IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NO. 7 OF 2000

CLIFF NJOVU

VERSUS

THE REPUBLIC

From the Magistrate Court sitting at Blantyre Criminal Case No 76 of 2000

CORAM: D F MWAUNGULU, J

The State, Absent

Kanyongolo, legal practitioner, for the appellant

Kachimanga, Official Court Interpreter

Mwaungulu, J

JUDGEMENT

The defendant appeals against a Blantyre Magistrate Court judgement. The Blantyre Magistrate Court convicted the appellant of the offence of theft by servant. This is an offence under section 286 of the Penal Code. The Blantyre Magistrate Court sentenced the appellant to two and half years imprisonment with hard labour. The defendant appeals against conviction and sentence. The appellant, unrepresented in the court below, appears by counsel in this Court.

Mrs Kanyongolo, the appellant's legal practitioner, has drawn two grounds of appeal. The first relates to the conviction. Mrs Kanyongolo contends that the plea was defective. She contends that the court below did not, as it should have done, never put all the elements of the offence to the appellant. She contends, therefore, that the guilty plea on which the court below convicted the appellant was equivocal. The court below should not therefore have convicted the appellant. The second ground is about the lower court's sentence. She contends the sentence was manifestly

excessive in all the circumstances of the case. I deal with the ground as arisen.

Mrs Kanyongolo first point for the appellant is that the plea is defective. She argues that what the court below recorded in the course of the plea is inadequate for entering a conviction on a guilty plea. The lower court, after reading the charge to the appellant, recorded the following answers from him:

"I have understood the charge and I admit it. Yes, I took these items. I had no claim of right over the items. I wanted [them] to be mine."

Mrs Kanyongolo argues this was not enough. The lower court should have put all the elements of the offence to the appellant. She relies on many decisions in this Court where it has been stated that statements such as, 'I admit', 'it's true' and the like are, without more, inadequate to find a conviction on a plea of guilty. This Court stresses that the court receiving the plea must put all elements of the offence to the defendant. This ensures the court is satisfied the defendant pleads to all aspects of the crime. There can be no criticism or further explanation of the rule.

The trial court can only obtain an unequivocal plea. The trial court must proceed to trial if the plea is equivocal. In Republic v Benito (1978-80) 9 MLR 211, 213, Chatsika, J. , said :

"It is trite law which has been emphasized many times in this court that before a plea of guilty is entered all the ingredients of the offence must be put to the accused person and he must admit each and every one of those ingredients. It is only when this has been that a plea of guilty may properly be entered. If the accused person in making his replies to the charge modifies his admission by stating some justification, a plea of guilty should not be entered."

Chatsika, J., followed O' Connor, J.'s statement in P. Foster (Haulage) Ltd v Roberts, [1978] 2 All ER 751, 754-755:

"In my judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court's jurisdiction to permit a defendant to change an unequivocal plea of guilty at later stage. A court cannot accept an equivocal plea of guilty: it ... must either obtain an unequivocal plea or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged."

Courts do not treat, construe and interpret judicial pronouncements like legislation. Requiring a trial court to put all elements or ingredients of the offence to the defendant means, in my judgment, no more than that the court must aptly put to the defendant the matters constituting the crime. The trial court must present to the defendant all aspects the statute prescribes as

constituting the offence. This does not mean, as Mrs Kanyongolo suggests, that even the particulars of a particular crime should receive the same perspicacious treatment as the elements or ingredients of the offence.

The statement the court below recorded, in my judgment, is impeccable on the elements or ingredients of the offence except, of course, to that the appellant was the complainant's employer. As I understand it, Mrs Kanyongolo does not question the plea on that her client was not such servant. The statement covers the actus reus and the mens rea of theft or larceny. It covers asportation. It covers the animus furandi. It refers to the appellant taking the property without a claim of right. It also refers to intention to deprive the owner of the property. The appellant states that he wanted the property to be his. These are the elements and ingredients of theft or larceny under statute and common law. The recorded statement was therefore not defective about the elements and ingredients of the offence.

Mrs Kanyongolo, to my mind, seems to suggest that the plea was defective because the issue of the tarpaulin and jack should have been put to the appellant. She thinks, correctly in my view, that this was important because in the statement to the police the appellant denied stealing the two items. These details however, are not the elements or ingredients of the offence. They are the particulars. These are the factual issues that have to be established by evidence if there be a trial. While their accuracy, as we shall see shortly, is equally important, they need not be fully adumbrated in the actual plea the defendant makes. In this case however, they were. The appellant was responding to the particulars, I suppose, as they were read. The particulars list all items including the two mentioned earlier. The appellant replied that he took all the items. It is not therefore that the two items were not put to the appellant.

Mrs Kanyongolo's concerns are however important for another reason. Even if the elements or ingredients of the offence or particulars of the offence are aptly put to the defendant the court convicts only if the facts it accepts from the prosecution in support of the plea establish guilt. Mrs Kanyongolo contends the facts the lower court accepted in support of the plea do not justify the conviction. She thinks that, in spite that the appellant accepted the truthfulness of the facts the prosecution presented in support of the plea, the lower court could not find that the appellant stole the tarpaulin and jack when the statement to the police, also tendered by the prosecution, showed that the appellant never stole the two items. Mrs Kanyongolo's anxieties are germane.

Even if the plea is unequivocal, a guilty plea, entails a continuing duty on the court, before sentence, to ensure the defendant really intends to plead guilty. The supporting facts to the plea are important for reasons this Court stressed in Republic v Sibande, Conf. Cas. No. 855 of 1999:

"The facts court take in support of the plea are important. They help the court to appreciate whether the defendant really wants to plead guilty to the charge. This is important. The court can only accept an unequivocal plea. The plea is equivocal if facts the court accepts fail to raise sufficient material to account for the elements of the offence or raise a reasonable

defence to the charge. Moreover the facts together with what the defendant raises in mitigation are significant for sentence."

The prosecutor, in the supporting facts, establishes both the ingredirents or the elements of the offence and the particulars in the count. If the facts undermine an ingredient or element of the offence or show a different factual complexion from the one in the particulars the court should consider changing the plea.

The facts the prosecutor presents may render a guilty plea unsustainable. They may differ substantially from the particulars or fail to establish critical particulars. The trial court, in that case, until sentence, can and should alter a guilty plea to a not guilty plea. The particular's importance determines the trial court's course. If the variance is de minimis it may be unjust to the prosecution and the defence to go to a full trial. All will turn out on the facts before the trial court. For example, for a defendant who agrees committing an offence on a particular victim and place a variance on the date the offence was committed can and should be cured by ammendment rather than a full trial. Where however the facts establish the defendant could not have committed the crime and an alibi emerges from the facts presented by the prosecutor the date of the offence is important. The matter can only be resolved by trial. The trial court must alter the guilty plea to one of not guilty where the doubt in the particulars can only be resolved by trial of the issue.

The court must alter a guilty plea to a not guilty plea where the facts raise doubt on the defendant's guilt and the court has not passed sentence. After sentence the court is functus officio. The facts generally could generate such doubt. The doubt, as happened here, could arise from the items of evidence presented to the court. In this case, although the defendant admitted the facts as correct, the caution statement showed he denied stealing the tarpaulin and jack. The appellant's counsel contends therefore that the guilty plea in relation to theft of all the items in the count is unsustainable. The trial court should have altered the plea, she contends. And the conviction cannot be sustained.

Where the defendant pleads guilty more, in my judgement, is required of the trial court particularly, as happened here, where the defendant is not represented by a legal practioner. As the appellant was denying theft of the jack and the tarpaulin in the caution statement, the trial court could have put the fact to him so that he specifically states the position. If he maintained the denial the court would have entered a plae of not guilty and proceed to trial. The prosecution could have amended the charge to accomodate the property the appellant admitted stealing. This was probably the right course to avoid the cost of a fully blown trial. If a legal practioner was present, she would have advised the court or the defendant accordingly. Where therefore the caution statement raises a defence and the defendant intends to plead guilty, before recording a guilty verdict the court may have to put the fact raised in the caution statement to the defendant. This is because the court can only accept an unequivocal plea of guilty. The plea is not unequivocal if from what the defendant says or the facts supporting the plea there is a suggestion the defendamt never committed the criime alleged at all.

I would therefore allow the appeal. The appellant admitted stealing the tyres. I convict him of stealing the tyres.

The appeal against sentence also succeeds. It does on the same pretext that the supporting facts the prosecution tendered are equally unhelpful on the sentence. The court below applied the guidelines in Republic v Missiri, Conf. Cas. No. 1392 of 1994. On the property value as stipulated in the charge the sentence was the right one. The guideline however is based on proved value. The facts the court accepted in support of the plea are silent on the value of property. It is important that such facts should condescend on those aspects that have a bearing on the sentence. The prosecutor must work on such facts carefully for reasons this court expressed in Republic v Sibande. The value of the tyres is not established in the facts accepted to support the plea. It is difficult to arrive at an appropriate sentence in theft where the property stolen has not been proved. In relation to these offences, among other things, the value of the property is important to sentence. I pass a sentence therefore that results in the appellants immediate release.

Made in open Court this 2nd Day of June 2000

D F Mwaungulu

JUDGE