IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Miscellaneous Criminal Application Case Number 51 of 2003

CHIMWEMWE GULUMBA

Versus

THE REPUBLIC

In the Second Grade Magistrate Court sitting at Salima Criminal Case number 108 of 2002

CORAM: D F MWAUNGULU (JUDGE)

Gulumba, Legal Practitioner, for the applicant/appellant

Nayeja, Senior State Advocate, for the respondent

Chisi, the official court interpreter

Mwaungulu, J

JUDGEMENT

Initially this was the defendant's application for bail pending appeal. I decided to hear the substantive appeal instead. The defendant in the lower court appeals against conviction and sentence. The Salima Second Grade Magistrate Court convicted the defendant for assault occasioning actual bodily harm and malicious damage to property. Assault occasioning actual bodily harm and malicious damage to property are offences under sections 254 and 344 of the Penal Code, respectively. The lower court sentenced the defendant to fifteen and nine months imprisonment, again, respectively. The defendant appeals to this Court against the conviction and sentence.

If the question on the appeal against conviction, the same question as in the lower court, is whether, on the law and evidence in the lower court, the defendant is guilty of the

crime, there is no merit in the appeal. Of course the lower court was overzealous in accepting and analyzing certain aspects of evidence. The defendant is justified in assailing some findings of fact. Some findings of fact are perverse and unsupported by the evidence. Fortunately, those objectionable findings were, in my judgment, unimportant, as we see shortly, to the crucial matter before the lower court and this Court. On the crucial findings, on the law on the matter, the lower court's verdict is faultless.

The lower court's findings were that the complainant, whose only mistake was vigilance in pursuing her debtor, the defendant, suffered serious injuries and destruction to her clothing at the defendant's hands. In the lower court the defendant's contention, repeated in this Court, was she was the victim and only acted in self defense in assaulting the complainant in the course of which she tore the complainant's clothes. The lower court took two perspectives to the defendant's defense. First, on the evidence, the lower court rejected the defendant's testimony preferring the complainant's version of events. Secondly, the lower court thought, if it erred in this finding, the defendant used excessive force.

On the first perspective, the criticism that the lower court never considered the defendant's defense cannot be proper. Of course, the rules of burden of and standard of proof require the prosecution, where the defendant raises a defense, to show that the offence was committed without the defense. The court is, therefore, under a duty not only to consider the defense the defendant actually raises but any defense which, though not expressly or tacitly raised by the defendant, the evidence before the trial court raises. This rule is based on common sense and the remarks of the Supreme Court in Republic v Henderson [1975 -77] 8 MLR 9. The lower court found, properly in my judgment, that the defendant sought out the complainant because the complainant persisted about the debt owed her. It is not, therefore, that the lower court never considered the defense. It is that, on the evidence, the lower court rejected the defendant's version of events raising defense of self. The defendant had an evidentiary burden, see the Supreme Court's remarks in Republic v Henderson, to raise the factual premise for the defense. The prosecution had a duty to show beyond reasonable doubt that the offence occurred without the defense. In the lower court's opinion, the defense had not, on the evidence, been established. This Court has very little to do where, like here, there is material to support or disown a fact in issue before a trial court.

The lower court, however, thought that, even if the defense of self defense availed the defendant, the defendant used excessive force. That conclusion is, on the evidence and on principle, faultless. Self defense is a total defense to any crime involving violence and injury to a person. The defense excuses or justifies certain crimes involving violence and injury to a person. It is a defense of necessity. That necessity only arises to the extent that the defendant's action is necessary for self preservation. The defense is unavailable to one who acts beyond that necessity and acts in vengeance or uses more force than is necessary for self preservation.

There was, in my judgment, material before the lower court for arriving at whatever conclusion. This Court seldom, in such circumstances, interferes with the lower court's findings. This Court on appeal or review proceeds by way of rehearing. The Court examines all the evidence in the court below, subjecting the evidence for relevance and admissibility and mindful that, unlike the reviewing court, the lower court has the advantage of seeing the witnesses and assessing credibility. Generally, where there is evidence to establish a fact one way or the other and a tribunal of fact, a judge or jury, as the case may be, decides one way, it is rare, and I think impossible, for an appellate court to reverse the finding of fact. A fortiori an appellate court will, as a matter of principle, reverse a finding of a tribunal of fact where there is no evidence to support a finding. There is no evidence to establish a fact where, for admissibility, weight or credibility, a tribunal of fact rejects the evidence. Generally, a court reviewing a tribunal of fact should reverse a finding of fact based on evidence that should be excluded subject, of course, to section 5 (2) of the Criminal Procedure and Evidence Code:

"The improper admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised – (a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction, or (b) it would have varied the decision if the rejected evidence had been received."

It was important to restate these principles, most of them established in this Court in Patel v R (1923) 1 A.L.R. (Mal) 894; and R v Mamanya (1964-66) 3 A.L.R. (Mal.) 271, in the Federal Supreme Court in Chipembere v R (1962-63) 2 A.L.R. (Mal) 83 and the Supreme Court of Appeal in Pryce v Republic (1971-72) 6 A.L.R. 65; and Idana v R (1964-66) 3 A.L.R. 59, because of matters Mr. Gulumba and Ms Nayeja, the appellant's legal and respondent's legal practitioners respectively, raised in the appeal.

There is one final point raised for the defendant in relation to the conviction for malicious damage. Miss Nayeja and Mr. Gulumba thought that the conviction could not stand. The damage to the shirt was in the course of the fight, the defendant wanting to injure the complainant and damaging the property in the process. Both counsels urged me to acquit the defendant on the malicious damage count because the defendant, having only wanted to injure the complainant and only damaged the property in the course of the other crime, could not have damaged the shirt willfully. This is unacceptable.

Where one act or transaction results in many crimes it is in the discretion of the prosecution, subject to the rule about de minimis, to charge the defendant for all or any of the crimes the situation creates. Where the prosecution charges the defendant of all crimes and proves all or some of them, I know of no principle, apart from the principle of de minimis and the inherent power of the court over proceedings that are an abuse of the process of the court, entitling a court to exclude any crime the prosecution proves. The question is whether the prosecution had proved the offence of malicious damage.

Both Ms Nayeja and Mr. Gulumba thought that on the facts the lower court accepted, the defendant did not willfully destroy the clothes, she only intending to injure the complainant. The argument is, as I understand it, that the defendant never intended to destroy the property. This submission, in my judgment, can only be premised on the narrower understanding of the word 'willfully.' The understanding of the word 'willfully' under section 344 and, indeed, under other provisions in the Code, is informed, under section 3 of the Code, by the meaning of the word under English Criminal Law. The word there is not understood only to mean 'deliberately' or 'voluntarily'. It covers both intention and recklessness. One, in my judgment, acts willfully not only where what one does is as result of his volition but also, where the immediate acts is as a result of ones volition, the consequence of his willful act are matters known by all reasonable men and women to follow naturally from his act of volition. If a man intends to shoot an attendant inside a shop through a glass window, destruction to the window, even though not the immediate concern, is a result of his willful act and therefore acts willfully in destroying the window.

In R v Sheppard [1981] AC 394, Lord Diplock, dealing with willful neglect of a child, said:

"… on a charge of willful neglect of a child under section 1 of the Children and Young Persons Act 1933 by failing to provide adequate medical aid, …the jury must be satisfied (1) that the child did in fact need medical aid at the time at which is charged with failing to provide it (the actus reus) and (2) either that the parent was aware at the time that the child's health might be at risk if it were not provided with medical aid, or that the parent's awareness of this fact was due to his not caring whether his child's health were at risk or not (the mens rea).

Lord Diplock thought this last component implies recklessness. In Metropolitan Police Commissioner v Caldwell [1982] AC 341, a case involving section 1 of the Criminal Damage Act Lord Diplock said:

"… a person charged with an offence under section 1 (1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given thought to the possibility of there being in such risk or has recognized that there was some risk involved and has nonetheless gone on to do it."

Under English law, therefore, 'willfully,' as used in section 344 (1) of the Penal Code connotes intention or recklessness. The offence however is 'malicious' damage to property. Malice is therefore part of the crime. In English law the Court of Appeal in R v Cunningham [1957] 2 QB 396:

". . . malice must be taken . . . as requiring either (1) An actual intention to do the . . . harm . . .; or recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular type of harm might be done and yet has gone on to take the risk of it)."

These principles apply to understanding malicious damage under section 344 (1) of the Penal Code. The defendant did not intend to damage the complainant's shirt. He knew or ought to have known that, in attacking the complainant like the defendant did, his action, albeit directed to the person, would damage the complainant's shirt. That, in my judgment, is enough to bring the defendant's action s in the purview of section 344 (1) of the Penal Code.

The appeal against conviction, unlike the appeal against sentence, must fail. The sentencing approach is the same in malicious damage and assaults occasioning actual grievous bodily harm as for other offences. The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest

Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and mental component comprising the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence.

Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.

While the criminal law is publicly enforced, the victim of and the effect of the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example for offences against the person in sexual offences, the victim's age is important. An

illustration of circumstances on indirect victims is the effect of theft by a servant on the morale of other employees, apart from the employer.

Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public order. The objectives of punishment range from retribution, deterrence, rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case.

The offence of an act causing grievous bodily harm comprises of the unlawful act and the grievous bodily harm. The sentence should, therefore, reflect the nature of the unlawful act and the extent of the grievous harm. Generally, a heavier sentence, even if the grievous harm be moderate, is appropriate where the defendant uses a lethal weapon. Conversely, where the grievous harm is serious, the sentenced will be heavier, even though the defendant did not use a lethal weapon. The whole matter will also be affected by circumstances, aggravating and extenuating, around the offence. The defendant used a bamboo, the size and nature of which the record is silent. The complainant and the defendant are neighbours. It is unfortunate that matters turned in this way.

Malicious damage to property involves a trespass and destruction or damage to goods. Consequently, the sentence must, among other things reflect the nature of the trespass and the extent of the damage. The property damaged was a shirt.

The sentences passed were, in the circumstances, oblivious to the nature of the offence, the circumstances in which the offence was committed, the circumstances of the victim and the offender and the public interest. This was an offence where a community order was appropriate. I pass a sentence as results in the defendant's immediate release. To that extent alone the appeal succeeds.

Made in open court this 15th Day of April 2003

D F Mwaungulu

JUDGE