IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 28 OF 1999

DAMIEL NELSON

M'MEHERA MPUTAHELO..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Mwaungulu, J

Bazuka Mhango, for the appellant

Jaffu, for the respondent

Ngwata, Court Interpreter

Mwaungulu, J.

JUDGEMENT

The appeal is from the judgement of the Second Grade Magistrate at Zomba. The magistrate convicted the appellant, Damiel Nelson M'hehera Mputahelo, for obtaining property by false pretenses and theft, offences against the Penal Code. The grounds of appeal are general. They question the conviction. No appeal lies against the sentence. In the Court below, although the appellant was unrepresented, the parties formidably contested the matter. This explains why the appeal is only against conviction. In this Court and the Court below the parties fervently and effectively argued the matters. The Court below lacked arguments Mr. Bazuka Mhango and Miss Jaffu, representing the respondent and appellant respectively, proferred in this Court. The appeal therefore raises issues and arguments unavailable, at least with the same effectiveness, in the Court below.

The appellant was arrested because Mr. Mhango of the National Sports Council complained to the police. Mr. Mhango alleged he paid the appellant K32, 000 for sale of a motor vehicle, the subject of theft in these proceedings. Mr. Lwanda, who never appeared in the proceedings, seized the motor vehicle from Mr. Lwanda. Mr. Mhango went to the police for help. Mr. Lwanda went to the police later. The police resolved Mr. Lwanda retains the car. The police prosecuted the appellant for theft of Mr. Lwanda's car

and obtaining Mr. Mhango's K32, 000 by false pretenses. It is necessary to outline the events this way because the prosecution and the defense evidence were strongly contested here and in the Court below. There is much to say about the evidence the Court below used.

There are two sets of grounds of appeal. The first came with the Notice of Appeal. Further grounds came later. First, it is said the Court below erred in law in convicting the appellant because there was no evidence to support the conviction. Secondly, it is said the trial court erred in law in holding a sufficient case was made at the close of the prosecution case for the appellant to defend himself on the two counts. The appellant contends generally that there was a failure of justice. Further grounds raise two new points. One questions admissibility of secondary evidence. The other alleges the proceedings undermined due process. The appellant prays the convictions be quashed.

THE EVIDENCE

The submission, partly based on evidence not on the record and matters that, strictly speaking, should have been excluded, considerably influenced the Court below. Rid the record of these considerations, one can isolate evidence the basis of convictions on both counts.

The theft count

Shorn these objections, the conviction for theft turned on that Mr. Mhango bought and the appellant sold the car using a fake blue book. The record should exclude assertions that Mr. Lwanda said to Mr. Mhango the appellant stole the car. That was said at the bank. The appellant was absent. That assertion, meant, as it turned out to be, to prove the content's truthfulness, was inadmissible. If made in the appellant's presence it was admissible, not to prove the content's veracity, rather to show the statement was made and, obviously, the appellant's conduct and reaction to it are relevant to innocence or guilt. The appellant being absent, the effect is not improved by the assertion's repetition at the police. This assertion was inadmissible to prove the appellant stole the car or that the car was stolen.

In Subramaniam v. Public Prosecutor, [1956] 1 WLR 965, 970 the Privy Council of the House of Lords said:

"Evidence of a statement made to a witness by a person who is not himself called a witness may or may not be hearsay. It is hearsay and inadmissable when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not true of the statement, but the fact that it was made. The fact that the statement was made, quite apart form its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

The rule against hearsay prohibits, except in well known circumstances, admission of another's statement to prove the assertion's truthfulness. The rule is criticised because it excludes otherwise relevant material from the court or tribunal of fact. Such material is relevant. The rule against hearsay, however, makes a principle of common sense and reason that, save in the circumstances excepted, inclusion of such material could

undermine justice and fairness.

The rule, despite criticism, makes it impossible for the defendant to bring cogent evidence pointing to innocence(Evidence in Criminal Proceedings: Hearsay and Related Topics, Law Com. No 138 (1995), England and Wales), applies to favourable defense evidence. The defense, like the prosecution, cannot rely on another's statement to establish veracity of the assertion in the statement. In Sparks v. R, [1964] AC 964, the charge was indecently assaulting a girl just under four years. The girl, naturally, could not give evidence. The trial court ruled inadmissible evidence that the child told the mother a coloured boy raped her. The defendant was white. The appeal was dismissed. In R v. Turner, (1975) Cr. App. R. 80, the defendant appealed against conviction. The trial court ruled inadmissible a statement by Saunders, not called as a witness, that another, not the defendant, committed the robbery. The Court of Appeal upheld the decision.

In the Court below and here the state submitted there was evidence the appellant hired, borrowed or stole the car. The assertions are hearsay. Mr. Bazuka Mhango submitted that, contrary to the prosecution submission that the motor vehicle was stolen, Mr. Mhango, the prosecution witness, told the court that Mr. Lwanda said Mr. Lwanda lent the motor vehicle to the appellant and that the appellant never stole the motor vehicle. Mr. Bazuka Mhango then submits there was no evidence the car was stolen but evidence that the appellant borrowed it. That evidence is hearsay. The defense cannot rely on it. The critical evidence therefore is that the appellant sold a car using a fake blue book.

The sale was strongly contested. The prosecution evidence comprises Mr. Mhango's direct testimony that the appellant sold Mr. Mhango a car and a contract of sale between the appellant and Mr.Mhango. In the caution statement the appellant denies the sale. According to the statement, the appellant left the car with Mr. Mhango because of a sudden trip to South Africa. He never sold the car.

The appellant's testimony on oaths is against Mr. Mhango's testimony. The appellant asserts that Mr. Lwanda, set on, on the appellant's advice, to open a car rental company, was selling toyota cressida and other vehicles. Mr. Lwanda asked the appellant to sell the cressida. The appellant found Mr. Mhango. Mr. Lwanda asked for K70, 000. Mr. Mhango could not afford. He offered to pay K32, 000 and the balance later. Mr. Lwanda accepted. He issued a receipt for the money. The appellant contends that Mr. Lwanda seized the car because Mr. Mhango could not raise the money. Mr. Lwanda, the appellant argued, refused to pay back the money to Mr. Mhango and treated the K32, 000 as rental for the time Mr. Mhango used the car. He bases this on an ingenuous fact that Mr. Lwanda's presence at the bank where Mr. Mhango was to give money to Mr. Phiri is inexplicable.

In his evidence on oaths the appellant disclaims the agreement. He did not write it, make it or sign it. This is against Mr. Mhango's testimony that the appellant authored it. The state, noting the appellant's disputation of authorship, called the investigating officer familiar with the appellant's handwriting. The officer saw the appellant write a caution statement.

The obtaining property by false pretenses count

On the representation in the count, the evidence is unsophisticated. Mr. Mhango never relied on the blue book the appellant gave him. The blue book copy the appellant disputes has a different owner. The representation is to ownership and authority to sell a car. Two excerpts of Mr. Mhango's evidence in-chief and in cross-examination should be reproduced. The Director of Public Prosecution never reexamined the witness on the matter. At page 15 of the untyped record Mr. Mhango said:

"When he was selling the car to me, he said that the car was his."

The appellant cross-examined the witness at length. This is what Mr. Mhango said at page 27 in cross-examination:

"You told me that the car was somebody's car therefore when changing the name in the book we would be together"

The agreement the state produced as evidence of sale states:

"I undertake to facilitate the change of ownership with the relevant Authorities, namely the second owner as indicated in the blue book and the Road Traffic Commissioner in due course."

Ownership was important, at least in the Court below, to establish the falsity of the allegation in the charge. The state relied on information at the Road Traffic Commissioner's office to prove the motor vehicle was Mr. Lwanda's and that the blue book was fake. The appellant's evidence on oaths is that the motor vehicle was Mr. Lwanda's. He accepts, as far as one can see, that a blue book was handed to Mr. Mhango. The State's case is that the appellant gave a blue book whose copy was tendered in Court. Mr. Mhango gave evidence to that effect. The appellant queries that the book Mr. Mhango received for the transaction can be that whose copy was tendered in court. He never gave the blue book whose copy is the document the state proffered in Court. The appellant queries where the state got the copy from.

REASONING

Rather than summarise, the lower Court's findings should be considered when treating the grounds of appeal. I should approach the matters from the two counts, starting, because it is easier, with obtaining property by false pretenses.

Obtaining property by false pretenses

the law

Obtaining property by false pretenses is an offence under section 319 of the Penal Code:

"Any person who by false pretenses, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen shall be guilty of a misdemeanor, and shall be liable for imprisonment for five years."

A false pretense is defined in section 318:

"Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be

false or does not believe to be true, is a false pretense."

Obtaining property by false pretenses is proved if the defendant makes a false pretense, intends to defraud and obtains from another something capable of being stolen. The offence bases on a false pretense. The offence is committed when the false pretense operates on another to release property (R. V. Laverty, 54 Cr. App. R. 495; Metropolitan Police Commissioner v. Charles [1977] A.C. 177).

The defendant must make a false pretense as defined. The defendant must say words, write or present a writing or do some action whose effect is a representation of some fact. The provision codifies the Common Law where the representation is to a fact, not law. Section 15(4) of the Theft Act 1968 in England now includes a representation as to law. Though section 3 of the Penal Code presumes the meanings to terms in the Code to those under English Criminal Law, a false pretense is defined by our Code. The representation must be to a present fact and be false.

The expression "words, writing or conduct" should not be read disjunctively. The key word is a "representation." A representation can be made by words used, writing made or proffered and conduct done in conjunction. One can, however, make a representation excluding possibility of another mode. Whatever mode, it is a question of fact whether a defendant made the representation the prosecution alleges(R. v. Adams, The Times, January 28, 1993).

The representation

The representation the prosecution alleges is that " he had property in and authority to sell" the motor vehicle. The allegation conveys two understandings. First, reading disjunctively, ownership is separate from authority to sell. The conviction stands on proof of anyone aspect (Sitikhala v. R. (1964) 1 ALR Mal. 1, 9; R v. Brown, (1983) 79 Cr. App. R. 115). Secondly, read conjunctively, the allegation entails ownership and authority to sell. Then the omnibus allegation must be proved. A variation is fatal (Sitikhala v. R, ibid.). The omnibus rendition, apart from the evidential aspects considered shortly, borders on ambiguity. Apart from a beneficiary under a trust, a man who has property in an object has a right of disposal, including disposal by sale. A man representing property in the object also means he has authority to sell the property. It is needless then to include in the representation that the man had authority to sell.

On the evidence, there are difficulties with the omnibus rendition. The Court below gave measured attention to the evidence and the law on this count. The Court below never made specific findings on issues on which, as seen, there was concession or conflict in a vital prosecution witness' testimony. The State never based the omnibus allegation on the appellant's conduct. No action is proved to represent the appellant owned and had authority to sell.

The Court below, on the theft count, referred to the appellant's proffering a fake blue book. Accepting that conduct, it does not represent the appellant owned or had authority to sell the car. The blue book, the basis of the conduct, mentions another as owner. Mr. Mhango was not induced by that the appellant was the owner where the blue book shows another owner. Showing a blue book cannot, without more, imply or represent one owns

and has authority to sell a motor vehicle. The State, therefore, relied on words the appellant said and writing he proffered to establish the allegation. The words used and the written agreement fail to establish the omnibus interpretation.

Inconsistences in Mr. Mhango's testimony and lapses in the prosecution's case

The Court below never resolved the discrepancy in what the appellant actually said. Mr. Mhango in examination-in-chief said the appellant said the car belonged to the appellant. In cross-examination Mr. Mhango conceded the appellant said the motor vehicle belonged to somebody else. Despite this damning assertion, the Director of Public Prosecution never reexamined Mr. Mhango to mollify the effect of cross-examination. The Court below did not make a finding of fact on the words actually used despite this apparent contradiction on evidence on oaths from a prosecution witness.

Mr. Mhango conceded in cross-examination that the appellant said the appellant never owned the car. Even if it is not a concession there is doubt about what the appellant told Mr. Mhango. The conflict in the vital evidence of a prosecution witness was neither explained nor explained away. That doubt must be resolved in the appellant's favour. It must be taken then that the appellant never said he had property in the car. A similar conclusion follows from the written agreement.

That the appellant never said that he had property in the motor vehicle is confirmed, assuming the document was obtained in the circumstances the prosecution alleges and the appellant its author, by the writing the State relied on. The document refers to a "second" owner as in the blue book. The inference is the appellant is the "first owner." This is gainsaid by that the appellant said all along the car belonged to somebody else. There was "another" owner who was not the appellant. The Prosecution never cross-examined the appellant on the words' meaning. Maybe this was unnecessary. The appellant disputed authorship. The words' meaning border speculation. Overall the words create doubt the appellant said he had property in and authority to sell the motor vehicle. The copy of the agreement, as shown later, is inadmissible for a noncompliance with the Criminal Procedure and Evidence (Documentary Evidence) Rules.

the allegation should be read disjunctively

Read conjunctively, as demonstrated by that there is nothing said or written to show that the appellant had said he had property in the motor vehicle, the omnibus allegation he had "property in the motor vehicle and authority to sell" is not established. Its other component, the appellant had "property in the motor vehicle," has collapsed.

The allegation should be read disjunctively, resulting in conviction if the appellant asserted property or authority to sell the motor vehicle. The doubt that he represented he had property in the motor vehicle is resolved in the Appellant's favour. Is it shown that the appellant represented authority to sell the motor vehicle? You do not have to own something to sell it. You could sell on the owner's authority. A person can represent he has authority to sell another's property. That representation can be by word, writing and/or conduct.

It is resolved the appellant actually said the motor vehicle belonged to another. The inference is he indicated he had the owner's authority to sell. That is not the only inference. The motor vehicle could be stolen. Title would pass. The property only revests to the true owner after successful conviction of the thief, not otherwise (Section 25(1) of the Sale of Goods Act). In those circumstances the defendant does not have the "authority of the owner" to sell the car. That does not mean he has no authority at all to sell the car. He passes title if he sells in a market overt. (R. V. Wheeler, 92 Cr. App. R. 279, section 20(a) of the Sale of Goods Act). The representation is he had "authority to sell." The representation is not he had the "authority of the owner to sell."

As to writing, accepting the document and its admissibility, the agreement never represents he had "authority of the owner" to sell. The allegation is the appellant represented "that he had authority to sell." The agreement does not allege that either.

probably there was a representation by conduct

It could be the overall conduct makes such a representation. On the facts, and I must emphasyse that it is only on the facts on the record, not as a point of law, I accept that. If he was selling on Mr. Lwanda's authority, he was representing he, as agent, had the owner's authority to sell. Reluctantly, because the Court below never made specific findings on the matters constituting the representation. I find the appellant represented by conduct that he had the owner's authority to sell the car. This leaves the other aspect: the representation must be false.

was the representation false? It is unnecessary to prove the representation that the appellant had property in the motor vehicle false

Again on the representation's falsity, there is a paucity of findings on critical aspects of the offence. The Court below said generally that what the appellant said was not true. That was inadequate. Even if untrue, it never proved the representation false. The onus is on the prosecution to show that the representation is false (R v. Mandry and Wooster, 58 Cr. App. R. 27). The lower Court made no specific findings. The evidence must be reviewed. In doing so, this Court lacks the lower Court's vantage of seeing and assessing credibility of witnesses. To these matters, the lower Court's opinion informs and guides the appeal court. On inference from established evidence, the judgement of the appeal Court is as good as the Court below. Where inferences are not born out by the facts, the Court on appeal can interfere with the lower Court's findings.

So far it is demonstrated there is no evidence the appellant actually said, wrote or conducted himself to represent he had property in the motor vehicle. On the three aspects, all is contrary: that he did not say he had property in the motor vehicle. It is unnecessary, therefore, to prove ownership of the motor vehicle. In his evidence in chief the appellant confirms the motor vehicle belonged to Mr. Lwanda. The printout is, on the appellant's concession, unnecessary to prove ownership. It is unnecessary therefore to consider admissibility of the computer printout. Nevertheless, it was inadmissible to prove ownership.

the computer printout is inadmissible

First, it is said often a blue book is neither a document of title nor evidence of title. Most

decisions excluding the blue book as evidence of title are based on decisions based on the English Road Traffic Acts. In judicial proceedings, admissibility of the blue book and indeed much information from the Road Traffic Commissioner, was under section 167 of the Road Traffic Act, 1964:

"(1) Any extract from a register or other records kept in terms of this Act or any regulations made under this Act shall, if it purports to be certified to be a true extract by the officer having custody or control of such register or records, be received in any court on production by any person and without further proof as prima facie evidence of the facts therein stated.

(2) The registration book of any motor vehicle or trailer shall be received in any court on production by any person and without further proof as prima facie evidence of the facts therein stated."

The registration book is prima facie evidence of what it contains, including ownership. This is repeated in section 139(1) of the Road Traffic Act, 1997:

"A document purporting to be an extract from or copy of any register or record kept in terms of this Act and purporting to be certified as such shall in any court and upon all occasions whatsoever be admissible as evidence and shall be prima facie evidence of the truth of the matters stated in such documents without the production of the original register or record or any certificate, licence, other document, microfiche, microfilm or computerised record from or of which such extract or copy was made."

Here however, it is not the registration book but the computer printout that was produced. The printout, according to section 167(1) of the Road Traffic Act(section 139 of the Road Traffic Act, 1997), rule 9 (d) of the Criminal Procedure and Evidence(Documentary Evidence) Rules and section 3(3) of the Authentication of Documents Act, should have been certified or authenticated. The uncertified and unauthenticated printout was inadmissible.

the oral accounts of the officer from the Road Traffic Commissioner are inadmissible

The oral accounts of the records of the Road Traffic Commissioner's office are admissible as secondary evidence(rule 3 (3)(e) of the Criminal Procedure(Documentary Evidence) Rules). The difficulty is that the Road Traffic Commissioner's officer never said he is the one who made the printout or saw the records. He was called to tender the printout. His oral evidence on the records is inadmissible because he never saw the records. Apart from that the secondary evidence would have to be admitted under the conditions in rule3(5). The printout, however, is a public document in terms of rule 7. It is inadmissible for reasons given in the preceding paragraph.

records at the Road Traffic Commissioner's office are pubic documents

Even if admissible, the hearsay rule catches the information. Computer information is in three categories. Two are unaffected by the hearsay rule. First, where the computer is a calculator to process information (R. v. Woods (S.W, 76 Cr. App.R. 23, and Sophocleous v. Ringer, [1988] R.T.R 52). The second is information the Computer is programmed to

record (R. v. Pettigrew, 71 Cr. App. R. 186; R. v. Spiby, 91 Cr. App. R 186. The third category, caught by the hearsay rule, is “information recorded and processed by the computer which has been entered by a person, whether directly or indirectly”(Archbold, Criminal Pleading, Evidence and Practice, 1995 ed., Sweet & Maxwell, 1/1408). The printout falls in the third category.

It was submitted in the Court below the printout was a public document and hence admissible to prove ownership of the motor vehicle. The matter was not fully canvassed in the Court below and in this Court. The information in the printout is caught by the hearsay rule and inadmissible unless it belongs to exceptions to the rule. Public documents are exceptions to the rule against hearsay. The cases of Sturla v. Freccia, (1880) 5 App. Cas. 623, Irish Society v. Bishop of Derry, (1846) 12 Cl. & F. 641 and Witton & Co. v. Phillips, [1926] Ch. 284 decide that public documents are admissible evidence to prove facts they state. The question is whether the Road Traffic Commissioner record are public documents.

In the law of evidence, Lord Blackburn defines a public document in Sturla v. Freccia. The definition seemingly suggests a public document that which is made for the people to use it and being able to refer to it. The formulation is very wide and unhelpful at time. The definition must be restricted to information the public document intends to record and inform the public on. This avoids absurdity and ambiguity. Otherwise, it would be possible, for purposes of conversation, to prove marriage, in a divorce case, from mention of Mrs. Lwanda from the Road Traffic Commissioner’s records. Reference by the public must therefore mean reference for the purposes for which the records are made. Marriage or births can be established from public documents that register marriage or births. The records at the Road Traffic Commissioner are public documents. They are not records of title. They would not be public documents for the rule excepting public documents from the rule. There is, however, a statutory definition for criminal proceedings.

These records fall in the definition of public documents under the Criminal Procedure and Evidence Code(Documentary Evidence) Rules, cap 8:01, subsidiary. Rule 7 provides:

“(1) The following documents are public documents-

(a) documents forming the acts or records of the acts of-

(I) the sovereign authority;

(ii) official bodies and tribunals; and

(iii) public bodies, legislative, judicial and executive whether of Malawi or of any other country;

(b) public records kept in Malawi of private documents;

© documents other than documents specified in paragraph (a) or paragraph (b) which are public documents within the

meaning of the Authentication of Documents Act.

(2) All documents, other than those specified in subrule (1) are private documents.”

The Road Traffic Commissioner's records are not within the definition in the rule. The documents must "form acts" or be "records of acts of" in paragraph (a) or be "public records of private documents. The records of the Road Traffic Commissioner neither form acts nor are records of acts. They are not records of private documents. They are however covered by the definition in section 2 of the Authentication of Documents Act:

"(a) a document emanating from an authority or an official connected with the courts or tribunals of any state being a party to the Convention, including those emanating from a public prosecutor, a clerk or registrar of a Court, a sheriff or a process server;

(b) an administrative document not hereinafter excluded;

© a notarial act;

(d) an official certificate which is placed on a document signed by a person in his private capacity, such as an official recording the registration of a document, or the fact it was in existence on a certain date, and an official or notarial authentication of a signature, but does not include

(e) document executed by a diplomatic or consular agent;

(f) an administrative document dealing directly with a commercial or customs operation ..."

The combination of paragraphs (b) and (f) of the definition makes these entries public documents. They are not caught by the hearsay rule. The printout is excluded because it is unauthenticated or uncertified.

even if authenticated, on the facts, the printout is not evidence.

The documents here nevertheless cannot be evidence of title. The Road Traffic Commissioner's witness said the information in the computer is unchanged until a new certificate of fitness becomes necessary. Title in a property, unless, there is a contrary indication, passes on the conclusion of a sale (R. v. Wheeler, 92 Cr. App. R. 279). Under the Road Traffic Act, certificates of fitness are valid for twelve months. The Road Traffic Commissioner exempts other motor vehicles. Until then, ownership changes without affecting the Road Traffic Commissioner's records. This is why the Road Traffic Act says the records are only prima facie evidence of what they contain. The motor vehicle here was not stolen. It was given to the appellant. If anything, by the prosecution theory, it was stolen by the act of selling. Until that time it was not a stolen car for purposes of section 25(1) of the Sale of Goods Act. Here property in the car passed when the sale agreement was concluded. There the records of the Road Traffic Commissioner cannot be evidence of title in the motor vehicle.

Without a representation the appellant had property in the motor vehicle, it is unnecessary to consider falsity of the representation the appellant had property in the motor vehicle. Regardless, the appellant said on oaths the car belonged to Mr. Lwanda. The remaining question is whether the allegation the appellant had authority to sell the motor vehicle is false. The state is to prove the representation false.

was the representation the appellant had authority to sell the motor vehicle false?

On this allegation there are no appellant's words actually said or writing to represent he had authority to sell. The possible candidates are two statements quoted earlier. In cross-examination the appellant said:

"You told me that the car was somebody's car therefore when changing the name in the book we would be together."

In the copy of the agreement, the appellant, it is alleged, wrote:

"I undertake to facilitate the change of ownership with the relevant Authorities, namely the second owner as indicated in the blue book and the Road Traffic Commissioner in due course."

Subject to admissibility of the agreement, these assertions, though indicative of an agency, are futuristic in outlook. The representation can only be as to a past or present fact.

The most there is, and I reluctantly accept that, is that the appellant conducted himself as to impress that he was an agent of the owner.The appellant was representing that, the property belonging to somebody else. He had the authority of that other to sell the motor vehicle. Accepting that, on the evidence, there are problems proving the representation false. Before handling this, I should repeat an earlier observation about the actual representation alleged. The actual representation is "he had authority to sell." This is different from "he had authority of the owner to sell." On the evidence and the law the State has not discharged the duty to establish the falsity of the allegations. Whatever construction, none was false or proved so.

If the allegation is that the appellant represented that "he had authority to sell," however the property was obtained, in law he could sell the motor vehicle and vest property in the purchaser, that, as we have seen, even if he stole the motor vehicle. In law a similar result obtains where the defendant had no "authority of the owner." The law vests the possessor with authority to sell the property. More importantly, the appellant was not selling a stolen car. He could sell the car. It is the act of selling, if it is without the owner's consent, that is conversion which constitutes the offence here. It is incorrect in fact therefore that the representation that the appellant had authority to sell was false. This legal aspect notwithstanding, on scrutiny, the evidence is more damning.

The Court below accepted the appellant had the motor vehicle lawfully. At page 315 of the untyped record the learned magistrate accepted the State's submission at page 311:

"In the present case the accused 'somehow' acquired a car from lieutenant Lwanda but the moment he decided to sell it he formed the intention to steal it."

At page 318 the Magistrate said:

"The Court has noted with great concern that he definitely borrowed the car from Lt. Col. Lwanda but he converted it and sold it to Mr. Mhango without his consent. If someone converts somebody's property without his consent that tantamount to theft."

The State doubted the circumstances the appellant came by the motor vehicle. The appellant deserves a favourable rendition of this doubt. The result is that we cannot conclude that the appellant acquired the motor vehicle unlawfully. The appellant therefore lawfully acquired the motor vehicle from Mr. Lwanda. A man who borrows property obtains it lawfully. There is no admissible evidence to support the lowe Court's finding that the appellant borrowed the car. Apart from the inadmissible assertions we excluded earlier, there is no contrary admissible prosecution testimony. Even if the appellant got the motor vehicle lawfully, the charge of obtaining property by false pretenses is proved by showing the representation that the appellant had authority to sell false because the appellant did not have Mr. Lwanda's authority to sell. The prosecution must show the representation the appellant had Mr. Lwanda's authority to sell false.

no direct prosecution testimony that Mr. Lwanda did or did not ask the appellant to sell the car

There is no direct prosecution testimony that the appellant had or never had Mr. Lwanda's authority to sell the car. There is, however, direct defense testimony that Mr. Lwanda asked the appellant to sell the car. The Director of Public Prosecution never cross-examined the appellant on the whole evidence or on this aspect in particular. The appellant's evidence that Mr. Lwanda requested him to sell the motor vehicle must, without good reason, be accepted. If, as the appellant testified, Mr Lwanda asked him to sell the car, the appellant sold the car with Mr Lwanda's consent.

There is direct and uncontested defense evidence that Mr. Lwanda asked the appellant to sell the car

That Mr. Lwanda never gave evidence complicates the matter. Rejecting the defense evidence, as the Court below did, that Mr. Lwanda asked the appellant to sell the car, without Mr. Lwanda's testimony, no prosecution testimony establishes that Mr. Lwanda did or never authorised the appellant to sell the car. The result is that there is no evidence on which the Court could decide either way. The State will have failed to prove the issue. There is, however, the appellant's direct uncontested testimony. The appellant was not cross-examined. There is no good reason for rejecting the appellant's oral testimony that Mr. Lwanda authorised the sale. The appellant's testimony must stand. Whether the appellant had authority to sell, the car was particularly critical to the alleged representation and the obtaining property by false pretense's count generally.

The State proceeded on the appellant's testimony being disbelieved. The trial court, no doubt, took that course. It was right and proper to challenge the witness' evidence or, at least, while in the witness box, it was made plain to him that his testimony was not to be believed (R. V. Hart, 23 Cr. App. R. 202). In one case it is decided failure to cross-examine a witness is fatal to conviction. In another it was held not to be the case (Browne v. Dunn, (1893) 6 R. 67, 76-77; and Flanagan v. Fahy, [1918] 2 Ir. R.361, 388-389). The modern view is that a party who wants a witness' testimony to be disbelieved, should challenge the witness so that the Court can assess the witness' credibility and reaction, unless, as was not so here, the witness' testimony was palpably reasonably not true. In the Hart case, the defense was an alibi. Neither the defendant and his witnesses were cross-examined. In the summing-up the jury was not informed of the consequences if the

defense case was believed to be true. In the Court of Appeal, in a judgement with which Lord Justices Swift and McNaghten agreed, the Lord Chief Justice said:

"In our opinion, if on a crucial part of the case, the prosecution intends to ask the jury to disbelieve the evidence of a witness, it is right and proper that a witness should be challenged in the witness-box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted. Here no questions were asked in cross-examination. Having regard to that matter, and also to the summing-up, we have come to the conclusion that the conviction was unsatisfactory and cannot stand, and that the appeal ought to be allowed."

In this matter the appellant was not cross-examined. It was not put to him that his evidence was to be disbelieved. The judgement of the Court below does not consider that the appellant was uncross-examined. The appellant's evidence stood alone. There was no basis for rejecting it. Rejecting it, there is no corresponding prosecution testimony that Mr. Lwanda did or did not authorise the appellant to sell the car. Authority cannot be presumed from that the appellant sold the car. Equally, want of authority cannot be presumed from that the appellant sold the car. The state had not discharged their duty to prove the representation that the appellant had authority to sell the car false. That the appellant was not cross-examined on the matter is complicated by that Mr. Lwanda was not called to testify.

Failure to call a witness with vital material to assist the Court

On failure to call Mr. Lwanda to testify Mr. Bazuka Mhango submits that, at the least, the prosecution should have sought the Court to compel Mr. Lwanda to appear. This however was only if Mr. Lwanda was a recalcitrant witness. It was submitted in the Court below and repeated here that Mr. Lwanda was such a witness. There was, of course, evidence from the investigating officer that the witness was unhelpful during investigation. There is no evidence that the witness was not willing to comply with summonses to attend. There is reason to believe that he was willing to attend the proceedings. There is a reason, it appears, why Mr. Lwanda, did not attend Court.

The appellant pleaded on 10th March, 1999. The Court adjourned to 24 th March 1999 for trial. On 24th March, 1999, the Director of Public Prosecution told the Court that, in spite serving summonses on the witnesses, only the Road Traffic Commissioner's officer came. The Director of Public Prosecutions was surprised that Mr. Lwanda was absent. The Director said, Mr. Lwanda specifically requested for transport which the Director of Public Prosecution duly proffered. This is not, at least on the Director's assertions to the Court, evidence, and I use the word evidence in its loose sense, of a recalcitrant witness. The Director's own explanation is the witnesses, including Mr. Lwanda, probably confused dates because of another matter for the next day. Court adjourned to the next day, the 25th March, 1999.

The next day, the Director told the Court that the witnesses for both counts had come. Whether the witnesses confused the dates is unclear. The Court heard three prosecution witnesses. Whether Mr. Lwanda was among the witnesses the Director of Public

Prosecution said came is uncertain. The Director of Public Prosecution at page 45 of the untyped record informed the Court that his next witness was Sergeant Kandoje. The Director was not calling him and calling Detective Inspector Samika instead Mr. Lwanda is not mentioned to the Court. After Detective Inspector Samika's evidence, the Director of Public Prosecution amended the charge. After the plea to the amended charge, the Director of Public Prosecution told the Court he closed the State's case. Mr. Lwanda was not mentioned. That Mr. Lwanda was followed up to find out what the problem was is uncertain. Evidence lacks that he was informed of the matter next day. Evidence lacks that the Director of Public prosecution was having problems tracking the witness. The Director of Public Prosecution never sought adjournment for Mr. Lwanda to come. All showed Mr. Lwanda caused some problems during investigation. Nothing suggested unwillingness to come to Court. He was ready to come to Court. He had requested the Director of Public Prosecution to give money for fuel. One can only speculate why Mr. Lwanda was not called as a witness. He was a crucial and available witness and, as the record goes, there is no explanation why he was not available to testify.

There is authority of the Supreme Court of the land. In Nankondwa v. Republic, (1966-68) 4 ALR Mal 388, 392), Cram, J.A., said:

"It is the function of the Prosecution to call a witness who can supply the court with material, even vital evidence. If the Witness cannot be found, then the Prosecution should lead evidence of a vain search."

The Supreme Court held that a statement by a prosecutor at the bar cannot be proof. The prosecution must lead evidence of vain search. Here only Mr. Lwanda could contradict the appellant's testimony that Mr Lwanda authorised the appellant to sell. He was a witness with material and vital evidence. The witness was available. There is no evidence of a search. The absence of Mr. Lwanda to contradict the appellant's testimony that Mr. Lwanda authorised him to sell the car undermines the prosecution's case that the appellant had no authority to sell the car. In Nankondwa v. Republic, Cram, J.A., continued to say:

"Meria alone could testify whether the appellant had met and quarreled with her on the night in question. After the appellant had given his contradictory testimony, if the evidence of Meria appeared essential to a just decision of the case, the trial court, by S. 153 of the Criminal Procedure Code ..., had a duty to issue a summons for her as a witness. The return of the summons, and not the statement of counsel, should have governed the situation. The absence of Meria, whether available or not, weakened the prosecution, which had to negative provocation."

What the Director said across the bar was not evidence that the witness was unwilling to testify. As the Supreme Court advised, the best was proof of service of the summons or evidence of search failure by the officer who served the process. If it was the Director of Public Prosecution himself who served, his testimony should have been on oaths. We are unsure the witness was served or received money for fuel. All we have is a statement from the bar to the effect. The Supreme Court deprecates this in the Nankondwa case.

mr. Lwanda's evidence essential to the just decision of the case

More importantly, the Supreme Court's suggests that the Court is under a duty to invoke section 153 of the Criminal Procedure Code (now section 201 of the Criminal Procedure and Evidence Code). The appellant, having given the evidence he did, the evidence of Mr. Lwanda was essential, in the words of Cram, J.A., to the "just decision of the case." Given the importance of Mr. Lwanda's testimony, he should have been called as a prosecution witness. One can speculate that the prosecution did not anticipate the appellant's testimony on oaths. Nevertheless, the appellant having raised the matter after the close of the prosecution case, short of cross-examining the appellant, the Director of Public Prosecution, should have invited the Court to call Mr. Lwanda. More importantly, the Court, the appellant having given the testimony he gave, should have invoked the powers in the section to call Mr. Lwanda.

The matter, however, did not arise after the appellant gave evidence. In the caution statement the appellant said Mr. Lwanda gave him the car. Such doubt as there is must be resolved, on the evidence on the record, in the appellant's favour. There is evidence that the appellant was asked by Mr. Lwanda to sell the car. That evidence has not been contradicted. The State had not proved beyond reasonable doubt that the representation that the appellant had authority to sell the car was false. There is evidence that the owner of the motor vehicle, Mr. Lwanda, authorised the appellant to sell the car.

Falsity of the representation cannot be inferred only from the use of a fake registration book

Before winding the obtaining property by false pretense count let me consider an aspect to be considered in detail on the theft count. The Court below discusses it on the theft count, By extension it applies to the obtaining property by false pretenses count. The reason, among others, the Court below gives for rejecting the appellant's version of events as true is that the appellant gave Mr. Mhango a fake blue book. Later I demonstrate that the copies of the fake blue book are inadmissible and should be excluded. The reasoning is that the appellant could not have used a fake blue book if he had authority to sell the car. That conclusion can only be at the expense of ignoring other inferences. If the appellant wanted to pocket the K32, 000, he could have produced a fake blue book though he was authorised to sell the car at K70, 000. He would be guilty of theft of Mr. Lwanda's money, not obtaining Mr. Mhango's money by false pretenses. The evidence is circumstantial. The conclusion the Court below drew is not the only possibility or inference. There are other inferences to exclude before the lower court's inference is had. Such a conclusion is based on a generalisation that is weak and remote from experience.

Besides, the appellant queries, rightly in my judgement, a lot of aspects about the copy of the blue book tendered in Court. There are gaps in the prosecution case that cast doubt on the prosecution's theory on the aspect. One of these gaps is that, in spite that the State went at full length to get the computer printout on the motor vehicle under discussion, the State did not check the actual chassis and engine numbers on the motor vehicle. This was important to establish whether the alleged faked document was false. For, assuming the printout's accuracy, if the numbers on the actual motor vehicle and printout coincide, the

blue book the appellant gave Mr. Mhango is fake. On the other hand, if the numbers on the motor vehicle the ones on the document the appellant gave Mr. Mhango coincide, the information in the printout is erroneous. It is insufficient that the records are a public documents and are mechanically produced (R. v. Coventry JJ ex p Bullard, (1992) 95 Cr. App. R. 175). On record there is no evidence of the actual numbers on the motor vehicle to determine that the document the appellant gave Mr. Mhango is fake.

Admitting the copy of the blue book, scrutiny shows that the fake blue book and the printout come one after the other in terms of time. The printout only shows one and probably current owner. The copy of the fake blue book is dated 28th July, 1994. The printout, which does not show previous owners, is dated 1st December, 1994. The registration book is more informative. It would show whether the owners in the fake blue book ever owned the car. There is another blue book. For if the fake blue book is all that there was, it is difficult, without the printout, to see how the police resolved the motor vehicle belonged to Mr. Lwanda because the printout tendered in court was only made on the 16th of February 1999. The evidence leaves gaps and doubts.

The prosecution sought to establish falsity of the document by the Road Traffic Commissioner's officer's testimony. His evidence is that the blue book tendered in court was not issued by the Road Traffic Commissioner. The witness does not state why the particular blue book was not issued by the Road Traffic Commissioner. This is curious because, obviously the blue book itself was not shown to him. This is important because the appellant disputed vigorously in the court below that the blue book he gave to the appellant was the one of which the D1 was a copy. The blue book was seized by Mr. Lwanda. No one explains how the copy was made from the original Mr. Lwanda seized. The appellant contended the blue book, much like the whole case, is a fabrication for some reason. There is no evidence that the witness from the Road Traffic Commissioner saw the actual blue book. Exhibit D1 that the witnesses saw was a photocopy of the page of the blue book. One wonders whether the witness from the Road Traffic Commissioner concluded that the copy of the blue book was fake because of the stamp, the signature, the handwriting or whatever.

the copy of the blue book is secondary evidence and is inadmissible for a noncompliance with the Criminal Procedure and Evidence(Documentary Evidence) Rules and the Authentication of Documents Act

This leads to the fake document's most contentious issue. The preceding paragraph shows the State produced a copy of the fake blue book. Mr. Bazuka Mhango submits that the copy, being secondary evidence, should be excluded for a noncompliance with the Criminal Procedure and Evidence Code (Documentary Evidence) Rules. The State submits compliance. Mr. Bazuka Mhango is right. Of course, according to rule 3(1), contents of a document are proved by primary or secondary evidence. The copy of the blue book is secondary evidence(rule 3 (b)). Rule 3(4) however restricts use of secondary evidence to certain circumstances.

"Documents must be proved by primary evidence except in the circumstances hereinafter mentioned."

None of the circumstances stipulated in rule 3(5) relate to the document under consideration. Rule 3(5) provides:

"Secondary evidence may be given of the existence, condition or contents of a document in the following cases: -

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or any persons out of each of, or not subject to, the process of the court or of any person legally bound to produce it, and when, after the notice mentioned in rule 4 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved in which case such written admission is admissible;

© when the original has been destroyed or lost or is in power of a person not legally bound to produce it, and who refuses to or does not produce it after reasonable notice or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of rule 7;

(f) when the original is a document of which a certified copy is permitted by these Rules, or by any other law in force in Malawi, to be given in evidence;

(g) where the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection:

Provided however that evidence as to such general result may be given only by a person who has examined them and is skilled in the examination of such documents."

The nearest possibilities arguable for the State are paragraphs (a) and © of rule 3(5). Mr. Mhango said Mr. Lwanda seized the blue book the appellant gave him. Mr. Mhango never mentioned a copy of the blue book. He mentioned agreement copies. The appellant, therefore, did not have the blue book. Mr. Lwanda is neither a person out of reach, a person not subject to the process of the Court nor a person not legally bound to produce the document. There is no evidence on the record that the Director of Public Prosecution, in terms of paragraph (a), gave the witness notice to produce the original document and that the witness refused or neglected to produce it. Notice is a precondition for admissibility under rule 4 of the Criminal Procedure and Evidence(Documentary Evidence) Rules for the application of condition 3(a) in the rules unless, of course, and this is not true here, the situation falls in the exception.

It was submitted by Miss Jaffu that failure to produce the original blue book is through no default or neglect on their part. The Court should still accept the secondary evidence

under the last aspect of paragraph (c). That aspect of the rule should be read strictly. Where there would be delay, lack of default on the party relying on secondary evidence excuses production of secondary evidence. The State never established that there was going to be delay in calling Mr. Lwanda to court or requiring him to produce the original document. Courts are neutrals in any prosecution of an accused person. Obviously, on this matter there was default by the prosecution, the party relying on the secondary evidence. First, they never collected the original blue book from Mr. Lwanda. There is no evidence of the person, the time, place and manner the copy tendered in court was made from the original. Secondly, there is no evidence that the State issued a summons to the witness to produce the original. Thirdly, the State did not call Mr. Lwanda at all. It would be leaning so much to the State's side to overlook all these avenues of ensuring fairness that the State should think that the Court will go all the way to accept what occurred here. Much so when the appellant in the Court below questioned the authenticity of the copy of the blue book and, as we shall see shortly, the lower court did not give the sort of guidance the appellant, who was unrepresented, needed in such a situation. The matter is not within paragraph (a) of rule 3(5). The State is not claiming that the original has not been lost or destroyed. It is not with a person not legally bound to produce it. Mr. Lwanda is a competent and compellable witness. He could not have claimed any immunity. Neither would a fake document be a public document for purposes of paragraph (e). It is a private document under rule 7(2) of the Criminal Procedure and Evidence(Documentary Evidence) Rules. Secondary evidence of the document was inadmissible.

the appellant was unrepresented and the court should have been more cautious

Even if it was, since the appellant was unrepresented, the Court should have followed the guideline in R. v. Wayte, (1983) 76 Cr. App. R.110, 118:

"As general rule, it cannot be doubted that both counsel and the court should ensure that documents are not handed to or seen by the jury until their admissibility, if questioned by any party to the proceedings, has been decided. For this to be done, some warning should be no doubt be given to counsel for both parties affected by the evidence, who might wish to object their admissibility. If a defendant is unrepresented, then the guidance of the court should be sought before the document is put before the jury. In all cases, it is desirable to prevent any party being taken by surprise and to ensure that there is a fair opportunity for the other parties to consider the admissibility of the document. If necessary, all parties should have an opportunity to examine the document. We stress the words "as a general rule" because it must not be forgotten that the documents in the present case inevitably had a dual purpose if they were admissible. They were relevant for the purpose of advancing Mr. Campbell's own case. They were further relevant for the purpose of impeaching and undermining the evidence which the appellant had given adverse to Mr. Campbell."

The operation of the guideline meant that the Court should have given guidance on how the appellant, who was unrepresented, should proceed now that the authenticity of the document was in issue. Properly guided, the appellant could have decided to call Mr. Lwanda as his witness now that the State was not calling Mr. Lwanda. Short of that the

Court should have called Mr. Lwanda now that the appellant raised the matter.

The scope of the best evidence rule is circumscribed, at least in criminal proceedings, in a specific way by rules 3 and 4 of the Criminal Procedure and Evidence Code(Documentary Evidence) Rules.

a break in the events

Finally, there is a break in the chain of events connecting the blue books, prompting the appellant to wonder where the book he actually gave Mr. Mhango is. Mr. Mhango only speaks of a copy of the agreement being available. He does not mention the presence of a copy of the blue book. Apparently, the blue book is seized by Mr. Lwanda. There is no mention of how the copy tendered in Court was had.

the original fake blue book is not before the court

The state never proved the appellant used a fake document. The copy of the blue book is inadmissible. There is no material, therefore, for the Court below to decide the appellant used a fake blue book. There are, therefore, doubts about the alleged faked blue book. The lower Courts reason for rejecting the appellant's version of events is tenuous on this reason and the others mentioned. If the use of a fake book is any reason advanced for establishing falsity of the representation that the appellant had authority to sell the motor vehicle, the argument falls. The state never established a fake book was used.

This strengthens the appellant's contention all along these proceedings that the original blue book the appellant gave the appellant should be produced. There is no reason given for non-production of the original blue book. The copy produced in the Court below should not have been admitted for reasons just given. The Court would not be disingenuous to conclude that one reason this critical evidence is overshadowed is adverse facts to the prosecution case could emerge.

The appellant obtained the money. As it has turned out, going by the appellant's testimony, that money was somebody else's. I do not consider that significant. The obtaining was proved by the direct evidence of Mr. Mhango. The Court below received wholeheartedly Mr. Mhango's evidence. The Court below was impressed by his testimony.

the written agreement is inadmissible

It was contended for the appellant here and in the Court below that the agreement was not the appellant's. He did not write it. Although Mr. Mhango's evidence is equivocal on whether Mr. Mhango was present when the agreement was written, the sub-inspector testified to the similarity of the handwriting between the caution statement which the appellant wrote in the sub-inspector's presence. Contrary to what Mr. Bazuka Mhango submitted, the sub-inspector's testimony suffices to prove the handwriting and the signature. The matter is governed by section 191(1) of the Criminal Procedure and Evidence Code:

“When the Court or the jury, as the case may be, has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact. A person shall be held to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person or under his authority and addressed to that person, or, when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.”

The witness need not see several times the person write. A single observation of writing suffices (Burr v. Harper, (1816) Holt N.P. 240 and Warren v. Anderson, (1839) 8 Scott 384).

Admissibility, a matter not raised by Mr. Bazuka Mhango, is the serious objection to the written agreement. The appellant raised it generally in the Court below when rejecting the written agreement. A photocopy was tendered in court. This was secondary evidence under rule 3, paragraphs (b) and (c). It could only be admitted under the conditions in rule 5. The appellant was not represented in the Court below. The Court was under a duty to check the admissibility of the evidence. The party tendering the document was to justify the admissibility of the secondary evidence under the exceptions in the rule. The agreement here was a private document under rule 7(2) of the Criminal Procedure and Evidence(Documentary Evidence) Rules. There is no justification for the admissibility of the copy of the agreement. The Court below should not have accepted the copy of the agreement without ensuring its admissibility or at least without alerting the appellant, who was unrepresented, about the inadmissibility of the copy of the agreement. All reference in the lower Court’s judgement to the contents of the agreement are untenable.

Even if the written agreement was admissible, it adds very little and insignificantly to proving that the representation that the appellant had authority to sell the car is false. The written agreement shows that the appellant sold the car to the appellant at K32, 000. The appellant says that K32, 000 was part payment. The price fetched by Mr. Lwanda was K70, 000. I accept, as the Court below did, on Mr. Mhango’s oral testimony that he paid the monies he claims he paid. That the appellant, if sent by Mr. Lwanda to sell the car, sold it at a different price cannot be proof that the appellant had no authority to sell the car. This situation does not prove the appellant had no authority to sell the car. This is not a logical result from the premise. If it is, it is not the only inference.

If, as seen, the appellant wanted to purloin the proceeds, he could sell for less. Then the appellant commits theft of Mr. Lwanda’s money. There is no prosecution evidence that Mr. Lwanda did or did not receive the money. It becomes difficult then to even consider a conviction for theft under section 157(2) of the Criminal Procedure and Evidence Code. In fact, there is direct uncontested defense evidence, although the Court below never made a finding of fact on the matter, that Mr. Lwanda got the money and the appellant got none of it. There are other possible inferences to that there is a discrepancy between what the appellant actually sold the car for and what he claims on oaths. Theft of the money is an illustration. There are other considerations.

It cannot be said that generally in everyday human discourse when one sells a thing below the price of the owner he has no authority to sell the car. Just as it cannot be said that because one has lied on an aspect, he has no authority to sell. All these generalisations, however improved, do not conform to human experience. Yet these are the sort of generalisations on which an inference that the appellant lied on this aspect means that he had no authority to sell the car would be premised. They are very weak to justify the inference. So, even if the written agreement was admissible, which it was not, it does not prove that the appellant lied he had authority to sell the motor vehicle. Neither is the matter proved by considering what Mr. Mhango and the appellant said on oaths on the matters. The generalisations on which to premise the inference are too weak to support the inference.

The appellant obtained property. The finding bases on Mr. Mhango's testimony rather than the agreement copy. The obtaining property by false pretenses charge fails because, although the appellant represented by conduct that he had the owner's authority to sell, the state has not proved the representation false beyond reasonable doubt.

was the false representation the reason for parting with the money?

There is the question whether the false representation caused Mr. Mhango to part with K32, 000. Mr. Mhango's testimony is that the agreement was written before he paid. The Wheeler case decides that parting with property must precede the contract for the representation to be the operative cause of parting with the money. The reasoning of the Court of Appeal in England is that property passes on the conclusion of the agreement. The property having passed to the purchaser by agreement, when the property is parted with after the agreement, the representation cannot be the basis for parting with the property because the property now belongs to the man who benefits from the agreement. On the facts of this case, when Mr. Mhango parted with the money, the motor vehicle belonged to him, property having passed under the agreement to Mr. Mhango. The representation ceases to be false after the property has passed to the buyer because the buyer now has the property. At that stage the representation as to ownership is irrelevant because the car does not belong to Mr. Lwanda. Writers have criticised the decision(Archbold Criminal Pleading Evidence & Practice, Sweet&Maxwell, 1994 ed. Para. 21-147).

The learned authors conclude the decision is correct on its particular facts. The decision however is logical. It appears pedantic to split the transaction for purposes of analysis. The wisdom of the Court of Appeal is founded on that split which enables analysis. The offence is obtaining property by false pretenses. A man who induces another to enter an agreement albeit on a false representation is civilly liable but not committing a crime. Then the defendant has obtained an "agreement" by false pretenses. This is not a crime at common law or under statutes. Our law only creates offences of obtaining "credit" and "property" by false pretenses. A man who parts with property under an agreement does so by the force of the agreement, not the false representation. At the time he parts with the money, the property belongs to him. If in this matter the representation was false, which is unproven, the count fails because there was no false representation to be the operative cause of Mr. Mhango parting with the money.

The theft count

no evidence the appellant borrowed the car

On the theft charge what has been said on the obtaining property by false pretenses applies. The issue should therefore preoccupy us briefly. The theft count bases on conversion. The Court below accepted this. At page 318 the learned Magistrate said:

“The Court has noted with great concern that he definitely borrowed the car from Lt colonel Lwanda but he converted it and sold it to Mr. Mhango without his consent. If someone converts somebody’s property without his consent that tantamount to theft.”

The factual base of this conclusion is problematic. The materials on which the Court below concludes the car was borrowed, as shown, are hearsay and inadmissible. Even in the caution statement, the appellant says Mr. Lwanda gave him the car. The appellant does not say Mr. Lwanda lent him the car. The Court below could not justify the conclusion that the appellant borrowed the car on the admissible evidence on the record. The only evidence on how the appellant got the car is the appellant’s. There is no admissible evidence from the prosecution on how the appellant came by the car. On this aspect there is consistency between what the appellant said on oaths and in the statement to the police. Mr. Lwanda gave the motor vehicle to the appellant. Mr. Lwanda did not lend the car to the appellant.

The State and the Court below relied on section 271:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any to, the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents that is to say-

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.”

No basis for concluding that the appellant did not have the consent of the owner

The court’s conclusion that the appellant sold the car without the consent of the owner is unjustifiable on the evidence on the record. The burden was on the prosecution to show that the appellant sold the car to Mr. Mhango without Mr. Lwanda’s consent. Like in rape, the state should negative consent. That can be done by the prosecution proffering evidence to that effect. This, as we shall see shortly, was not done or done unsatisfactorily. The prosecution had an evidential burden. At the close of the prosecution case there was no evidence to negative consent. Lack of consent cannot be inferred just from selling somebody’s car. A prima facie case of theft is not made out by proving that

somebody sold another's car. The State must prove beyond reasonable doubt that the defendant sold the property without the consent of the owner.

The only material that could negative consent was the appellant used a fake blue book. That, as shown, is insufficient to justify an inference that the appellant sold the car without consent. More importantly, there was no admissible evidence that the appellant used a fake blue book. The copy of the blue book the Court below accepted was inadmissible. At the close of the prosecution case, there was no evidence to negative consent.

If it is thought that the onus was on the defendant to show consent, the appellant discharged that burden. He said on oaths that Mr. Lwanda gave him the motor vehicle to sell. In the statement at the police, the appellant said Mr. Lwanda gave him the motor vehicle. He had to discharge that burden on a balance of probabilities. He discharged the evidential burden by proffering evidence which the State did not contradict either by cross-examination or rebuttal by calling witnesses to refute what the appellant said. That evidence could come from the defendant. The burden of proof, however, cannot be on the appellant to prove owner's consent. Like in rape, the State should negative consent beyond reasonable doubt. For theft by public servant contrary to section 283(1) of the penal Code theft is presumed from proven facts. That provision, however, has not been tested for constitutionality. To hold that the defendant should establish consent in ordinary theft is tantamount to presuming theft from proof that somebody sold another's car.

However, even after trial the State had not proved the matter against the appellant beyond reasonable doubt. The Conviction is unsafe and unsatisfactory. One who sells the property of another without the authority of the special or general owner converts the goods and, for purposes of the section, commits theft. There is no conversion and, therefore, theft if the owner has asked another to sell the car. This situation is not caught by the provisions of subsection 3 to section 271 of the Penal Code.

The State and the Court below agreed the appellant had the motor vehicle lawfully. For the doubt in the State's stance and the position the Court below took on the aspect, a construction of the facts favourable to the appellant would be the appellant lawfully had the motor vehicle. The prosecution had to prove the appellant sold the car without the owner's consent. It is a question of fact whether another has sold the other's property without consent. The question for the Court below was whether the appellant had Mr. Lwanda's authority to sell the car. If he had no authority, the sale is conversion and the appellant committed theft. If he had authority, the sale was with the owner's consent even if the owner wanted a higher price. The appellant would not, in that case, have sold the car without the consent of the owner. The sale was with the owner's consent.

The Court below approached the matter only from that the appellant's story could not be true. In criminal cases the standard of proof has always been and remains to be proof beyond reasonable doubt. The Court should examine the whole matter before it and decide whether on the case as a whole the State has discharged that duty. The defense case must be considered and treated like the prosecution case. The prosecution case could be so formidable that in the face of it the defense pales. The reverse is also true. A trial

court, however, should not think that the prosecution's case is made out simply because the defense case is weak or unreasonable. That is tantamount to placing the burden, which is always on the state, on the defense to prove the case beyond reasonable doubt. Even if the defense case is untenable, the trial Court must, to satisfy itself that the State has discharged the duty, approach the state's case with the rigours the burden and standard of proof require.

The trial court did not try to examine the State's case and evidence for what they were worth. The Court preoccupied itself with the question whether the appellant's story was true. No doubt, if the defendant's story is true, it casts real doubt on the prosecution's case, but, as I have said, the standard of proof is beyond reasonable doubt.

For the State, the application of the principle, as was stressed in The Director of Public Prosecution v. Woolmington, [1935] AC 462, does not mean proof beyond a shadow of doubt. For the defense, the application of the principle does not mean any doubt will suffice. For the defense, a reasonable doubt will suffice. It follows that, while the defense case, if true, undermines the prosecution case, it suffices if the defense case is reasonably true. The question the trial court should ask is whether the defense case is true or is reasonably true. Even if it was not true but reasonably so, there is sufficient doubt to undermine the prosecution case. This, at least, is the adumbration of the judgement of Weston, J., in Gondwe v. Republic, (1971-72) ALR Mal., 33, 36-37:

"As to (ii), the appellant gave an explanation, for what it was worth, and let me say at once that, like the resident magistrate, I do not think it was worth much. Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for an accused person to prove his innocence. This has been so often as to be in danger of losing its urgency. As in every case where an accused gives an explanation, in this case its application required that the court's approach to the appellant's story should not have been what it evidently was: "Is the accused's story true of false?", resulting, if the answer were "False" in finding that the appellant must necessarily have had a fraudulent intent. The proper question for the court to have asked itself was - ," Is the accused's story true or might reasonably be true?- with the result that if the answer were that the appellant might reasonably have been telling the truth, the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law."

The State's case was that, in selling the motor vehicle, without the owner's authority, the appellant committed theft by conversion. The appellant's case was that Mr. Lwanda requested the appellant to sell the car. The matter was evidential. We have already dealt with matters that should have been excluded from the record because they were inadmissible. Apart from one aspect of circumstantial evidence, considered later, there was no evidence from the state on whether or not the appellant had authority to sell the car. On the other hand, there was direct testimony from the appellant that Mr. Lwanda had asked the appellant to sell the car. As seen, the Director of Public Prosecution never cross-examined the appellant on the particular aspect and the appellant's general evidence. The Court below never considered the legal effect on evidence of a witness

who has not been cross-examined. More importantly, the witness who could contradict the appellant's testimony was Mr. Lwanda. No reason is given for the State not calling him. The explanation given does not agree with what is recorded. Mr. Lwanda was a vital and available witness. The State never called him. There was a duty, as seen from the Supreme Court judgement in Nankondwa's case, on the lower Court itself to call him. The Court did not do so. Failure to call this witness really undermines the prosecution case. The matter is not resolved, as was done by the Court below, just by the incredibility of the appellant's story. The Court had to consider whether, the appellant's story having been discredited, there was basis on the totality of the case the conviction was proper. The Court had to check whether there was evidence on the state's side to show that the appellant had no consent. There was no such evidence. The base was undermined by the absence of the vital witness who should have contradicted the appellant's uncontroverted testimony.

One could infer from that the appellant used a fake blue book that the appellant had no authority to sell the car. It is the only circumstance though. It does not form a chain. Regardless, lack of authority to sell is not the only inference from proof that a man used a fake book to sell a car. That inference can only be based on a generalisation that a man who uses a fake blue book has no authority to sell a motor vehicle. That generalisation is not true in real life. The generalisation could be improved. That improvement, however, points to the difficulty of the inference that the Court below drew. The matter has to be looked at not in isolation. Looked at from the vista of the points I have raised the inference is really undermined particularly by the fact that the appellant's evidence, for whatever it was worth, was uncontroverted and a vital prosecution witness was not before the Court. There is therefore considerable doubt that the appellant did not have authority to sell the motor vehicle. More importantly, the copy of the fake blue book was inadmissible in Court. The State has not proved that the appellant used a fake blue book. The original was not before the court. That the appellant used a fake blue book cannot be a basis for the inference that the appellant did not have Mr. Lwanda's authority to sell the car.

the previous inconsistent statement

There was one matter, however, which caused me concern. It is what appeared to me to be an inconsistence between what the appellant said in his caution statement and what he said on oaths. Mr. Bazuka Mhango argued there was no inconsistence. I think there was in one respect. I have shown that the appellant was consistent twice that Mr. Lwanda gave him the motor vehicle. In the statement at the police the appellant denied the whole sale transaction. On oaths, however, he agrees there was a sale but that it was not between him and Mr. Mhango but between Mr. Mhango and Mr. Lwanda. The statement tendered in court was a denial. It is only when the appellant gave evidence on oaths that the inconsistence in the statement was appreciated. It is difficult to know the reason why the State produced it at all. The statement is exculpating and self-servicing therefore. It is not a confession. The Director of Public Prosecutions did not cross-examine the appellant on the previous inconsistent statement. He could have done so under section 219(2) of the Criminal Procedure and Evidence Code:

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to the matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

This provision codified the Common Law. The Director of Public Prosecutions should have put the inconsistent parts to the witness just as he did not cross-examine on the caution statement. The statement, however, was before the Court.

The Court below alluded to the previous inconsistent statement. In civil proceedings, the earlier statement, at least in the United Kingdom, is the truthful one. The rule is different in criminal cases. In England, and the decision is persuasive here, the case of R. v. Golder, [1960]1 WLR 1169, the Court of Appeal held that then the jury should be directed that previous statements are not evidence on which the jury should act. In R. v. Governor of Pentonville Prison ex p Alves, [1993] AC 284, in the House of Lords, Lord Goff, in a speech agreed by other Law Lords, said that the decision in Golder did not mean that the jury should be directed that the evidence of the witness is unreliable. Lord Goff instead approved the decision of the Court of Appeal in R. v. Pestano, [1981] Crim LR 397, that such evidence’s credibility is for the jury subject to a proper warning as to weight by a judge. I approve the approach.

Here the Court should, as I have done, noted the inconsistence and direct itself accordingly. The Court should have warned itself about the weight to attach to whatever statement, the one on oaths or the statement at the police. On appeal, however, the Court will not reverse the verdict simply because of lack of such a warning if there be material on which the Court below should have convicted. If there is no material or the material is, as here, nebulous and suspect, the Court on appeal should remember that the demands of burden and standard of proof imply that any reasonable doubt should be resolved in the defendant’s favour. In the instant case the Court below never appreciated the matter. If it had and made a particular finding, from the rule, there would have been no difficulty on my part in deciding whether what the appellant said on oaths or in the caution statement is true. The doubt must be resolved in the appellant’s favour. Regardless there are many problems with the evidence accepted in the court below and the inferences drawn that the conviction stands unsafe.

Even if no such doubt existed, it is not untypical for people to lie to improve an already good case. The wise words of Davies, J., in Parojcic v. Parojcic, [1959] 1 All ER 1, were approved in this Court by Smith, J., in Mahomed Nasim Sirdar, (1966-68) 5 ALR Mal 212, 218

“It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case.”

In considering the inconsistence it may be important to remember that the caution

statement relates to obtaining money by false pretenses, not theft. If the theft allegation had been put to the appellant, it would have emerged, as it has under oaths, that the appellant was given the motor vehicle to sell for Mr. Lwanda. The matter was not argued in the Court below. I content myself with that in law there was no crime committed on the facts of the case.

Order

At the end of the Prosecution case there was a prima facie case on the obtaining property by false pretense's count. The State, however had not discharged their duty to prove the case against the appellant at the end of the trial. The conviction is unsafe and unsatisfactory. There was no case to answer against the appellant on the theft charge. The computer printout was inadmissible because it was neither authenticated nor certified. The copy of the blue book was inadmissible for the noncompliance with the Criminal Procedure and evidence(Documentary evidence) Rules. There was no case to answer at the close of the prosecution case. Neither was the case made out at the end of the trial. I allow the appeal. I quash the convictions for theft and obtaining property by false pretenses contrary, respectively, to sections 278 and 319 of the Penal Code. I set aside the sentences of the Court below.

Pronounced in open Court this 9th December 1999 at Blantyre.

D F Mwaungulu

JUDGE