JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NUMBER 45 OF 2007

BETWEEN:

WILLIAM KAZEMBE …….APPELLANT

- AND -

THE REPUBLIC ……..……..RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Miss Kayuni, State Advocate for the State
Mr Msukwa, of the Counsel for the Appellant
Mrs Moyo – Official Interpreter

J U D G E M E N T

Twea, J

This is an appeal against both conviction and sentence.

The convict was charged with two counts; housebreaking contrary to Section 309(a) and theft contrary to Section 278 of the Penal Code respectively. After a full hearing he was convicted on both counts and sentenced to 5 years and 3 years imprisonment with hard labour respectively. He now appeals this decision.

It is clear from the evidence of PW1, the victim witnesses, that the offences in issue were committed on different occasions. She told the lower court that on 9.01.07 she was at her garden. When she returned home, she found that her house was broken into and her battery was missing. Then again on the 11.01.07, she came back from the garden and found that her house had been broken into and money valued K85,000 was missing. Upon causing enquiries she received some information and went to the house of the parents of the convict and later to the house of the convict. It was her evidence that she found her battery at the house of the convict. He was using it to operate his radio. She informed the court that the convict admitted and apologised for taking the battery but he denied taking the money and challenged her to report the matter anywhere she wanted. She reported the matter to police.

It is clear therefore, that the charge was bad for duplicity. Further, the particular of offence do not indicate when the offences took place. This should have been indicated so that the defence could know and prepare how to defend the case.

I have examined the evidence in total. I find that the evidence of PW1 is clear on what happened on the 9th and 11th January, 2007. The evidence of the convict is also clear that he viewed the two incidents separately and defended himself accordingly. I do not find that he was misled by the duplicity nor that he had been prejudiced thereby. I accordingly invoke Section 5 of the Criminal Procedure and Evidence Code: See ***Rep Vs Nahuwo [1971 – 72] ALR (M) 433 page 434.***

I must mention that the appeal did not consider the issues of duplicity, but only challenged the conviction and sentence.

I have considered the evidence. I find no fault with the finding of the magistrate.

The issue of breaking has not been disputed. It is not even disputed that following the breaking of 9.01.07 the battery was stolen, which battery was found at the house of the accused. It is not also disputed that following the breaking on 11.01.07, money worth K85,000 was stolen of which the accused admitted stealing K35,000 only. That K15,000 cash and some new clothes which he admitted to have bought with the money stolen were recovered.

The convict challenged the conviction for theft of the on ground that he was a house servant of PW1 and that he had been authorised to take the battery. Unfortunately the evidence does not support this. PW1's evidence was that the convict was instructed to remove acid from the battery. He, however, not only took it away, but was using it at his house. There is no explanation as to whether he removed the acid as expected. It is also on record that he apologised that he took away the battery and was using it.

Taking into account that the battery missed after a breaking, that the convict, as a house servant was aware of this and said nothing to his employer, PW1, and the fact that the battery was found in his house being used by him, the only inference that this court can draw is that he is the one who broke into PW1's house and stole the battery.

In the breaking and theft of money, there is no dispute that the convict left PW1 at the garden and came to the house. PW2 clearly said the convict entered the house of PW1 by the front door and came out through another door. He then bade him farewell. There was also no dispute that upon arrest the convict informed PW3, the investigating officer, that he only stole K35,000 on which K15,000 cash was recovered and some new clothes that he bought with the stolen money. The convict said the same things in his statements at police.

He now challenges the conviction on the ground that the trial court should not have relied on the caution statement after a plea of not guilty.

It is correct that a plea of "not guilty" is a general denial and once recorded it puts every element of the offence in issue. However, it is equally legal to accept, in evidence, extra – judicial statements that are corroborated. In this case the convict informed investigators what he stole and what he had from the stolen cash – which were recovered. No evidence has been adduced to rebut this. Further, when cautioned the convict repeated the confession. It is trite law that a confession can be accepted as evidence of what happened against the maker unless it is rebutted. In the present case the confession was not rebutted. If fact the convict tried to justify himself by alleging that the money he stole was proceeds of the maize that PW1 sold which was cultivated by PW1 and himself. He never disputed that at all material times he was a servant of PW1. It cannot be said, for one moment, therefore, that he was co – owner of the money in issue. I therefore find that the conviction was properly grounded.

For these reasons the appeal against conviction must fail in its entirety.

Be this, as it may, I do not think I am at liberty to add new charges after conviction: ***Rep Vs Sandifoso [1971 – 72] ALR (Mal) 146.*** For this reason, I will confirm the conviction in respect of the breaking and theft of 11.01.07 only, which are more serious. If the State wishes to charge him for the offences of 9.01.07 they should do so within 15 days of this order otherwise they are barred from doing so.

On the sentence, I find that it is within the guidelines in respect of housebreaking. This was deliberate and planned. The convict was a house servant and familiar with PW1's house. He left her at the garden to commit the offence.

On the count of theft however, I think 3 years is excessive. Even if it was planned. I bear in mind that some money has been recovered and that the convict has really not derived any benefit from his act. I therefore reduce the sentence to 18 months imprisonment with hard labour. To this extent the appeal succeeds.

The sentences to run concurrently.

Pronounced in Open Court this 17th day of January, 2008 at Blantyre.

E. B. Twea
JUDGE