lilongwe, being

armed with a dangerous or offensive weapon or instrument, namely an AK 47 rifle robbed Mr. Lloyd Banda of a motor vehicle, one cooler box with soft drinks, one hand bag, one nokia cell phone, a driving license and K9,000.00 cash. They pleaded not guilty to the charge. They were nonetheless found guilty after full trial and were convicted. They each were sentenced to six years imprisonment with hard labour.

The evidence of the prosecution opened with the testimony of PW 1 Foti Banda, a Foreman at World Vision. He stated that he lived at Likuni and ran a mini-shop at Chinsapo. On 2nd November 2007 after knocking off from work and after doing other errands he went to pick up his wife from the mini-shop at Chinsapo. When his wife entered the car, a World Vision Land Cruiser, he locked her in. He then went to collect a cooler box. He then saw three people one in red clothes and having a gun on the other side of the vehicle. One wore a blue top like those worn by the police. One grabbed his neck and hit him. He took away his phone and K3,000.00 cash on him. He was told not to shout. He pleaded with them and he heard his wife scream as the robbers struggled with her. Well wishers came to help and he threw the keys to them. Somebody said leave the woman and they pushed his wife down, firing a gun in the process. They drove off and he and his wife were taken home by some well wishers. They then reported the matter to Police and 997 Rapid Response. They were told that three different people had already reported the matter. Because of the car's, robbers tracking device, they could not go very far with the vehicle and they abandoned it at the Secondary School near the grave-yard. The robbers made away with cash, office keys, cellphones, cooler box and driving license.

During cross-examination he said that the incident took place at 7.00 pm. There were lights at the mini-shop. The one who hit him attached from behind.

PW 2 was wife of PW 1. Her evidence was basically a repeat of what PW 1 said K6,000.00 was the money stolen plus US$ 80 worth of Celtel and TNM Units. She identified a defaced cell phone that had been recovered – it was hers. She too like PW 1 could not identify the assailants. She had been in a state of shock.

PW 3 was in Cell phone repair business and resided at Chinsapo. The two accused persons were known to him as business colleagues. He got a cell phone from Chipanda and sold it. Later he learnt that the cell phone was a stolen item. It was the same cell phone that PW 2 identified as her's.

PW 4 was the police investigator assigned to the present case. Following the report of a car jack he visited the scene in Chinsapo. The vehicle was recovered 150 metres from the scene. The attackers were not identified but they managed to trace the stolen telephone. Alexander Demme answered the phone and the police interrogated him. He led to the person who sold it to him. The telephone was traced to Chipanda in Devil's Street in Lilongwe. Chipanda told the police that he got the cell phone from Njolomole. When confronted, Njolomole denied to have given Chipanda the cell phone. The two were jointly charged with the present offence. The police got a print out of the number of the stolen phone being 09458920. Using that print out they were able to trace number 0999923494. Although the sim-card had been changed, Celtel was able to make

recordings on the print out and this helped to trace the phone. The face of the phone had been changed.

PW 5 was Denis having earlier been discharged of the offence. He fixes fridges in Area 22 in the City of Lilongwe. He bought the phone in question from one Thoko Kadzuwa in Devil's Street. Later the police recovered it and he led them to Thoko Kadzuwa. Thoko Kadzuwa led to Chipanda as the one who supplied him with the phone.

The defense story of James Chipanda was that he is a resident of Area 22 and carries on a business of phone accessories in Lilongwe Market. On the material day he was at home chatting with his wife and kids. On 7th December the police called him and asked him where he got the cell phone that he sold to Thoko Kadzuwa from. He said that he got it from Matthews Njolomole. The police later called Njolomole and the two were jointly charged. He knew nothing about the robbery. The phone in court is the same he got from Njolomole. Although Njolomole denied giving him the phone he affirmed that he got it from Njolomole.

Njolomole stated that he is a businessman residing in Chilinde and supplying to Asians goods that he brings from Zimbabwe. On 2nd November, 2007 at 7.00 pn he was at home washing clothes on 12th December the police arrested him in connection with the cell phone in question. He denied knowledge even when he was confronted with Chipanda. Chipanda had said Friday witnessed the transaction but Friday denied when called. He is a friend to Chipanda, having known him for five years although they did not do business together. He denied

the robbery charge. Each accused called one witness to support their testimony. In judgment the lower court dismissed the evidence of the witnesses as a mere sham. The court found that the two co-accused persons were part and parcel of the gang that robbed PW 1 and PW 2 even though the complainants were not able to identify the assailants.

Regarding the Appellants the court said:-

> *"The two accused persons have known each other for five good years. The question of mistaken identity is out of question. Both accused persons are legally represented by the same lawyer and he has led and allowed them to incriminate each other in evidence; ... leading to the actual source of the phone. The court believes that accused persons know that the source of the stolen phone is so sinister such that revealing it will lead to the arrest of the whole gang of robbers that robbed the complainants on 2nd November."*

The last quoted paragraph is the centre of this appeal. The grounds of appeal are that:

1. The lower court erred in law in finding that the fact that co-accused had known the Appellant for 5 good years then what the co-accused said in evidence in court could be believed as the issue of mistaken identity could not arise.

2. The lower court erred in law in finding that since the co-accused and the Appellant were represented by the same lawyer and the lawyer led and allowed them to incriminate each other then the evidence of the co-accused could be believed.

3. The lower court erred in law by finding that since the appellants did not reveal the people behind the robbery then he committed the offence when it was not his burden to do so.

4. The lower court erred in law in requiring the Appellant to prove his innocence when the burden and standard of proof in criminal cases lies on the prosecution.

In arguing the appeal the Appellant also stated that the lower court relied on the prosecution evidence without looking at defense evidence, the court failed to consider the fact that the complainants did not identify him, the lower court failed to see the so many inconsistencies in the evidence of the prosecution, in disregarding the defense story and that the evidence was not sufficient for finding the Appellant guilty in all the circumstances. He also argued that the sentence was manifestly excessive. He said that the lower court saw his truthfulness but still insisted on convicting him. It was wrong for the magistrate to rely on the fact that the co-accused knew each other for five years and to wonder why one lawyer represented both. He said he told the police who the real owner of the goods was and yet they still arrested him. He said that he was surprised that he got similar sentence with Matthews Njolomole who gave him the goods. The 2nd Appellant

argued his case before Kamanga, J. It was argued that the State did not meet the high standard of proof of beyond reasonable doubt to establish the guilt of the 2nd Appellant. It was argued that the lower court relied on the uncorroborated evidence of the co-accused to convict the Appellant. It was argued that it is required that the evidence of an accomplice be corroborated as a matter of practice. If a court is to convict on the uncorroborated evidence of a co-accused but the court must first warn itself of the dangers of convicting on the uncorroborated evidence and secondly should be satisfied beyond reasonable doubt that it can convict on that evidence. It was argued that when the co-accused mentioned the 2nd Appellant the police investigator had to prove it but he did not. There was no identification parade. None of the other items stolen during the robbery were found on the 2nd Appellant.

The State on the other hand argued that there was ample evidence proving the charge against both Appellants. Under section 242 of the Criminal Procedure and Evidence Code an accomplice is a competent witness and a conviction can not set aside merely because it was based on the evidence of an accomplice. According to *R v Rudd 64 TLR 240* the testimony of a co-defendant is admissible as against his co-defendant for the purposes of the case although it needs to be treated with caution if it is uncorroborated (See also *R v Baskerville [1916] 2 K B 658)*.

This is an appeal from the magistrate court. An appeal from a magistrate court to the High Court is by way of rehearing. This entails this court making fresh and detailed scrutiny of the evidence in the matter and making its own findings which may be inconsistent with those of the lower court. In other words this court is

free to make its own orders on the matter. (See *Haclean Chilongo & Another –vs- Rep Criminal Appeal No. 132 of 2008 (LL) (Unreported): Kondwani Justen & Others –vs- Rep Criminal Appeal No. 39 of 2008 (LL) (Unreported)*. I have examined the entire record from the lower court. I must say that I found the record not properly kept in some places. I have found on it no Charge Sheet. The record shows at Page 2 that a new Charge Sheet was introduced on 17th December, 2007. Not even that new Charge Sheet, which apparently had three accused persons, is on file. The record shows that the third accused person was discharged and later turned into a prosecution witness. Then the manner of recording evidence in some places constitutes a departure from the requirements of Section 163 of the Criminal Procedure and Evidence Code which should be in narrative form. A narrative form must be such that it records what the witness says in a manner he or she says it but not in question and answer form. What is recorded must be comprehensible and capable of making clear the flow of the testimony of the witness. It seems that in certain parts of the record the magistrate opted to take the evidence in note form such as on pages 17 to 20 where the record shows:

> *"We got print-out of called number on the stolen line 09458920 It led us to 09923494. Serial number is the same for both lines. Sim-card changed but celtel recorded/traced the phone Demme said he changed face, from blue to current one. I tender print-out evidence Counsel. Witness did not author it.*
>
> **But we will still rely on it so you can cross-examine the witness.*
>
> **Here is phone recovered from Demme Serial number marries with one on print-out.*

C. Statements

Ex P2 & 2(a) – Chipanda

2nd C. Statement – 2(b)

Ex P3 & 3(a) – Njolomole/Mandingo

Phone bought at K4,200

Chipanda – K100 =

Thoko - K200 =

Recovered vehicle is with WVI

26 years with Police.

M/Vehicle Theft Unit – long time 6 years. I recovered phone

Demme is a State witness.

Celtel officers can come to testify.

6 people in the robbery.

Victims say they can not identify assailants.

RXN

Yes, Celtel involved in investigations

Phone led me to arrest and charge the two accused persons.

J Celtel print-out, we would not have identified Demme.

Thoko led us to Chipanda, who led us to Njolomole."

With such notes the reviewing court has to try and figure out what exactly must have been said by the witnesses. Be that as it may the record is sufficiently clear for this court to be able to make its own findings and the inadequacies of the record did not prejudice the Appellants such as to occasion a failure of justice. Magistrates however are advised to ensure that the mode of taking and recording evidence in trials and inquiries is regulated by Part V of the Criminal Procedure and Evidence Code. In particular magistrates are reminded to comply with the provisions of Section 163 of the Criminal Procedure and Evidence Code when taking or recording evidence in inquiries or trials. For every record of trial in the lower court there is the potential of it ending up in the High Court either on review or appeal and it is important that the High Court has a complete and clear record of what transpired in the lower court. More so, bearing in mind that our lower courts do not have court reporters or stenographers.

In the present case the full judgment of the lower court has aided this court in appreciating the evidence that was before the lower court. I must say that there is ample proof that on the material day the complainant and his wife were violently attached by armed robbers who found them at 7.00 pm at their mini-shop at Chinsapo. The complainant and his wife were violently attached and manhandled by a group of armed men who had an AK 47 rifle. Apart from cell phones, cash, cooler box, cell phone Units, the robbers also stole from the complainant his employers' vehicle, land cruiser. Having stolen these items and others the assailants drove off but had to abandon the vehicle about 150 metres away because of its anti-theft devices. There is no doubt that for the complainant and his wife this was a traumatic experience. What was worse was that soon after

robbing them complainants of their properties the robbers fired a short, probably to reinforce fear in the complainants and whoever may have attempted to intervene. As truthful witnesses the complainant and his wife stated that in the circumstances they were not able to identify the assailants that night. The part of an identification parade not having been conducted as raised by the second appellant is irrelevant in those circumstances. An identification parade would not have yielded anything because the complainant did not identify the assailants at the time of the attack. Yet they identified the cell phone recovered as part of the items stolen that night. There is ample evidence connecting the 1st Appellant with the cell phone. The court below was right to reject any explanation given by the 1st Appellant and concluded that he was the one in the company of others who stole the cell phone during the material night from the complainant. His appeal against conviction is without merit. It is dismissed. None of the grounds of the appeal against conviction have been made out and each one of them is dismissed. There was no failure of justice in respect of him.

The 2nd Appellant, Matthews Njolomole was implicated by the 1st Appellant James Chipanda. It has been argued for the 2nd Appellant that the evidence did not prove the case of the 2nd Appellant beyond reasonable doubt and that it lacked corroboration as evidence of an accomplice. I agree that the burden of proving the guilt of an accused person lies with the prosecution who must discharge it beyond reasonable doubt. (See Section 187 (1) of the Criminal Procedure and evidence Code, *Gondwe v Republic 6 ALR (Mal) 33; Chiwaya v Republic 4 ALR (Mal) 64)*. Again the law is clear that an accomplice or a co-accused is a competent witness against an accused person and that where there is a

conviction, the same shall not be set aside merely because it was based on uncorroborated evidence of an accomplice (See Section 242 of the Criminal Procedure and Evidence Code) what this means is that a court may convict and that conviction may be upheld not withstanding that it is based on the uncorroborated evidence of an accomplice. What amounts to corroboration in any particular case will depend upon all the circumstances of the case but it must be coming from an independent source not being the witness whose evidence must be corroborated. In so far as accomplices are concerned corroboration is not required as a matter of law though in practice courts warn themselves of the dangers of relying on uncorroborated testimony of an accomplice. The case of *Devoy v Rep 6 ALR (Mal) 223* considered it most unsafe to convict an accused person on the uncorroborated evidence of an accomplice. However this is not to say a court should never convict an accused as uncorroborated evidence of an accomplice. What is required is for the court to exercise caution before relying on the evidence of an accomplice because of the obvious temptation of an accomplice to taint his evidence to incriminate someone else or to obtain a lighter sentence himself (See *Banda v Rep 4 ALR (Mal) 336)*. Having made due allowance for the accomplices' position at the time of giving his evidence and the motives which he may have for giving false information, the court may be satisfied that the evidence of the accomplice though not corroborated is true and proceed to convict (See *Zgambo v Rep Criminal Appeal, No 30 or 1977; Tinazari v Republic 3 ALR (Mal) 194)*.

The lower court found that the 1st Appellant and the 2nd Appellant in the company of the people committed the robbery in question. The lower court may not have

expressly stated that it warned itself of the dangers of relying on the evidence of an accomplice to convict the 2nd Appellant. However, it is clear that the court made due allowance for the 1st Appellant's position at the time of his evidence and the motive which he may have for giving false information and was clear that it was satisfied that 1st Appellant's evidence though uncorroborated was materially true. Indeed the lower court was able to isolate what evidence of 1st Appellant to accept as true and which one not to accept as true following its own analysis of the evidence. At page 15 of the handwritten judgment the court stated that:

> *"The court believes that (the) accused persons know that the source of the stolen phone is so sinister such that revealing it will lead to the arrest of the whole gang of robbers that robbed the complainants on 2nd November."*

In its analysis of the evidence in defense the lower court observed at page 18 of its judgment that:

> *"Chipanda gave an account of his whereabouts on the material day. The court however finds it to be a concoction of lies because ordinarily, an active person like Chipanda, who is doing business can (not) retire to bed around 7.00 pn, unless he is sick. Njolomole told the court that he was home around 7.00 pm. That account, too, has some gaps."*

The magistrate had the opportunity of seeing the witnesses and the Appellants as they testified. She was entitled to make her own assessment whether to believe their versions of the story. In the event she rejected the defence stories and accepted the prosecution evidence. She then found the Appellants liable to the offence. I am unable to fault the learned magistrate. I have also made my own assessment of the whole evidence on record. I find that although the evidence of the 1st Appellant is not corroborated, it does connect the 2nd defendant to the present offence in material particular such that notwithstanding the absence of warning the 2nd Appellant was properly convicted of the robbery herein.

I must say that reference to the five year relationship between the two appellants adds nothing to the strength of the case for the prosecution. Neither does the statement by the Magistrate that the one lawyer who represented both Appellants had led to or allowed the appellants to incriminate each other. In fact searching through the record I found no evidence to support the statement by the learned magistrate that it was the Appellants lawyer who led them to or allowed them to incriminate each other. In my view the lawyer did nothing of the sort. The lawyer clearly was simply performing his role as legal practitioner for the two Appellants and also as an officer of the court.

To my mind the evidence on record proves the charge against the 2nd Appellant beyond reasonable doubt.

The result is that the Appeal against conviction by both Appellants is dismissed.

Regarding the appeal against sentence I must say that I find no merit in it either. As a matter of fact I find the sentence of 6 years imprisonment for a robbery of the nature committed in the present circumstances to be lenient and on the lower end of what would be considered meaningful sentences for robbery.

In *Republic v Ladistas Thamando and Others Conf. Case No. 1230 of 1994* Msosa, J. as she then was enhanced a sentence for robbery from 72 months (6yrs) imprisonment to 10 years imprisonment and another of thirty-six months to 5 years imprisonment.

She stated that:

> *"Armed robbery is a very serious offence. These types of offences are prevalent these days. There is need for the courts to pass meaningful sentences in these types of offences so that the people can be protected from people like the prisoners who go about causing terror in society without any concern or sympathy to others. The prisoners were armed with dangerous weapons. They stole property of substantial value. They stole the complainant's vehicle and caused substantial damage to it. They molested the complainant in the middle of the night."*

In *John Pensulo v Rep Criminal Appeal No. 95 of 1994*, Mtambo, J. as he then was dismissed an appeal against a sentence of 8 years imprisonment for robbery. In *Republic v Davie Brown Zaola Confirmation Case No. 276 of 1995*, Mwaungulu, J.

enhanced a sentence of 4 years imprisonment for robbery to 8 years imprisonment. His Lordship said:

> *"Where in an armed robbery guns are involved and actually used to intimidate a sentence of ten years imprisonment would be a good starting point, the sentence would be downgraded to reflect mitigating factors such as plea or guilty or that this is the prisoner's first offence."*

The sentence of 6 years imprisonment with hard labour in the present case was inadequate. I was minded of enhancing it but resolved that although it is not adequate, it is not so grossly inadequate as to warrant interference. The prisoners should consider themselves lucky to have been given such a lenient sentence. There appeal against sentence is also dismissed.

PRONOUNCED in Open Court this 22nd day of April, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E