IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 318 OF 2000

THE REPUBLIC

VERSUS

NANKHOPE

From the Second Grade Magistrate Court sitting at Zomba Criminal case Number 55 of 2000

CORAM: D F MWAUNGULU (JUDGE)

Kamwambe, Chief State Advocate, for the State

Defendant, present, unrepresented

Ngwata, the official court interpreter

MWAUNGULU, J

ORDER

When I reviewed this matter, I questioned the defendant's conviction. The Zomba second grade magistrate convicted the defendant of the offence of attempted theft. The Penal Code does not specifically create the offence of attempted theft. The State relies on section 401 of the Penal Code. The second grade magistrate sentenced the defendant to nine months imprisonment with hard labour. I was not concerned with the sentence. I was concerned with the conviction.

In the Court below it was the evidence of the defendant compared with the complainant. The latter's evidence prevailed in the court below. The complainant told the court below that the defendant approached him in the early part of the morning of 8th November, 1999. The complainant is a grocer. The defendant demanded K1, 500 from the complainant. The defendant demanded the money because, the defendant told the complainant, the complainant had a case at the police for keeping unnecessary things in the complainant's house. The defendant demanded

the money because the defendant wanted the matter settled. The defendant, a police man, introduced himself. The defendant was with another, also introduced to the complainant as a policeman. The complainant did not believe the defendant was a policeman until the defendant produced the handcuffs. The complainant did not give the money. Instead he called the public to arrest the two policemen. The defendant was arrested. The other policeman fled. On these facts the lower court convicted the defendant of attempted theft.

The facts the lower court accepted suggest nothing more than that the defendant, to obtain money from the complainant, accused the complainant of committing some crime. This scarcely proves theft or an attempted theft. The complainant conceded keeping somebody's property in circumstances which, reading between the lines, were questionable and suspicious. Depending on the defendant's intention at the time, the defendant could be tried for corruption. If the money demanded was a fine collectable under some law, the defendant committed no crime, let alone corruption. On the other hand, if, and this is the case, the defendant demanded the money because he intended to 'settle' the matter, there was corruption. The defendant was charged with attempted theft, not corruption.

The facts the lower court accepted scarcely establish theft or an attempted theft. Our criminal law has been based on two distinct concepts of English Criminal Law. A crime is generally created and proved on proof of the twin components of a state of mind and an actual act. Actus non facit reum nisi mens sit rea. Despite statutory inroads on grounds of public policy on the mental element requirement, criminal law favour existence of the mental element and an act for creation and proof of a crime.

The necessity of the mental element both at Common Law and statute was stressed by Lord Reid in Sweet v Parsley, [1970] A.C. 132, 149:

"It if firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly, is not in itself sufficient to justify a decision that a section which is relevant as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been,' because it is a universal principle that if a penal provision is reasonable capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

Lord Reid continued and said at page 149 - 150:

"It does not in the least follow that, when one is dealing with a truly criminal act, it is sufficient

merely to have regard to the subject-matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to mens rea means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or disgraceful the offence, the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should have prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that, fortunately, the Press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and of its administration. But I regret to observe that, in some recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence."

On the facts the lower court found, the mental element was established. The facts established several intentions, fraudulent ones, under section 271 (2) of the Penal Code. The State, however, had to prove the act constituting the crime of theft or attempted theft.

Our Criminal law recognises two acts which, with the appropriate mental element, constitute theft. The commonest is asportation. If a man with a fraudulent intent move, however slightly, any thing capable of being stolen, at common law he was guilty of larceny. This is what is covered by section 271(2) of the Penal Code by using the word "takes." The other act is conversion. Section 271(2) uses the word "converts." There is no real difference between this word and the word "appropriate" used in section 3 of the Theft Act 1968 in England. Section 3 of the Penal Code provides:

"This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

The understanding of both words in English Criminal Law informs this court when interpreting the Penal Code. Normally, conversion and appropriation imply lawful taking in the first place. Of the facts, there was no taking. Consequently, there could have been no conversion or appropriation without the taking. There was no taking or conversion to constitute theft. This court has to decide whether these facts prove an attempted theft.

Attempted theft has not been defined under the Penal Code. The state relies on the definition in section 400 of the Penal Code. The lower court did not rely on section 400 in defining the crime.

It relied rather on this Court's definition in Chilunga v Republic 1968-1970 ALR Mal. 338. Neither there nor in other cases where this Court has defined an attempt has there been construction of section 400 of the Penal Code. In Chilunga v Republic and other decisions this court has followed the English decision of R v Eagleton (1855) Dear.C.C. 515. In England, there was another decision of the Court of Appeal in Davey v Lee, 51 Cr. App. R. 303 The two lines of authority proffered different results. In England the matter was normalised by passing of the Criminal Attempts Act, 1981. In R v Gullefer, 91 Cr. App. R. 356, Lord Lane, C.J., in the Court of Appeal said that the law was now as stated in the Criminal Attempts Act 1981. The Lord Chief Justice said: "The first task of the court is to apply the words of the Act of 1981 to the facts of the case." The decision was followed in R v Jones, 91 Cr. App. R. 353. Lord Justice Taylor stated at page 354 that the correct approach is "to look first at the natural meaning of the statutory words, not to turn back to earlier case law and seek to fit some previous test to the words of the section."

The Criminal Attempts Act is a codifying statute. Section 1 defines an attempt in words used in the Eagleton's case. These are the words this Court depended on in the cases it decided on this aspect. The words in section 1 of the Criminal Attempts Act of 1981 are different from the words in our section 400 of the Penal Code:

" When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

It is immaterial that by the reason of the circumstances not known to the offender it is impossible to commit the offence."

Obviously our Act does not use the words connoting acts preparatory to commission of the offence, the very words used in The Criminal Attempts Act, 1981 in England. I agree with the Lord Justice Taylor in R v Jones and the Lord Chief Justice Lane in R v Gullefer that one has to apply the plain meaning of the words in the statute to the facts in the case. That, in my judgement, avoids the conceptual problems which Chatsika, J., refers to in Chilunga v Republic and the confusion in English law before the Criminal Attempts Act, 1981. If the plain words of section 400 are applied to the facts, it becomes unnecessary to decide whether acts are preparatory or proximate to commission of the offence.

First, section 400 requires the defendant must intend to commit a crime. That intention must be immediate and contemporaneous to some act. The Court of Appeal has held in R v Khan and others, 91 Cr. App. R. 29 that the intent required is the one required for the full offence. This excludes intents constituting merely preparatory acts. The evidence must point to an intention to commit the crime for which the defendant's act are an attempt of. Secondly, the defendant must put his intention into execution. There must be evidence that the defendant at the time of the offence wants to execute his intentions. This he must show by some overt act. The overt act must be such that points to the actus reus of the offence. It is not any act. Just as the intent must be the one for the full offence, the overt act must be such that it points to an act that constitutes the crime. Acts that are merely preparatory do not meet this test. It must be an act that points to the act that in itself and the circumstances points to an act which constitutes the crime. The offender need not complete the act to be convicted of an attempt. For if he does complete the act, he is guilty of the complete offence. It is always a question of fact whether the act points to an act constituting the actus reus of offence.

For theft it is easy to say how these principles apply. Where the actus reus is constituted by asportation, any act, with a fraudulent intention, that points to taking completes an attempted theft even if it was impossible to complete the offence. Therefore when one puts his hand in a pocket to fetch whatever is there is guilty of an attempt if the owner holds the hand and the purloiner fails to take the property. This act, to all fair minded people, points to asportation, the actus reus for theft. Where the act is conversion, an act indicating intention to deal with the property inconsistently with the owners right to property constitutes an attempted theft even if the defendant does not end up dealing with the property in a manner in consistent with the owners right. For conversion, however, the property will already have moved into the hands of the offender.

Applying these principles to the present case there was no attempted theft on the facts accepted by the lower court. The defendant did not get the property. Demanding the money does not in my judgement constitute an overt act pointing to asportation. It would have pointed to asportation if, the complainant tendering the money, the defendant stretched his hands to receive the money, that act would be pointing to asportation. There it would have mattered less that it was impossible to finish the crime. Anything less than that would make anybody demanding money guilty of an attempt to steal. That is not the law as I understand it both at common law and under statutes. In so far as the defendant never took the money, there could be no attempted conversion.

All the facts accepted by the lower courts suggest is that the defendant wanted to obtain money from the complainant by accusing the complainant of committing some crime. The defendant should therefore have been tried for the offence of attempts at extortion by threats. The fact accepted by the court below of this case are in the prohibition in section 305 (a) of the Penal Code. The section provides:

"Any person who with intent to extort or gain anything from any person ... accuses or threatens

to accuse any person of committing any felony or misdemeanour ... shall be guilty of a felony ... ”

Attempted theft, however, is a not a minor offence to attempts at extortion by threats. Attempted theft is a misdemeanour. Regardless under section 152 conviction for an attempt is only permissible if the defendant has been charged with the substantive offence. Here the defendant was charged with an attempt. It was an attempted theft. He was not charged with extortion or attempts at extortion. I quash the conviction and sentence of the court below. The defendant should be released unless heard for other lawful reasons.

Made in open Court this 12th Of May 2000.

D F Mwaungulu

JUDGE