IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NO. 83 OF 1997

GERALD BANDA

VERSUS

THE REPUBLIC

In the First Grade Magistrate Court sitting at Limbe

Criminal Case No. 2377 of 1996

CORAM: MWAUNGULU, J

Kapanda, Senior State Advocate, for the State

Appellant, present, unrepresented

Soka Banda, the official interpreter

Marsen the recording officer

Mwaungulu, J

JUDGMENT

This is an appeal from the judgment of the First Grade Magistrate sitting at Limbe. That Court convicted the appellant of the offences of burglary and theft. Bo the offences are against the Penal Code. The First Grade Magistrate sentenced the appellant for the burglary and theft respectively to five and two years imprisonment with hard labour. Th e Appellant dissatisfied with the conviction and the sentence appeals to this court.

On the 3rd of December there was a burglary at the house of the Chaswekas. When all this took place, there was nobody at the house. The allegation is that K19, 000 cash, 5 Botswana pullas, an electric fan, a cap, a blanket, a pair of jeans trousers, a bed spread, a pair of short trousers and a Set of tumblers were stolen during the burglary. The appellant was found wearing a pair of trousers stolen from the house. At his house an electric fan, a cap and a blanket were recovered within a day or two of the theft. The appellant's explanation for how he came by the goods is that in the morning at the market he saw a man with a bag who was

behaving suspiciously. When the appellant tried to talk to him, the man dropped the bag

and took to his feet.

The court below convicted the appellant of the burglary and theft at the Chasweka's house. The gist of the reasoning of the court below is found at page 18 and 19 of the record. At page 18 the First Grade Magistrate said:

"The truth is that the accused broke and stole and that is why he was found in possession of the properties. Therefore his explanation that he got them from a person who ran away is not satisfactory"

The court below had this to say in relation to the law on the facts that it found:

"In Loughlin v. R 35 Cr. App.R. 62 the Lord Chief Justice said that if property by means of a burglary or theft, and shortly afterwards the accused is found in possession, that is enough evidence that he is a burglar and thief.

In the present case, the complainant's house was broken into and property stolen and the accused was found in possession of the said, it can be concluded that he obtained possession of the said property by means of burglary and theft as enunciated in Loughlins case."

The appellant has raised several grounds of appeal. The gist of all of them is that the court below did not adequately deal with his defence that the property was gotten from somebody else. The appellant is supported in that view by Mr. Kapanda, appearing for the State.

That burglary and theft can be inferred from the fact of recent possession is true. It is not the whole truth. The Loughlin's case that the court below relied on was considered in R. v. Smythe 72 Cr.App.R 8. The Court of Appeal emphasized that it was a misconception to think that the doctrine of recent possession only relates to cases of handling. That Court approved a passage from Cross on Evidence, 5th ed., page 49:

"If someone is found in possession soon after they have been missed, and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to have been stolen... The absence of an explanation is equally significant whether the case is being considered as one of theft or handling, but it has come into particular prominence in connection with the latter because persons found in possession of stolen goods are apt to say they acquired them innocently from someone else. Where the only evidence is that the defendant on a charge of handling was in possession of stolen goods, a jury may infer guilty knowledge or belief (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue."

The truth of the matter is that from the fact of recent possession the court could infer that the defendant is the thief or burglar as may be or that the defendant handled the goods knowing or believing that they were stolen. The difficulty is usually to decide whether the case is one of theft or receiving stolen goods.

Speaking generally where the only evidence is that the defendant was found with property recently stolen, it is not easy to exclude the possibility that the defendant was a receiver of stolen goods. Usually however there is evidence that points the way. The

Court may care to consider the time and place of the theft, the type of property stolen, whether the property readily passes hands, the circumstances of the defendant, whether he is connected in time and space to the complainant and anything that is said by the defendant.

Here the appellant told the court that he got the property from somebody else. Apart from the fact that the time is very short, little is known about where the appellant is from the complainant's house. All the witnesses said they did not know the appellant at all. What the appellant said in court is consistent with what he had said to the police. The statement was tendered in court as part of the prosecution case. That statement was not considered at all, at least in relation to the appellant's assertions, consistent with his defence, that he got the goods knowing that they were stolen. Such statements are self-servicing. They are admissible to show the stance of the offender when first confronted with an accusation(R. v. Pearce 69 Cr. App. R. 365). In R. v. Mc Carthy 71 Cr. App.R. 142, Lawton L.J., said:

" One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation to crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, 'That cannot be right, because I was elsewhere,' and gives details of where he was, that is something which the jury can take into account."

The court below overlooked this aspect of the evidence. Its conclusion was that the appellant's explanation was unsatisfactory. The basis of that conclusion is not clear from the judgment. The court had to decide whether the evidence leaned toward the appellant being the burglar or receiver of stolen property. The case as it has been shown turned squarely on the fact that the appellant was found with property recently stolen. His explanation of how the property came to him was a relevant consideration to the inference to be drawn on the fact that the goods found on him were recently stolen. Here it tends to show that the appellant was a receiver rather than the burglar.

I agree with the Senior State Advocate that the appeal should be allowed. The conviction for burglary and theft are set aside. The appellant is found guilty of the offence of handling stolen property contrary to section 328 of the Penal Code. The sentences are set aside. The appellant has been in prison since December 1996. I pass such a sentence as results in his immediate release.

Made in open court this 13th December

D.F. Mwaungulu

JUDGE