IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL REVIEW CASE NO. 6 OF 2016

BETWEEN:

GIFT MSEYAMA ..... 1st APPLICANT

EVANCE GOLDEN..... 2nd APPLICANT

BRIGHT MAMBULASA ..... 3rd APPLICANT

STEVEN MALOLA..... 4th APPLICANT

SAIDI LUBANI..... 5th APPLICANT

Coram: Hon. Justice M L Kamwambe

Munthali of counsel for the State

Maele of counsel for the Applicants

Phiri...Official Interpreter

ORDER

Kamwambe J

This application calls for the High Court to exercise its powers of review on the legality and propriety of the finding of a 'case to answer' in relation to section 254 of the Criminal Procedure and Evidence Code and is made under section 360 as read with section 363 of the Criminal Procedure and Evidence Code.

The facts are that the 1st, 2nd, 3rd and 4th accused persons are charged with the offence of robbery contrary to section 301. The 5th Applicant stands charged with the offence of receiving stolen property contrary to section 328 (1) of the Penal Code. After pleas of not guilty the State paraded witnesses which led the court to make a ruling of case to answer against all the Applicants on their respective charges. The ruling is marked FM 3. The Applicants are of the view that the ruling of case to answer was made without proper consideration of the relevant law and the facts put before the court.

The Applicants argue that the submissions of the prosecution show that the prosecution's case hinges on the confession statements which were retracted and were objected to for being acquired by force. There was no evidence corroborating the contents of the caution statements.

I have looked at the State's submissions for a case to answer or not and I wish to quote the second paragraph on page 9:

> *"The confession by the 1st accused involved him also implicating the other accused persons.* A *follow up of the facts in the confession led to the arrest of the other accused persons* and *also the recovery of* a *number of items. From the 1st accused specially, he led the police to his mother in Mulanje where he allegedly went to hide* some *of the proceeds of the robbery. It* was *also his confession which led to the arrest of sixth accused person* and *the consequent seizure of the motor vehicle he allegedly paid K450,* 000. 00 as a *deposit to the sixth* accused. *The driver of the minibus, Fred* Banda, *also clearly identified the first accused* as *the person who called him with the others to take them to Blantyre on the night the offence* was *committed. All the pieces of evidence f it together pointing to the 1st accused having*
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> CRIMINAL DIVISION "

taken part in the commission of the offence. The State feels that taking all the evidence in its totality the confession by the 1st accused was *undoubtedly* made *by him and it is materially true in its content. The confession is extensively corroborated by the other pieces of evidence presented by different State witnesses. The State therefore submits that there is ample evidence for presuming that the 1st accused committed the offence charged and he should be called upon to enter* a *defence."*

The factual analysis is impeccable. 1st Appellant should stand trial to defend himself.

Under section 176 (2), a confession of one accused cannot be used against another accused unless that other has adopted it. Authorities are numerous on this law. The confession by the 1st accused person implicates only himself. Where the basis of implicating the other accused persons is the confession of the 1st accused person, such evidence shall be inadmissible. Independent evidence must therefore be found to be used against the other accused persons. Where an accused person has retracted his confession, the confession is subjected to a test under section 176 (3). It reads as follows:

"Evidence of a *confession admitted under subsection (1) may be taken into account by* a *court, or jury, as the* case *may be, if such court or jury is satisfied beyond reasonable doubt that the confession* was made *by the accused and that its contents are materially true. If it is not* so *satisfied the court or jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the* case *specifically to direct the jury* as *to the weight to be given to any such confession."*

A pertinent observation to make from the quotation above is that the standard of proof to accept a confession is beyond reasonable doubt. The question is, at what stage of trial does this take place? When the court is summing up the case determining a case to answer or no case to answer, or after accused persons have entered their defence? It is my conviction that a prima facie case must be established that there is a satisfactory confession evidence that it was made by the accused and that it is materially true even at the time of case to answer. The follow up question is whether a review is proper against an order of a case to answer. It is proper so that the High Court gives direction to the lower court to avoid miscarriage of justice. A court should not find the co-accused persons with a ***prima facie*** case to answer on confession evidence of another accused person because that evidence is simply inadmissible.

The evidence of Fred Banda and Eunice Saveya who were declared hostile witnesses should not be used against the 1st accused person or any other co- accused persons, because evidence of a hostile witness becomes unusable (see **R v Lawrence Mthethwa** Criminal Case No. 121 of 2010). In respect of 1st accused person we have only the confession evidence and the question is whether in the circumstances it is materially true. He was able to lead the police to his mother's house where he hid the stolen property and also to mention his accomplices. He used part of the stolen money to purchase a car from Lubaini. I believe that for the 1st accused person his confession is materially true.

For the second accused person the court should look for independent corroborating evidence. He did not adopt the 1st accused person's confession statement although he was implicated by this confession. The prosecution seem to suggest that 2nd accused too made his own confession statement, hence he says that the contents are materially true. Further, the prosecution says Cassim Rashid came to testify and confirmed the facts

contained in the confession. More likely this means that his own confession played a big role in finding him with a case to answer.

For the 3rd accused person, Bright Mambulasa he was also implicated by the 1st accused person. This evidence is inadmissible no doubt as Bright did not adopt it. But again it is suggested by the State that he confessed to have gained K2.3m from the proceeds of the robbery out of which money he bought a Toyota Carina car registration number MN 1669. The vehicle was tendered in court and no one has claimed ownership of the vehicle. The court must have found that the confession was undoubtedly his and its contents materially true. I believe it is safer for now for the court to enter a case to answer basing on own confession evidence. But I observe that the caution statement which is supposed to be the basis of the confession is not available.

In respect of the 4th accused person, Steven Maiolo, likewise he was also implicated by the confession evidence of the 1st accused person. The prosecution comes up openly that he also made his own confession. He confessed that he got MK l.7m from the robbery. He led the police to his house to collect the remaining MK lm after he used MK700, 000.00. The State found that the confession was undoubtedly his and that its contents were materially true. I am sure the court had reason to be satisfied likewise. However, the caution statement carrying the confession is not on record, unless he confessed verbally to a Police investigator.

The 5th Applicant was the sixth accused person who was also mentioned in the confession statement of the 1st accused person who gave the said 5th Applicant MK450, 000. 00 as a deposit for the purchase of a vehicle. His charge is receiving stolen property contrary to section 328 of the Penal Code.

The above is some of the prosecution evidence that the court relied upon. Let me now consider whether the lower court misdirected itself on the relevant law. I looked at its short ruling. The ruling shows that the basis of the prima facie case to answer is not based on the confession statement of the 1st accused as against the other co-accused, but on either other independent evidence or the co-accused own confessions. The last paragraph on page three of the ruling is very clear and I quote:

> *"For the charge of robbery against the five accused persons this court proceed to find that the State evidence has managed to establish the important elements in this charge, therefore a prima facie case has been* made *out against all of you accused persons except* for *the 5th accused person Lovemore Mindano who is only implicated by the* 1*st accused person and there is no any other evidence whatsoever that has hinged him to the offence as charged, and this court proceed to acquit him* from *the charges."*

What one would postulate from the quote above is that the magistrate was aware about the import of section 1 76 (2) of the CP&EC and that he directed his mind to it. However, Evance Golden, Bright Mambulasa and Steven Maiolo retracted their confessions in their caution statements at trial by pleading not guilty **(Chisenga** - v- **R** [1993] 16 (1) MLR 52 (MSCA)) . It was the duty of the trial court to look for independent evidence to corroborate the confession so as to make it materially true. I note that none of such evidence exists. The guard did not see the robbers. There is no basis for them to defend themselves. To allow them to do so would be persecution.

In respect of Saidi Lubaini it was not proved that he received the stolen property knowing or having reason to believe the same to have been stolen. Definitely the magistrate was not sure, no wonder he said:

> *"On the 6th accused who has been charged differently from the rest* as *he is suspected to have received monies from Gift Nseyama knowingly that the same were stolen. Should we say that when the accused received these monies he knew that the same were stolen? Much* as *I don' t want to put the burden on the accused to prove his innocence I would just love to hear from him if indeed he knew that the monies were stolen when he received it, however, it must be remembered has* a *Constitutional right to remain silent and this is not waived from him.* "

In fact, what the magistrate was guarding against to do, for the accused not to prove his innocence, is exactly what she succeeded to do. This was unprocedural and unlawful.

In **Mohomed Nesin Sirdar -v- Rep 5 ALR (MW) 212,** the High Court held that knowledge that goods were stolen at the time they were received may be inferred from the accused person's conduct before and after receiving the goods and from all the surrounding circumstances of the case; and knowledge in this connection includes the state of mind of the accused who wilfully refrains from making enquiries about goods received into his possession . This is very instructive. In respect of Lubaini, no circumstance was brought forward to establish guilty state of mind in receiving the money.

The lower court was aware of the evidential weight to be given to evidence of a hostile witness. On second paragraph of page three of the ruling, the court pertinently said:

> *"The Jaw regarding to this is very clear. In the case of* ***Magombo and Phiri v Republic*** *(1981 -83) l* 0 *M LR, it* was *provided that evidence from witnesses that are declared hostile should not be used. Therefore the State cannot rely on the evidence of these two witnesses any*

more. This court will therefore proceed to disregard the evidence of these two witnesses."

The court further warned itself as follows:

"The court should by any means avoid putting he accused persons on defence in order to have them implicate themselves so *that the State achieves its conviction."*

But this is what it has done except for the 1st accused person who no doubt has *prima facie* evidence against him. The magistrate articulated the law satisfactorily well but failed to marry them well with the prevailing facts. In my view there is danger that a miscarriage of justice might occur. It must be admitted that the case was poorly handled by the prosecution. It failed to read the case or facts at hand and strategize the right approach to make.

The other argument by the Applicants is that a robbery is committed where there is a theft and use of violence. Actual violence need not be proven if there are threats. However, PW2 Charles Lyson who was a guard on duty testified that the shop was broken into about midnight when he was attacked at the shop by criminals who tied him both legs and hands and laid him down. This was obviously violence used on the victim of the robbery and at SFFRFM property such as breaking the doors and safe. Of course, the primary victim is the company and violence was duly done to the guard representing the company. The charge may not have disclosed all elements of the offence due to poor drafting. But as section 254 of the CP&EC provides, the court is at liberty to allow necessary amendments to be made in accordance with section 151 of the CP&EC; or indeed a kindred charge substituted. What is important is that substantial justice is seen to be done at the end of it all. It would appear the attack on the guard was immediately before the theft, or it could have been simultaneous.

The purpose of the review is to give direction to the lower court to heed against causing injustice to the accused persons. Under section 362 { 1) of the Criminal Procedure and Evidence Code as read with section 353 (2) { a) {i) , this court has powers to acquit or discharge the Appellants against whom no sufficient evidence has been advanced.

Following on the above, Evance Golden, Bright Mambulasa, Steven Malola and the Saidi Lubaini are acquitted.

The application for stay was allowed and after having reviewed the lower court ' s record, only the 1st accused should defend himself as there is *prima facie* sufficient evidence against him.

On another note I wish to comment further on section 254 of the Criminal Procedure and Evidence Code. We should find out the intention of the parliamentarian for this enactment. I have read it several times to make meaning out of it. What is clear is that when the court finds that there is no case to answer, then a proper judgment ought to be made in line with section 139 and 140 of the Act. No such labour is required when a finding of ' case to answer' is made. In my view this means that a simple recorded sentence that 'I find you with a case to answer ' is sufficient without bothering to analyse the evidence. However, this does not mean that the High Court is precluded from reviewing 'case to answer' decisions. As such, the whole lower court record shall be looked into to see if the decision was appropriately arrived at.

Made in Chambers this 5th day of January, 2017 at Chichiri, Blantyre.

M L Kamwambe
JUDGE