Ref. No. LL/CR/120/6/92

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 17 OF 1993

PENJANI SINGINI

V

THE REPUBLIC

From the First Grade Magistrate's court at Lilongwe

Criminal Case Number 59 of 1992

CORAM: MTAMBO, J.

For the State, Limbe, State Advocate
Appellant present, represented by Fachi
Law Clerk, Chilongo
Machine Operator, Mtunduwatha

JUDGMENT

The appellant was arraigned before the First Grade Magistrate's court at Lilongwe on a charge of theft by a person employed in the public service contrary to s. 278 as read with s.283 (1) of the Penal Code. He denied the charge but was nonetheless convicted after a full trial and was sentenced to the mandatory time of two years in prison with hard labour. He has appealed to this court against both conviction and sentence.

The appeal is clearly on matters of fact and my duty in considering it, therefore, is to re-hear the case, as the phrase in understood in law. In this respect I do not think I can do better than to refer to the oft-cited case of Pryce v. Republic 1971-72 ALR Mal. 65. I think I should also mention at this stage that the State does not oppose the appeal.

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Let me now refer to the evidence which is not seriously in dispute except in some immaterial points. The whole episode was as narrated by Mr. Joseph Mliwa (PW1), a hospital attendant at Kamuzu Central Hospital where the appellant worked as a pharmacy assistant a job which involved the dispensation of drugs to various departments of the hospital. He told the court that on the material day, June 13, 1992, he was on duty in the under-five department. He said that at one stage he was sent to the pharmacy to collect a book for children's vaccination where he met the appellant and asked him to assist him find the book. He did not find it. But before he left, the appellant told him to wait a little bit as he went to look for it elsewhere. Meanwhile, there was a closed carton in the room and he asked the witness to look after it while he was away. Then there came a patient who asked for assistance to the eye department. He led him there and since the appellant had not returned he carried the carton with him. On his way back, he met PW3, a matron at the hospital, who asked him what it was that he carried. He told her to check for herself as he himself did not know it and said that the carton belonged to the appellant. When it was opened there were two bottles of chloroquine, two bottles of ferrous sulphate and one hundred bottles of "Benzyl" penicillin of a total value of K183.00. Hence the charge which alleged that the appellant stole those items.

Simply put the essence of theft is the taking of another's property, of course dishonestly. And this must, therefore, appear to be the case even where the charge is brought under s. 283 (1) because the subsection merely creates a presumption that if the missing property was lawfully in the custody or under the control of the accused by virtue of his employment in the public service and he is unable to account for it, be will be presumed to have stolen it, unless, of course, he satisfied the court to the contrary. It has, therefore, first to be shown that property is missing, within the meaning of theft as defined in s.271 of the Penal Code, before considering whether the charge be brought under s.283 (1) or any other section creating the offence.

The evidence in the present case shows that the appellant left the carton that contained the drugs in the room where he worked. PW1, on his own initiative, took it outside where he met PW3, the matron, who accosted him and he said the carton belonged to the appellant. Is this theft by the appellant of the drugs which were contained in the carton? With respect, I do not think so for how can it be when the appellant did not take another's property or when nothing missed or was lost. The drugs were there and were still under the control of the appellant by virtue of his job as a pharmacy assistant. Theft cannot therefore be said to be borne by the evidence.

The trial court appears to have based the conviction largely on what it observed to have been a failure on the part of the appellant to challenge the confession statement which he made to the police when it observed thus:

> "He did not refute the contents of his confession statement in any way whatsoever. He did not even attack the manner in which the statement was recorded from him whether it was obtained in some objectionable way so that we can infer that the said statement was not made voluntarily."

With respect, the observation does not appear to be quite correct because the record shows, for instance, that in an answer to a question in cross-examination PW2, the recorder of the statement, said: "I did not force you to admit the charge". Surely, this must have been suggested by the appellant and, therefore, an attack on the manner in which the confession was recorded. It must be observed that he is a lay man who was not represented by counsel at the trial. In any case, I have held that theft was not proved and, therefore, that even if it is accepted that the appellant confessed, he confessed to having commited no offence, so to speak.

In the light of the foregoing, I allowed the appeal in open court on March 30, 1994 and ordered the appellant's immediate release from prison unless he was held for any lawful reason.

MADE in Chambers this 25th day of April 1994 at Lilongwe.

I. J. Mtambo

J U D G E