IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO 30 OF 2001

STANLEY RICHARD PALITU
LUKA KAVALO
JOSEPH KAPHATA
MAXWELL OLIVER BAKILI
REX KASUNGWI
HENDERSON NGALANDE

VERSUS

THE REPUBLIC

From the Principal Resident Magistrate sitting at Blantyre Criminal Case No. 7P of 2000

CORAM: **D F MWAUNGULU(JUDGE)**
Chirwa, legal practitioner, for the second, fourth and sixth appellants
Tembo, legal practitioner, for the first, third and fifth
Chimwaza, Principal State Advocate, for the State
Nthole, Recording officer

Mwaungulu, J

JUDGEMENT

This is an appeal from the Blantyre Principal Resident Magistrate Court. The Blantyre Principal Resident Magistrate convicted the appellants of conspiracy to commit a felony contrary to section 404 of the Penal Code. I should reproduce the charge because the State accuses the

appellants for conspiring together to steal K84,000, Malawi Government property:

"Stanley Richard Palitu, Luka Kavalo, Josephy Kaphata, Maxwell Oliver Bakili, Rex Kasungwi and Henderson Ngalande, during the period from 21st day of July, 2000 to 14th day of August, 2000 at Blantyre A.D.D. offices, in the city of Blantyre, conspired together to steal the money amounting to K84,800.00, the property of Malawi Government."

Sometime before the appellants' arrests, the Blantyre Treasury Cashier's office lost motor vehicle registration receipt books. Normally a car dealer obtained receipt books from a Treasury Cashier's office. On a purchase, a car dealer filled the receipts and paid at the Treasury Cashier's office. Probably, the first appellant, now deceased, Stanley Palitu, previously at Limbe Treasury Cashier's office and on disciplinary grounds transferred to Blantyre Agricultural Development Division, probably gave the books to the car dealer. Just as probably the car dealers solicited the receipt books from the Treasury Cashier's office. Whatever happened is unimportant for the offence the appellants answered. What is clear though is that, using these lost receipt books and official stamps, fake or real, motor vehicle registration money for the public treasury ended with the appellants, or at least some.

The books were used despite that the Finance Ministry gazetted them lost. Mr Dolozi, of the National Audit Office, only discovered this when auditing the Blantyre Road Traffic Commissioner's and Treasury Cashier's offices in August, 2000. Mr Dolozi visited Toyota Malawi and Stansfield Motors Limited where the registered motor vehicles originated. From Toyota Malawi Limited Mr Kansungwi and Mr Kamphata, the third and fifth appellants wrote the documents. Mr Kamphata admitted registering the vehicles at Limbe Treasury Cashier's office. He could not point the cashier who gave him the books used when taken to Limbe Treasury Cashier's office. Mr Kamphata however led Mr Dolozi to Blantyre Agriculture Development Division where they arrested the first appellant. The first appellant admitted writing the receipts using the date stamps. He mentioned where the receipt books and the date stamps were. The Police recovered both. The first appellant led them to Mr Ngalande, the sixth appellant. The police arrested the other appellants during investigations.

The appellants made statements to the police. It is useful to examine these statements because, apart from them, there is no evidence of the appellants conspiring together. More importantly, the learned Principal Resident Magistrate did not discriminate incriminating evidence against co-accused, which clearly was, under statute and common law, inadmissible against co-conspirators.

Mr Palitu, the first appellant wrote at the Police that the sixth and fourth appellant approached him at Blantyre Agriculture Development Division. They proposed that, since he worked at Limbe Treasury Cashier's office before, they had receipt books from which he could issue receipts. They gave him date stamps bearing Limbe Treasury Cashier's office. Mr Palitu got K1000 for every motor vehicle registered until the external auditor and the police arrested

him. The sixth appellant told the Police that he recalled that in July Mr Palitu gave him an envelope for the fourth appellant. He only knew the contents, a date stamp No. 2710, in August when Mr Bakili mentioned it.

The third appellant told Police that Mr. Palitu told him he agreed with former Treasury Cashier employees, not motor vehicle dealer's officials, to get registration forms and share monies from vehicle registrations. Mr Palitu told him that Mr Palitu would register the vehicles. The third appellant wrote that he registered vehicles and collected K6,750. The fourth appellant told the police about the receipt books and date stamps. He wrote Mr Ngalande asked him to take a parcel to Mr Palitu. He never knew the contents then. He saw the date stamp when Mr Palitu opened the parcel.

Mr Kavalo, a Stansfield Motor's employee, wrote that in July 2000 a work mate mentioned a deal where Mr Palitu would register vehicles and share money. They would give Mr Palitu forms. Mr Palitu would collect the money. Mr Kamsungwi, an employee of Toyota Malawi, told police that Mr Palitu approached him and his friend Mr Kaphale to assist them get money when registering motor vehicles. On 26th July he and Mr Kamphata gave Mr Palitu the registration forms. He told the police they registered motor vehicles and shared proceeds.

On oath the appellants denied the charge. Mr Palitu told the lower Court that Mr Ngalande met the sixth appellant who gave Mr Ngalande an envelop for him. He opened the envelope after Mr Ngalande left. It contained slips. The next thing was Mr. Dolozi's visit on 31st August 2000. At the Regional Traffic Commissioner's Office, he found Mr. Dolozi. Mr Dolozi had motor vehicle receipts and registration documents. Asked if he knew anything, Mr. Palitu said he knew nothing. Mr. Dolozi left. He came back with more motor vehicle receipts and a date stamp. Mr Palitu again denied knowledge. He denied the matter at Limbe Police station. The police bit him. He was stopped in the middle of the statement because the investigator knew the whole story and wanted the other appellants implicated.

The second appellant said all was well until Mr Dolozi and fiscal department officials visited his office. He admitted issuing documents the investigators brought. He told them he collected the documentation from Limbe Treasury Cashier. Investigators asked him to go to where he collected them. The investigator told him not to bother because they collected the man. He told the court below he was beaten. Subsequently, the police produced a statement and forced him to sign.

The third appellant told the court that until Mr Dolozi and Mr Kamwendo visited his office alleging some registration documents had problems, he knew very little. He told the court that Mr Dolozi and Mr Kamwendo showed him documents the appellant signed. They accompanied the appellant to Limbe Treasury Cashier where he claimed collecting the receipts. He pointed counter number 1. He admitted writing the statement the prosecution tendered. He denied knowledge of the transactions. He admitted he was the only clerk registering vehicles at

Stansfield Motors. The fourth appellant told the court below between July and August the sixth appellant sent him envelopes for Mr Palitu. He never knew the contents. Unlike the rest, he never suggested the police assaulted him. The fifth appellant said he knew nothing besides routine registering of cars. He was therefore surprised when Mr Dolozi called him. Mr Dolozi told him of problems with registration of vehicles from Stansfield Motors. The fourth appellant was present and he it was that collected receipts from the Treasury Cashier's office. He actually led them to Treasury Cashier's office and pointed the counter. He told the court below that at the police, despite his request for one, the police refused him access to a lawyer because investigations ended. The sixth appellant told the court that he only delivered a parcel to the first appellant. He did not know the contents. He denied stealing.

The learned Principal Resident Magistrate reviewed the evidence. His understanding of the burden of proof is impeccable. He recognised the evidence was circumstantial. Relying on well-known authorities of this Court and the Supreme Court, he directed himself properly on the law. Equally, following well-known authorities of this Court and the Supreme Court, he warned himself about the danger of convicting on an accomplice's evidence without corroboration. Counsel for the appellants criticise the learned principal resident Magistrate's handling of the confession evidence. The trial court had problems with the law and evidence on conspiracy.

On the confession, both counsel made two points. The first bases on section 176 of Criminal Procedure and Evidence Code:

"(1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.

(2) No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by accused and that its contents are materially true. it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession."

Both counsel submit, correctly in my judgment that the trial court could not rely on what the other said in the statement as evidence against the other. The section itself proscribes the use of the confession against another except, of course, in the circumstances the section itself mentions,

namely, that the other adopts it. This section applies to all confessions, confessions to public officials or confessions to people not public officials.

There are three justifications for the rule. First, the statement is in the absence of the other. Unless the other subsequently adopts it, one cannot infer the other adopted it. It is a question of fact, where the statement is in the presence of the other, whether the other adopts the statement. The Court may consider an instant and inter presents denial, subject to rules about self-servicing statements, a rejection of the confession. Silence by the other, once accused of a crime, may be admission of the crime and, in certain cases, adoption of a confession of another. Secondly, the statement is hearsay and inadmissible to prove the facts asserted in the statement. Thirdly, allowing such statements would leave a possibility, not remote in the circumstances that a defendant has only to mention others to implicate them. That may lead to miscarriages of justice. Section 176 (2), therefore, codifies the common law. Under the statute and common law therefore, unless the other adopts it, the confession is evidence only against the maker.

In the judgment, there is no doubt the trial court confused the issue. Many passages in the judgment indicate to this Court, as they do to counsel, the trial court relied on statements in the caution statements as evidence against another. At page 31 of the trial court's judgment, the trial magistrate said:

"In the case at hand the accused person had testified in their defence, but it is mainly their caution statements which contain incriminating evidence of fellow co-accused. I have already warned myself of the dangers of convicting a co-accused on an uncorroborated evidence of a fellow co-accused."

At page 35 the trial magistrate said:

"Furthermore prior to the caution statements, the first accused also made a written statement in which he briefly narrated what was happening and even implicated the co-accused."

The second point the appellants' legal practitioners make is that the learned Principal Resident Magistrate could not use the statements the appellants having retracted them. The learned principal resident magistrate relied on the Supreme Court of Appeal's approach in Chiphaka v Republic (1971-72) 6 A L R (Mal) 214. He relied on the statement by Chatsika, J. A., who gave the majority opinion:

"At common law proof of physical violence or inducement would be a ground to include confession altogether. In Malawi, after the enactment of Section 176 of the Criminal Procedure and Evidence Code, proof of threats, ill-treatment, intimidation, inducement and the like, go not

to admissibility but to weight and if any allegation of any of these factors is established, it is difficult to conceive of any reasonable court accepting a confession to be materially true in the absence of pointers of such cogency as ..... to amount to corroboration as the term is understood in law."

This Court in Republic v Chizumila Conf. Case No 716 of 1994, unreported and Jasi Republic Cr. App. Case. NO 64 of 1994,unreported, observed that Chiphaka v Republic was not a unanimous decision. It was a majority decision (Chatsika and Weston, JJA agreeing and Edwards, JA dissenting). Subsequent Supreme Court of Appeal decisions followed Chiphaka v Republic. As pointed out in Republic v Jasi and Republic v Chizumila, the Supreme Court of Appeal majority decision in Chiphaka v Republic was per in curium Chiwaya v Republic (1966-1968) 4 A L R (Mal) 64. The Supreme Court of Appeal must have approved Skinner, C.J., suggestion that section 176 of the Criminal Procedure and Evidence Code was volta face and changed the position in Chiwaya v Republic. The Chief Justice, in the High Court, suggested that section 176 intervened and affected the law on confessions in this country then. What section 176 did to the law on confessions then has to be examined in the light of what the 1994 Constitution has done to the law on confessions of 1994.

In Republic v Chizumila I never declared section 176 of the Criminal Procedure and Evidence Code unconstitutional. I did however hold that a statement obtained by duress would be inadmissible. The reasons were given in Republic v Jasi. In Republic v Jasi I did not follow Nyirenda, J.'s, suggestion in Republic v Chinthiti, Cr. Case. No 17 of 1997, unreported, that section 176 of the Criminal Procedure and Evidence Code is unconstitutional. Section 176 is not unconstitutional. One must distinguish two notions the 1994 constitution introduces.

Section 176 of the Criminal Procedure and Evidence Code should be read against two constitutional provisions. Section 42 (2) (c) of the Constitution provides:

"Every person arrested for, or accused of, the alleged commission of an offence shall in addition to the rights he or she has as a detained person, have the right ... not to be compelled to make a confession or admission which could be used in evidence against him or her."

This Court in Republic v Chithiti thought section 176 of the Criminal Procedure and Evidence Code offended this provision and therefore was unconstitutional. This could only be if the section 42 (2) (c) right, indeed all section 42 rights, is non-derogable. Section 42 rights are derogable. Consequently, laws can, under section 44 (2), limit the rights subject, of course, to section 44 (3). Section 44 (2) provides:

"Without prejudice to sub-section 1, no restrictions or limitation may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law which are reasonable recognised by international human rights standards and necessary in an

open and democratic society."

Section 44 (3) provides:

"Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question and shall be of general application."

Since the section 42 (2) (c) right is derogable, section 176 limits it. A statute limiting derogable rights is not unconstitutional by merely affecting a particular right. Our Constitution allows limitation, derogation and restrictions on certain rights, as long as, as pointed out in Republic v Jasi, the limitations are by law. 'Law' refers to all laws, written or unwritten. Section 176 is written law and limits, if it does, the section 42 (2) (c) right. If it limits, the court has to consider whether, it negates the content of the right. More importantly the limitation, if it is one, must be reasonable, recognised by international human rights standards and necessary in an open and democratic society. The question is whether section 176 limits the section 42 (2) (c) right.

In my judgment section 176 is a rule of evidence and procedure. On the former, the section lays a rule of admissibility. No doubt, confessions are relevant to prove a fact in issue. The question is whether such evidence can be excluded by some rule despite its relevance. One such rule, developed by the common law, excludes it if obtained by coercion or inducement.

With confessions however one must distinguish between proof of the objection to its admissibility and the admissibility of the confession itself. A confession cannot be inadmissible at a mere suggestion that it was obtained by force. It must be proved that force was in fact used. The problem is to find a rule that proves the objection to admissibility, the force. At common law a trial within a trial solved the problem. The confession was inadmissible if a judge found it was obtained by force, If the judge found that the statement was not so obtained the confession was admissible. The objecting party could still raise the matter with the jury.

The difficult with the common law position was its illogicality and redundancy. Whether a confessor is beaten or not is a question of fact and a proper one for a tribunal of fact, the jury. It is, ununderstandable why that question should be left for the judge or rather why a jury cannot decide it. Excluding the inadmissible confession on a judge's finding force was used deprives the jury of a function clearly theirs. The objection to the jury deciding on the force question is that the jury, once it finds that the statement was obtained by force, may not clearly expunge the evidence from their minds. That is unconvincing. Juries properly directed by a judge can make the distinction. The matter is for a judges direction. Once the judge finds that the statement was obtained properly, it is still open to the objector to raise the matter for the jury. The jury has to go through the process all over. They have still to be directed that they could reject the testimony, which they find was obtained by duress.

Section 176 is short hand for all this proclivity. Section 176 provides for the confession to come in and leaves it for the judge of fact to decide what weight should be attached to a confession. As I pointed out in Republic vs Chizumila, the judge should advise the jury to attach no weight whatsoever to a statement obtained by force. The reason I gave is a weak one: the weight to be attached to such a statement is negligible. It is a good reason but a weak one. There is a stronger reason.

Under section 19 (1), the dignity of all persons shall be inviolable. Moreover section 19 (3) of the Constitution proscribes subjecting citizens of this country, the mentors and recipients of rights constitutional rights, to torture of any kind or to cruel, inhuman and degrading treatment or punishment:

"No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment."

Under section 44 (1), this right is non-derogable. Laws or practices cannot restrict or limit it. A rule allowing use of evidence obtained by torture is unconstitutional, unreasonable, does not comply with international human rights standards and is not necessary in an open democratic society. Section 176 of the Criminal Procedure and Evidence Code only lays a rule and procedure for letting in such evidence. The judge must direct the jury on the weight to attach to the confession. The judge must, because of sections 19 (3) and 44 (1) of the Constitution, direct the jury to attach no weight whatsoever to statements obtained through torture. In my judgment the court cannot and should not even direct the jury on pointers. The statement must be given no weight at all.

It is offensive to public policy and human dignity for the judicial process to use evidence obtained this way. The risks of miscarriage of justice are phenomenal. More importantly, allowing such evidence, may licence public officials to use torture in pursuit of public goals and interests with so much compromise on citizens' rights. When public goals and interests conflict at the level of decision then, as Dworkin suggests, we must take rights seriously.

The section moreover does not override the offender's right under section 46 (2) to apply to court where section 19(3) and 42(2)(c) rights are violated. On such application the court can make orders under sections 46(3) and 46 (4) and 34 of the Constitution. The citizen can apply before or during the proceedings. If made before the proceedings a statement obtained by duress may never see the doors of a court again. This is good for the citizen and important for the constitutional rights regime, which emphatically proscribes torture or cruel, inhuman and degrading punishment by prohibiting derogation, limitation and restriction of this right.

As pointed out in Republic v Jasi, to the defendant, there are practical and logical advantages in admitting confession obtained by force. The defence might assess their chances

better with the jury than when the judge decides the question whether force was used. The defence might also think that the objection may be better appreciated in the light of all the evidence. These considerations led to the Republic v Jasi directions. The directions have been said to be complex. The complexity arises from rights introduced by the 1994 Constitution.

Under the 1994 Constitution, how confessions are received must recognise the citizen's right to challenge Part IV violations even where no proceedings are pending against the citizen or, where proceedings are contemplated, before those proceedings are commenced. A citizen desiring to challenge a section 19 (3) or section 42 (2)(c) violation cannot be compelled to wait for the state to commence the proceedings. The right and the right to a remedy for violation is independent of those proceedings. Otherwise public officials will violate the rights in limine. The effective remedy for a confession proved to be obtained by force is exclusion. Once al judge sitting alone concludes that the confession was obtained by force he must expunge it from his mind and, if sitting with the jury, advise the jury to attach no weight whatsoever if the jury finds as a fact that the confession was obtained by duress. The defendant, as was pointed out in Jasi v Republic, has a right to determine when and whether to let in or challenge the objectionable confession. Section 176 in its present form does not offend or compromise the defendant's rights. It is proportionate and reasonable in its safeguards and rights it gives to the citizen to put to the judge or the jury the fact of the force having been used and what weight to attach to such evidence once it is proved that the statement was obtained by duress.

At common law therefore confession evidence is relevant and admissible unless excluded by another rule. One such rule excludes confessions obtained by duress. Even if not obtained by duress, as the trial court found, a confession under section 176, a codifying provision, is only evidence against the maker. The law is not any different for a conspiracy. Of course statements in the course or in furtherance of a common purpose are admissible as an exception to the hearsay rule under the res gestae rule. The statement must however be made in the course or in furtherance of the conspiracy and there must be independent evidence of the conspiracy. A confession at the police is clearly not made in the course or in furtherance of a crime R v Walters (1979) 69 Cr. App. R 115, 1200) and the judge must direct himself, if sitting alone, and the jury that the statements cannot provide a link between the defendant and the conspiracy (R v Blake (1993) Cr. App. R. 169). The statements at the police or at apprehension were not in furtherance of a common purpose or conspiracy. They were confession and only admissible against the makers. Neither do the acts themselves prove the conspiracy. Apart from them little shows a conspiracy together as the charge suggests.

The trial magistrates perceptions of a conspiracy were based on the Supreme Court's decision in Director of Public Prosecution v Banda and others M.S.C.A. Cr. App.Cas. No 21 of 1995. In particular the trial magistrate referred to two cases the Supreme Court approved. The Supreme Court of Appeal adopted Lord Pearson's definition in the House of Lords in Director of Public Prosecution v Doot and others [1973] A C 817 that a conspiracy "involves an agreement express or implied." The Supreme Court applied Coleridge, J.'s, direction to the jury in R v Murphy (1837) C & P 297:

"It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilt. You are to say whether, from the acts that have been proved, you are satisfied that the defendants were acting in concert in the matter."

In my judgment, Pearson, J.'s, statement is apt. At the end, the question is whether the defendants acted in concert. Where all people agree together and are in communication with one another, the so called 'joint conspiracy,' all defendants are guilty of the conspiracy. In a 'wheel' conspiracy one co-ordinates the activities of others who are in agreement although not communicating to one another. There all them are guilty of the conspiracy. In a chain conspiracy one agrees and communicates with another who in turn communicates with others along the chain. In all these situations the state carries the burden to prove there was one agreement among all and not two or more separate agreements. This is clear from R v Wise (1990) Independent 21 August 1990 and R v Griffiths [1966] 1 Q B 589. In R v Wise it was necessary to show the other attached himself to a conspiracy. If the agreement was understood to the conspirators to be only with one person that is insufficient for a conspiracy. On the hand, two completely independently arranging one offence are not guilty of conspiracy to commit a crime R v Griffiths). The lower Court never considered the principles in these cases.

The trial court could, as he found that the statements were voluntary, only use the appellants' confessions against the makers. The statements could not be used to establish the conspiracy. The acts proved in the court below do not establish a conspiracy among all or some conspirators at all. If anything the acts show separate agreements. I have already decided that the statements they made against each in the confession against them separately and cannot be relied on to prove the conspiracy. However even those statements do not show that all the appellants conspired together. They indicate to me two or more agreements. Those separate agreements, as pointed out in R v Griffith, cannot found a conspiracy by all. The state had not proved the conspiracy. The state chose to charge the appellants of a conspiracy. There was material for other substantive crimes. The state opted for a conspiracy by all. The evidence dopes not show such a conspiracy. It shows separate agreements. I would therefore allow the appeal against conviction and set aside the sentence.

Made in open Court this 19th day of September 2001 at Blantyre.

D F Mwaungulu

JUDGE