

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal number 29 of 2003

ALEXANDER KUMBIKANO

Versus

REPUBLIC

In the Senior Resident Magistrate Court sitting at Zomba Criminal Case number 120 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Makhalira, Legal Advocate, for the appellant

Chimwaza, Deputy Chief State Advocate, for the respondent

Kamanga, the official court interpreter

Mwaungulu, J

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate at Zomba. The Zomba Senior Resident Magistrate convicted the appellant with three others of robbery. Robbery is an offence under section 301 of the Penal Code. The Senior Resident Magistrate sentenced the appellant and the others to ten years imprisonment with hard labour. The appellant is the only one who resorted to this Court. The rest have not appealed. This Court could not review the matter under section 15 of the Criminal Procedure and Evidence Code because of this appeal. In considering the appeal, therefore, I will review the matter touching the defendants who have not appealed.

It is necessary to review the matter against the others who have not appealed in this

appeal because what the appellant raises applies, at least, to two defendants who have not appealed. The Senior Resident Magistrate obviously did not direct her mind to a common law rule, given statutory force by section 176 (2) of Criminal Procedure and Evidence Code:

“No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.”

There are decisions of this Court to the same effect: *Watson v R* (1961-63) 2 ALR (Mal) 32; *Twaibu v R* (1961-63) 2 ALR (Mal) 532; *Kumalele v Republic Cr. App. Cas. No 61 of 2000*, unreported. There are also decisions of the Supreme Court of Appeal, one of which is *Gama v R* (1964-66) 3 ALR (Mal) 528.

What we know on this matter is not complex and, if it helps to resolve this appeal, is as follows. On the night of 2nd February 2002, a group of people, armed with guns, robbed Mrs. Dulama’s grocery. All of them, except the first defendant in the court below, escaped. The public arrested the first defendant in the court below and gave him to the police. The first defendant in the court below made a confession statement that the prosecution tendered in the court below. The lower court, after considering what this Court said in *Republic v Chizumila*, conf. case no. 316 of 1994, unreported, properly considered the confession against the first defendant in the court below.

In that confession the first defendant in the court below mentioned the three defendants in the court below who included the appellant. Of course, besides this statement, the first defendant, before making the confession statement to the police, led the police to the other defendants connecting them with a robbery at Mrs. Dulama’s grocery. In the court below there was no evidence that there was a confrontation of the defendants. Consequently, there was no evidence of the other defendants’ reaction when accused of the crime. A court can most certainly infer guilt from conduct or statements admitting a crime when the defendant is accused of a crime. In *Useni v R* (1964-66) 3 ALR (Mal) 250, this Court approved this statement from *R v Lambe* (1971), 2 Leach 552:

“The general rule respecting this species of testimony is, that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are taking him to the magistrates ... for the purpose of undergoing his examination First then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner to any person at any moment of time, and at any place ... are, at common law admissible in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true.”

In this particular case, there was no evidence that the other defendants through conduct or statements admitted the crime. More importantly there was no evidence in the court below that the other defendants, in terms of section 176(2) of Criminal Procedure and Evidence Code, adopted the first defendant's confession statement. The lower court could not, as it clearly did, use the statements in the first defendant's confession statement as evidence against the other defendants.

At the close of the prosecution case, there was no case to answer. Where at the close of the prosecution case all there is is a statement in another's confession connecting the defendant with a crime, unless the defendant adopts the confession, there is no case to answer against the defendant. The trial court should acquit the defendant at the close of the prosecution case and not call the defendant to enter his defense.

I agree with Mr. Makhalira's and Ms. Chimwaza's submissions that the conviction of the appellant is not sound in law and in fact. I therefore, allow the appeal. I set aside the conviction and the sentence against the appellant. In the same vein, I set aside the convictions and sentence of the third and fourth defendants in the court below.

Made in Open Court this 13th Day of August 2003

D F Mwaungulu

JUDGE