IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 151 OF 2007

SHAIBU PHIRI..... 1ST APPELLANT
FELIX KASEWETHA..... 2ND APPELLANT

-AND-

THE REPUBLIC..... RESPONDENT

CORAM: HON. CHINANGWA, J

Appellants, Present/Unrepresented
Thabu Nyirenda, Counsel for Appellants
Miss Mtaba, Counsel for Respondent
I. Namagonya, Court Reporter
S. Bazilio, Court Interpreter

JUDGMENT

The two appellants Shaibu Phiri and Felix Kasewentha appeared before the First Grade Magistrate Court sitting at Lilongwe from 15th May to 24th September, 2007. It was on a charge of Theft by servant contrary to section 286 of the penal code. The particulars stated that Shaibu Phiri and Felix Kasewentha on 30th April, 2007 at area 9 in Lilongwe being servants employed by Yung Duk Cho as security guards stole 60 metres of electric cable valued at K1,500,000 the

property of Yung Duk Cho. The appellants pleaded not guilty to the charge. Nevertheless, after trial each was found guilty, convicted and sentenced to 24 months penal servitude. They are at Maula prison serving their sentences.

Facts aver that complainant Yung Duk Cho is a Korean, but now a Malawi citizen. She lives in area 10. She operates Korean Gardens in area 3. She started construction of a house in area 9.

She employed the two appellants as night watchmen. An electric ground cable about 60 metres long missed from the site. The 2 appellants were suspects. They were arrested and charged with the offence of Theft by servant contrary to section 286 of the penal code. They were convicted.

The appellants through counsel Nyirenda of Legal Aid Department appeal against both conviction and sentence. The grounds are as follows:

(a) *The learned magistrate wrongfully allowed Pw3 to testify.*

(b) The learned magistrate erred in law by failing to direct no case to answer.

(c) *The learned magistrate wrongly used an alleged lie by 2nd appellant to support his guilt.*

(d) The sentence was in principle manifestly excessive.

On the 1st ground counsel attacked the testimony of Pw3 No A4427 Sub/Inspector Makungwa that it was full of hearsay. I have examined the testimony of Pw3 contained in this court record. Pw3 introduced his testimony with the fact that he received a complaint of theft from the complainant – Pw1. Thereafter Pw3 repeated what he had heard from complainant.

> *"During the period she was building the house the place was guarded by accused persons. Towards the end of April, 2007, she discovered that the said cable was missing. She thought that the cable was perhaps, in the building under construction because there were so many people working there. After checking she discovered the*

coatings of the cable that missed from the house."

This was hearsay which the trial court should have not recorded. The danger was that the trial court considered this hearsay material in its judgment as it summarized the testimony of witnesses. The trial court ought not to have considered it in evidence. It was inadmissible.

However, the description of the scene of crime. The set up of the premises, were rightly admitted in evidence. Similarly the tendering of coating material of the cables and statements under caution were properly admitted. It would be stretching matters too far to think that an investigator cannot describe the set up of the premises at the scene of crime.

Counsel Nyirenda argues that the trial court should have made a ruling of no case to answer. It is my judgment that the trial court was the best judge at that time. Therefore a ruling of a case to answer in compliance to section 254 of the Criminal Procedure & Evidence Code was not bad in law. Similarly there was no point to make a ruling for each appellant

separately. Unless the trial court found one with a case to answer and the other a no case to answer.

The issue is whether the conviction can be supported by evidence. The two appellants were night watchmen. There is no evidence in the court record that whenever the 2 appellants reported on duty there was a handover and takeover exercise of the premises.

I raise this point because it is in evidence of complainant and pw2 that there was construction of a house going on at the premises. There were people working on site. How secure were the building materials during day time when appellants were off-duty. Who had custody of them? There are no answers from the court record. It is possible that the items might have been stolen during day time when the appellants were off-duty.

Finally there is doubt as to the guilt of the 2 appellants. The doubt is resolved in their favour. The conviction is quashed and sentence of 24 months penal servitude set aside.

The appellant s to be released forthwith unless held on other lawful ground.

Pronounced in Open Court on this 4th day of June, 2008 at Lilongwe.

R.R. Chinangwa
JUDGE