

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO.17 OF 2007**

BETWEEN

**ZEBRON NGAIRO----- 1ST APPELLANT
PETROS SALANGA MWALUGHALI----- 2ND APPELLANT**

AND

THE REPUBLIC----- RESPONDENT

CORAM : HON. JUSTICE E.M. SINGINI, SC.

: Mr. Kambawuwa , Senior Legal Aid Advocate, of
counsel for the Appellants
: Miss Mchenga, Senior State Advocate, of counsel for
the Respondent
: Mr. Chulu, Court Clerk
: Miss Mthunzi, Court Reporter

JUDGMENT

The two appellants were jointly tried before the subordinate court of the First Grade Magistrate sitting at Mzuzu. They were charged with the offence of burglary contrary to section 309 of the Penal Code and with the offence of theft contrary to section 287 of the Penal Code. They both pleaded not guilty to both charges, but after trial the court found them guilty as charged and convicted them of the two offences. The court sentenced both of them to imprisonment with hard labour for ten and half years on the charge of burglary and for two years on the charge of theft and ordered that the sentences were to run concurrently with effect from

the date of arrest. The conviction and sentence were handed down on both of them on 19th March, 2006.

The State's case against the two, as accused persons, was that on the night of 26th October, 2005, they broke and entered a dwelling house of one Billy Luhanga at Kapoka Trading Centre in Chitipa District and stole a motorcycle Registration No. MZ 5302 valued at K450,000, the property of World Vision International assigned at the time to Billy Luhanga as employee. Mr. Luhanga testified that he got up in the night and noticed that the door of his house was unlocked. When he checked further he noticed that the motorcycle which he kept inside the house was not in the house. He concluded that someone must have broken into his house and stolen the motorcycle. He then informed a workmate, Mr. Mufungwe, who was also his senior.

The two of them, joined by Mr. Luhanga's wife, searched for the motorcycle in the surroundings. There was moonlight and they also lit a lamp to assist them to see better. They saw a trail of tyre marks of a motorcycle starting from the house going in some direction. They also saw a trail of shoe prints of what must have been two persons along the same path in parallel with the tyre marks. The earth around the area was of sandy soil. One of the pairs of the shoe prints bore an engraving of the letter "S". They followed these trails up to a distance of two kilometres and then came back. They did not find the motorcycle. Mr. Luhanga then reported the matter by phone to the police at Chitipa Police Station on the same night.

During that night the police came to the house and started their investigations. There were seven police officers that came for the task.

They too followed the two trails of the tyre marks of the motorcycle and shoe prints, but they were not accompanied by Mr. Luhanga and his two colleagues. After a distance of about five kilometres at a graveyard the police noticed that the trail of tyre marks ended. When the police searched around the place they saw a motorcycle lying on the ground within the graveyard covered with tree branches and leaves. This was later confirmed to be the motorcycle missing from the house of Mr. Luhanga.

The police testified that a short distance away from where the motorcycle was within the graveyard they saw a person whom they said was in a state of hiding. They approached the person, and it was Petros Salanga Mwalughali, the first accused in the trial and who is the second appellant in this appeal. According to the testimony of the police, this was at around 4:00 o'clock in the morning. The shoes the first accused was wearing at the time bore exactly an engraving of the same shoe print of the letter "S". This strengthened police suspicion against the first accused and they arrested him there and then and brought him with them to Chitipa Police Station. All the police officers that visited the scene of crime testified at the trial and all to the same effect.

According to the testimony by the police the first accused refused to explain on the spot why he was found at the place but said he would give his statement at the police station. At the police station he was charged and cautioned. He signed a caution statement in which he is recorded to have confessed to committing the offences of burglary and theft as charged. The caution statement also shows that he mentioned that he committed the offences together with a second person whose name he

gave as Zebron Mwangailo who lives at Kyela in the Republic of Tanzania, a town at that country's border with Malawi.

That was really the totality of the evidence the State presented at the trial against the first accused, viz, being found all by himself nearby the place where the stolen motorcycle was found and at the strange hour of 4:00 o'clock in the morning: wearing shoes with the same engraving resembling the letter "S" on the sole as was observed with the trail of shoe prints that accompanied the trail of tyre marks of a motorcycle; the confession to committing the offences in the caution statement he signed at the police station.

The State's case against the second accused, the first appellant in this appeal, is founded solely on the caution statement signed by the first accused confessing to committing the offences and in it mentioning that he was with another person named Zebron Mwangailo who lives at the border town of Keyla in Tanzania. The town of Keyla borders Karonga District in Malawi. On the basis of that statement the police in Chitipa passed the information to the police in Koranga who, under cross border police cooperation arrangements, sought the assistance of the police at Kyela in tracking Zebron Mwangailo.

The police at Keyla responded positively. They arrested the second accused and handed him over to the police in Karonga. He was arrested by Kyela police on 7th November, 2005, some twelve days after the arrest of the first accused in Malawi. The second accused, though, answers to the name of Zebron "Ngailo" and not "Mwangailo". However, testimony was given in the trial by Kyela police that "Mwangailo" and "Ngailo" are the same surname and that they knew that the second accused answers to

both versions of that name or surname. To show that they knew the second accused well, Kyela police also testified that on two occasions he had been tried for equally serious offences in Tanzania, but they did not deny the evidence the second accused gave in his own defence that on both occasions he had been acquitted of the charges. Still, the only evidence at trial in the present case against the second accused was that of the confession statement of his co-accused.

Both accused appealed against their conviction and sentence. In the record of the appeal, the second accused is shown as the first appellant and the first accused as the second appellant. The separate grounds of appeal presented by the appellants may be summed up as being to the effect that their convictions were wrong in law and could not be supported by the evidence adduced against them at the trial and that the sentences were excessive.

When hearing of the appeal was first called before me on 16th May, 2007, the appellants were unrepresented by counsel and I directed that they should be accorded legal assistance provided by counsel from the Department of Legal Aid. I adjourned the hearing to the following day, but I granted a further adjournment to allow counsel more time to study the case and confer with the appellants. I heard the appeal on 24th May and the appellants were represented by counsel Mr. Kambawuwa, Senior Legal Aid Advocate. The State was represented by counsel Miss Mchenga, Senior State Advocate.

At the opening of the hearing, Mr. Kambawuwa indicated that he was going to argue against conviction in respect of the first appellant, but was only going to argue against sentence in respect of the second

appellant. This he did, and I must acknowledge that he did so with admirable eloquence.

In reviewing the inferences drawn by the lower court from the evidence at the trial, on the basis of which inferences the court reached its guilty verdict and convicted the appellants, I have reached the conclusion that the court gave undue weight to the confession statement signed by the first accused.

First, that confession statement of the first accused is solely the evidence the court relied upon in convicting the second accused. However, during trial the first accused denied totally knowing the second accused. As there was no other piece of evidence to connect the second accused to the commission of the offences the two were charged with, the court ought to have found it unsafe to convict the second accused. Further than that, the admission of the confession statement of the first accused against the second accused, who did not in any way at any point adopt the statement or any part of it as his own, was unlawful for being in contravention of section 176(2) of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi) which provides categorically that-

“(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.”.

Decided case authorities abound that sanctify the law under that provision: see the case of *Watson v. Regina* 2ALR Mal 32.

In my judgment therefore the conviction of the second accused (the first appellant in this appeal) was wrong in law. On that ground alone I accordingly allow the appeal of the first appellant and quash his conviction. Counsel for the State, Miss Mchenga, also submitted that the State, too, did not support the conviction of the second accused.

With respect to the appeal of the first accused (the second appellant in this appeal), although Mr. Kambawuwa as his counsel argued before me only the appeal against sentence, I have given consideration to the evidence adduced at the trial against the first accused upon which his conviction was based. It was the evidence of the shoe print, the evidence of being found at the place where the stolen item was found at a rather awkward hour of 4:00 o'clock in the morning, and the evidence of the confession statement he signed at the police station.

Giving evidence in his own defence the first accused admitted wearing the shoe of the design as presented but questioned the conclusion that it could only have been him to whom the shoe prints could have been attributed given that a shoe of that design could have been worn by many others. He disputed the hour of 4:00 in the morning and explained that it was at 7:00 am when he was merely passing by the place and was stopped by the police, questioned and then arrested.

In its judgment, the trial court did conclude that all it had in the case as evidence against both accused was circumstantial evidence and that it needed to look to other pointers in linking the accused to the commission of the offences they were charged with. The court then proceeded in its judgment to make several inferences of its own in reaching the conclusion of guilt against the two accused persons. As was

held in the case of *Nyamizinga v. Republic* 6 ALR Mal 285, it is for the prosecution to discharge the burden of justifying an inference of guilt from circumstantial evidence. Further, a conviction upon circumstantial evidence is permissible only where an inference of guilt is the only one that can be drawn from such evidence: *Moyo v. Republic* 4 ALR Mal 470. In other words, the proper approach is to treat circumstantial evidence as generally unsafe upon which to base a conviction.

In this case I have not found that the weight of evidence adduced by the prosecution at the trial was sufficient to justify an inference of guilt against the first accused. I therefore similarly allow his appeal and quash his conviction. I make an order for the return to the first accused of all his property seized from him in the investigation of the offences.

The State made submissions opposing the appeal of the first accused and supporting both his conviction and sentence. With my judgment allowing his appeal, I grant leave for the State to appeal should the State so wish.

PRONCED in open court at the District Registry in Lilongwe this 5th day of June, 2007.

JUSTICE E.M. SINGINI, SC.
J U D G E

