IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 10 OF 2000

(Being High Court Criminal Cause No. 43 of 2000)

BETWEEN:

THOMSON FULAYE BOKHOBOKHO.....1ST APPELLANT

- and -

LEWIS LIVIEL JONATHAN.....2ND APPELLANT

- and -

THE REPUBLIC.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR JUSTICE MTEGHA, JA
THE HONOURABLE JUSTICE MRS MSOSA, JA.

Kalemba, Counsel for the 1st Appellant

T Chirwa, Counsel for the 2nd Appellant

Annabel Phoya, Counsel for the Respondent

Mbekwani (Mrs), Official Interpreter/Recorder.

J U D G M E N T

Mtegha, JA

The two appellants, jointly with three others, were charged in the High Court sitting at Chiradzulu, with six counts of murder. They pleaded not guilty to the charges, and after a full jury trial, the appellants were found guilty and they were convicted. Of the three others, one died while awaiting trial, the other was discharged and the third one was acquitted. The appellants were sentenced to the mandatory sentence of death. They now appeal to this Court against both the convictions and sentences.

Between January and March 2000, six women were murdered in Chiradzulu District. The victims were Elube Tambala, Veronica Joseph Chiwalo, Mary Muononga, Apuna Kashoti, Enelesi Njerero and Rose Chituta Mataya, as reflected in counts 1 to 6 respectively. They were either strangled or stabbed and had their bodies dismembered or interfered with. In some cases, their private parts, breasts and intestines were removed, and in other cases, the abdomens were opened and in some cases, the eyes were gorged out. It became quite clear to the Police that they were dealing with serial or ritual killers. The Police embarked on extensive investigations and in April 2000, they arrested one, Evance Solomon alias SITENALA. After being questioned, Sitenala, who subsequently died in custody while awaiting trial, revealed that he perpetrated the murders with his friend Bokhobokho, the 1st appellant. Bokhobokho was arrested soon thereafter. They both gave caution statements to the Police, and in their statements they admitted to have murdered the victims and further stated that they were selling the human organs to Lewis Liviel Jonathan, the 2nd appellant, and Samuel Chimwanza Ngole, who was the fourth accused at the trial, and he was acquitted. In their statements, they told the Police that they killed these women so that they could get rich. When Police arrested Jonathan, they searched his house, his rest house and his bottle store; but they found nothing. He himself denied to have been involved in the murders and maintained his denial up to the trial.

There is no doubt that the victims were murdered, and the only question which had to be determined by the lower Court was who was responsible for these gruesome murders. During the trial, the prosecution relied on confession statements and they tendered in evidence confession statements which were obtained from the 1st appellant in respect of counts one, three, four and five, but the prosecution did not tender any confession statements in respect of counts two and six. In his confession statement, the 1st appellant further stated that he sold the intestines and other body parts from the victims to the 2 nd appellant and to Ngole for various sums. At the trial, the 1st appellant retracted his confessions. The jury, nevertheless, convicted him.

Ngole, as pointed out earlier, was acquitted. During the trial, the 2nd appellant denied through and through that he was involved in these murders. Nevertheless, he too was convicted.

Mr Kalemba, learned Counsel for the 1st appellant, filed four grounds of appeal as follows:

"1. The learned lower court judge erred in law by not sufficiently directing the jury on the law governing admissibility of confession statements in a criminal case.

2. The learned lower court judge erred in law in directing the jury to disregard counsel's comments as evidence while addressing the jury in his submissions.

3. The learned lower court judge erred in law by directing the jury that there was enough circumstantial evidence to convict the appellant Thomson Fulaye Bokhobokho on Counts 2 and 6.

4. In all circumstances of the case the conviction of the Appellant Thomson Fulaye Bokhobokho has occasioned a failure of Justice."

Learned Counsel for the 1st appellant, however, argued these grounds together. The thrust of his argument is that the bulk of the evidence which was before the Court below, and upon which the lower Court convicted the 1st appellant, consisted of confession statements which were retracted at the trial because they were obtained after the Police had beaten him. Counsel further stated that the confession statements which were tendered in Court only related to four women, namely, Elube Tambala, Mary Muononga, Apuna Kashoti and Enelesi Njelero, but not Veronica Joseph Chiwalo and Rose Chituta Mataya, and therefore, the 1st appellant could not be convicted on counts two and six, because there was no evidence upon which the jury could convict if the confession statements in respect of those counts were not tendered. He also argued that although retracted confessions are admissible under s.176 of the Criminal Procedure and Evidence Code (CP & EC), there was no corroboration or independent pointers in the rest of the evidence to determine whether there is connection with the statement to prove that the statements were materially true in respect of the confessions relating to the four charges.

Learned Counsel for the 1st appellant also argued that for the Court to convict on circumstantial evidence, the evidence adduced before the court must be such that it eliminates all reasonable hypothesis of the accused's innocence. In the instant case, there is no circumstantial evidence pointing to the guilt of the appellant, and the appellant only. He cited to us the cases of **Rep. v Nalivata and Others (1971-72), 6 ALR (Mal.) 101, Chiphaka v Rep. (1971-72), 6 ALR (Mal.) 214, CPP v Lucius Chikuni, MSCA Criminal Appeal No. 23 of 1991** (unreported), **Gladstone**

Kambuwe v Republic, MSCA Criminal Appeal No. 8 of 1995 (unreported) and **Bokola v Republic (11 ALR (Mal.) 145** to support his arguments.

Learned Counsel for the respondent, Miss Phoya, has submitted that questions of admissibility of confession statements are matters of law for the judge to decide; and once a confession statement is admitted, it is up to the judge to direct the jury to weigh that confession and to put what weight they place on it, taking into account other evidence which is before the jury. In the present case, the learned Judge had done so. She cited the cases of **Mulachila v Rep. 10 ALR 281, Rep. v Nalivata (ibid) Lawrence (1982), AC 510, and Chan wei Keung (1967), 2 AC 160.**

The law regarding confession statements in this country is well-settled. It is governed by s.176 of the CP & EC. This section states:

"176(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 that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without having been unduly influenced thereto.

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a 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 not so satisfied the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge summing

up the case specifically to direct the jury as to the weight to be given to any such confession."

The interpretation of this section has been amplified by case law as correctly cited by both Counsel. **Skinner, CJ**, had this to say in the **Nalivata** case:

"I was referred to the need for corroboration of the accused's confessions in each case. Counsel cited a number of cases decided in our courts and in the East African courts, the most recent of which was Chiwaya v. Rep. (1) It was submitted by counsel that although a court may convict on a retracted confession even without corroboration, such confessions should be received with great caution, and in practice corroboration is always sought. I do not think that these cases govern the law which is now applied in a case such as the present one. Since Chiwaya's case was decided, s.176 of the Criminal Procedure and Evidence Code was enacted. Sub-section (3) of the section provides that a

confession may be taken into account if the court is satisfied beyond reasonable doubt that the contents of the confession are materially true. It goes on to provide that if the court is not satisfied to that standard the court is to give no weight whatsoever to the confession.

In the event of a statement containing a full and frank admission of facts from which the only inference is the guilt of the accused, it appears to me that once the court has decided to take the confession into account the court has in effect decided upon the guilt of the accused, subject of course to any evidence

supporting a defence available under Chapter IV of the Penal Code.

In such a case 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 admission of guilt contained in the confession before accepting such confession as true. The pointers which I would look for are those referred to in R. v. Sykes. (2) In that case the Court of Criminal Appeal approved a direction to a jury which was in the following terms:

'...[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 have been ascertained and which have been, as in this case, proved before us?'

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."

What the Honourable the Chief Justice said in this case was fully endorsed when the case went on appeal to this Court in the **Chiphaka** case. **Chatsika, JA**, in delivering the judgment of the Court stated:

"In dealing with this matter, the learned Chief Justice quoted the case of R. v. Sykes. The relevant passage reads as follows (8 Cr. App. R. At 236-237):

'...(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 can 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 have been ascertained and which have been, as in this case, proved before us.'

The learned Chief Justice in this case went on to say (1971-72) ALR Mal. at 104: "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."

In the case of **Malachila** cited above, **Unyolo, J**. (as he then was), also stated as follows:

"The first observation to be made about the caution statement is that it was retracted by the appellant at the trial. The law is now well-settled on the question of retracted confessions. Counsel cited the case of Rep. v. Nalivata (1) which holds that any retracted confession may now be taken into account if the court is satisfied beyond a reasonable doubt that it is materially true. The case holds further that before a court can be satisfied that the contents of a confession are materially true, it should consider whether there is evidence external to the confession which corroborates it or with which it is consistent and whether

it is possible that the accused had the opportunity of committing the offence to which he confessed."

Looking at these authorities and relating them to the present case, the trial Judge correctly admitted the confession statements, and he sufficiently directed the Jury on what their duty was in relation to the confession statements made by the 1st appellant, that is, to consider and decide what weight to attach to them. It was up to the Jury to place any weight they so found. The convictions in respect of counts one, three, four and five were, therefore, proper.

The second thrust by Counsel for the 1st appellant is in relation to counts two and six. He has submitted that since no confession statements were tendered by the prosecution in relation to these counts, there was no other evidence which could sustain a conviction on these two counts. He submitted that the learned Judge did not direct the Jury that there was enough circumstantial evidence to enable them to convict.

Learned Counsel for the respondent has submitted that indeed the learned Judge did not direct the Jury on the question of circumstantial evidence. Nonetheless, there was enough circumstantial evidence to warrant a conviction on these two counts. For example, Exhibit 20 shows the 1st appellant showing the Police the place where he killed the second deceased, Veronica Chiwalo. Furthermore, the injuries sustained by the all the deceased, and the way they died, are similar. Their body parts were removed, their eyes were gorged out and their intestines and breasts were removed. Moreover, the deaths of

all the deceased occurred within a very short period of time, and finally, the deaths occurred in the same vicinity. In such circumstances, it would be reasonable to conclude that the person who killed the victims in counts one, three, four and five also killed the victims in counts two and six.

It is correct that in his summing up, the learned Judge indicated that he would deal with the question of circumstantial evidence, but he did not actually deal with it. It is also correct that the prosecution did not tender confession statements specifically for counts two and six; but as it was pointed out by learned Counsel for the respondent, the 1st appellant mentions the victims in the other confession statements, and failure by the learned Judge to direct the Jury on the question of circumstantial evidence per se is not fatal to the counts. The Jury was entitled to convict on the evidence as a whole. The 1st appellant's appeal therefore fails, and it is dismissed.

Mr Chirwa, learned Counsel for the 2 nd appellant, filed four grounds of appeal, but argued the first three grounds together. He has submitted that the 2nd appellant was convicted on the confession statement of the 1st appellant, and in particular his caution statement, marked Exhibit 28A. In that statement, the 1st appellant alleged that he sold intestines belonging to Elube Tambala to the 2nd appellant.

We have stated earlier in our judgment that the law regarding confession statements in this country is governed by s.176 of the CP & EC. Section 176(2) states:

"No confession made by any person shall be admissible as evidence against any other person except to such an extent as that other person may adopt it as his own."

It is quite clear that the confession made by the 1st appellant could not be used by the prosecution to secure a conviction against the 2nd appellant unless the 2nd appellant adopted it to be his own. This being the position, we have to consider whether the 2 nd appellant adopted the confession to be his own. In his own caution statement, the 2nd appellant denied involvement in these murders. The police searched his house, rest house and bottle store, but found nothing incriminating. It was the 1st appellant's evidence that he mentioned the 2nd appellant because he was being beaten by the Police; that he admitted because he was beaten by the Police; and that the statements were being written by the Police. In cross examination, and indeed in examination-in-chief, the 1st appellant denied the involvement of the 2nd appellant.

In his summing-up to the Jury, the learned Judge said he would address the Jury on confessions; but he did not do so. Clearly this was an error on the part of the learned Judge. Had he addressed the Jury on the question of confessions, as we have outlined above, the Jury may not have convicted the 2nd appellant.

Learned Counsel for the Respondent had submitted that the 2nd appellant was convicted on the basis of circumstantial evidence. We have not identified any circumstantial evidence in the evidence which connects the 2nd appellant with the offence, except the confession of the 1st appellant, which was retracted during the trial.

For these reasons, the conviction against the 2 nd appellant cannot stand; it is set aside, and the appeal succeeds. He should be released forthwith unless lawfully held on other matters.

DELIVERED in open Court this 18th day of October 2001, at Blantyre.

Sgd .....

R A BANDA, CJ

Sgd .....

H M MTEGHA, JA

Sgd ..... **A S E MSOSA, JA**