LB/CR/326/3/93

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 7 OF 1994

CHIGONA

versus

THE REPUBLIC

HIGH COURT LIBRARY

CHIEF JUSTICE
HIGH COURT OF MALAWI
24 AUG 1994
P.O. BOX 30244, CHICHIRI
BLANTYRE

From the Resident Magistrate's Court from Blantyre
Criminal Case No. 45 of 1993

CORAM: CHATSIKA, J
Chipeta, Chief State Advocate, for the State
Nkhoma, Official Interpreter
Mikanda, Recording Officer

JUDGEMENT

The appellant, Isaac Pius Chigona, who, until his arrest on the 11th February, 1993 was a Police Officer holding the rank of Senior Superintendent, was convicted of theft by a person employed in the public service contrary to section 278 as read with section 283(1) of the Penal Code (Cap 7:01) and was sentenced to 14 years IHL. He appeals to this court against conviction and sentence.

In his initial ground of appeal, it was stated that there was insufficient evidence at his trial to justify the conviction. He then added two more grounds in which he attacked the documentary evidence which was adduced at the trial and also attacked the alleged failure by the trial magistrate to properly consider the evidence relating to the fact that one of the safes in the appellant's office was damaged and that it could not be locked. It was the appellant's contention that some of the money which was alleged to have been stolen was kept in the damaged safe and that it was stolen by some people when the appellant was away. I shall deal with these grounds of appeal later when I consider the evidence.

According to the evidence, the appellant came to Limbe in August 1990 and assumed the responsibility of station officer at Limbe Police Station. Part of h is duties as Station Officer was to keep cash exhibits. The procedure relating to cash exhibits was that when the cash was brought to the station, it was registered in a register which was kept for that purpose. The register together with the money would then be taken to the appellant, in his capacity as station officer, who would check the entry against the cash and sign in the appropriate column in

HIGH COURT LIBRARY

the register indicating that he had received the cash. The appellant kept the money in a safe and returned the register to the record-keeper. When the money was to be paid out the appellant would write on the "remarks" column the reason for paying out the money and the recepient would sign for it in the "recepient" column. There was money which came in as "exhibit" relating to a particular crimial case which would be paid out to the owner when the case would be concluded and there was some money which was "lost and found" money. However, the procedure of receiving and paying out the two types of money was the same.

On the 8th February 1993, government auditors came to audit the appellant's books. The audit took the form of comparing the register in which the money exhibits were recorded against the physical cash kept in the safe. It was discovered during and at the end of the audit that the actual cash kept in the safe relating to some entries in the register was less than the corresponding amount shown in the register as having been received by the appellant. The auditors made a list showing the amount shown in the register as having been received by the appellant, the amount actually produced by the appellant and the difference between the two amounts as money which the appellant was unable to produce. The total amount of the shortfall was the amount which the appellant was presumed to have stolen.

In some of the entries, the appellant was unable to produce to the auditors the whole amount which, according to the entry in the register, he had received. He was therefore presumed to have stolen the total amount of the money which he had received and which he had failed to produce to the auditors.

The total amount of shortfall, that is money which the appellant produced but was less than the corresponding amount which he received was K5,590.77. The total amount of money which the appellant received and which he could not produce at all to the auditors was K58,435.00. He was, however, charged with theft by a public servant of the sum of K64,020.77 (It should have been K64,025.77).

In the course of the trial, when the lists which were prepared by the auditors were examined closely, it was found that certain figures had been duplicated. This error was corrected and the charge was accordingly amended to read K63,555.77. This was the figure which the appellant was finally convicted of as having stolen.

In arguing the appeal before this court, the appellant submitted that he should not have been convicted of theft by a person employed in the public service on the grounds that the money which he was alleged to have stolen was not money belonging to the Government but rather money belonging to members of the public. He contended that, if anything, he should have been convicted of simple theft contrary to section 278 of the Penal Code. This argument, in my judgement, cannot be sustained. The court below went into details to establish that the appellant was

a public servant. He received the money by virtue of his employment. He was unable to produce it or make due account for it. He was, therefore, according to the words used in section 283 (1) of the Penal Code, presumed to have stolen the same unless he could successfully rebut that presumption. In the instant case the appellant failed to rebut the presumption.

The appellant also argued that one of the safes kept in his office was damaged and that it could not be locked. In relation to this safe, the appellant stated that on the 29th December 1992 he suddenly became ill while he was in his office and he was taken to the hospital where he was hospitalised for about a week and given off-duty for three weeks. He only reported for duties on the 29th January 1993. He stated further that he believed that in his unconscious state on the 29th December 1992, he must have put the envelopes containing some of the money in the damaged safe and that it was stolen while he was in hospital. I have considered this submission very carefully and I must say at the very outset that I cannot accept it. While it is true that there was a damaged safe in his office , there is no evidence that that safe was ever used for keeping money. There is no evidence that on his return to work on the 29th January 1993 he found the envelopes containing the money in the damages safe. If indeed, the appellant had put the envelopes containing the money in the damaged safe and had discovered the mistake upon his return to work, he would have immediately reported the matter to his superiors. Indeed, the whole matter of the appellant's illness and his absence from work for a month appears to me as having been self inflicted for the purpose of providing a defence to the impending charge of theft by public servant which the appellant well knew would soon come.

One matter which gave some concern was the fact that the appellant came to Limbe Police Station to assume duties as Station Officer on the 1st August 1990 while the list prepared by the auditors shows that some of the entries in the register on which irregularities were found dated back to 1989. A careful perusal of the record shows that a handing over was made between the appellant and his predecessor when the appellant took over the money which was previously handled by his predecessor. It is inconceivable that the appellant would have accepted to receive money from his predecessor which was less than the corresponding amount in the register. I am satisfied beyond doubt that the handing over was done properly and that the appellant received from his predecessor money equal to the corresponding amounts shown in the book. I am therefore satisfied that any shortfalls or complete disappearance of any money took place during the period the appellant was the Station Officer.

I find no merit in the appellant's appeal against conviction which is hereby dismissed.

The mandatory minimum sentence for theft by public servant of money in excess of K5,000 is 14 years. The appellant was convicted of theft by public servant of the sum of K63,500. It was open to the court to impose a sentence which was well above

the minimum sentence of 14 years. I do not, however, intend to do so. The appellant is not a young man and it could well be that the 14 years sentence may take the better part of his remaining life. The appeal against sentence is dismissed, resulting in the appeal being dismissed in its entirety.

Pronounced in Open Court this 22nd day of July 1994 at Blantyre.

L A CHATSIKA
JUDGE