IN THE HIGH COURT OF MALALWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NO. 34 OF 2007

SHINGIRAYI THYANGATHYANGA & RON FIGEREDO

VERSUS

THE REPUBLIC

CORAM: HON. JUSTICE TWEA
T. Phillipo State Advocate for the State
P.N. Mangison Official Interpreter

J U D G M E N T

Twea, J

This is an appeal from the judgment of the First Grade Magistrate Court sitting at Ntonda. The two convicts appeared together with a juvenile before the court on a charge of robbery. They all pleaded not guilty. The court found all of them guilty after a full trial and convicted them. The two convicts were sentenced to 4 years imprisonment. The juvenile was sentenced to 3 years suspended on condition of being of good behaviour.

I wish to point out however, that the Court's Order was irregular. According to Section 3 of the Children and Young Persons Act, the court should not use the terms "convict" and "sentence" against juveniles. Further, a juvenile cannot be sent to prison unless the court certifies that the juvenile is so unruly or raved a character. Such a decision however, must be made in the best interests of the juvenile. The court was therefore under a duty to consider Sections 4 and 16(1)(h) and (2) of the Children and Young

Persons Act. However, I will not make any alternative order because the juvenile is now at large.

The two convicts now appeal against both the conviction and sentence.

The evidence has it that the convicts, now appellants, were among the group of 8 young persons who were out on a drinking spree on the night in issue. In the course of the night a fracas ensured between their group and another, which resulted in a fight and some stone throwing.

It was the evidence of PW1, the victim witness, that he found the appellants and their colleagues at a bar. They accused him of having been involved in the assault on some of their colleagues. He denied, but they attacked him. He was thoroughly assaulted and his trousers were torn. It was his evidence that in the course of this assault his cell phone and money worth K7,000 were stolen.

The appellants admitted the fracas and attacking and beating up the PW1 but denied stealing anything from him.

The state does not support the conviction for robbery. It is clear that robbery is stealing by use of threat of actual violence in order to steal or overcome resistance to the thing being stolen or retained. In the present case there was an onslaught on the victim witness by the appellants in revenge for the assault that one of their colleague had suffered at the hands of some unknown assailants, which PW1 was suspected to have been part of. It is on record that this happened at night although there was light at the bar. The victim was assaulted in the full view of the public. It is also on record that after the fracas the appellants called Police so that they could make over the victim for the assault on their colleague. I would agree with both counsel that the evidence does not support the finding that the appellants or any of their colleagues stole from this victim. It is not disputed that they attacked him with vengeance, tore his clothes and injured him. He was then taken to Police and hospital by well wishers. There is all possibility that the things in his possession fell during the assault and were picked up by some other people. I am fortified in this by the evidence of PW3 the Police Officer who was seized on this case. He told this court that he attempted to call this number of this cellphone but to no avail. Clearly, if PW1 had reported a theft against any of the appellants or their colleagues, the Police would have

preceded to their homes to recover the items because PW1 identified the appellants at the time he reported the matter.

The conviction for robbery therefore is unsafe and I, accordingly, quash it.

Be this as it may I find that the appellants had admitted to have assaulted and wounded the victim. It is my view that, on the facts, the appellant would have been found guilty of unlawful wounding contrary to Section 241 of the Penal Code and I would have so found.

I therefore set aside the sentence of 4 years, I order that the accused be released, immediately unless they are in custody for any other lawful reasons.

Pronounced in Open Court this 3rd day of June, 2008 at Blantyre.

E.B. Twea
JUDGE