IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 26 OF 2017

(Being Criminal Case No. 327 of 2017 FGM Court, Mwanza)

BETWEEN:

ALLAN KWADA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE S.A. KALEMBERA

Miss Munthali, Senior State Advocate, of Counsel for the Respondent

Mr Sitolo, of Counsel for the Appellant

Mrs Chanonga, Official Interpreter

JUDGMENT

Kalembera J

The Appellant, Allan Kwada, appeared before the Mwanza First Grade Magistrate Court charged with the offence of Robbery contrary to section 301(2) of the Penal Code. The particulars of the offence alleged that Allan Kwada on or about the 15th day of June 2017 at Envulo village in the district of Mwanza robbed Caphus Matewere and Zondani England a solar panel valued at MK950,000 and at or immediately after the time of the said robbery used or threatened to use actual violence to the said Caphus Matewere and Zondani England in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or

retained. The Appellant pleaded not guilty to the charge. After a full trial, the Appellant was convicted as charged and sentenced to 8 years IHL effective soon after completing the sentence he was currently serving. Being dissatisfied with his conviction and sentence, the Appellant has brought this appeal against both the conviction and sentence.

The Appellant has filed the following grounds of appeal:

1. The learned Magistrate erred in law in convicting the appellant in that there was no evidence to support the conviction of the appellant on the offence charged.
2. The learned Magistrate erred in holding that the sentence imposed on the offence should run consecutively with an earlier offence the appellant had committed rather than concurrently, by reason of the fact that the two offences which form the subject of offences were allegedly committed by the appellant more or less during the same or similar transaction.
3. The learned Magistrate wrongfully erred in refusing and ignoring the appellant's plea and/or request to summon Galasiano Frank and John Blackson (who were serving prison term sentences) as witnesses for the defence.
4. The learned Magistrate wrongly admitted evidence of property being found in an incomplete house as belonging to the appellant in consequence of an illegal search and illegal arrest of the appellant.
5. The learned Magistrate erred in holding that the confession statements made by the appellant under duress were admissible in evidence against the appellant.
6. That in all the circumstances of the case the verdict against the appellant has occasioned a failure of justice.
7. The learned Magistrate failed to give sufficient consideration to the appellant's youth and school going when he imposed a custodial sentence of 8 years imprisonment with hard labour.
8. The circumstances in which the offence was committed did not justify the imposition of a sentence of 8 years imprisonment on the offence charged.
9. That in all the circumstances of the case the sentence of 8 years imprisonment with hard labour is manifestly excessive and wrong in principle.

This being an appeal from the subordinate court, I am mindful that it is trite that such appeals be dealt with by way of rehearing, that is, I must look at and analyze all the evidence in the court below.

It is in evidence from PW I & PW II that they are G4S security officers (guards) attached to Vale Logistics. On the material day they reported for duty along the railway line at Chithumba, Chikwawa. Around mid-night they saw stones being thrown at them and they decided to run away. PW I met a person who had a panga knife and an axe, and he detained him and kept two of his friends to keep PW I under watch. After doing whatever he untied himself, and when he went to check he found that a solar panel had been stolen. And it was the evidence of PW II that when the robbers came he ran away and he was chased for about 500 metres. He then borrowed a cell phone and phoned their supervisor. The supervisor came around 1:30 am and found that a solar panel had been stolen. They were considered the first suspects and they ended up being arrested by the police.

It was also the evidence of PW III, Number A6490 D/Sgt. Rodney Kumkuyu, that Mr Shupo Sambakunsi, Security Coordinator for G4S under Vale Logistics reported that two security guards who were working at Unvulo site were attacked by a group of unknown criminals and a solar panel worth MK950,000 was stolen. Consequently, after investigations, the Appellant was arrested. A search at his house led to the recovery of the stolen panel as well as other company properties which had been stolen previously along the Vale railway line. The solar panel was hidden under the ground in an incomplete house. He was charged with robbery and he admitted the charge.

After this witness the State closed its case. The Appellant was found with a case to answer. He opted to testify and call witnesses. On the day he was supposed to testify he informed the court that since his witnesses had gone to Chichiri (Prison) he would testify alone.

It was his testimony that Yerudzani Chidzuwa, Galasiano Frank and John Batisoni owed him MK4,000. They were failing to pay back the money despite his asking for it. Later on, Yerudzani Chidzuwa, his relative, gave him the solar panel as security for the loan. He also told the court that one night at around 11:00 or 10:00 pm they came to him and said they had put property in the house of his sister. They

said they had placed a solar and they said they would tell me later where they got it. That very same night he was arrested. In cross-examination he said that he was recorded a statement at the police. He was also slapped at the police. He did not know the value of the solar panel.

The main issues for the court's determination are:

1. Whether the appellant was properly convicted or not on the evidence before the lower court.
2. Whether the learned magistrate erred in ordering the sentence imposed to run consecutively with a sentence the appellant was already serving.
3. Whether the sentence imposed was excessive.

Under section 300 of the Penal Code robbery is defined as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, shall be guilty of a felony termed 'robbery."

To sustain a conviction, the following elements must be proved:

1. The use of violence or threat of violence for purposes of obtaining or retaining the property or for the purpose of overcoming resistance to its being stolen or retained.

It is therefore paramount that for one to be convicted of robbery, it must be proved that there was theft, and that the theft was accompanied by use of violence or threat of violence immediately before or immediately after the theft for purposes of overcoming resistance to its being stolen or retained.

I am mindful that the burden of proving the guilt of the accused person lies with the State or prosecution –section 187(1) of the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi. It has been held that for the prosecution to discharge its burden it must prove the elements of the offence beyond reasonable doubt. There is no burden laid on the accused person to prove his/her innocence except in exceptional circumstances. In the famous and commonly cited case of **Woolmington –v- DPP** (1935) AC 462 at pp 487 Viscount Sankey, L had this to say:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.....It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...."

In the case of **Miller –v- Ministry of Pensions** (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

This statement by Denning, J was approved by Smith, Ag. J. in the case of **Rep –v- Banda** (1968-70) ALR Mal. 96 at p. 98.

Counsel for the Appellant has submitted in the first ground of appeal that the learned Magistrate erred in law in convicting the appellant in that there was no evidence to support the conviction of the appellant on the offence charged.

In the matter at hand though, it is in evidence that at the offices of Vale Logistics there was a robbery on the material day and that a solar panel was stolen. The G4S guards were attacked, and PW I was tied up and threatened. The robbers were armed with panga knives and an axe. Following investigations, the Appellant was arrested and the solar panel recovered within his compound. He even showed the police where it was buried. He also admitted the charge at the police. It has further been contended in the grounds of appeal that The learned Magistrate wrongly admitted evidence of property being found in an incomplete house as belonging to the appellant in consequence of an illegal search and illegal arrest of the appellant; That the learned Magistrate erred in holding that the confession statements made by the appellant under duress were admissible in evidence against the appellant; and that in all the circumstances of the case the verdict against the appellant has occasioned a failure of justice.

As regards confession statements, in the case of **Sulaimana and Others v Republic [1998] MLR 377** – Unyolo JA (as he then was) had this to say on the admissibility of caution statement at page 381:

"With respect, the procedure adopted was irregular. In terms of section 176 of the Criminal Procedure and Evidence Code, a caution statement is admissible in evidence in its entirety. Counsel for the accused may of course cross-examine the recording officer thereon and may also comment on it in his address to the jury. As regards the weight to be placed on a caution statement, that is a matter for the jury, upon a proper direction by the trial judge in the course of summing up."

In the case of **Chiphaka v Republic** (1971-72) ALR Mal 214 the Supreme Court of Appeal, citing with approval the English case of **R v Sykes** 8 Cr. App. R. at 236-237 held that the correct pointers which courts in Malawi ought to consider in determining whether or not the contents of a caution statement of the accused are materially true are the following:

"....And the first question you ask when you are examining a confession of a man is, is there anything outside it to show it was true? Is it corroborated? are the statements made in it of facts so far which we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been as in this case, proved before us?"

In the matter at hand, as has already observed herein, other than admitting the charge and giving a confession as to what happened, the Appellant led the police to the recovery of the stolen solar panel. In court he tried to exonerate himself from his caution statement by alleging that it was obtained under duress. However, I must agree with the State that it was an afterthought. After all in cross-examination he even conceded that some stolen property, the distributor, was found in his house but the solar panel was found in an incomplete house in the compound. Thus, the recovery of the solar panel is corroborates the statement he made at the police. It cannot therefore be heard that the caution statement was given under duress. It was properly admitted into evidence.

As regards the recovery of the property, section 24A (1) allows the police, in the presence of the arrested person to conduct a search without a search warrant. The arrest and search herein was therefore not illegal.

It has further been argued that the the learned Magistrate wrongfully erred in refusing and ignoring the appellant's plea and/or request to summon Galasiano Frank and John Blackson (who were serving prison term sentences) as witnesses for the defence. Counsel referred me to the case of **Chiwaya v Republic, Criminal Appeal No. 106 of 1976** which held that it is the duty of the trial court, assisted by the prosecution to ensure that the accused person's witness's attendance was secured. I have gone through the lower court record and it is clear that the lower court actually adjourned the matter in order to allow the Appellant and his witnesses testify. However, on the appointed day, the Appellant informed the court that he would testify alone since his witnesses had gone to Chichiri Prison. In essence, he withdrew his intention to call these witnesses. Indeed, it might be argued that the Court and the prosecution should have done more and help the Appellant have his witnesses in court. The record does not show that the court refused him to call his witnesses, it would have been a different scenario if on the appointed date the Appellant had insisted to have his witnesses and the court refused to help. In the circumstances, the Appellant himself withdrew his intention to call the two witnesses.

On the issue of ordering the sentence imposed to run consecutively with the sentence he was serving, I do agree the Respondent that it was regular. The offences were not committed in the course of the same transaction, to prevent the learned magistrate from ordering the sentences to run consecutively. Where the offences were committed in the course of the same transactions it is in order to

order the sentences to run concurrently. And section 12 of the CP&EC provides that subject to section 14 any court may pass any lawful sentence combining any of the sentences which it is authorized by law to pass. The learned Magistrate did not therefore err in ordering the sentences to run concurrently. I do concede though that considering the young age of the Appellant, despite his previous conviction, the court should have exercised some leniency.

All in all, it is the considered view of this court that the conviction of the Appellant was in order, and it is hereby upheld. As regards consecutive sentences, the learned Magistrate acted within the powers conferred on him by law. However, the sentence of 8 years imposed on the Appellant was highly excessive considering the young age of the Appellant. I therefore set aside the 8 years IHL imposed on the Appellant and substitute it with a sentence of 3 years IHL. The learned Magistrate's order of consecutive sentences is upheld.

PRONOUNCED this 13th day of February 2018, at the Principal Registry, Criminal Division, Blantyre.

S.A. Kalembera

JUDGE