IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal number 61 of 2000

Between

KAJOLLY KUMALERE

And

THE REPUBLIC

In the Second Grade Magistrate Court sitting at Nchima Criminal Case Number 40 of 2000

CORAM**: D F MWAUNGULU (JUDGE)**

Tembo, Legal Practitioner, for the appellant

Chimwaza, Deputy Chief State Advocate, for the State

Nthole, the official court interpreter

Mwaungulu, J

JUDGMENT

This is an appeal from the judgment of the Nchima Second Grade Magistrate Court. The Nchima Second Grade Magistrate Court convicted the appellant with others of an offence relating to national examinations. Section 57 of the Education Act, which I quote later in the judgment, creates several offences about national examinations. The Nchima Second Grade Magistrate Court sentenced the appellant with others to fines. The appellant is the only one who appealed. This Court could not review the sentence under conviction under section 15 of the Criminal Procedure and Evidence Code because of this appeal. In hearing his appeal, therefore, I will consider the convictions of others who have not appealed.

The appellant, unrepresented in the court below and when lodging the appeal, raises five grounds: the lower court misdirected itself in convicting based on confession of another defendant; the conviction is unsupported by the evidence; the trial court misdirected itself in convicting the appellant when there was no evidence of cheating, the decision was wrong in law and fact; and the sentence was manifestly excessive. The Deputy Chief State Advocate does not support the conviction.

In the lower court the prosecution sought to establish several theories: the teacher in charge of the school and other staff at the school, shortly after the examination papers were opened, obtained the examination paper; the teacher in charge and other staff prepared answers which they passed to students in the examination room; and that some students sat examinations. The appellant denied receiving examinations from the teacher in charge. The prosecution charged the teacher in charge with the rest of the defendants. The defendants comprised of the teachers involved in the exercise and the students who benefited from the exercise. The appellant admitted sitting as an internal candidate at the examination centre. His explanation was that he did not know the irregularity, the examination number having been given to him by the examination centre.

On the basis of these concessions of the appellant, the first ground of appeal that the lower court erred in convicting on a confession by the teacher in charge, must relate to the evidence that the appellant received written answers from the teacher in charge and other staff. The appellant, from the record of the lower court, denied receiving the worked out answers from the teacher in charge or other staff. On oath the teacher in charge denied ever doing what he was accused of. More importantly, he led no evidence to the effect that he supplied the appellant or the other students with the worked out answers. The prosecution relied on a statement by an official from the Malawi National Examination Board that the Board had information that this is what occurred.

The evidence on this point from an official of the Malawi National Examination Board was inadmissible to show that the teacher in charge gave the appellant the worked out answers. Statements from persons other than those who through the medium of experience with the senses can testify to those facts are generally inadmissible to prove facts in issue before a court of law. There is this Court's decision to the effect in Careta v Republic (1966-68) ALR (Mal) 285. Only those who saw or heard the teacher give the worked out answers could testify to that effect. Of course what the teacher said on the matter could establish the fact. The teacher was accused of the crime. A statement by the teacher or a student, accused of the crime, to that effect was admissible. It is a confession and admissible. In Useni v R (1961-63) 2 ALR (Mal) 250 this Court approved this statement from R v Lambe (1791) 2 Leach 552.

""The general rule respecting this species of testimony is, that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him,

whether such confession be made at the moment he is apprehended, or while those who have him in custody are taking him to the magistrates … for the purpose of undergoing his examination …. First then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner to any person at any moment of time, and at any place … are, at common law admissible in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true."

A confession is however evidence only against the maker unless, of course, the other adopts it. The lower court obviously did not direct itself to a common law rule, given statutory force by section 176 (2) of Criminal Procedure and Evidence Code:

"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."

There are decisions of this Court to the same effect: Watson v R (1961-63) 2 ALR (Mal) 32; Twaibu v R (1961-63) 2 ALR (Mal) 532; Kumalele v Republic Cr. App. Cas. No 61 of 2000, unreported. There are also decisions of the Supreme Court of Appeal, one of which is Gama v R (1964-66) 3 ALR (Mal) 528. The appellant did not adopt the statement of the teacher in charge. The appellant's criticism that the lower court could not employ the statement by the teacher in charge against the appellant is germane.

On the other hand, that the appellant and other students got worked out answers from the teacher in charge and other facts the appellant and others accepted and the lower court found could not make any difference to the offence the appellant and others stood charged. Section 57 of the Education Act, on which the appellant and others stood charged, reads:

"Any person having in his possession or under his control any national examination paper on any part thereof, or any information relating to any national examination or any national examination paper, who communicates such paper or information to any person, other that a person to who he is by duty bound or authorized to communicate it, or who uses such paper or information for the benefit of any person or in any manner prejudicial to, or likely to be prejudicial to, the proper and fair conduct of any national examination shall, in addition to any other penalty to which he may be liable under this Act, be guilty of an offence and liable to a fine of 100 and to imprisonment for one year."

There are two aspects to this crime. First, the defendant must have in possession or under his control an examination paper or any information relating to any national examination or any national examination paper. Secondly, the defendant must communicate such

paper or information to a person other than the one to whom he is supposed to communicate or use the paper or information for the benefit of another or in a manner prejudicial to proper and fair conduct of a national examination.

The students, including the appellant, sitting in the examination room certainly had the examination paper in the examination room. They certainly never used it or communicated the paper or information to anyone or the teacher in charge. The evidence suggests the examination paper was probably opened in advance but we do not know by who. The teacher however was in possession of the paper and, in my judgment, although we are unsure about the students actually involved, used the information to benefit some students or, which is still a crime, employed the examination paper in a manner prejudicial to conduct of fair and proper examination. It was wrong and a crime under section 57 of the Education Act to use the papers to work out answers for one, some or all of the students sitting examinations at that time. The students, who only received the papers during the examination, could not, without more, be guilty of the offence under section 57. The students would be guilty if it is shown there was an arrangement that would make them principals to the crime. Concerning such an arrangement, there is no evidence or real doubt.

The appeals against sentence and conviction are allowed. I set aside the sentence against the appellant. I confirm the conviction against the first defendant. The conviction and sentences against the other defendants are set aside. The judgment should be communicated to all of them.

Made in open court this 12th Day of October 2001

DF MWAUNGULU

JUDGE