KP/SR/2/8/91

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CONFIRMATION CASE NO. 273 OF 1991

THE REPUBLIC

versus

ATHUMAN SHABANI

From the Resident Magistrate's Court at Karonga
Criminal Case No. 82 of 1991

CORAM: MTAMBO, AG. J.

For the State, Nyirenda, Senior State Advocate
Accused, absent, unrepresented
Chilongo, Official Interpreter
Mrs. Manda, Court Reporter

ORDER IN CONFIRMATION

Athuman Shabani, a Tanzanian, hereinafter referred to as the convict, was arraigned before the Resident Magistrate's Court sitting at Karonga on a charge of, and I quote:

> "Importing and possessing goods contrary to Customs laws in contravention of s.134(a) as read with s.142(b) of the Customs and Excise Act."

The particulars of the offence read:

> "Athuman Shabani on or about the 26th day of July, 1991, at Kaporo Customs Entry point, in the district of Karonga, imported and was found in possession of prohibited goods to wit, eighty-two

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(82) bales of second-hand goods which goods the accused had imported from Tanzania into the country."

He admitted the charge and was accordingly found guilty and convicted as charged, after the narration of facts, and was sentenced to a fine of K300 or 12 months in jail with hard labour in default of the fine with a further order that the bales of clothing, the subject matter of the charge, be forfeited to the Government of Malawi to be disposed by the Controller of Customs and Excise in the manner he deems fit. He paid the fine and the matter was set down to consider the propriety of conviction and sentence.

The brief facts are that on July 26, 1991, the convict arrived at Kaporo Customs Post in the district of Karonga, driving a loaded truck, where he declared to have only carried bags of malt from Tanzania. On inspection of the load, however, 82 bales of second-hand clothing were found hidden beneath the bags, hence the charge.

I wish to quickly observe that the charge is bad for duplicity in that it charged the convict with having committed two offences, namely, the importation and possession of the goods, in one count. I do not, however, intend to interfere with the judgment of the learned magistrate for this reason as it does not appear, on the examination of the record, that a failure of justice was occasioned thereby.

I should next consider whether the charge brought was the correct one on the evidence. In order for a charge under s. 134(a) of the Customs and Excise Act to be upheld, it must appear that the act alleged is itself contrary to the provisions of the customs laws. Such may not be said to have been the position in the present case as there does not seem to be any provision in the customs law regarding second-hand clothing which must therefore mean that there cannot be a contravention of the said laws. As for the reference to s.142(1)(b) of that Act, I observe that that was inappropriate. The goods in question are not "prohibited goods" as the term is defined in s.2 of that Act. The correct provision in this respect could have been s.143 of that Act, and I mention this for future guidance only.

In view of what I have said above, it is apparent that the charge brought against the convict was misconceived. I, therefore, quash the conviction entered thereunder and set aside the sentence as well as the consequential forfeiture order made by the trial court.

I should now consider whether the evidence on record discloses another offence and, if it does, whether I can substitute a conviction for such offence notwithstanding that he was not charged with it. Importation of used clothing is not permitted except in accordance with a licence

issued in terms of paragraphs 3 and 4 of the Control of Goods (Import and Export)(Commerce) Order made under regulation 3 of the Control of Goods (Import and Export) (Commerce) Regulations. Under paragraph 5(1)(b) of the said Order, it is an offence to import into Malawi used clothing without being a holder of a licence. It would seem therefore that the provision under which the convict could appropriately have been charged should have been the one above as read with s.6 of the Control of Goods Act in that he can be said to have imported used clothing without being a holder of a licence to do so.

Under s.150 of the Criminal Procedure and Evidence Code a conviction of an offence not charged is permissible but only if such offence is both minor and cognate to that charged - see the case of Republic v. Mang'anda (1971-72) ALR (Mal.) 448. Such, however, does not seem to be the position in the present case. While the offence is obviously minor to that charged, it cannot be said to be cognate thereto and, for this reason, may not be substituted tehrefor.

I have quashed the conviction and set aside the sentence which must mean that the money which has been paid by way of a fine and the forfeited goods are to be returned to the convict. And I so order.

The convict has presumably since returned to his native land if it were not for which I would have ordered a re-trial for the reason that the evidence discloses an offence other than that alleged in the original particulars. Such an order, which must necessarily specify the period within which to commence the re-trial, would, however, be futile and instead I make such an order as may be possible for the State to bring a fresh charge against the convict whenever it can. And it is so ordered.

PRONOUNCED in open Court this 31st day of August, 1992, at LILONGWE.

I.J. Mtambo
AG. JUDGE