IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 48 OF 2006

(Being Criminal Case Number 481 of 2003 at

Blantyre Magistrate Court))

BETWEEN:

JUSTICE MBEKEANI ……..APPELLANT

- **AND –**

THE REPUBLIC ……RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Miss Kaukonde, of Counsel, for the appellant

Miss Chimwaza, Deputy Chief State Advocate, for the State

Miss Maida – Official Court Interpreter

J U D G E M E N T

Manyungwa, J

This is an appeal by Justice Mbekeani, the appellant herein, against the judgement of the Senior Resident Magistrate Court sitting at Blantyre. The appellant was charged in the lower court with the offence offence of Aggravated Robbery contrary to section 301 of the Penal Code, Chapter 7:01 of the Laws of Malawi and he was convicted after full trial of the said offence and was

sentenced to 8 years Imprisonment with hard labour effective from the date of his arrest. He now appeals to this court on five (5) grounds against both the conviction and sentence as follows:-

GROUNDS OF APPEAL

1. The lower court erred in law when it chose to rely on the evidence of PW2 and PW3 which was mainly based on confession evidence that was supposed to be retracted as the said confessions were obtained under pressure.
2. The lower court erred in law when it chose to totally disregard the defence evidence that the confession evidence and caution statements were not voluntarily made.
3. The lower court erred in law when it made a finding that PW2's and PW3's evidence was corroborated by PW4's evidence when PW4's evidence had left a lot of doubt and was not sufficient in itself.
4. The lower court erred when conviction was against the weight of evidence.
5. The trial magistrate erred when he passed an excessive sentence against the appellant of 8 years Imprisonment with Hard Labour without due regard to the mitigating factors submitted to court.

As can be seen grounds 1 to 4 deal with conviction while ground 5 is against sentence. I shall, in the course of my judgement deal with grounds 1 and 2 together, and then deal with grounds 3, 4 and 5 separately. Before I delve into the arguments must also put on record my gratitude to both Counsel for the appellant and Counsel for the State, whose research and industry was of great assistance to the court. However, I may not be able to reproduce all their submissions in the course of this judgement, but where necessary I may do so.

The first and second grounds of appeal deal with the issue of a confession statement that the appellant made at the police station. The admissibility of confession statements are in our law

governed by section 176 of the Criminal Procedure and Evidence Code. The said section is in the following terms:

> S176(1)"Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon anyone or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto
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> (2) 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.
>
> (3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.
>
> (4) Nothing in this section except subsection (2) shall apply to any confession made by an accused at his trial or in the course of any preliminary inquiry relating thereto.

The prosecution's evidence, according to PW2, in the lower court, Detective Sub-Inspector Clement S M Phiri, based at Blantyre Police station was that he received a report that motor vehicle namely a Toyota Raider Hilux Registration Number BM 5262 belonging to Malawi Redcross in Lilongwe had been robbed at Lunzu in Blantyre District. It was the evidence of PW2 that he in the company Detective Sergeant Sayenda and other police officers went to Lunzu Police Unit where they found the reporter Mr Jalasi Malikebu who was the driver of the said vehicle, on the day of the incident. The witness further stated that he sent messages to all Police Stations and went on a hunt for the stolen motor vehicle. On 13th October, 2003, PW2 testified, that upon arrest of another suspect one Patrick Taipi and upon the police mentioning the three suspects namely McFallen Chimbalanga, Justice Mbekeani and Zamir Boardman, the said Patrick Taipi led the police to the houses of the three suspects namely McFallen Chimbalanga, Justice Mbekeani and Zamir Boardman at Ndirande. PW2 further informed the lower court that as leader of the investigative panel, he interviewed the suspects and they revealed to him to have been responsible for the robbery of the motor vehicle, and that as proof of their explanation the suspects led the police party to the place where they boarded the stolen motor vehicle up to the point of the robbery and the place where they dropped the driver. The witness told the court that they got photographs of their confessions from the scene, which were taken by Detective Inspector Munthali from the Southern Region. Further, the witness testified that Detective Sergeant Sayenda PW3 cautioned and charged the suspects and that PW2 and another police officer were police witnesses.

PW3, was Detective Sergeant Sayenda of Blantyre Police station who told the court that after receipt of the report of the robbery herein, the police received further information that one suspect answering to the name of Patrick Taipi had been arrested in Mulanje on similar allegations of theft of Motor vehicles. The witness told the court that their investigations led them to the arrest of Zamir Boardman, McFallen Chimbalanga and Justice Mbekeani, who upon being interviewed revealed to PW3 and his collegues that they indeed robbed the motor vehicle in question on the material day and that they even led the police to where they dumped the driver PW1, Jailosi Malikebu. The appellant, together with his accomplices, according to PW3, demonstrated how they committed the offence and the police even took photographs at the scene.

Further PW3 tendered in the lower court exhibit P3, a caution statement recorded from the appellant which was, as a matter of fact, a confession statement. In the said caution statement, the appellant elaborately explained how the offence herein was committed. Even in the formal charge, the appellant readily admitted having committed the offence. Furthermore PW4 informed the lower court that the confession statement from the appellant was obtained without force and that no torture was used. PW2 Detective Inspector Phiri of Blantyre Police explained in his testimony how Patrick Taipi a suspect, who was arrested in connection with other similar offences led the police to the houses of the appellant and his two accomplices in Ndirande and Chilomoni. This evidence is similar to the testimony of PW2 who further told the court that upon being interviewed the appellant and his two accomplices revealed to the police that they were the ones who robbed the motor vehicle in question and even led the police to the scene, the place where they boarded the vehicle which they eventually robbed and also the point at which they finally dropped the driver, PW1. The witness further told the court that he together with his fellow officers photographed the confessions of the appellant and his two accomplices on the scene, and that it was Detective Sergeant Sayenda who cautioned and charged them.

However the appellant in his evidence in the lower court regarding the statement told the court that on 3rd November, 2003 he alongside McFallen Chimbalanga and Zamir Boardman were taken from Chilomoni Police to Soche Police from where they proceeded to Soche Police where plea was taken. The appellant further told the court that thereafter they were taken back to Chilomoni Police Station's backyard where the appellant was asked to tell the Police how many vehicles he had stolen, as the police told him that they were a reformed police. And when the appellant told the police that he had not stolen any vehicle and that he knew nothing about the offence, the police told him that he was uncooperative and warned him that there would come a certain time to deal with him, and the appellant was placed back into the cell. The following day, the appellant testified in the lower court, that four (4) officers from Anti-Motor vehicle came asking for the appellant's name. The appellant testified that they then took him to the backyard where he was asked to tell the police officers where he has taken the vehicle from the Red – Cross and sold it. The appellant further testified that he was beaten for close to an hour whilst he kept denying the allegation. Later on, so the appellant alleged, that officer Phiri PW2 showed him a statement which he had allegedly written himself and asked the appellant to sign which the

appellant refused. So the appellant alleged in the lower court that upon this refusal Detective Sergeant Phiri pulled a plier with which he pulled out the appellant's left thumb nail, and still the appellant stated that he know nothing. Then the police officer went to the main office and took the Occurrence Book, and brought it to the backyard, and that since the appellant's signature was not hard to be signed Detective Phiri forged the appellant's signature for almost five(5) times and then he signed it on the confession statement which he had. The appellant's story in the lower court therefore was that the signature was forged and that the statement was not made by him. What the appellant here was trying to do was to retract his statement by saying that the statement was not made by him and that even the signature was forged.

In ***Anandagoda v R*** [1962] IWLR 817, Lord Guest stated that a statement made by an accused person will not amount to a confession unless

> "…[I]n the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence, or which suggested the inference that he committed the offence… there must be some quality of guilt in the fact acknowledged."

Under English law, a confession will not be admissible in evidence unless the prosecution has established, to the satisfaction of the court that the accused made it freely and voluntarily in the sense as was stated by Lord Hailsham in ***DPP v Ping Lin*** [1976] AC 574 at 600 that:

> "[I]t was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or…by oppression."

In Malawi however the law is that evidence of a confession will be admitted under section 176(1) of the Criminal Procedure and Evidence Code notwithstanding that it was not made voluntarily. It must be appreciated that section 176(3) provides that when all the evidence, including the confession statement, has been received, the court may take the confession statement into account in reaching its decision if satisfied 'beyond reasonable doubt' that: (a) the confession was made by him and (b) that its contents are materially true. If these two tests are

not satisfied then the court shall give no weight whatsoever to such evidence. Thus in respect of confessions, proof of threats, intimidations or inducements affects not admissibility of the confession statement but the weight to be attached to it. In my most informed opinion therefore the confession statement was admissible, the question would be, what weight to be attached to it. In ***Madinga v Rep*** [1993] 16(1) MLR 263 the Malawi Supreme Court of Appeal held that any statement by a party relevant to the matter in hand may be used in evidence against him. Their Lordships Unyolo JA, Mtegha JA and Chatsika JA stated at page 269

> "We take the general rule to be that (apart from any express statutory exceptions) any statement made by a party relevant to the matter in hand may be in evidence against him, whether or not the statement is voluntary or not. The statement that the appellant made at the Old Town Shop is, therefore, admissible. However, the weight to be placed by the court on such a statement is a different matter, depending on various circumstances."

However, the Supreme Court of Malawi in the case of ***Chiphaka V Republic*** [1971 – 72] ALR, Mal 214 did remark that where an allegation of violence or inducement is proved, it is difficult to conceive of any reasonable court accepting a confession to be materially true, in the absence of pointers of such cogency as to virtually amount to corroboration. In the ***Chiphaka case*** [supra] the appellants Chiphaka, Segula, Maluwa and Issa and three others were charged in the High court with the offence of theft from a vehicle in transit, contrary to section 278 as read with section 282(c) of the Penal Code, Chapter 7:01 of the Laws of Malawi. What had happened was that newly minted coins, the property of Malawi Government, were stolen from a train in transit between the port of Beira in Mozambique and Limbe. Boxes and bags of coins were dropped from the train and later recovered by the police. At the trial of the appellants and the three others, the State offered no evidence against one and he was acquitted, a discontinuance was entered in respect of another and the third was acquitted for lack of evidence against him. The appellants allegedly made confessions giving full account of the planning of the theft by the first accused, a Malawi Railways conductor and the complicity of others. According to the confessions, the first accused and two of the others planned to and did board the train carrying

the coins on an incline on which it slowed down. The first accused allegedly opened one of the boxes carrying box of coins, some of which were then thrown out at a convenient place. The theft was discovered and the stolen property found however before it could be moved from its hiding place near the railway line.

At the trial the appellants and their two co-accused retracted their confessions on the grounds that they were involuntary. They allegedly that they were tricked into signing them by the police saying that they were signing statements that they did not work for the Malawi Railways. None of them did work for the Malawi Railways. In addition, it was alleged that they had been tortured before signing the statements. Chief Justice Skinner, who presided over the proceedings in the High Court rejected the allegations of torture and trickery. He found that the evidence of each appellant individually could not be believed and then considered in terms of section 176 of the Criminal Procedure and Evidence Code that the statements signed by the appellants were materially true. He convicted them all and sentenced the first three of them to seven (7) year's imprisonment and the fourth to four years. On appeal in the Supreme Court it was argued by Counsel that the High Court erred in law in taking into account that (a) the confessions alleged to have been made by the appellants and (b) that they were materially true. The Supreme Court in dismissing their appeals had this to say; as per Chatsika JA and Weston JA.

> "In dealing with this matter, the learned Chief Justice quoted the case of ***R V Sykes*** (1913) 8 Criminal Appeal R 233, at 236 – 237 '…[A]nd the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?...I think such are the pointers which a court in Malawi should look for when deciding whether the contents of a statement are true…"

The learned judges continued to say at p 237

> "We are satisfied that the court's approach was that required by the law of Malawi and would wish to add this only, that the cogency of what the learned Chief Justice calls "pointers" will naturally vary with circumstances in which any particular confession was made which are infinite. At common law proof of physical violence or inducement would be a ground to exclude a confession altogether. In Malawi, after the enactment of section 176 of the Criminal Procedure and Evidence Code proof of threats, ii – treatment, intimidation, inducement and the like go not to admissibility but to weight and if any allegation of any of these factors is proved it is difficult to conceive of any reasonable court accepting a confession to be materially true in the absence of pointers of such cogency as virtually to amount to corroboration as that term is understood in law. Conversely, of course, and at the other extreme, if the court is satisfied that a confession has been spontaneously volunteered – free and voluntary in the language of the old law – the pointers would not require to be anything like strong."

This case still stands good and is the position of the law in this country, being a Supreme Court decision. If allegations of threats, ill – treatment, inducements are proved, then the court should look for pointers, cogent evidence outside the confession before accepting a confession to be true. Of course I must hasten to add that there is an emerging school of thought especially from the judgements that have come out of the High Court, from as early as 1965, in the case of ***Chanza v Reginam*** [1964 – 1966] ALR Mal. 228 in which Bolt, J held that before a confession or incriminating statement by an accused person is admitted in evidence the prosecution must discharge the burden of proving that it was made freely and voluntarily and that where an accused person denies ever having made a confession and this is his only objection to the evidence, no issue of admissibility is raised since the only question is whether the statement was made or not, but where the court finds that the statement was freely made. In that case the

appellant was charged in the Resident's Magistrate Court, Blantyre with two counts of theft from motor cars. At the trial, a police officer stated that he had arrested the appellant in respect of a different offence, and accompanied him to his house where he found a camera which had been stolen from a parked car a week previously. The prosecution then sought to put two confessions allegedly made by the appellant to the police. The appellant objected saying that although he had not been subjected to some pressure by the police he had refused to speak. The magistrate ruled that this raised no issue of admissibility and admitted the evidence. The appellant was acquitted on the first count but convicted on the second count. The prosecutor then tendered a certificate purporting to show three previous convictions against the appellant. Only one of these was conceded by the appellant but no further proof was produced and the magistrate failed to record whether in imposing the sentence he relied on all three or only on the one conceded. In dismissing the appeal, Bolt J, at page 231 – 232.

> "In the present case the appellant alleged that the police witness had forced him but no inquiry of the kind envisaged by Clayden F C J was made. Moreover it can not be too strongly emphasized that with any alleged confession or incriminating statement, there is an onus on the prosecution to prove that it was obtained freely and voluntarily. Although, in the present case, there was evidence that the appellant had been cautioned and that his statement had been read back to him, I feel that the Crown made no real attempt to discharge the necessary onus i.e. quite apart from the objection raised by the appellant himself. I am inclined to think, with respect that it would have been safer to conduct a trial within a trial to determine the admissibility of the disputed evidence."

The learned Judge continued

> "What is the effect of these two alleged irregularities?...In my opinion no injustice was occasioned. The learned magistrate dealt with the appellant in an eminently fair manner and acquitted him

> on the first count although there was evidence which tended to throw strong suspicion upon him. That would have been no reason of course to convict him on the second count upon inadequate evidence. I consider however that the evidence adduced on this count was very strong. An expensive camera, together with several other articles was stolen from a parked car near Nash's motel, and the appellant, barely a week later, was found in possession of the camera."

The learned judge proceeded to dismiss the appeal. However, this is a High Court case, that was decided in 1965, before the Supreme Court of Appeal decision in ***Chiphaka*** [supra] that was decided in 1972. It must be pointed out further that in 1994, Malawi adopted a Republican Constitution, which ***inter alia*** provides in Section 42(2)(c) as follows:-

> S42(2) "Every person arrested for or accused of the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
>
> (c) not to be compelled to make a confession or admission which could be used in evidence against him or her.."

Since the adoption of the Republic Constitution the chorus of voices calling for the reconsideration of the Supreme Court's decision in the ***Chiphaka case*** has grown louder and seems to have gathered momentum. From as early as 1996, the High court in the case of ***Republic v Lazalo Likhunye*** Confirmation Case Number 1003 of 1996 called for the reconsideration of the law in ***Chiphaka V Republic*** [supra] in the light of Section 42(2) (c) of the Constitution. The court adumbrated that the court must resolve the question whether the statement was obtained by force. If it finds that the statement was not obtained by force, then the court must rely upon it. Then, the confession the court said, just like other pieces of evidence must be examined in the light of the totality of the evidence before it. This is then the point upon which pointers, the court opined, must be sought.

My learned brother Mwaungulu J also comprehensively dealt with the issue in the case of ***Nelson Jasi v the Republic*** Criminal appeal Case Number 64 of 1997 when he stated at page 4 of his judgement

> "Since the ***Republic v Chizumila*** Confirmation Case Number 316 of 1994, this court has stressed the approach to take if there is an objection to a confession statement on the grounds of duress or inducement. That approach is based on what the Supreme Court of Appeal approved in ***Chiphaka v Republic*** [1971 – 72] ALR Mal. 214…
>
> It comes out very clearly in the judgement of the Supreme Court that first the court has to decide whether the statement was obtained by duress or inducement. If the court finds that it was not so obtained, in other words, if it is a free and voluntary confession, the confession can be used by the court. The confession statement has to be treated like any other evidence. In that respect the court has to decide whether it was materially true. In deciding that the court has to look for pointers that show that the statement is materially true but only after it is satisfied that the statement was obtained without duress or inducement. Once the court decides that the statement is materially true, a confession is proof better that the any other. On the other hand, the court below could find that the statement was obtained by duress. As was shown in the ***Chizumila case***, on Section 176 of the Criminal Procedure and Eveidence Code and on subsequent decisions of the Supreme Court, the confession should be excluded."

Further, the learned judge opined that the Constitution guarantees the right of the defendant not to be compelled to make a statement which may be used against him at a trial, and that the question once the allegation is that there is a violation of this right, is what would be the proper way of administering this right? The question, the learned judge reasoned, suggests a procedure

for dealing with such evidence in the face of the allegation. However it is to be noted that our Constitution does not provide for a procedure. The court must then look for the procedure at common law, a procedure based on the law governing confessions. This is what the court said at page 8:-

> "Under this procedure, there was need for a trial within a trial to determine the admissibility of such statements. This was changed by statute under Section 176 of the Criminal Procedure and Evidence Code, under this provision a statement however obtained was admitted. It's admission did not mean that it was going to be relied on. The court was not obliged to consider this statement. The stringent requirements that the statement could be taken into account by the court if the court is satisfied beyond reasonable doubt that the statement is materially true and the confession was made by the accused presupposed that the defendant was compomentes. If there was duress it was held, the statement could not be materially true…At common law in both trial by and without a jury the procedure is harmonized. The matter is in the hands of the defence Counsel. He can elect to object at the outset in which case there will be trial within a trial. Or, he may choose to let in the evidence, in which case it will nonetheless be admissible. This is the equivalent of our Section 176 of the Criminal Procedure and Evidence Code. In such a case the court may disregard the confession and as the case may be, advise the jury to disregard it. There is no need for a trial within a trial. Where as happened here, the matter is raised when the defendant is giving evidence, there will be no need of a trial within a trial. The court may use its discretion in deciding whether to recall the witness or not. In so far as the procedure of dealing with confessions goes there is no conflict between Common Law and Section 176 of the Criminal Procedure and Evidence Code.

> Section 176 of the Criminal Procedure and Evidence Code is an embodiment of the procedure at Common Law. It does not mandate the use of evidence obtained by duress."

The legal position therefore is that where there are allegations of duress or intimidation, it is open to the accused or defence counsel as the case may be to object to the admission or tendering of the confession statement during the hearing of the prosecutions case and this will inevitably call for a trial within a trial or the defence may choose to let the confession be admitted in evidence, and mount a challenge that it was either obtained through duress or intimidation or force, in which case it will be up to the court to assess what weight, if any, to place on the confession statement. If the court finds that indeed the confession was obtained through force, the court would be perfectly entitled to place no weight whatsoever, and in a trial by jury, the jury would then be directed accordingly. Section 42 (2) (c) of the Republican Constitution therefore has not changed the position, the ***Chiphaka case***, is in my view, still good law.

In the instant case the learned magistrate in the lower court accepted the confession statement as being freely and voluntarily made. The learned magistrate in the lower court at page 132 of the court record stated thus:-

> "I would at this point direct my mind to the allegation of use of force in obtaining the evidence. This issue twice arose in the matter. First it was during the prosecution where it arose during cross – examination of PW2. There was a question posed to that effect. Not much was said and done in that regard. Looking at the evidence it would appear that the defence did not discredit the prosecution's assertion that the statement were obtained freely and voluntarily.
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> During cross – examination of PW3, again the issue of use of force to obtain evidence from the defendants was also alluded to. What has been said about PW2 also applies. In other words nothing has

> been put across in cross – examination to discredit PW3's evidence. The issue arose again in the testimonies of DW1 and DW2. As we have seen that the evidence was not obtained through torture. Here it is an assertion by the defence…Alternatively the defence had an opportunity in the prosecution of the matter to raise an objection to that evidence being admitted evidence. See ***Jase v Rep*** [supra]. This court therefore does not attach weight to the defence's plea for the court to disregard the evidences."

Here the lower court did not find that the allegations of torture were made out, or indeed that they were disproved by the prosecution's evidence. The position at law is that once an allegation of torture, inducement intimidation or duress is made by an accused, the onus is then on the prosecution to prove that the statement was freely and voluntarily made by the appellant. PW 2 at page 55 of the lower court record, informed the court that upon their arrests at Ndirande and Chiromoni, and upon being interviewed by PW2, the appellant and his two accomplices revealed to have been responsible for the robbery. Upon their further interview, the appellant and his two accomplices as proof to the interview led the police to the scene of the incident up to the point where they dropped off the driver. In cross – examination, PW2 told the court that the statements were recorded according to what the appellant and his accomplices said in the police's presence, and that the statements were obtained without force or duress. PW2 further told the court that it was false that he pulled the appellants toe nail, and also that it was a total lie that the 1st accused in the lower court was beaten unconscious. The witness emphasized saying that the appellant gave the statement voluntarily. PW3 in his evidence at page 64 of the lower court record testified that after being interviewed the appellant and his accomplices they led the police to the place where they robbed the vehicle and where the dumped the driver. Thereafter the appellant and his two accoplices demonstrated how they committed the offence and that photographs were taken. Further, the witness when asked in cross – examination whether the statements were obtained freely, the witness said the confession statements were obtained freely and that no torture was used. Hence the finding by the lower court that the appellant's confession statement was obtained freely without duress or inducements. Likewise, I am satisfied beyond reasonable doubt that the statement is materially true. Furthermore the learned Senior Resident magistrate

looked at the exculpating aspects of the confession statement in the light of other available evidence outside the statement itself. Remember that if it is found that the appellant voluntarily and freely made the statement then this court has to be satisfied beyond reasonable doubt that the confession is materially true. Then it has to look for pointers. Both PW2 and PW3 told the lower court that the appellant and his accomplices after their arrest led the police to the scene of the crime, showed the police where they forcibly boarded the vehicle, and how they moved up to the point where they dropped off the driver. In point of fact the appellant and his accomplices demonstrated to the police how they committed the crime on the material day. To all this, there was no dispute, the defence never disputed. Furthermore the appellant and his accomplices told the police that the motor vehicle which they robbed from PW 1, was sold to a businessman in Mozambique. To this testimony too, there was no dispute. A man's confession is proof better than any other. In ***Usen v R*** [1964 – 66] 3 ALR Mal. 250 this court approved this statement from ***R V Lambe*** (1791), 2 Leach

> "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 magistrate…for the purposes of undergoing his examination…First then, to consider this question as it is governed by rules and principles of common law, confessions of guilt made by the 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."

Further, there is the testimony of PW4 Allan Njobvuyalema, who told the court that he knew the appellant and that at the time of the trial he had known the appellant for a long time, and also due to the fact that the appellant stayed close to PW4's grandparents, but also that he had known him from far back home. This witness testified that he saw the appellant when the appellant came to

PW4's home one morning in June of the year 2003. The appellant on that day had told the witness that he wanted a loan of MK8, 000.00 to fuel a car from his work place. The witness told the lower court that he was working for Red Cross as driver, and that at the time the appellant was driving a white Toyota Twin Cab bearing a Red – Cross Logo, and also that he saw some people in the car, and that the person who was sitting on the passengers seat in front of the car was a coloured. PW4 told the court that the appellant told him that that he was based in Lilongwe. PW4 then gave the appellant the MK8, 000.00 he was looking for and that since that day, the witness never saw the appellant till the day that he was summoned at the police station and that he explained his story while the appellant was present and the police interviewed him on the MK8,000.00. The witness also told the court in cross – examination that at the time that he gave the MK8, 000.00 to the appellant he was assured by the appellant that the money was going to be sent back the same day by Coachline from Lilongwe, but that the money was never sent, and that he never heard from the appellant.

It is worth to note that there was no dispute that the appellant had gone to the house of PW4 on the material day and borrowed MK8, 000.00. It was also not disputed that the appellant had gone to the house of PW4 in a White Twin Cab bearing a Red – Cross Logo. The appellant even admitted that PW4 was right when he told the court that the appellant stays in Ndirande. Even in his defence, the appellant never disputed the fact that he went to the house of PW4 and therefrom borrowed MK8, 000.00. There was also no dispute that at the time of the trial the appellant had not returned to MK8, 000.00 he had borrowed from PW4. This narration of events in PW4's testimony, in my view quire clearly, corroborates the testimonies of PW2 and PW3, in that the vehicle that was robbed from PW1 is the same one that was seen by PW4 at his house being driven by the appellant and I do so find. Moreover, it was also evident that the appellant lied to PW4 that he was working for the Red Cross. In ***Republic v Chizumila*** Confirmation Number 316 of 1994, the court in confirming the conviction of the accused and his colleagues had this to say on the rule of evidence on recent possession

> "When we come to thefts and burglaries the court is called upon to infer the commission of these crimes from the fact that goods have been found in possession of an accused person shortly after they

> were stolen. Where the possibility of the accused person handling stolen goods is disproved, the accused may be convicted of theft and burglary if the defendant offers no explanation to account for his possession of the property or if the court is satisfied that the explanation given by the accused which is consistent with innocence is not true."

From the evidence of PW4, it is very clear that the appellant was on the material day seen driving a White Toyota Twin Cab bearing the Malawi Red – Cross Logo. From this evidence, which was not disputed it can not be doubted that the vehicle that was seen by PW4 is the same vehicle that was robbed from PW1.

It is therefore my finding that that the lower court correctly, in my view, found that the confession statements were freely and voluntarily made. I am therefore satisfied beyond reasonable doubt that indeed the appellants' confession statement was materially true. I find therefore that the evidence of PW2 and PW3 was ably corroborated by the evidence of PW4. On this basis therefore, I would dismiss the appellant's 3rd ground of appeal.

The forth ground of appeal is that the conviction was against the weight of evidence. To begin with, the formulation of this ground of appeal does not sound proper as it does not seem that it can stand on its own it being too general. However, having dealt with the other grounds of appeal, which have already been discussed above, let me turn to the defence of alibi. The appellant in his evidence in defence told the court that on the material day of the crime he was not in Lunzu, he was in Ntcheu as his sister had passed away on 4th June, 2003 and so on 4th June, 2003 he went to Ntcheu to bury her, and that the appellant only came back on 11th June 2003. The appellant here was raising the defence of ***alibi***. This defence entails that the appellant was at another place at the time the crime was being committed. Our Criminal procedure and Evidence Code does not define ***alibi*** but the Criminal Justice Act 1967 does define alibi as:-

> "Evidence tending to show that by reason of the presence of the defendant at a particular area at a particular time he was not or was

> unlikely to have been at the place where the offence is alleged to have been committed at the time of its alleged commission."

Regard being had to the evidence of PW1, PW2 and PW3 respecting the whereabouts of the appellant in relation to the offence herein, it seems this court would not be justified to interfere with the lower court's finding of the appellant's guilt by reason only of his plea of ***alibi***. To begin with at common law, ***alibi*** evidence and expert opinion evidence are the only two types of evidence of which the defence are obliged to give advance warning to the prosecution. This was the point that was taken up by the prosecution during the hearing of the appeal. The record indeed does not show that this advance warning was given by the defence to the prosecution. This not withstanding, the burden of proving an alibi is not on the defence, the prosecution bears a burden to disprove it. Lord Parker in the case of ***Wood (No. 2)*** 1967 52 Criminal Appeal Rep at p 74 said, as commented at par F3:12 by the authors of Blackstone's Criminal Practice.

> "Although there is no general rule of law that in every case where an alibi is raised the judge must specifically direct the jury that it is for the prosecution to negative the alibi it is the clear duty of the judge to give such a direction if there is a danger of the jury thinking that an alibi, because it is a defence raises some burden on the defence to establish it."

In that connection the evidence of PW1, PW2 and PW3 is corroborated by evidence of PW4, which places the appellant in Blantyre on the day of the incident. I therefore do not find any merit in the appellant's plea of alibi. Consequently, I dismiss the appellant's plea of alibi.

The appeal against sentence is dismissed. If anything the sentence leaned more on leniency. I am always reminded of the remarks of this court in ***Maganizo v Republic*** 1997 Criminal Appeal 5.

> "The appeal against sentence should be dismissed. The appellant was in the company of another. In ***Republic v chizumila*** (1994)

> Confirmation Case No. 316 of 1994 it was said that it is an aggravating factor that the offence was committed by more than one person. There is a great threat to society when people organize themselves to commit a crime. The appellant was actually armed. He threatened the complainant with a gun. Of course the appellant is committing the offence for the first time. Of course he pleaded guilty. Of course the appellant is young. I agree entirely with the remarks of Eubank J in the Court of Appeal in ***E v Richhardon and Others***, The Times February, 1988 – Come Crimes he said are so heinous that a plea of youth, a plea that the crime was a first offence, or that the offender had not been to the prison before were of little relevance. It should hardly be expected that a man who goes with a gun in the company of others to terrorize will find a court with the itching ear to hear lamentations of mercy."

In the case of ***Republic V Fraser Chikakuda and Baison Mustafa*** Confirmation Case Number 536 of 1996 the convicts in that case were convicted of the offence of armed robbery contrary to Section 301 of the Penal Code. The facts were that during the night of 18th May 1996 Frazer Chikakuda in the company of Baison Mustafa, who was deceased at the time of the Confirmation, armed with an AK47 Assault rifle and a panga knife robbed a tax registration number BJ 8586 a Toyota Corolla valued at MK70, 000.00 belonging to Mr Rashid Chidzani. At the time the vehicle was robbed it was being driven by the owner's driver. The convict was sentenced to 6 years in the lower court but on confirmation Justice Hanjahanja, as he then was set aside the 6 years Imprisonment with Hard Labour and instead ordered the convict to serve 7 years imprisonment with hard labour. This is what the learned judge said:

> "The accused deserved a stiff and severe sentence so that he and those evil minded persons like he is, should know that crime does not pay. The courts will do everything possible in their power to use the law to protect the people of this country and those who come to visit the country from such criminals. I find the sentence

> of six years was on the low side. I set it aside. In its place I substitute a sentence of seven years imprisonment with hard labour."

See also ***Kamwendo and Others V Rep*** [1994] Crim App No. 17 of 1994. In the instant case, although the appellant is a first offender, I wish to note that the aggravating factors far outweigh the mitigating factors, here the appellant was in the company of others. As was stated in the ***Rep V Fraser Chikakuda and Baison Mustafa*** case, the practice of the court has been to increase sentences where more than one person is involved in the commission of the crime. Further, the appellant and his accomplices were armed, the evidence is that they had a gun. Furthermore, it appears that the offence was carefully planned and executed.

I therefore dismiss the appellant's appeal against sentence. The sentence of 8 years imprisonment with hard labour does not come to this court with any sense of shock.

In these circumstances and by reasons of the foregoing, the appellant's appeal against both conviction and sentence fails.

The appeal is dismissed in its entirety.

Pronounced in Open Court, Principal Registry, this 7th day of May 2007.

Joselph S Manyungwa

JUDGE