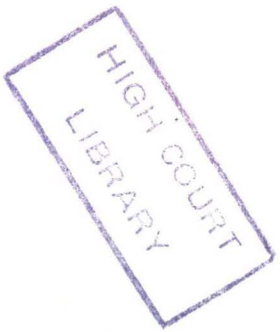


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 642 OF 1993



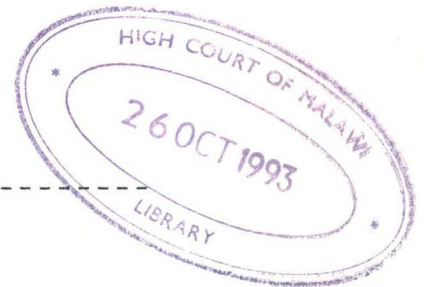
THE REPUBLIC

versus

ASSANI MSOSA

Coram: CHATSIKA, J.

Chatha (Miss), State Advocate
Accused, absent, unrepresented
Mthukane, Senior Law Clerk
Longwe, Court Reporter



ORDER IN CONFIRMATION

This case comes before this Court for the purposes of confirming the conviction and sentence which were recorded in the lower Court.

The accused was charged with theft by a person employed in the public service contrary to Section 278 as read with Section 283(1) of the Penal Code. The particulars of the charge averred that the accused person, Assani Msosa, on or about the 10th February 1992, at the offices of the Government Press in the Municipality of Zomba, being a person employed in the public service, namely, a driver, and having by virtue of his employment received or had in his custody or under his control a complete wheel for a Bedford motor vehicle, MG 407F, to the value of K630, was unable to produce the said motor vehicle wheel to his employers or make due account therefor. He was convicted of the offence and was sentenced to a term of 7 years imprisonment with hard labour. In addition, and in compliance with the provisions of Section 283(6) of the Penal Code, the Court made an order for the seizure and sale of the accused person's property sufficient to realise the sum of K630 which would be paid to his employers.

The first witness for the prosecution at the trial was Mr. Goliati who is an executive officer at the Government Press. He told the Court that on the 10th February 1992, Mr. Kadumbo who had been instructed to drive MG 407F which was the vehicle which was assigned to the accused, reported that the vehicle's spare wheel was missing. He stated that on the following day he asked the accused about the missing wheel and the accused alleged to have told Mr. Goliati that he (the accused) had lent the wheel to

Mr. Chintali. When Mr. Chintali was asked, in the presence of the accused, Mr. Chintali denied that he received a spare wheel from the accused. It may be pertinent to point out that when Mr. Goliati asked Mr. Chintali about the missing wheel the accused also denied that he told Mr. Goliati that the wheel was lent to Mr. Chintali.

PW2 was Mr. Kadumbo, another driver at the Government Press. He told the Court that on the 10th February 1992, while the vehicle which was assigned to him was in the garage, he was instructed to drive MG 407F which was the vehicle assigned to the accused. He took the vehicle to a filling station and was accompanied on this trip by Mrs. Kazembe, a clerical officer of the Government Press. Mr. Kadumbo found the vehicle keys in the vehicle. This was unusual because the normal practice was that a driver collected vehicle keys from the security man. He suspected that the vehicle was not properly handed over to the security man by the person who last drove it. Mr. Kadumbo reported the fact of the missing spare wheel to Mrs. Kazembe. Mr. Kadumbo continued to state that on the following day, he and the accused were called to Mr. Goliati's office and that at that meeting the accused stated that he gave the spare tyre to Mr. Chintali and that when Mr. Chintali was called to the meeting the accused denied having said that he gave the tyre to Mr. Chintali.

PW3 and PW4 were Mr. Katwanji and Mr. Bwanali. These were security officers who were in charge of the vehicles yard during the material period. I did not think that the first part of the evidence of either of them was relevant. Each of them concentrated on events of the 28th January 1992. The facts of this case show that the accused person last drove MG 407F on the 7th February 1992. The next person to drive it was Mr. Kadumbo who drove it on 10th February, 1992. It would be helpful to have evidence relating to whether the vehicle had its spare wheel on the 7th February 1992 when the accused left it in the hands of the security officers.

The evidence of PW5, Mr. Steven Munuwa, PW6 Mr. Manyowa, PW7 Mrs. Mary Chiwaula and PW8, Mrs. Grace Kazembe, was equally irrelevant as it failed to touch on the vital question as to whether the accused handed over the vehicle together with the spare wheel on the 7th February 1992 when he last drove the vehicle.

PW9 was Mr. Wilson Clement Chintali. It will be recalled that it was alleged by Mr. Goliati (PW1) and Mr. Kadumbo (PW2) that the accused had stated that he gave the spare wheel to him. It was further stated that this fact was further denied by the accused in the presence of Mr. Goliati and Mr. Kadumbo. One would have expected the prosecution to lead evidence from the witness to bring out this fact. The only evidence which came from this witness was that he knew the accused person as a fellow driver at the Government Press and that he had information that the spare wheel of the vehicle which was assigned to the accused

person was missing. This evidence did not add anything to the prosecution's case. One wonders why this witness was even called if this was all that he had to testify.

PW10 who was the last prosecution witness was a Police Officer. His evidence was of a formal nature. He gave evidence of the arrest of the accused person and also tendered the statement which he recorded from him.

In his defence the accused person stated that on the 25th January 1992, he took his vehicle, MG 407F to the P.V.H.O. workshop for repairs. He collected it from the workshop on the 28th January. He stated that before collecting it he checked it and confirmed that the spare wheel was on it. He drove the vehicle from that day and that on the 7th January 1992 he went and delivered it at the vehicle yard and left the keys with the security officer. There was evidence to suggest that the spare wheel was on the vehicle at the time of leaving it at the yard for otherwise the security officer to whom he had handed over the keys would have made a note of it. He finished by stating that it was only on the 11th February 1992 when he reported for duties that he heard that the spare wheel of his vehicle was missing.

In the body of his evidence, the accused person stated that the 7th February 1992 was a Friday. On that day he received a letter inviting him to attend an interview on the following Monday which was the 10th February 1992. He obtained permission to be away on the 10th February and it was while he was away that Mr Kadumbo, whose vehicle was in the garage, was instructed to drive MG 407F.

I have endeavoured to outline the evidence in this case in some detail in order to see whether the accused was properly convicted.

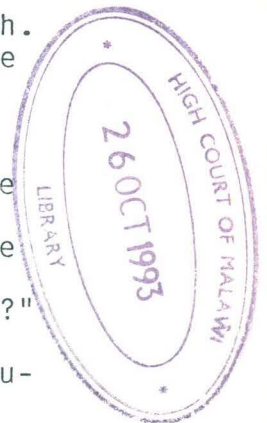
Being a criminal case, the burden of proving the guilt of the accused person beyond reasonable doubt remains with the prosecution throughout the trial. The charge of theft by a person employed in the public service under Section 283(1) of the Penal Code is in a special category in so far as the burden of proof is concerned. All that the prosecution is required to prove, and so prove beyond reasonable doubt, is that (a) the accused person was employed in the public service (b) by virtue of that employment he received or had in custody or under his control certain property (c) he was unable to produce to his employer such property or make due account therefor. When these three elements are proved beyond reasonable doubt by the prosecution against the accused person, a legal presumption is created that the accused person has stolen the property unless he satisfies the Court to the contrary. The standard of proof laid on the accused person in leading evidence to satisfy the Court to the contrary is not beyond reasonable doubt, but on the balance of probabilities. In other words, the standard of proof laid on the accused person is the lower standard as is required in Civil Cases.



Magistrates usually give themselves the usual warning that in Criminal Cases the prosecution must prove the case against the accused beyond reasonable doubt. Regrettably, this warning is only given lip-service. It seems to serve only as part of the format of writing judgments. Some magistrates hold the view that a criminal judgment without such warning is incomplete and irregular. Nothing could be further from the truth. It must be emphasized that at the end of the trial the Court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecution by the substantive law are proved. If it is not so satisfied, the accused person must be acquitted.

Secondly, even where all the important elements required to be proved by the prosecution have been proved beyond reasonable doubt, the Court must consider the evidence in defence. If such evidence reaches a point where it creates some doubt as to the guilt of the accused person, then such doubt must be exercised in favour of the accused person and must result in his acquittal. In the case of Gondwe v. Republic, 6 ALR (Malawi), 33, Weston J, in dealing with the treatment of defence evidence had this to say at Page 36:-

"..... the appellant gave an explanation, for what it was worth, and let me say at once that, like the resident magistrate, I do not think it was worth much. Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for an accused person to prove his innocence. This has been said so often as to be a danger of losing its urgency. As in every case where an accused person gives an explanation, in this case its application required that court's approach to the appellant's story should not have been what it evidently was: "Is the accused's story true or false?" resulting, if the answer were "False" in a finding that the appellant must necessarily have had a fraudulent intent. The proper question for the Court to have asked itself was "Is the accused's story true or might it reasonably be true?" - with the result that if the answer were that the appellant might reasonably be telling the truth, the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law."



In the instant case, from the evidence which has been outlined, it is clear that the most vital point, in so far as the guilt or innocence of the accused is concerned is the time when he last drove the vehicle in question and left it in the vehicle yard. We have to look at the evidence and find whether it was proved beyond reasonable doubt that when the accused brought MG 407F to the vehicle yard at about 5.10 p.m. on the 7th February 1992, the spare wheel of the vehicle was missing. If there is doubt as to whether the spare wheel was there or not, such doubt must be exercised in favour of the accused.

In his evidence the accused person stated that he took his vehicle to the P.V.H.O. workshop for repairs on the 25th January 1992. He collected it after repairs on the 28th January, 1992. He expressly stated that at the time of collecting the vehicle he, together with the security officer of PVHO, checked the accessories of the vehicle such as jack and spare wheel. He directly testified that the spare wheel was in the vehicle at that time. This evidence was corroborated by the evidence of PW6, Mr. Manyowa, of PVHO and that of Mr. Bwanali, a security officer at the PVHO who testified that at the time of collecting the vehicle from PVHO on 20th January, the spare wheel was there. He drove the vehicle from the 28th January up to the 7th February 1992 and that he parked the vehicle in the yard when the spare wheel was in it on that day and left the keys with the security officer of the vehicle yard at the Government Press. One would have expected the security officer who was on duty at the Government Press vehicle yard to give direct evidence to the effect that when the accused person brought the vehicle to the yard on the 7th February at 5.10 p.m. the spare wheel of the vehicle was not there. Unfortunately such evidence was not forthcoming.

PW3, Mr. Katwanje, who was a security officer, stated that on 28th January the accused brought MG 407F to the vehicle yard and that when the vehicle was checked it was found to have its spare wheel missing.

PW5, Mr. Munuwa, also a security officer, stated that he reported for duties at the Government Press vehicle yard on the 28th January 1992 at 5.45 p.m. He took over from PW3, Mr. Katwanje. He stated that Katwanje told him that MG 407F arrived on that afternoon without a spare wheel. This part of evidence was clearly hearsay and inadmissible in evidence.

If the evidence of PW3 is to be believed that on the 28th January 1992 the accused brought the vehicle without a spare wheel, when they knew that it ought to have a spare wheel, why did they not report this fact until the 10th February 1992 when the missing of the spare wheel was discovered by Mr. Kadumbo who drove it on that day. Could the evidence of this witness be reasonably true?

Another anomaly in the evidence is the absence of evidence relating to the spare wheel at the time the vehicle was taken from the yard by Mr. Kadumbo on the 10th February. Mr. Kadumbo stated that on that day he was instructed to drive MG 407F. He drove it and went to fill petrol accompanied by Mrs. Kazembe. He then checked and found that the vehicle's spare wheel was missing and reported this fact to Mrs. Kazembe. It is not clear whether he noticed the missing of the spare wheel immediately when he went to collect the vehicle or whether he noticed this fact after he had driven it to fill the fuel.

I have already established that there is no evidence to prove that when the accused came to leave the vehicle on the 7th February, there was no spare wheel. It is also clear that when

Mr. Kadumbo came to collect the vehicle on the 10th February, no proper check was made to show whether the spare wheel was, in fact, not there.

In the final analysis, it is found as a fact that the evidence of PW3 to the effect that MG 407F was brought to the Government Press Vehicle Yard on the 28th January without a spare wheel the matter would have been reported to the authorities. It is also significant that the same witnesses failed to testify as to whether or not the spare wheel was missing when Mr. Kadumbo came to collect it from the yard on the 10th February. Also significant is the fact that although the drivers were required to check the vehicle before taking it away to ensure that all accessories were there, Mr. Kadumbo did not conduct that check with the security officers. He reported the missing of the spare tyre after he had driven it.

Against this evidence, is the evidence of the accused who stated that he took the vehicle from the PVHO on the 28th January when the spare wheel was there. He also stated that he left it in the Government Press vehicle yard on the 7th February when the spare wheel was there.

In view of the anomalies in the prosecution evidence relating to the spare wheel on the 28th January, on the 7th February, I find that the prosecution failed to prove their case against the accused person beyond reasonable doubt. In my view, it would be most unsafe to allow this conviction to stand. According the conviction is quashed and the sentence of 7 years which was imposed is set aside.

Unless the accused person is being held in custody in respect of some other lawful reason it is hereby ordered that he be released from such custody forthwith.

Pronounced in open Court this 14th day of September 1993 at Blantyre.


L.A. Chatsika
JUDGE

