IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 44 OF 1995

THE REPUBLIC

VERSUS

FRANCIS M PHIRI AND FELIX MROWA

From the Principal Resident Magistrate's Court at Balaka
Criminal Case No. 100 of 1995

CORAM: MWAUNGULU, J
Chikonga, State Advocate for the State
Accused, present and unrepresented
Mangisoni, Official Interpreter
Mukhuna, Recording Officer

Mwaungulu, J

JUDGMENT

This case was set down to consider the conviction, the Reviewing Judge thinking that the conviction was misconceived. The defendant was charged with another on two counts, one for breaking into building and committing a felony therein contrary to section 311 of the Penal Code and another of being found in possession of property reasonably suspected of having been stolen or unlawfully obtained contrary to section 329 of the same Code. The former count was withdrawn. Consequently, the other defendant was withdrawn from the charge. The defendant then stood alone on the second count - for which he was convicted and sentenced to nine months

imprisonment with hard labour. This conviction should not have been had. The Reviewing Judge's observation is correct.

The most that can be made on the count is that in 1991 the defendant sold video and screens to two prosecution witnesses who gave evidence in Court. These people kept these items till 1995 when police were investigating the offence which was withdrawn where a video screen and deck were involved. The items were actually found with the prosecution witnesses who told the Court below that they bought the items from the defendant in 1991. Since 1991, therefore, the defendant never had the items the subject of the charge.

The defendant is charged under section 329 of the Penal Code which is in the following words:

"Any person who is brought before a court charged with having in his possession, anything which may be reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of such court of how he came by the same, shall be guilty of a misdemeanour."

I do not need to spend a lot of time interpreting the section. That was ably done by the Acting Chief Justice Weston in **Republic v Mongola** (1968-70)5 A.L.R. (M) 297 in a passage which, in all fairness, it is good to quote in full:

"Next, the section is concerned, and concerned only, with possession, as defined in s.4 of the Penal Code, subsisting at the time the accused is charged under the section. The plain English of the statute-- 'brought before the court charged with having in his possession,' where the use of the present participle in the context imports contemporaneity--precludes any application of the section to past possession, that is, to possession that is no longer in the accused at the time when he is charged under the section. Had the legislature intended the section to apply to any such past possession, it could easily, and would undoubtedly, have enacted that 'any person who is brought before the court charged with having or having had in his possession ..."

The Principal Resident Magistrate did not consider the decision. If he had, no doubt, he would have come to the conclusion, inevitable here, that the defendant could not, having parted with possession in 1991, have been convicted of the offence. I set aside the conviction and sentence.

Made in open Court this 23rd day of February 1996 at Blantyre.

D.F. Mwaungulu

JUDGE