IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 42 OF 1996

PETRO NAISON

JOHN MPASO

Versus

THE REPUBLIC

From the First Grade Magistrate's Court at Mulanje
Criminal Case No. 121 of 1994

CORAM: MWAUNGULU, J

Kalolokesya, State Advocate for the State
Accused, present and unrepresented
Chilunga, Official Interpreter
Mwenyeidi/Mangison Recording Officers

Mwaungulu, J

JUDGMENT

This is an appeal against the decision of the First Grade Magistrate at Mulanje. The first appellant, Petro Naison, is unhappy with the sentence imposed on him by the Court below. He does not appeal against conviction, having pleaded guilty to the offence in the Court below. The

second appellant, John Mpaso is appealing against both the conviction and sentence. The two were convicted by the First Grade Magistrate at Mulanje of the offence of robbery. They were sentenced to thirteen years imprisonment with hard labour. The sentences were to be served immediately.

Starting with the second appellant's conviction, the appeal should be allowed. In my judgment, on the view which the Court below took on the facts, the second appellant could not be convicted of the robbery of Mr. Piasi's grocery.

On the night of 13 and 14th of April 1993 there was a serious robbery at Mr. Piasis's grocery. The complainant and his wife were sleeping in the shop when a group of men, others armed with pang knives and another with a gun, raided the shop. There was heavy shooting. The complainant and his wife ran to the hills for their lives. When they came back, the intruders had run away with property worthy well over K26, 000. The matter was reported to the police.

The arrest of the appellants and two others, one acquitted and another discharged, is a product of good cooperation between our police and the Mozambican police, for the Mozambican authorities arrested their national who told them that he had committed several offences inside and outside Malawi with our nationals. The man was willing to lead our police to Malawian nationals. This led to the arrest of the first appellant. Then the matter of the robbery at the complainant's house was already with the police. The first appellant led the police to places where he committed offences. This included the complainant's grocery.

The story which unraveled after that was that the appellant was involved in the robbery with Malawian nationals but that the gun was being carried and used by Mozambican nationals. On the night of the robbery they handled a lot of property which was stashed in some place. The next day he met the second appellant. He went to the other defendant acquitted by the Court below to hire a motor vehicle tp deliver the goods to another defendant, also acquitted in the Court below, who had bought the goods.

The Court below, from what can be made out of the record, accepted that the second appellant had not been at the place when the offence was committed. It proceeded to convict the second appellant on the basis that the second appellant was an aider and abettor and therefore, a principal offender to the crime. That was an unusual conclusion. The second appellant was not present when the offence was committed. There was no suggestion that the second appellant was part of the confederacy to commit the offence. If he was part of the confederacy, he need not have been present at the time of the crime in order for him to be convicted of the offence. There is no suggestion that the second appellant was part of a prior arrangement to commit the offence. The first appellant was very unclear on what took place on the date of the meeting with the second appellant when the car was hired to deliver the good to the one who had bought the goods. There is more in the first appellant's testimony to suggest that the second appellant was just at the place at the first appellant's behest. This is consistent with the second appellant's

evidence both on oaths and at the police that the second appellant had just been called to help load the goods. This, in my judgment, on reading the record, was accepted by the Court below. The Court below decided that in assisting the first appellant in loading the goods, the second appellant was an aider and abettor and a party to the crime under section 21(b) of the Penal Code.

In my judgment the second appellant was not a party to this crime. It is what Lord Justice Goddard, C.J., said in **Johnson v Youden** [1950], K.B. 544, 546-547 that has often been quoted on this matter:

"Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not know actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence..."

This statement was approved by the House of Lords in **Churchill v Walton** [1967]2 A.C. 224; **Maxwell v Director of Public Prosecutions for Northern Ireland** 68 Cr. App. R. 128. It was also approved by the Privy Council in **Mok Wei Tak and another v R**, 92 Cr. App. R. 209.

I have already said that on the record there is nothing to suggest that the second appellant knew of the crime committed the previous night. The second appellant was called in to help load the goods on the car. It is unclear whether the loading of the car took place at the scene of the crime. What escaped the judgment of the Court below was that the taking of the goods was done several hours after the robbery. There is nothing to suggest that the second appellant knew of the crime and that his participation in loading the property was in furtherance of knowledge of a crime having been committed. I allow the appeal and set aside the conviction and sentence of the second appellant.

The first appellant thinks that the sentence imposed on him is manifestly excessive. There is much to say about that. In arriving at the conclusion which I have on the sentence, it is not that I am paying lip-service to matters that account for the gravity of the offence: the fact that the intruders were armed, they actually used the gun, they were working in concert and actually put the victims to extreme fear and terror. On the other hand I have not to underplay the fact that the appellant here pleaded guilty and cooperate with the police both at the investigation and trial stage. Even with all these considerations, the sentence of thirteen years imprisonment with hard labour is manifestly excessive. I allow the appeal. The first appellant will serve a sentence of eight years imprisonment with hard labour.

Made in open Court this 28th day of February 1997 at Blantyre.

D.F. Mwaungulu
JUDGE