REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY: CRIMINAL DIVISION

CRIMINAL APPEAL NO. 03 of 2017

(Being criminal case No. 166 of 2016 in the First Grade Magistrate Court Sitting at Uliwa)

Vyanangika Msonda
-v-
The Republic

CORAM:
HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. W. Nkosi	Counsel for the State
Mr. C. Duke	Counsel for the Appellant
Mrs. L. Munthali/G. Msukwa	Official Interpreter
Mrs. J. Chirwa	Court Reporter

DeGabriele, J

JUDGEMENT ON APPEAL

Introduction

The Appellant was arrested, charged, tried and convicted of the offence of arson contrary to section 337 of the Penal Code. He was sentenced to 48 months imprisonment with hard labour. he has appealed against both conviction and sentence. He had initially applied for bail pending appeal. This Court denied granting bail and directed that the appeal hearing be expedited.

Grounds of Appeal

There are 3 grounds of appeal filed as follows;

a. The learned subordinate court erred in law and in fact in convicting the Appellant of arson when the evidence did not support such a finding

b. The conviction was against the weight of the evidence
c. In the alternative, the sentence of 48 months was excessive in the circumstances regard being had to the mitigating factors that he was a first offender and is of ill-health

Appeals in the High Court

The principles guiding this Court in exercise of its power on appeal were laid down by the Supreme Court of Appeal in ***Pryce v. Republic, [1971-76] 6 ALR (Mal) 6:***

> *"In our opinion the proper approach by the High court to an appeal on fact from a magistrate's court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, ... must then make up its own mind, not disregarding it; and not shrinking from overruling it, if on full consideration, the court comes to the conclusion that the judgment is wrong."*

The law

It is established law that the burden of proof in criminal cases rests on the prosecution. Lord Sankey in ***Woolmington v Director of Public Prosecution [1935] AC 462*** put the point in the following terms:

> *"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilty; 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 guilty"*

Burden of proof and standard of proof are very much interrelated. The standard of proof in criminal cases is proof beyond reasonable doubt, as outlined in the case of ***Rep v Banda [1968-70] ALR Mal. 96*** that,

> *"That degree is well settled. It need not reach certainly, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause 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."

The relevant provision is section 187(1) of the Criminal Procedure and Evidence Code.

"The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution"

The Appellant herein was convicted under Section 337 of the Penal Code which outlines the offence of arson and provides as follows;

"Any person who wilfully and unlawfully sets fire to—
(a) any building or structure whatever, whether completed or not; or
(b) any vessel, whether completed or not; or
(c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
(d) a mine, or the workings, fittings, or appliances of a mine,
shall be guilty of a felony and shall be liable to imprisonment for life."

The Evidence

PW1 stated that on returning from visiting some family members, his wife and 2 colleagues saw that their grass thatched house as well as the one that was partially grass thatched and roofed with iron sheets were on fire and most of his properties were burnt. In cross examination he stated that he did not see the Appellant burning the house but his wife and her colleagues saw him and they had shouted at him. PW2 stated that she knew the Appellant who was a neighbour and had set the house of fire. She saw the accused carrying a piece of glowing firewood from the rear of the house to the front and he was accompanied by his son. She said it was a moonlit night and the Appellant was at a distance of 3 metres. Further, the firelight illuminated the area. All the four women shouted for help as they all saw the Appellant with the glowing

firewood. In cross examination she stated that the Appellant was wearing black shorts with no shirt

PW3 and PW4 were both below the age of 13 Brenda and passed the *voir dire* test and gave unsworn testimony. Their evidence was similar to that of PW2. In cross examination she stated that they shouted for help at about 7pm

PW5 stated that on 15th August 2016 they had gotten a judgement from court and visited some relatives. On arriving home, they found the houses were on fire. In cross examination she stated that she did not see him physically burning the house.

The Appellant gave evidence in defence and called witnesses to support his case. DW1 was the Appellant who told the court that on 15th August 2016 they returned from court. He said that at night he saw lighting in his room but continued to sleep. Only when he heard shouting did he check what was happening. He saw houses on fire and went to the scene. He was told by people to leave the place since he was wanting to revenge. In cross examination he stated that he visited the scene just like everyone else. He denied to have set the houses on fire. He said that the witnesses saw him but they may have been mistaken in identifying him. He also stated that the witnesses would not have mis-identified him in the circumstances since he was very well known to them as a neighbour.

DW2 was the wife of the Appellant who stated that her husband went to the scene of fire just like other people. She stated that her husband was suspected because there were disputes already. She also said she had heard people say that they would make sure that he was convicted. She did not go to the scene of the fire herself. DW3 told the court that he had heard the wife of the victim and the children of the victim say that they would make sure that the Appellant would be convicted and they would use the evidence in court that a child had been denied. In cross examination she stated that she lived near the victim and the Appellant. The witness said that the Appellant may have forgotten him as a witness. The witness also stated that she did not see the accused at the scene.

DW4 told the court that he rushed to the scene where houses were on fire to try and rescue the houses. He told the court that the Appellant then came and asked what had happened. In cross examination he stated that a number of people were at the

scene but the accused came after him. He also told the court that he had told the Appellant to leave as the victim was alleging that the Appellant had caused the fire.

I now proceed to discuss the grounds of appeal. The first and second grounds of appeal will be discussed together.

a. ***The learned subordinate court erred in law and in fact in convicting the Appellant of arson when the evidence did not support such a finding***
b. ***The conviction was against the weight of the evidence***

In his submissions the Appellant states that the Appellants allege that the lower court erred in convicting the 2nd Appellant without giving the Turnbull warning since the case depended on visual identification evidence. The Appellant argues that the witnesses would have mistakenly identified him since this was at night regardless of the moonlight, and that there were a number of people present. The law of identification has been outlined in the case of ***R v Turnbull (1977) Q.B.224*** where the court stated that;

> *"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one.*
>
> *"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification at the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"*

What is required at law is that the lower court should warn itself on convicting based

on the evidence of identification only, as such identification can be mistaken. The question here is whether the conviction was based on identification only. The response is in the negative as there is other circumstantial evidence that supported the conviction, which I will discuss later.

On identification, it is not disputed that there was moonlight and there was a blazing fire which lit the whole area. The witnesses clearly stated that they saw the Appellant with a glowing piece of firewood and then he ran away. When an alarm was raised people then came to help douse the fire and the Appellant himself came again and he was clearly identified as the person who had earlier on set the houses on fire. The Appellant himself confirmed in his evidence that the witnesses knew him as a neighbor and would not have mistaken his identity in the circumstances. I agree with the State's submission that the absence of the *Turnbull* warning did not occasion any injustice to the Appellant as the conviction was not wholly dependent on the identification.

This court finds that there was no issue on the identification itself. The incident occurred at night but under the illumination of the moon, the area was illuminated by the blazing flames, the Appellant was very well known as a neighbour who lived less than 100m of the victim, the parties had an ongoing dispute at the magistrate court and the Appellant was less than 3 metres of the witnesses who saw him with a glowing piece of firewood. The evidence, as the lower court held, showed that the Appellant was at the scene of the fire, first to light the fire and later as a concerned person purportedly trying to help and find the cause of the fire.

This Court has to determine if there was any evidence to cast doubt on the fact that the Appellant caused the fire. In his submissions the Appellant has alleged that since no one saw him actually torching the houses, the evidence against him was circumstantial and was not enough to enter a conviction against him. Circumstantial evidence is described as evidence that leaves no break in the chain of events on which an interference of guilt is drawn. In the case of ***Nyamizinga v Republic [1971 – 72] 6 ALR. 258*** it was held by Chatsika J, as he was then, that

> *"Where the evidence is circumstantial the accepted and logical approach is by way of elimination, that is by negating all possible hypotheses of innocence... In order to justify from circumstantial evidence an inference of guilt the facts must be incompatible with the innocence of the accused and incapable of*

explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

It is true that nobody saw the actual setting on fire of the house by the Appellant or otherwise. The prosecution evidence discloses that the Appellant was seen with a glowing piece of firewood coming from the rear of the house going to the front and in the company of his son. When he was shouted at he ran away. The evidence of the defence is also to the effect that after the judgement at the magistrate court which was pronounced in favour of the victim, the Appellant arrived home before anyone else. He conceded that the fire was around 7pm and he had arrived home around or just before 7 pm. His story that he was asleep by the time the fire was blazing, which time has been establishes as 7 pm is not plausible.

The evidence herein is direct evidence where he was seen and clearly identified. The evidence is then supported by circumstantial evidence in that the conduct of the Appellant and his evidence was inconsistent with his claims of innocence; ***see Nyamizinga v Rep (supra)***. The facts herein are incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt. This arises from the fact that the parties as neigbours were embroiled in a case at the magistrate court, the victim emerged a winner and the Appellant lost the case and it was therefore plausible that he had intended to revenge. The claims by the defence witnesses that they had heard that he will be implicated because of the court case really do not hold any water. First such statements are hearsay and are not admissible. There was nothing in this matter that barred the Appellant to bring forth those persons as witnesses. Especially as he had wanted the lower court to use those statements as proof of a contrived case against him. This court finds, as did the lower court, that such statements were designed to detract from the truth.

This Court notes that the Appellant was the neighbour of the victim. By his own evidence he noted a very bright glow of light from his bedroom but decided to go back to sleep. It was only when he heard noises that he decided to come out and inspect. He was then at the scene of fire after some people had already been there. This court also notes that most people in this neighbourhood, going by the evidence of witnesses on both side had not gone to bed as it was only around 7pm. The evidence of the Appellant that he was asleep with his family, so deep asleep that he could go back to

sleep after noticing such a bright glow of light, does not ring true. It does not tally with his statement that he arrived home just before 7pm and found only children at home and that when his wife came she went to sleep as she was ill. The wife of the Appellant did not mention this matter but simply stated she arrived home after her husband and he husband was home when the fire started.

The Appellant conceded that the witnesses who stated that they had seen him at the scene of crime could not mistake his identity as he was well known by them as a neighbour. The evidence shows that when the Appellant returned to the scene of crime the witnesses were quick to point him out as the culprit. This court has surmised that the victim and the Appellant had a case before the magistrate court, whose decision was in favour of the victim. It seems the Appellant herein rushed home and went to set the house on fire out of revenge. Having outlined the evidence above, I find that the lower court was right in entering a conviction for arson and the evidence was given the weight it deserves.

The appeal against conviction fails in its entirety.

c. ***In the alternative, the sentence of 48 months was excessive in the circumstances regard being had to the mitigating factors that he was a first offender and is of ill-health***

Sentencing is done at the discretion of the sentencing court as long as the discretion is exercised judicially, and the sentencing court hands down a sentence in accordance to its jurisdiction. The High Court will only interfere with a sentence if it is proved that the sentence was wrong in law and it was manifestly excessive, ***see Rep v Makanjila [1997] 2MLR 150 HC***. Generally, the sentence that ought to be passed must fit the crime as excessive sentenced tend to violate the accused rights to fair treatment under the law. Indeed, maximum sentenced are said to be reserved for worst offenders, ***see Republic v Chikakuda [1992] 2 MLR 288 HC.***

The mitigating factors in this case is that the offender is a first offender. The fact that the Appellant was and is of ill health was raised in the lower court and the lower court in turn did take that aspect into consideration. This Court notes that on filing the application for bail pending appeal, the Appellant stated that he is suffering from swollen stomach and scrotum due to liver failure. The medical report states he is diagnosed with hernia, anaemia and swelling and accumulation of fluids in the scrotum

sac. There is mention of liver failure. This Court abhors the tendency of applicants and their lawyers to exaggerate issues in a bid to gain sympathy of the court. Such bigotry efforts are wasted on this Court when all the paperwork is available for this Court to see, read and reach its own conclusion.

The Appellant herein did mention his sickness at the lower court just before sentence and the lower court took the same into account as mitigation. He cannot be excused from the commission of the offence and the subsequent conviction only based on the fact that he is sick. From the look of things, he was sick with the same problem when he committed the offence and he should have thought about his health at that time. It is wrong for the Appellant to think that the world owes him a living due to his illness and he should automatically be treated with more lenience than he deserves.

The State has outlined a number of aggravation factors which are there was complete loss of 2 houses and property that have not been recovered, the offence was committed at night, the Appellant wilfully and unlawfully planned this offence, and it was an offence of revenge committed at night straight after losing a court case. The Appellant showed no remorse. In the eyes of this Court, the main aggravating factor is the act of setting a dwelling house on fire. I concur with the holding in the case of ***Republic v Chitseko, (1997) Conf. Cas. No. 78,*** that,

> *"The natures of the offence and the circumstances in which it was committed are so critical a consideration, although this is the defendant's first offence. Arson is a serious offence. It is punishable with life imprisonment. Arson under our law involves a conflagration to different properties. Setting a dwelling house must be regarded as one of the most serious instances of the crime. While as the value of the dwelling house and the extent of the damage may weigh considerably, just setting a dwelling house on fire is in itself grave enough as to call for longer and immediate imprisonment."*

The offence of arson is a very serious offence as reflected in the fact that the legislature set a maximum sentence of life imprisonment. This Court is also aware that any sentence passed by the courts must fit both the offence and the offender and should be tempered with mercy., *see* ***Rep v Shauti Conf Case Number 175 of 1975 (unrep).*** Under section 340 of the Criminal Procedure and Evidence Code the laws provided that first offenders must be considered for non-custodial sentences unless

such sentences are not the appropriate way to deal with them. If the court opts for a non-custodial sentence the court must give reasons for the same. I agree with the conclusion of the lower court that the appropriate sentence here in was a custodial sentence.

The Appellant herein was sentenced to 48 months imprisonment with hard labour with effect from the date of arrest which was 15th August 2016. The starting point for offences of arson is 3 years. Which can be adjusted upwards or downwards depending on the mitigating or aggravating factors especially bearing in mind that the maximum sentence is life imprisonment. Looking at the evidence before this Court, this Court had considered enhancing the sentence to 72 months imprisonment, but bearing in mind the ill-health of the Appellant, this Court has confirmed the sentence of 48 months as being appropriate in these circumstances. The Appellant will therefore serve 48 months imprisonment with hard labour with effect from the date of arrest which was 15th August 2016

The appeal against the sentence fails in its entirety.

Made in Chambers at MZUZU REGISTRY this 11th day of April 2018

HONOURABLE D.A. GABRIELE
JUDGE