IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO 15 OF 1998

EDGAR ISAAC MTANGA

AND

FELIX KAMANGA

VERSUS

THE REPUBLIC

In the First Grade Magistrate court sitting at Blantyre Criminal Case No. 8 of 1998

CORAM: **MWAUNGULU, J.**

Dr. Mtambo, for the appellants

Manyungwa, Principal State Advocate, for the Respondent

Mkhuna, Official Interpreter

Mangisoni, Recording Officer

Mwaungulu, J.

JUDGMENT

This is an appeal from the decision of the First Grade Magistrate sitting at Blantyre Magistrate Court. This is where the two appellants, Edgar Isaac Mtanga and Felix Kamanga, were convicted of possession of Indian hemp, an offence contrary to regulation 4(a) of The Dangerous Drugs Regulation as read with section 19 (1) of the Dangerous Drugs Act. The First Grade Magistrate sentenced them to three years imprisonment with hard labour. The appellants were not represented by counsel in the court below. They are

now represented by Dr. Mtambo. The appeal is against conviction and sentence. Mr. Manyungwa, Principal State Advocate supports the conviction and wants the appeal dismissed. I allow the appeal against conviction and sentence in relation to the second appellant, Felix Kamanga. I dismiss the appeal against conviction and sentence in respect of the first appellant, Edgar Isaac Mtanga.

When the appellants appeared before the Magistrate Court in Blantyre on the 6th of January 1998, they, with another acquitted by the Court below, were jointly charged with the offence. The defendant acquitted by the court below was arrested at a road block. The police found him with two bags of Indian hemp. The appellants were charged of the offence because of implication by the defendant who was acquitted and the events as they unraveled when this man was arrested at the road block. In the court below the appellants were convicted on the evidence on the two aspects. The appellants now challenge the findings of the Court below on these aspects.

The gravamen of Dr. Mtambo's argument is that the State had failed to prove the guilt of the appellants to the requisite standard. That can only be true for the second appellant. There was, save for lack of warning about the need for corroboration for the evidence of the defendant who was acquitted, evidence on which the conviction can be justified. Apart from the evidence of the defendant who was acquitted, there was evidence from other prosecution witnesses that clearly established in relation to the first appellant that another person brought the two bags to the bottle store. The first appellant was involved in a conversation with this man. The first appellant asked the owner of the bar to keep the bags somewhere safely. The man who brought the bags disappeared from the scene. The appellant sent a boy, the boy was called as a witness in the court below, to call the defendant who was acquitted in the court below from the latter's house. When the defendant who was acquitted in the court below appeared, it is the first appellant who called him aside and talked to the man about the bags. The first appellant instructed the defendant who was acquitted in the court below to take the bags across the road block. Up to this point, therefore, there was enough evidence in the court below on which to convict. There was more to come.

When the man acquitted by the court below was arrested, the first appellant's conduct was, as the policemen who arrested the man noted, surprising. The first appellant came to the road block demanding that the man acquitted by the court below be released and the first appellant be arrested in the man's stead. The first appellant, even when they left the road block for Zalewa road block, was forcing other policemen to release the defendant who had been acquitted by the court below. The first appellant's conduct to my mind and properly to the mind of

the court below, is only consistent with a guilty mind. Apart from the direct testimony of prosecution witnesses, the circumstantial evidence leads to the same conclusion.

Of course the state has, and this court has always up to the coming into effect of the Constitution of 1994 been guided by the remarks in the House of Lords in **Woolmington v. Director of Public Prosecution**, [1935] A.C. 462,that the onus is on the State to prove the case against the defendant beyond reasonable doubt. This means nothing more than that the court must be satisfied so that it is sure that the offence was committed and the defendant is the one who did it. A trial normally takes place long after the event. Those who witness it have little thought that it will happen as to prepare their minds for noting every detail that a court would need for precision. They have to carry in their memory details that have to compete with other details. Then they have to recount the details by recollection. If absolute certainty was to be the goal, much crime, much to the chagrin of the public, would go unpunished.

I agree with the observation of Dr. Mtambo that the Court below should have warned itself of the fact that the man who had been acquitted was an accomplice. Such warning has invariably to be given. At one stage it was thought that failure to give such a warning was fatal to the conviction. That view is anachronistic. Where there is no such warning, the court on appeal has to look at the whole matter and decide whether apart from the warning, the conviction could be had and there was no failure of justice. This view has the imprimatur of the Supreme Court of Appeal (**Nkata and Others v. Republic**, (1966-68) 4 A.L.R. (M) 52). Here there has been no failure of justice. There was, in relation to the first appellant evidence from other prosecution witnesses, this evidence itself not requiring corroboration. More importantly the facts that the court below found are themselves corroborative. I would dismiss the first appellant's appeal against conviction.

The case against the second appellant is quite different. If the court below, as Dr. Mtambo has demonstrated in this court, had been more foreboding, there was quite some doubt created in the prosecution case itself. The doubt became more pronounced after the evidence of the defendant who had been acquitted was given to the court. For the court below the problem arose right at the beginning. When the first prosecution witness gave evidence the court below accepted as evidence the policeman's testimony that when the defendant who was acquitted was asked by the policeman the defendant who was acquitted told the policeman

that the bags had been given to him by the first and second appellants. It is clear that when the defendant who was acquitted made the statement the appellants were not there. This statement should not have been admitted.

Except in well established cases, at common law or statute, in common law jurisdictions, a statement made by another cannot be admitted in court to prove the truthfulness of what it states. If this were allowed, the dangers are easy to see. The truthfulness of such assertions cannot be verified and tested. Here the court, in so long as the statement was made in the absence of the appellants, could not accept that as evidence against the

appellants. Had the statement been made in their presence, the statement and their reaction to it, whether a denial, admission or silence, would have been relevant and admissible in court for all purposes.

Apart from this the evidence of the prosecution is unclear and contradictory if not obscure about the participation of the second appellant. The trial court seemed to have sensed this for in its judgment it speaks of a 'remote' connection of the second appellant. The first prosecution witness told the court below that at the first road block the release of the defendant who was acquitted was made where there was a request that the appellants said they should be arrested instead. The witness made two contradictory remarks. First he said that it was the first appellant who said the man should be released and that he be arrested instead. A few moments later he says both appellants said so. The second prosecution witness suggests that it was only the first appellant who said so. On the handing over of the two bags there is more ado. There is little to suggest that the second appellant was involved. All along the first appellant was the one talking to the man who brought the bags. He was the one who called the man acquitted in the court below. When talking to the man the first appellant was alone. The evidence of the man acquitted is more telling. He concedes that the bags were actually given to him by the first appellant. He says however that he thought that they were giving him the bags because the first appellant was with the second appellant at the bottle store. There was reasonable doubt, in my judgment, about the second appellant's guilt.

The prosecution's case was fraught with inconsistences that were not explained. Such inconsistences, if not explained, must be resolved in the defendant's favour. Of course I am aware of the remarks of Lord Justice Davies in **Parocjic v. Parocjic**, [1959] I All E.R.1, applied in **Mahomed Nasim Sirdar v. Republic** (1969-70) 5 A.L.R. (M) 212:

"It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case."

This however is the case of experienced investigating police officers who should have known better. I allow the appeal against conviction and sentence in relation to the second appellant.

The sentence that the court below passed cannot, for the reasons that the magistrate gave, be criticised. Dr. Mtambo has brought to my attention the guideline in**Re public v. Wilson**, (1994) C.C. No. 1236, where Banda, C.J., said:

"I would, therefore, suggest that quantities of dangerous drug from 1 to 50 Kgs should attract a sentence not exceeding 5 years imprisonment with hard labour and quantities from 50 Kgs to 250 Kgs should attract a sentence not exceeding 8 years and quantities over 250 Kgs should attract 9 years and over."

Dr. Mtambo submits that according to this guideline three years is manifestly excessive for possession of 10.5 Kg of Indian hemp. He thinks that from a mathematical calculation a sentence of one year is appropriate. Mr. Manyungwa submits that the guidelines were never intended to be for arithmetical calculation. I do not agree. While as it is difficult to come with an arithmetical measurement for imprisonment, the exercise does entail a measure of calculation or quantitative analysis which is not a field of precise mathematics. Obviously, everything being equal one would expect that lower quantities of the drug should attract lower levels of a sentence on the scale. This is common sense. The point is taken however that there could be reasons where lower quantities on the scale could attract a heavier sentence on the scale. Conversely, a larger quantity could attract a lesser sentence in an appropriate case.

The court below was, properly in my view, animated by the fact that here the law was being violated through a shrewd scheme masterminded by a man at the heart of the enforcement of the law. The court below can of course be criticised for using a first offender as a scapegoat for general deterrence. Faced with a first offender, the court should pass a sentence that deters him and not others. The deterrence for others must be only as a matter of course. There is also much to say

about Dr. Mtambo's contention that the first appellant has already suffered by losing his job. All that said, however, for the reason given by the court below, the sentence imposed is justified. I dismiss the appeal against a sentence.

Made in open court this 20th Day of July 1998

D.F. Mwaungulu

JUDGE