IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 2 OF 1997

SINO MPHUNZIA

VERSUS

THE REPUBLIC

From the Resident Magistrate's Court at Bangula
Criminal Case No. 241 of 1996

CORAM: MWAUNGULU, J
Manyungwa, State Advocate, for the State
Accused, present and unrepresented
Chilunga, Official Interpreter
Mangisoni, Recording Officer

Mwaungulu, J

JUDGMENT

This is an appeal against conviction and sentence. The appellant, Sino Mphunzia, was convicted by the Second Grade Magistrate at Bangula of the offence of cheating contrary to section 321 of the Penal Code. He was sentenced to three years imprisonment with hard labour. The appeal is against both the conviction and sentence.

The appellant and another who pleaded guilty to the charge were jointly charged with the

offence of cheating. The other defendant was convicted and sentenced. Trial only proceeded against the appellant. He was convicted after trial in the Court below.

The appellant's conviction turned out on the evidence of the other defendant and the lady cheated. The cheating involved the use of a specimen bank note issued by the Reserve Bank of Malawi. The complainant sold some beer worth K9.00. She went near a lamp. When she saw the President's head, she thought the specimen bank note was money. When the complainant came back to where the appellant and his friend were, both of them had disappeared. The complainant used the specimen bank note the next day. It is the one who she gave it to whom, a day after the transaction, discovered that the bank note was a specimen. The complainant was arrested. So were the appellant and his friend.

According to the complainant, it was the appellant who had, after asking for beer, asked her if she had change for K200.00. The Court below, from this assertion held that the appellant was part of the game that the two were playing.

The appellant, both at the police and the Court below, while conceding that he was present when the transaction took place, denied that he knew that the note was not legal tender. The statement that the appellant made at the police was tendered in evidence by the prosecution. It showed that the appellant was present during the transaction. It gainsaid knowledge. The Court below did not say anything on the confession statement. Just as there was no comment on the evidence of the defendant's friend that the appellant did not know or see the K200.00 bank note, the appellant's friend having only told him of its existence. These two aspects cast doubt on the verdict of the Court below.

The confession statement was being relied on by the prosecution. It could be considered as a partial admission or a wholly self-servicing statement. Whichever view is taken of the statement, it deserved treatment that the Court did not give it. The confession statement shows that when he was accused of the crime the appellant denied it. The exculpating aspects of the statement should have been looked at in the light of the other evidence that was before the Court below. The matter has been a subject of much discussion in the Courts in England. These crystallized in the decision of the Court of Appeal in **R v Pearce** 69 Cr. App. R. 365. There is a passage at page 369-370 which aptly puts the legal position:

"(1) A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted. With this exception a statement made by an accused is never evidence of the facts in the statement.

(2)(a) A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This, however, is not to be limited to a statement made on the first encounter with the police. The reference in **R. V. Storey** to the reaction of the accused 'when first taxed' should not be read as circumscribing the limits of

admissibility. The longer the time has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements. (b) A statement that is not in itself an admission is admissible if it is made in the same context as an admission whether in the course of an interview, or in the form of a voluntary statement. It would be unfair to admit only the statements against interest while excluding part of the same interview or serries of interviews. It is the duty of the prosecution to present the case fairly to the jury; to exclude answers which are favourable to the accused while admitting those unfavourable would be misleading. (c) The prosecution may wish to draw attention to inconsistent denials. A denial does not become an admission because it is inconsistent with another denial. There must be many cases, however, where convictions have resulted from such inconsistencies between two denials.

(3) Although in practice, most statements are given in evidence even when they are largely self-servicing, there may be a rare occasion when an accused produces a carefully written statement to the police, with a view to its being made part of the prosecution evidence. The trial judge would plainly exclude such a statement inadmissible."`

The decision was followed by the same Court in **R v McCarthy** 71 Cr. App. R. 142. Lawton L.J. said at page 145:

"One of the best pieces of the evidence that an innocent man can produce is his reaction to an accusation to crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, that cannot be right, because I was elsewhere and gives details of where he was, that is something which the jury can take into account."

This denial, as we have seen, was supported by the appellant's friend who gave evidence for the prosecution. The Court below made no reference or made a cursory reference to this evidence, relying, as it did, on the complainant's assertion that it was the appellant who had asked if the complainant had change for K200.00. This assertion, in my judgment, is as consistent with the appellant's explanation that he was only told of the existence of a bank note as it is consistent with the inference that he knew that the bank note was a specimen. Crime, unfortunately has to be established beyond reasonable doubt. Here this was not achieved if one considers the denial at the police and the evidence of the prosecution witness who told the Court that the appellant did not know about the actual bank note in question. I allow the appeal. I set aside the conviction and sentence.

Made in open Court this 14th day of March 1997 at Blantyre.

D.F. Mwaungulu

JUDGE