IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NUMBER 80 OF 2007

MAC DONALD GIBSON NYANDA ……APPELLANT

V

THE REPUBLIC……. RESPONDENT

CORAM : SINGINI, J.
: Appellant, unrepresented
: Miss Mchenga, Counsel for Respondent (Sate)
: Miss Mthunzi Court Reporter
: Mrs. Mnyenyembe, Court Interpreter

J U D G M E N T

The appellant was charged jointly with a co-accused, one John Michael Banda, for the offence of obtaining by false pretences contrary to section 319 of the Penal Code. They were tried before the Second Grade

Magistrate Court at Lilongwe. They each pleaded not guilty to the charge. After trial they were both convicted of the offence on 25th May, 2007, and were each sentenced on the same day to eighteen months imprisonment with hard labour, and the court made an order for the sentence on each to run from the date he had his statement recorded by the police. Only the appellant, and not his co-accused, has lodged an appeal to this Court. He appeals against both conviction and sentence. I heard the appeal on two days, first on 12th March, 2008, when the appellant completed presenting his appeal after which I adjourned the hearing on application by counsel for the State. Hearing resumed the following week on 19th March when I heard counsel for the State in opposition to the appeal on both conviction and sentence. The appellant was unrepresented both at the trial and before me on appeal. He did however present his appeal before me by himself.

The case against the appellant, as against his co-accused, is that the two of them acting with common intent presented a cheque that was later found to be a false cheque to a supplier of building materials operating in Area 2 in the City of Lilongwe, Mrs. Cecilia Mwale, who is the complainant in this case, and she gave evidence in the trial. Upon presentation of the cheque, the supplier supplied to them building materials of different description amounting to K350,000. The cheque they presented was of that amount purportedly drawn on an account named Hope for the Homeless Child held at the Lilongwe Branch of National Bank of Malawi. Both of them were known to the complainant and in her testimony she described the appellant's co-accused as a regular customer at her shop who bought materials from the shop with cash and sometimes made payment by cheque.

The two came together to the shop first on 20th February, 2007, and got a quotation of the price for the materials and then returned the next day on 21st February when they presented the cheque to the complainant personally upon which they collected the materials. They had come with a truck which they hired from the rank at the main market in Lilongwe City. They loaded the materials on the truck and left. The driver of the hired vehicle returned to the shop the next day on 22nd February and asked the complainant if the goods he had transported had been paid for by cash or by cheque. When he was told payment was by cheque he tipped the complainant that he had become suspicious of the two and warned that the purchase may have been a fraud.

The complainant then rushed to the bank to seek special clearance of the cheque when the bank told her that the cheque was not valid and could not be honoured. The complainant reported the matter to the police. With police investigations, the driver of the vehicle led the police to the places where he had delivered the materials. Some of the materials were indeed found there including at the house of the appellant leading to the arrest of the two of them.

The evidence on record against the two is overwhelming and I am surprised that they did not simply plead guilty to the offence accepting that they had been caught in their criminal act to defraud the complainant. I am even surprised that the appellant lodged this appeal, although indeed the grounds he filed with his notice of appeal were concerned only with the sentence. It was during hearing when he started presenting his appeal before me that he also gave the ground against conviction. This is what prompted

learned counsel for the State, Miss Mchenga, to seek adjournment of the hearing to another day so that she could prepare her response to the ground of appeal against conviction.

The appellant's ground of appeal against conviction is as aptly captured by the learned counsel for the State in her supplementary opposing skeleton arguments that he was not involved in the false pretence surrounding the cheque, but that all he did was buy the stolen items from his co-accused and he did not know that the items were stolen.

In my consideration of the evidence, all the actions and movements of the appellant were consistent only with a common intention with his co-accused to obtain the building materials they got from the supplier fraudulently and by presenting a cheque they knew was false. They acted together for several days preceding the collection of the building materials from the complainant's shop. They came together twice to the shop. I see no ground for me to interfere with the finding of the lower court that on the evidence before the court the appellant and his co-accused were guilty as charged.

I should address, though, the argument by learned counsel for the State presented in her skeleton arguments that an appellate court should confine its decisions on points of law and that questions of fact are irrelevant unless errors of law justify consideration of the power to alter the verdict of the lower court. She cites the case of *DPP v. McLuckie* 6 MLR, 301 in support. She also argues that there should be no interference with findings of

fact by a lower court unless there is insufficient evidence to support the finding and cites the case of *Useni v. Republic* 3 MLR, 250.

The authority of those two cases should be taken with guided caution and should not be understood that an appellate court cannot readily overturn a finding of fact by the trial court. The state of statutory law in Malawi is very clear under the Criminal Procedure and Evidence Code by providing in section 349 in subsection (1) that "any person aggrieved by any final judgment or order or any sentence made or passed by a subordinate court may appeal to the High Court" and then in subsection (2) that "an appeal under subsection (1) may be upon a matter of fact as well as on a matter of law". Thus, the law very liberally permits a subject of the State in a criminal case against the subject to appeal on a matter or a finding of fact and in such an appeal this Court, in its appellate jurisdiction, becomes seized of the power to examine the evidence that was before the lower court and may quite properly overturn a finding of fact by the lower court. It is on the State that section 349, in subsection (3), instead places the limitation or restriction from appealing on findings of fact.

I consider that although section 349 of the Criminal Procedure and Evidence Code (indeed the Code itself) predates the country's present Constitution, it serves very well the principle as stated in section 9 of the Constitution of impartiality of the courts by requiring that they make their decisions only according to facts and prescriptions of law; and by facts the Constitution can only be taken to refer to facts as are supported by evidence before the court. No finding will be protected by the sheer assertion or

statement by a trial court (as is oft done in judgments of many a subordinate court) that it has found as a fact if that finding be not supported or sufficiently supported by the evidence before the court or is in contradiction to, or is inconsistent with, such evidence.

In the present case, the guilty verdict by the lower court is well supported by the evidence that was before the court and I have found no ground to interfere with the verdict. I accordingly dismiss the appellant's appeal against conviction. I also dismiss his appeal against sentence. I therefore confirm both the conviction and sentence.

PRONOUNCED in open court at Lilongwe District Registry this 20th day of March, 2008.

E.M. SINGINI, SC

J U D G E

20/03/08