IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1200 OF 1995

THE REPUBLIC

VERSUS

DENNIS MLAUZI

From the First Grade Magistrate's Court at Mzuzu Criminal Case No. 76 of 1995

CORAM: MWAUNGULU, J

Divala, State Advocate for the State

Accused, present and unrepresented

Tsoka, Official Interpreter

Tomoka, Court Reporter

Mwaungulu, J

JUDGMENT

This case was set down to consider the conviction. The defendant, Dennis Mlauzi, was the only one convicted among three defendants that appeared before the First Grade Magistrate at Mzuzu. The three were charged with the offence of theft contrary to section 278 of the Penal Code. The defendant was sentenced to three months imprisonment with hard labour. At the time of hearing the matter, the defendant had already served the sentence that the First Grade Magistrate imposed on him.

The defendant was the watchman on the night of 13th and 14th of February 1995. The other two gentlemen charged with him, Isaac and Brian, were working at the poultry as chicken food

mixers. The drama leading to the arrest of the three starts on the morrow of 14th of February 1995 when the defendant reports to the veterinary assistant, Mr. Kachoma, that Brian Banda came to fetch a bag of salt that he had not collected the previous day. A check is made and it is found that in the store five pairs of boots and a bag of salt are missing. It appears the window to the store was open and the defendant, the watchman for the night knew.

A meeting was called early that morning at which Brian denied that the bag of salt, which had at the time of the meeting been searched, was found at his house. The defendants were taken to the police.

Before the Court below the case unravelled a lot of holes, which cast quite some doubt, as the Reviewing Judge thought, on the safety of the conviction. Brian Banda's evidence on oaths was that on the 14th of February 1995 he went to work in his garden early in the morning. When he came back to the house and ready to go to work, his brother, Isaac Banda, and wife told him that the defendant had that morning brought a bag of salt for them to keep and they refused. Isaac Banda confirmed this story on oaths. Mr. Mlauzi's story was that when he saw Brian take the bag of salt, he reported the matter to his boss.

From these facts, there are two renditions of evidence. The first one, which appealed to the trial Court, is that the defendant stole the bag of salt and the boots. The trial Court reasoned that the defendant was liable because he had been found with property stolen only hours before. There are a few problems with this premise.

First, there was no evidence that the bag of salt had been stolen a few hours before. There is nothing to suggest that bag of salt was in the store before the theft. There is no evidence when the boots missed. Just as there is no evidence when the boots were last seen in the store. They could have missed earlier and their loss only discovered by this episode. The trial Court must have assumed that the boots and salt must have been stolen that night. There is no basis for such a conclusion. If, as it appears the trial Court found, Brian's refusal is accepted all you are left with is the defendant who has a bag of salt from the company that missed on a day that is not known and the matter has come to light because the defendant has reported it.

If the trial Court was right to conclude that the goods found on the defendant were recently stolen, the Court had to consider the defendant's explanation on how he came by the goods. The trial Court rejected the defendant's explanation forthright on the pretext that the defendant's own story was that Brian left the store in the morning without getting the salt which Brian had told the defendant Brian had not collected the previous day. The defendant, however, said he went to collect the bag of salt from Brian's house. Isaac and Brian's wife could not allow him to keep the bag. No reason is given for such refusal. If the defendant stole the bag one has to try and understand why then he decided to report to the boss who did not know about the loss in the first place. There are two possibilities. First, that the loss was going to be discovered anyway and that the matter was going to catch up with him anyway. Secondly, it was now obvious that Brian and Isaac knew of the theft of the bag of salt. These are compelling reasons and the conclusion must be that when Isaac and Brian's wife refused to keep the salt, the defendant rushed to the office and decided to report on Brian.

The evidence on which this premise is arrived at, however, is the evidence of co-accused persons and required a warning as to corroboration. The First Grade Magistrate warned himself of the

danger only when rejecting the evidence of the defendant against Brian and Isaac. He should have used the same rule when evaluating the evidence of Brian and Isaac which implicated the defendant. The requirement of corroboration does not apply only in one direction. It applies to each of the co-accused in relation to others.

The defendant told the Court that the bag of salt was collected from Brian's house. Brian and Isaac agreed that the bag did reach the house. They say, however, that the defendant brought it to the office. The trial Court did not adequately resolve this issue. There are two reasons on which the suspicion on the conviction is founded.

First, the Trial Court did not warn itself of the danger of convicting the defendant on uncorroborated evidence of the other co-accused. On this point the law is now settled. A conviction will not necessarily be quashed because of lack of such warning. Absence of a warning is fatal unless there is no failure of justice. One has to go a little further and decide whether the conviction is sustainable on other grounds(Nkata v Republic (1966-68)4 ALR (M) 52). In this case there is a further point which makes the conviction suspect.

A material witness was not called for the prosecution. The matter whether it is the defendant or Brian who brought the bag of salt to Brian's house would probably have been better resolved if the prosecution had called Brian's wife. He was a material and available witness. No explanation is given for his absence. This is surprising when it was known all along. Moreover, Isaac had already been charged with the offence. In Nankondwa v Republic (1966-68) 4 ALR (M) 388,392, Cram, J.A., said:

"The prosecution case, before the consideration of the defence, was of considerable strength; its weakness... lies in the failure to call the most important eye witness, Meria. The appellant's wife: she was not only a competent witness against her husband but also, since the assault by fire was directed against her person, compellable...It is the function of the prosecution to call a witness who can supply the court with material, even vital evidence. If the witness cannot be found, then the prosecution should lead evidence of a vain search"

The conviction is unsatisfactory. I set it aside with the sentence.

Made in open Court this 1st day of February 1996 at Blantyre.

D.F. Mwaungulu

JUDGE