IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal number 13 of 2003

VINCENT MAKONYOLA

Versus

THE REPUBLIC

Being Criminal Case number 200 of 2002

CORAM: MWAUNGULU (JUDGE)

Chalamanda, Legal Practitioner, for the Appellant

Kamwambi, Chief State Advocate, for the Respondent

Vokhiwa, Official Recorder

Mwaungulu, J

JUDGMENT

Vincent Makonyola, the fourth defendant in the court below, appeals against the judgment of the Mbulumbudzi First Grade Magistrate Court. The Mbulumbudzi First Grade Magistrate Court convicted the appellant, with three others who have not appealed, for conspiracy to commit a felony and robbery with violence. The offences of conspiracy to commit a felony and robbery with violence are proscribed, respectively, under sections 404 and 301 of the Penal Code. The lower court sentenced the appellant and the others, again respectively, for conspiracy to commit a felony and robbery, to two and ten years' imprisonment. The lower court never ordered whether the sentences should run concurrently or consecutively. The lower court, however, ordered the sentences to run from the date of arrest. The other three defendants have not appealed. Vincent Makonyola appeals against the conviction and sentence.

In the morning of 3rd December, 2002 there was a robbery at Namadzi Agricultural Development and Marketing Corporation market. The lower courts finding of fact are found from page J 39 of the untyped judgment. The lower court found the robbery occurred around 6.30 O'clock in the morning. Seven women came early to sell maize at the market. The appellant, the marketing officer at the market, forced staff to open the market and serve the seven women. After serving the women, the appellant asked staff to wait a little longer because staff wanted to wash before resuming the day's normal work. The robbers struck during this time. The robbers hacked a member of staff, struggled with another, entered the appellant's office and stole money, slightly over K250, 000, according to the audit. When the robbers struggled with a member of staff, the appellant, the lower court found, stood there watching. A member of staff ran and reported the robbery at the police. The police rushed to the scene. The appellant pointed to the police the direction to which the robbers fled.

The police immediately mounted a search. The police arrested one robber, the third defendant in the court below. This robber led the police to the other two, the first and second defendants in the court below. At Namadzi police station, the third defendant told the police that the appellant masterminded the robbery to conceal a huge shortage at the market. The lower court found that the third defendant accused the appellant in the appellant's presence at the police. The lower court found as a fact that the appellant remained silent. The lower court also found that the third defendant produced at the police, in the appellant's presence, a map the appellant, allegedly, gave the robbers to facilitate the robbery. All the defendants, including the appellants, made statements to the police denying involvement in the crime.

The lower court found that the appellant and the others were guilty of conspiracy to commit a felony and robbery because they met in Zomba and discussed the robbery at Namadzi Agricultural Development and Marketing Corporation market. The lower court accepted the first and second defendant's evidence that the appellant went to Zomba to give them the plan. The lower court accepted the first defendant's evidence that on the 2nd of December, 2002, the appellant and the third defendant met at the first defendant's place of business. The appellant and the third defendant had a discussion. The first defendant never heard the contents of the discussions. Subsequently, in the absence, of the appellant, the third defendant brought and explained the plan to the first defendant. The lower court found therefore that the robbery was a result of as conspiracy involving the appellant.

The appellant, though counsel assails the lower courts verdict and sentence on several aspects in the petition of appeal. Essentially there are there categories of discontent. The first two grounds question the lower court's finding, at the close of the prosecution case, that the appellant had a case to answer. It is contended that the lower court's improper ruling occasioned a failure of justice. One ground complains of the lower court's failure to consider the appellant's testimony. The other ground asserts, in very strong terms, that

on the evidence, the lower court could not have convicted the appellant of robbery or conspiracy to commit a crime.

The formidable points raised by the appellant and the Chief State Advocate, who vehemently, supports the conviction, necessitate restatement of principles guiding an appellate court on an appeal from a trial court where, like here, the court can also revisit the finding of fact. The Supreme Court laid the principles in Pryce v Republic (1971-72) 6 ALR (Mal) 65. I reproduce an apt statement of the approach by Skinner, C.J., a statement with which Chatsika and Barwick, JJA agreed:

"In our opinion the proper approach by the High court to an appeal on fact from a magistrate's court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, in the words of Coghlan v Cumberland (3) ([1898] 1 Ch. At 704 – 705; 78 L.T. at 540) – "… must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong."

The Malawi Supreme Court of Appeal followed Pryce v Republic in Msemwe t/a Tayambanawo Transport v City Motors [1992] 15 MLR 302.F

This approach, to my mind, requires the appellate court, where there was no jury at first instances, to regard all evidence which is the basis of facts the lower court finds. Beyond the questions of credibility, the court, in my judgment, must consider whether the evidence, subject to section 5 (2) of the Criminal Procedure and Evidence Code, could have been excluded on any rules of evidence or otherwise. More importantly, the appellate court must scurry the record to see if there was evidence at all and, if there was evidence at all, whether it was sufficient to justify the finding of facts the lower court based its decision upon.

I can easily handle the criticism of the lower court's finding of a case to answer for the appellant at the close of the prosecution case. The right to such a finding in magistrate courts is statutory. There is a duty on the court in subordinate courts, as decisions of this Court, R v Laxmidas (1923-61) 1 ALR (Mal) 409, Zinyose v Republic (1966-67) 4 ALR (Mal) 626 and Republic v Salirana [1987-89] MLR 63, and the Supreme Court, Abraham v Republic (1968-69) 5 ALR (Mal) 187, show, to decide, at the close of the prosecution case, whether a case has been made out requiring a defendant to defend himself. Prior to section 254 of the Criminal Procedure and Evidence Code, the defendant had to plead at the close or any time thereafter that there was no case to answer. Failure to acquit, as Harold v R (1923-61) ALR (Mal) 538 and Day v R (1923-61) 1 ALR (Mal) 625 demonstrate, where there is no case to answer at the close of the prosecution case, is fatal to the conviction. A magistrate must therefore decide at the close of the prosecution case that there was no case to answer.

On the evidence that there was at the close of the prosecution case, the lower court's finding of no case to answer is, in my judgment, faultless. The lower court was under a duty to put the appellant to his defense when it found, properly in my view, that there was evidence which, without contradiction from the defendant, would found a conviction. A magistrate must put a defendant to her defense where, at the close of the prosecution case, there is evidence, which if the defense does not countermand, a court could properly convict. There was such evidence before the lower court at the close of the prosecution case. Circumstantial evidence and statements outside court, subject to what comes later, associated the appellant with the crime. I cannot understand the appellant's contention in the court below and in this Court that theft, an ingredient of robbery never occurred. There was evidence that money was stolen. Part of the money was found on some of the defendants. Of course, at that stage it was clear the money was not taken by the appellant. The state, however, proceeded on there being a conspiracy, a thing I comment on later, and that approach connects the appellant with the crime. Much of that evidence, at that stage, remained unscathed by cross-examination. This ground, therefore, is unsuccessful.

The appellant's complaint that the lower court never considered his evidence in defense is germane. Of course, in a long and detailed judgment, the court below rehearses, without analysis, all the prosecution and defense evidence. The lower court dedicates a very small proportion of the judgment to analysis of the evidence. In that analysis, the lower court only refers to the prosecution evidence and evidence from the other defendants. The lower court does not refer to the appellant's evidence at all. There might be just a question of style here, the lower court probably not referring to the appellant's evidence because it rejected it. A trial court must, however, be evenhanded in treating not only the defense evidence but the defenses the defendant raises. Failure to consider a possible defense is fatal to a conviction.

This appeal, however, turns on the appellant's main contention that on the evidence before the lower court the court below could not convict the appellant of the offences of robbery with violence and conspiracy to commit a felony. I have examined the evidence on the record and the lower court's findings of fact. The lower court's certain findings of fact have no evidential support; other findings of fact are based on nebulous evidence the lower court accepted. Apart from circumstantial evidence, which I consider later, two aspects of evidence were crucial to this case. First, there was the third defendant's assertion at the police that the appellant masterminded the robbery. The third defendant's assertion itself is no proof of a fact in issue. The appellant's reaction to the assertion is very critical. Obviously, if the appellant admitted the assertion, the appellant's statement is admissible as an exception to the hearsay rule. What the defendant says before prosecution witnesses is not hearsay but a confession. If authority is needed, it is a statement in R v Lambe (1791), 2 Leach 552, approved in this Court in Useni v R (1964 – 66) 3 ALR (Mal) 250, 255:

"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 …"

The principles are subject to another rule, more pronounced after the 1994 Constitution, that the state, where the defendant makes the statement before people in authority, such as the police, must inform the defendant, in clear terms, of her right to remain silent and warn that, if made, the statement may be used against her in a court of law.

The admission, however, need not be by word. The admission can be by conduct constituting positive acts or silence. It is a question of fact in each case whether proven conduct proves admission of crime. A court can properly infer guilt where proven conduct points to admission of a crime. Silence, where it is proved, may or may not comport admission of a crime. It will prove crime where, in all circumstances, all reasonable men would expect non-silence when a person is confronted with a crime. In all cases, in my judgment, it is a question of degree depending on the nature and circumstances of the crime and accusation. Consequently, courts view more grudgingly reticence before people of authority, such as the police, unless, of course, the authority informs the defendant of her right to remain silent and warns that anything said or done may be used against her in a court of law. Courts can safely assume that anything done or not done in the face of all this warning may, not must, indicate guilt. Without such warning courts are, properly so, reluctant to accept silence or conduct as proving guilt. The defendant would be acting in ignorance of those rights or in the mistaken belief that she was exercising her full rights under the Constitution to remain silent all the way.

There was no evidence that the appellant admitted the third defendant's assertion. The lower courts finding that the appellant remained silent is not supported by any evidence on the record. There is no evidence from the witnesses to show the appellant's reaction to the third defendant's accusations before police officials. Detective constable Kansuli's evidence on the accusation, the only on the aspect, far from states that the appellant remained silent:

"Upon receiving this report, a follow-up was made whereby the third accused was arrested. He was interviewed whereby he revealed his two friends who had fled to Zomba. Again a follow-up was made to Zomba and the two were found. Later in the afternoon the two were arrested. All were interviewed together whereby they denied having robbed the place but that they were hired by the market officer who is now the

fourth accused. They were confronted and the first accused told the police that it was the fourth accused [the appellant] who told the police that it was the fourth accused who told them to get him and have this money. All plans were arranged and a map was provided for easy access. The fourth accused admitted to have given them the map."

The first aspect of the testimony quoted suggests, to my mind, that the accusation was made in the absence of the appellant with only the three defendants present. The statement 'they were confronted and the first accused told the police that it was the fourth accused who told them to get him and have the money', is unclear as to whether it includes the appellant. Equally, it is uncertain whether the statement "The fourth accused admitted to have given them the map," is part of the discourse. Even without this, the prosecution witness does not tell the court that the appellant remained silent to the accusation. Equally, the witness does not indicate the appellant's reaction to the accusation about the appellant's participation in the crime. The lower court's finding, therefore, that the appellant remained silent when accused of the crime is not based on any evidence on the record. An appellate court will, where the lower court's finding of fact is perverse in the sense that it is not supported by evidence on the record, alter, a part from questions of credibility, a trial court's finding of fact.

The prosecution evidence that the appellant admitted giving the map to the other defendants, without even undermining the detective inspector's credibility, is affected by other considerations. From the extract of the detective inspector's evidence above, it is clear that the appellant made the admission at the police. It is unclear, from the detective inspector's evidence, whether the admission was in the caution statement or not. It is not in the caution statement. It can be assumed, therefore, it was made at the police but not in the caution statement. There must be problems with this prosecution evidence why this very crucial evidence is not covered in the caution statement. If it was in the caution statement, the general information on the right to silence and warning of its use in subsequent criminal proceedings would have covered it. The detective inspector does not suggest anywhere that at any point during the interrogation or confrontation he informed the appellant of his right to remain silent or warned him that whatever he said, including his admission that he supplied the map, could be used against him in a court of law. This admission, with all these difficulties, stands alone.

The prosecution's case against the appellant, therefore hinged on circumstantial evidence, to which I turn later, and proof of conspiracy to make the appellant a principal to the offence, to which I now turn. Once again, the lower court made findings which are not supported by the evidence on the record. On conspiracy, this extract from the judgment illustrates the lower courts findings:

"According to section 404 of the Penal Code, the four indeed met to discuss about money at Namadzi ADMARC and in their discussions the four agreed to rob ADMARC and get away with money. According to law, the four conspired to commit a felony and the state

has, in the evidence given, proved the elements making up the offence."

The evidence relied on for the conspiracy came from other defendants. The other defendant's evidence, accepted by the court below, never suggests all the defendants meeting as the lower court found according to the excerpt just recorded. The lower court's own judgment records in many places that the appellant met with some defendants separately and that it is these defendants who communicated to others in the conspiracy, a kind of a 'wheel' conspiracy, according to this Court's judgment in Palitu and others v Republic, Criminal Appeal number 30 of 2001, unreported. The lower court, however, found as if all defendants met together, a 'joint' conspiracy, again according to Palitu and others v Republic. Whatever the form of conspiracy, it is clear from Palitu and others v Republic, once the prosecution proves there was one agreement, all are guilty of the conspiracy:

"At the end, the question is whether the defendants acted in concert. Where all people agree together and are in communication with one another, the so called 'joint conspiracy,' all defendants are guilty of the conspiracy. In a 'wheel' conspiracy one co-ordinates the activities of others who are in agreement although not communicating to one another. There all of them are guilty of the conspiracy. In all these situations the state carries the burden to prove there was one agreement among all and not two or more separate agreements."

If anything, the prosecution evidence established a 'wheel' conspiracy, not a "joint' conspiracy as the lower court thought.

Mr. Chalamanda, appearing for the appellant here and below, submits, correctly in my judgment, the court below could not find a conspiracy on the evidence before it. The lower court's approach on the law on the matter is impeccable. Relying on a passage in Criminal Law by Smith and Hogan, the lower court stated, correctly in my judgment that a conspiracy, agreement, the offence's hallmark, which is more often in private, is difficult to prove. A court must look at the conduct and decipher whether from all that the principals are acting on the strength of agreement to commit a felony. Mr. Chalamanda submits on the strength of Palitu and others v Republic that the lower court could not prove the conspiracy on the basis of the defendants' statements at the police.

I have read the lower court's judgment. It is clear that the lower court did not rely on the defendants' statements at the police to find a conspiracy. The lower court relied on the appellant's conduct during the robbery and the other defendants' evidence on oath. As regards the former, conscious of lacking the lower court's advantage of assessing credibility, the conduct, without more, only rouses strong suspicion. The prosecution, here and in the court below, pressed many aspects to nail the appellant with the conspiracy and consequently with the robbery: the appellant asked a member of staff to

escort him to a toilet near the office; the appellant decided, as he had never done before, to open the market, slightly under an hour of the usual time, at around 6.30 o' clock a.m.; the appellant asked the members of staff to stay on longer; the appellant stood by while other staff struggled with a robber; and that the appellant asked one member of staff to release a robber the latter subdued after a long time. It could be that the other conduct somehow points to culpability. Other aspects of the conduct can be explained from the evidence before the court below. There were indeed seven women wanting to sell maize that early. The appellant could, even if he had never done it before, serve the women by ordering early sales. Unless the seven women were part of the conspiracy, for posterity we may live in the doubt of whether the appellant was part of this robbery. Particularly so when the other aspect of the circumstances in the chain, namely, the appellant's ordering release of a robber is explained by prosecution evidence that the appellant feared injury to that member of staff. In fact, if the appellant's conduct was disagreeable, he could have not correctly directed the police to where the appellants fled. He could have misled the police to defer arrest of the other defendants. The circumstantial evidence, leaving as it does several inferences, some, of course, consistent with innocence, is not conclusive of the appellant's guilt beyond reasonable doubt.

This leaves the other aspect of evidence on which the lower court found the appellant guilty of the conspiracy: the other defendants' evidence on oath suggesting a conspiracy. On this the lower court said:

"Owing to what has been said the court is of the view that the two offences indeed took place and that it was the four accused persons who committed them as per the evidence of PW1, 2, 3, 4 and 5 supported by the evidence of DW 1 and 3 who stated in court that DW 4 went to Zomba to give out his plans. DW 1 also stated that DW 3 and 4 came to his place of business to eat. They were offered a place and in the course of eating they discussed an issue which he could not hear because he was busy serving customers. But later in the day DW 3 came to him with the plan. DW 1 told the court that he knew DW 3 before the incident as they always met and chatted at his place of business. This piece of evidence too gives the court a clue as to where DW 4 was on 2ns December. It was in the evidence of DW 3 that the plan failed on 2nd December because DW 4 was away in Blantyre to collect receipt books. It's not true that DW 4 was in Blantyre but he was in Zomba with DW 3 to give out his plans likewise. It is not true that DW 3 conspired with PW 1 Davie Amadu to rob Namadzi Admarc because it was the same DW 3 who was seen in the company of DW 4 in Zomba by DW 1 and even talked to them as they were eating chips at his bench. What DW 3 told the court clearly indicates that he was hiding some information about what exactly happened on this day. This he was doing for reasons best known to him. However the evidence of DW 1 makes this court reach a decision so easily."

All this evidence was admissible. It matters less, according to section 242 of the Criminal Procedure and Evidence Code as the Supreme Court of Appeal explained in Devoy v Republic (1971-72) 6 ALR (Mal) 223; and Madinga v Republic [1993] 16 (1)

MLR 263 that the evidence was from accomplices. In Devoy v Republic the Supreme Court of Appeal did however accept Lord Reading, CJ., statement in R v Baskerville [1916-17] All ER Rep. 38 that the practice rule that the trial court warns itself of the danger of convicting on the uncorroborated evidence of an accomplice crystallized into a rule of law. Indeed decisions of this Court, starting with Patel v R (1923-61) 1 ALR (Mal) 894, and the Supreme Court, starting with Nkata v Republic (1966-67) 4 ALR (Mal) 52, hold that absence of such a warning is fatal to a conviction unless, of course, there has been no failure of justice. In this particular case the lower court was oblivious to that the other defendants were accomplices and that their testimony was subject to the warning just mentioned. The other defendants' testimony is, therefore, greatly undermined by lack of this warning.

The question then is whether, in the absence of this warning, the conviction should stand. This, of course, depends on whether on the totality of the evidence before the lower court, subject to this Court's re-hearing, the conviction is sustainable without occasioning a failure of justice. Failure of justice is a neutral expression meaning failure of justice from the perspective of the defendant, the victim and the public interest. For the defendant, the court must avoid a miscarriage of justice through conviction of the innocent. For the public and the victim of crime, the criminal process must be able to bring to justice those who offend. The criminal justice system's efficacy is grossly undermined by a system scarcely protecting the innocent and easily freeing the guilty. In between, there is a choice between two evils: it is a better evil to acquit the guilty if the innocent are served thereby than convict the innocent that we may get in all who are guilty. Consequently, the rules of the burden of proof and presumption of innocence dictate that, in the event of reasonable doubt, the doubt, in a criminal case, should be resolved for the defendant.

On the evidence, as demonstrated, real doubts linger on the appellant's guilt. Other jurisdictions have three verdicts, guilty, not proven and not guilty. For us the not-proven verdict still stands as a not guilty verdict. The conviction is unsafe. I allow the appeal. I set aside the conviction and sentence.

It seems, because of this appeal, the High Court never, as it should have done under section 15 of the Criminal Procedure and Evidence Code, reviewed the sentences on the other defendants. Courts, and this has the imprimatur of the Supreme Court of Appeal, deprecate including a conspiracy charge where, like here, the defendant is charged with the substantive crime. The consequence of the lower court's failure to order whether the sentences on the two counts should run concurrently or consecutively is the other defendants are serving a total term of twelve years imprisonment. That is an understandable where the defendants should not have been charged with the conspiracy in the first place. Moreover, the conspiracy and robbery were part of the same transaction. The lower, should, as the Supreme Court of Appeal held in Kumwenda v Republic [1993] 16 (1) M.L.R 233, have ordered the sentences to run consecutively. I, therefore, order the sentences against the other defendants to run concurrently.

Made in open court this 26th Day of May 2003

D F Mwaungulu
JUDGE