


# IN THE HIGH COURT OF MALAWI

## PRINCIPAL REGISTRY

## CRIMINAL DIVISION

## CONFIRMATION CASE NO. 952 OF 2020

**(Being Criminal Case No. 205 of 2020 before the Senior Resident Magistrate Court sitting at Mwanza)**

**THE REPUBLIC**

**V**

**YUSTINO KAMANGA**

**Coram: Justice Vikochi Chima**
**Ms Layna Kulesi, Senior State Advocate**
**Ms Tiwonge Penama, Senior Legal Aid Advocate**
**Mrs Moyo, Court Clerk**

## ORDER ON CONFIRMATION

**Chima J**

The accused was charged with burglary contrary to section 309 (a) of the Penal Code and also theft contrary to section 274 of the Penal Code. He was convicted on both counts and sentenced to 72 months' imprisonment with hard labour on the burglary and 24 months' imprisonment with hard labour on the theft. The sentences were to run concurrently. The complainant's testimony was that she woke up on the morning of a certain day in mid May 2020 to find that her six inch queen size mattress and a big brown blanket were missing. She noticed that a burglar bar in one of the windows had been tampered with. All her keys were on the doors intact. She went to the police station to report the incident. She later learnt from surrounding people that someone was selling the mattress that fit her description. She had never seen the accused pass by her house before.

The police investigator in the matter stated that when the complainant reported the missing of her items, he visited her house. He confirmed that the burglar bar was tampered with to allow entry. He recovered both the mattress and the blanket from the accused's house which the complainant identified as hers. Upon interrogating the accused, he admitted having broken into the complainant's house.

In his defence testimony, the accused stated that he carries pillion passengers for a living. He stated that one of his friends, Zakumwa Makosi, had offered him a mattress and blanket for sale. He then told him to bring the items to his house and bought them for K20, 000. He cut the mattress as he found it too big for his bed.

In cross examinantion, he stated that he bought the property from Zakumwa Makosi but that he did not know his whereabouts. He also stated that this friend does not own a shop which sells this kind of merchandise. He did not know from whence his friend got the items. He stated that he only admitted the commission of the offences at the police station due to coercion/ torture.

The reviewing judge set down the matter for consideration of the propriety of the conviction on the offences of burglary and theft due to the fact the complainant did not see the accused commit the offences and that the accused was only found with the mattress. It was her view that the court should consider the alternate verdict of receiving stolen property contrary to section 328 of the Penal Code by way of section 157 (1) of the Criminal Procedure and Evidence Code. On sentencing, the judge questioned the propriety of the magistrate referring to previous convictions of the accused that had not been presented by either the state or the accused and to which the accused had not been called upon to comment thereon. The previous convictions referred to were: Criminal Case No. 195 of 2020 of escape from lawful custody; Criminal Case No. 199 of 2020 of theft of bicycle; Criminal Case No. 203 of 2020 of theft; and Criminal Case No. 204 of 2020 of robbery. The magistrate stated that the accused was at the time serving a 15 months IHL sentence for the escape from lawful custody, 36 months IHL for the theft of bicycle, 26 months IHL for the theft and 98 months IHL for the robbery.

In *R v Wilford*,[1] the accused was found in possession of a stolen bicycle nearly a month after its disappearance. The accused had been charged with theft of the bicycle before the magistrate court. The learned magistrate convicted him of receiving stolen property and not the theft, holding that while recent possession of stolen property was evidence of guilty knowledge in the offence of receiving, there was no evidence that the accused was the actual thief. The learned magistrate stated:

> " there is no evidence that he was the actual thief, and having regard to the evidence as a whole I deem it safer to convict the accused of receiving stolen property on the principle enunciated in *R v Aves*, where it was laid down that guilty knowledge may be inferred where a prisoner is proved to have been in recent possession of stolen property and gives an account which the court believes to be untrue."

[1] (1923-1960) ALR Mal 457

On confirmation, Spencer-Wilkinson C.J. stated that the possession was sufficiently recent to justify the inference that he was either the thief or a receiver. He went on to hold that, on the evidence, it would have been open to the magistrate to convict upon the charge of theft as laid. He, however, felt it uncessary to alter the conviction. He said:

> 'The learned magistrate appears to have overlooked the fact that possession of stolen property shortly after the theft is equally evidence that the accused stole it or that he received it. In the case of *R v Loughlin* ([1951] W.N. 325; 35 Cr. App. R. 69) the Court of Criminal Appeal pointed out that it is too often the case, where a man is charged with house-breaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the court directs the jury to concentrate on the receiving. It was pointed out that that is not the law and **that it is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking.** In the same way, where a man is found in possession of a stolen bicycle soon after the theft, that is perfectly good evidence of the accused being the thief, and unless there is something in the evidence to indicate that he received the bicycle from somebody else rather than that he stole it himself, it is perfectly legitimate to convict him of the theft.
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> I do not think it necessary to interfere in this case by altering the conviction to one of theft because the conviction for receiving is not wrong; but I have thought it desirable to point out that it would have been open to the learned magistrate in this case to convict upon the charge of theft as laid.'(emphasis supplied)

In *R v Loughlin*,[2] the accused was charged with, on the first count, of having broken and entered a pavilion of the Ashford Golf Club and stolen a bottle of whisky and a bottle of cherry brandy and on the second count, of having received the property. The evidence was that on the night of January 25-26, 1951, the Golf Club pavilion at Ashford was broken into and the two bottles which were afterwards found in the accused's possession were stolen. Around 5 o'clock in the morning of the 26th, the accused was stopped in Ashford by a police officer, and both the bottles were found in his attaché-case. He was stopped within an hour or two of the property having been stolen from the Golf Club. Then the accused told a preposterous story of how he had walked from London and gone to sleep in a hedge outside Ashford; and to account for the fact that he had the two bottles with him he said that he had bought them from a man for £5 outside a public house which he thought was Lewsham way and he said that he got not only a bottle of brandy and a bottle of whisky but also a bottle of rum and another small bottle.

The learned Deputy Chairman summed up to the jury as follows:

> 'There is no evidence that he in fact was the person who broke into these premises, except the fact that he was found in recent possession of this stolen property, if you find that proved. Therefore, to simplify matters, I shall not ask you for a verdict on the first count, and you will concentrate on the second count of receiving.'

On an application for leave to appeal against conviction, Goddard L.C.J. stated that:

> 'Now, it is too often the case, where a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the Court directs the jury to concentrate on the receiving. That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the

[2] 35 Cr App R. 69

> housebreaker or shopbreaker and; if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself. That is what is so often done. It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking.
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> In this case, we do not propose to interfere with the conviction because the applicant's defence was that he received the property from a man in circumstances which, if true, clearly showed guilty knowledge on his part, or at least would entitle a jury to infer guilty knowledge. If a man is found in possession of stolen property in Ashford and to account for his possession says that he got it in London, and bought it from a man whom he has never seen before, cannot describe, and whose name he does not know, the jury could, of course, find that he received it knowing it to have been stolen; but in this case I do not think there is any doubt that if the jury had been left to find a verdict upon the charge of a pavilion-breaking they probably would have found that the applicant was guilty of that charge, and the conviction certainly would not have been interfered with by this Court.
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> I therefore hope that Courts will not think it necessary, when the only evidence against a prisoner is that he is found in possession of property which has been recently stolen from a house recently broken into, to direct the jury that that is not evidence upon which they can find a verdict on the housebreaking.'

Now the accused herein was found with the two stolen items, the mattress and the blanket, a month and a half later after they were stolen. The time gap is recent enough to support the inference of either theft or receiving. There is also a confession which was said to have been made by the accused that he broke into the complainant's house. The accused stated that he was coerced into admitting the offence. Section 176 of the Criminal Procedure and Evidence Code states that:

> '(1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto...
> (3) 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 the 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.'

The caution statement was recorded by a police officer but has the accused's thumbprint. The accused states that he was forced into admitting the offence. I should therefore understand that the contents of the statement came from himself but that they were obtained under duress/ torture as opposed to the assertion that he was forced to thumbprint on a caution statement the contents of which did not come from him. This allegation of him having been tortured by the police came only during cross examination. The accused never said anything of the sort in examination in chief. One wonders whether he could skip testifying on such a crucial point in his examination in chief and not to have given the details of the torture during that time. He also did not cross examine the police officer Detective Sub Inspector Ali who recorded it and who came to testify on the allegation of torture. Thus I am of the opinion that the accused made the statement voluntarily. All I need to do now is to satisfy myself as to its veracity. In *Rep v Nalivata*,[3] Skinner C.J. said that

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[3] [1971-72] ALR Mal 101

> '...before a court is satisfied beyond reasonable doubt that a confession is true, it is necessary in my opinion to see whether there are pointers in the evidence which tend to confirm the admissions of guilt contained in the confession before accepting such a confession as true. The pointers I would look for are referred to in *R v Sykes*...In that case the Court of Appeal approved a direction to a jury which was in the following terms:
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> > "...[A]nd the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which I have ascertained and which have been, as in this case, proved before us?
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> I think that such are the pointers which a court in Malawi should look for when deciding whether the contents of a confession are true."

The caution statement states that he had gone to burgle the house with one Zakumwa Makosi. This is the same one he mentioned in his defence testimony as the one who sold him the blanket and mattress. This name therefore certainly came from the accused's own knowledge. The only change is that in the caution statement, Zakumwa Makosi, was a partner in the burglary while in his evidence in court, he was a seller of the goods. I am thus satisfied that the caution statement's contents are true and that he only recanted them in court to escape being found guilty of wrongdoing. When the accused was asked if Zakumwa Makosi (whom the accused said was his friend) was in the business of selling such goods, he said he was not. And yet, the accused's testimony never showed that he had inquired from Zakumwa Makosi how he could be selling such items nor did the accused show that he had wondered how this friend of his was suddenly selling such property. It is either that the caution statement is false and his testimony is the truth or vice versa. The magistrate, who had the privilege of examining the demeanour of the witnesses, did not believe the accused's testimony, which testimony if it was indeed true that he had bought the items from Zakumwa, would still make him guilty of receiving since such testimony was consistent with guilty knowledge. In these circumstances, where the accused was found with stolen items shortly after they were stolen and where he confessed to stealing them, then the convictions were very much in order.

Coming to the question of the previous convictions, I note that the stated antecedents appear to have come from the magistrate's own knowledge in that he is the one who presided over all the other cases listed in the previous convictions. I was able to find two case files of the accused (out of those cited as previous convictions) which were presided over by the magistrate. These are Criminal Case No. 203 of 2020 in which the accused was convicted of theft and was sentenced to 26 months IHL with effect from 29 June 2020. The other was Criminal Case No. 204 of 2020 in which he was convicted of robbery and sentenced to 98 months IHL with effect from 29 June 2020. In the theft case, both the conviction and sentence were confirmed. In the robbery one, while the conviction was confirmed, the sentence was found to be excessive in light of the circumstances prevailing and the High Court reduced it to seven years IHL. I also came across another file against the accused which was Criminal Case No. 214 of 2020 (not mentioned by the magistrate) in which the accused had been convicted of theft and was sentenced to 54 months IHL with effect from 29 June 2020. This matter had also been presided over by the same magistrate. The High Court

confirmed the conviction but reduced the sentence to 24 months IHL. I was unable to find Criminal Case No. 195 of 2020 concerning escape from lawful custody and Criminal Case No. 199 of 2020 pertaining to the theft of bicycle.

The magistrate ought to have stated the source of his knowledge of the accused's previous knowledge. He ought also to have stated how the other sentences were running, that is, from what date and whether they were running concurrently or consecutively. From the files I was able to find, I note that the sentences are all running from the date of arrest, which was 29 June 2020. This shows that this was a case where the accused had committed a series of thefts within a brief period before he was arrested for one or more of them, which could have led to the discovery of his other thefts. In such situations, the State can choose to have several counts charged in one charge which is to be presented to a single magistrate or to have some counts to be contained in one charge and others in another. In the second scenario, there is a high possibility that the different charge sheets will end up before different magistrates. If an accused is convicted before one magistrate on the counts that were in a single charge sheet before that court and later is convicted before a second magistrate on the other counts, the State may say before the second magistrate the accused has a previous conviction, but strictly speaking, that accused cannot be said to be a repeat offender. A repeat offender is someone who after serving their sentence goes on to commit a similar offence. If all the counts are brought before a single magistrate, in meting out the sentence, the magistrate is to mete out a sentence on each count severe enough to reflect the idea that the accused committed, not just a single offence, but a number of offences within a brief period; however, the sentences are not to be as severe as those of a repeat offender. The sentences are usually made to run concurrently. If the different charges are made to come before different magistrates, then the last magistrate to sentence also needs to take into account that the convict is not a repeat offender but nonetheless, the sentence must be severe enough to reflect the seriousness of accused's offences. The sentences will usually be made to run concurrently.[4]

In this case, the sentences were rightly made to run concurrently with the other sentences that the accused is serving. The only problem is that the magistrate did not state how the other sentences were running. This needs to be shown as it helps the reviewing court to evaluate the correctness of the penalties.

Let me comment further that where the accused is alleged to have committed multiple offences, it is better for the prosecution to have the offences come in one charge but for the prosecution to elect a few of the counts with which to charge the accused with, say, three or four or five counts, and not all the alleged offences. The following passage from *R v Gondwe*[5] is instructive, where Spencer-Wilkinson, C.J. said:

> 'The accused in this case was charged in one charge with 32 counts, 16 being counts of forgery and the other 16 being counts of uttering the documents alleged to have been forged.

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[4] *R v Gondwe* (1923-60) ALR Mal.
[5] (1923-60) ALR Mal. at 446-448

> I would say at the outset that in my opinion it is exceedingly difficult for an accused person to be tried on as many as 32 counts without prejudicing him to some extent. The mere fact that 32 separate offences are alleged may well give a magistrate, albeit unconsciously, the impression that the accused must be a very bad man, and however similar various counts may be, there is always the danger that facts which relate to certain of the counts do not really relate to some of the others.
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> Generally speaking, an accused person should never, particularly in a subordinate court, be charged in one charge with more than five or six counts except in the most exceptional circumstances. The following passages from the judgment of the Court of Criminal Appeal in the case of *R v Hudson*...indicates [sic] the proper procedure where a variety of offences is alleged against an accused person (36 Cr. App. R. 95):
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> > "The court has on many occasions pointed out how undesirable it is that a large number of counts should be contained on one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment...It was a pity an application was not made...for separate trials, or perhaps if he had had a longer experience as Chairman he might have said at once that he would not try all these counts together. Cerainly judges have tried a large number of counts together, and so have Quarter Sessions, but it is not a thing to be encouraged and I hope it will not happen again that as many counts as were tried together in this case will be tried at the same time. It is quite possible to split the indictment up and put some counts in another indictment."
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> This judgement, of course, referred to a trial at quarter sessions, but the principle applies just as much in subordinate courts. If the prosecution has a large number of charges against an accused person then, if a conviction is had upon some of them, they can withdraw the remaining charges under s.82 of the Criminal Procedure Code in which case the accused will be discharged in respect of the remaining charges and it will be open for the prosecution to proceed upon them if the convictions are set aside. Even where, as in the present case, the accused is expected to admit all the charges, it is better to select a few to which he is asked formally to plead, and for the others to be taken into consideration under the provisions of s.322 of the Criminal Procedure Code.
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> Whilst it would, of course, make it much easier for magistrates if the prosecution were to select the charges to be proceeded with in the manner above indicated, I must point out that the matter really rests in the hands of the magistrates themselves. Under the provisions of s133(3) of the Criminal Procedure Code they can always say (as it was suggested in the case above quoted, that the Chairman might have said) that they will not try all the counts together. It appears to be frequently overlooked that a large number of counts relating to similar or connected offences only results, when convictions are obtained on all of them, in concurrent sentences, and the attempt to proceed in one trial upon a large number of counts tends to give the impression that the accused person is being persecuted rather than prosecuted. Magistrates should therefore insist on the prosecution confining itself at one trial to the important issues, and to limit the number of counts they are prepared to deal with in one trial. And this limitation should be exercised before the accused is called upon to plead.'

(Sections 82, 322A and 133(3) of the Criminal Procedure Code were the sections corresponding to sections 81, 322 and 127(3) of the Criminal Procedure and Evidence Code).

The accused herein was sentenced to six years IHL for the burglary and 24 months IHL for the theft and the sentences were to run concurrently. This was after a full trial. Though the property was recovered, the mattress was found in an altered state that diminished its use and value. The accused had damaged the burglar bar at the window of the complainant's house—the burglar bar will most likely need replacement and therefore the complainant will incur a cost. The accused is quite young being twenty years old. Under these circumstances and with regard to the other

offences that he committed contemporraneous with these offences, the sentences in this matter are appropriate. Thus I confirm both the convictions and the sentences in the matter.

**Made in open court this day the 11th of October 2021**

V. Chima

**Justice Vikochi Chima**