

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL APPEAL CASE NO. 9 OF 2018**

BETWEEN:

RAPHAEL BANDA1ST APPELLANT

ZAKALIYA LYSON.....2ND APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: Hon. Justice M L Kamwambe

Salamba and Chisanga of counsel for the State

Maele of counsel for the Appellants

Ngoma....Official Interpreter

JUDGMENT

Kamwambe J

The Appellants were convicted by the second Grade magistrate court sitting at Ntcheu of the offence of breaking into a building and committing a felony therein. They stole MK105, 620. 00 cash in Bemat shop and after full trial were sentenced to 4 years imprisonment.

The ground of appeal is that the lower court erred in law in convicting the Appellants on the basis of their confessions when the Appellants retracted confessions and there was no independent evidence corroborating the confessions. The prosecution paraded three witnesses. The evidence of PW 1 did not any way implicate

the Appellants. PW2 stated that he was attacked by three men who were dressed in camouflage and could not identify them because it was dark. PW 3 was a police investigator who had no suspects until Appellants confessed to committing the crime. It is argued by the Appellant that when we look at the evidence and the caution statement the only similar story is that the guard was tied and two shops were broken into, hence, one cannot say that the evidence of PW 2 corroborated the retracted confession. Corroboration must be not only to the fact that an offence was committed but also to the fact that it was the accused who committed it.

The State argued that the confession put the Appellants on the scene of crime and thus corroborated with the evidence of PW 2 who said that he was attacked by robbers on that night who tied both his hands. Though he did not identify the attackers, his story was corroborated with what the Appellants confessed that they attacked the night guard and broke into the shop. The guard's statement was made a year ago before the arrest of the Appellants. And when they were arrested, they narrated the same story as the night guard had told the police.

Let me make the observation that the facts of this case depict a more serious case of robbery because violence was involved. However, the offence of breaking into a building and committing a felony therein is still relevant.

In the case of **Chisenga v R 16(1) MLR 52 at 57 (SCA)** it was stated that:

"The prosecution, not having proved an essential element of the offence, cannot rely on a confession, denied confession, whether or not it is corroborated, bearing in mind that a plea of not guilty puts every material fact in issue and anything in the nature of an

admission by an accused person before the trial, ought, in such circumstances, to be disregarded by the court. In other words, the Appellants admission in his statement to the police that he stole only part of what the fourth witness for the prosecution alleged was the shortfall, cannot be used to save the case for the prosecution where an element of the offence charged has not been proved, something the court below seems to have upheld."

The spirit of section 176 (2) of the Criminal Procedure and Evidence Code is that a confession authored by an accused person which is materially true, however obtained, will be taken into consideration by court as relevant and admissible. In the event that it has been retracted by a not guilty plea, corroborative evidence shall be required to prove not only that the offence was committed but that it was committed by the alleged offender.

The evidence of PW2 and PW 3 show that the confession was materially true through their similarity with the caution statement. PW 3, the investigator, said that the Appellant was arrested for another crime and when asked about the Bemat incident he admitted to have participated in the crime and he even demonstrated how they carried out the crime. The detail resembles that given by PW 2. And the act of demonstration corroborates the caution statement. It is up to the court to determine how much weight to place on the corroboration evidence. In the circumstances, the lower court was right to consider the caution statement as materially true and not to be ignored together with evidence of PW2. The Appellant is identified through circumstantial evidence since the evidence of PW 2 and PW 3 place the Appellant on the scene corroborating the caution statement. It could not be any other person who committed the offence but the Appellant and his two colleagues. Appellant volunteered the facts in the caution statement without any force exerted on him. It must


be materially true. When the State says that there was additional evidence external to the confessions of the Appellant, it simply refers to the evidence of PW 2 and PW 3.

I would wish to in agreement with the words in **Yamikani Letasi v The Republic, MSCA Criminal Appeal No. 1 of 2017** whose judgment was delivered on 29th March, 2018 which I find to be more relevant to this case. It held that once a plea of not guilty has been entered in a criminal case, it puts in issue all the material elements of the offence charged. In that event, evidence by any competent witness, including investigators, is the only means by which the prosecution can attempt to prove the denied charge. The evidence of an investigator, whether it be about an accused's confession or about his denial, is all part and parcel of the means the law has put at the disposal of the prosecution in a bid to discharge the burden of proof of not guilty creates for them.

There was only one breaking in into Bemat premises on the night of the 27th day of June, 2016 which is in the confession statement taken a year after the commission of the offence. The story of the prosecution also refers to it minus the identity of the attackers. It can only be concluded that the confession statement, which I find to be materially true, identifies the Appellants as the attackers. This proves that the offence was committed by no one else other than the Appellants. There is enough corroboration evidence to support the conviction.

Through the investigator the State has proved its case beyond reasonable doubt and therefore this appeal fails in its entirety.

Pronounced this 28th day of August, 2018 at Chichiri, Blantyre.


M L Kamwambe
JUDGE