IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 35B OF 2000

CHARLES CHAFUNGATIRA

VERSUS

THE REPUBLIC

In the second grade magistrate court at Bangula confirmation case no. 423 of 2000

CORAM: MWAUNGULU (JUDGE)

Manyungwa State Advocate for the state

Kamkwasi representing the appellant

Kachimanga official interpreter

Mwaungulu J,

JUDGEMENT

Charles Chafungatira appeals from a Bangula second grade magistrate judgment of 14th August, 2000. The second grade magistrate convicted the appellant of theft of cattle. Theft of cattle is an offence under section 278 as read with section 281 of the Penal Code. The second grade magistrate sentenced the appellant to three years imprisonment with hard labour. The appeal is against conviction and sentence.

Mr. Kamukwasi, appearing for the appellant, raised one argument on which I must allow the appeal against conviction. He argues, correctly in my view, that, there being a gap in the circumstantial evidence, the conviction cannot stand. There is no direct evidence linking the appellant with the theft. The state relies on a chain of evidence on which the court must infer the appellant's guilt.

Where the prosecution, as here, relies on circumstantial evidence, the evidence must be such that it proves beyond reasonable doubt that the defendant committed the offence. The evidence relied on must be such that it leaves no break in the evidence on which the interference should be drawn. The principle is covered by decisions of this court (Nyamizinga v Republic [1971 – 72] 6 ALR. 258 and Banda v Republic [1971 – 72] 6

ALR (383). In Nyamizinga v Republic, Chatsika, J., followed Cram, J's, statement in Dickson v Republic. [1961 – 63] 2 ALR:

"Where the evidence is circumstantial the accepted and logical approach is by way of elimination, that is by negativing all possible hypotheses of innocence… In order to justify from circumstantial evidence an inference of guilt the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

The prosecution case was that the complainant's cattle were stolen on the 22nd July, 2000 at Mkolimbo village in Nsanje. That same night the appellant and Hastings Tembo crossed a roadblock

with four heads of cattle. The complainant reported the theft at the police roadblock. The complainant found his four heads of cattle in another village with a gentleman who gave evidence in the court below. His evidence is that the third, fourth, fifth and sixth accused persons gave him the cattle.

The prosecution case was that these are the heads of cattle the appellant and Hastings Tembo crossed the roadblock with. The two witnesses who saw the appellant and Charles Tembo cross the roadblock never saw the cattle the complainant recovered from Tengani village. They could not therefore, testify that these were the cattle the appellant and Hastings Tembo crossed the roadblock with. Mr Kamukwasi is right that the circumstantial evidence is such that proves beyond reasonable doubt that the appellant committed the offence.

There is no evidence to bridge the gap of course at Tengani the gentleman who saw the cattle testified that the four accused persons told him that the cattle belonged to the first appellant. That was hearsay. A court cannot accept this statement to prove the truthfulness of what it says. 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 as a witness may or may not be hearsay. It is hearsay and inadmissible 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 the truth of the stament, but the fact that it was made. The fact that the statement was made, quite apart from 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."

At the close of the prosecution case there was no evidence against the appellant for him to defend himself. Clearly the court below could not rely on what the other defendants said in their confession statements against the appellant. A confession is only evidence against the maker unless, of course, when the other adopts it. Section 176 of the Criminal Procedure and Evidence Code is clear on this.

Of course there was a confrontation of the defendantds. Their reactions when confronted with the allegation are admissible against them. The evidence is clear that each one of them denied when accused of the crime. Each one of them pointed another. This was not sufficient to base a conviction.

I would allow the appeal. I quash the conviction and sentence. The appellant should be released unless held for other lawful reason.

Made in open court this 9th day of March, 2001.

D F Mwaungulu

JUDGE