IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal Number 22 of 2002

CHARLES MALINGA

Versus

REPUBLIC

In the Second Grade Magistrate Court sitting at Balaka Criminal Case number 116 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Mpando, Legal Practitioner, for the appellant

Chinangwa, Senior State Advocate, for the respondent

Kamanga, the official court interpreter

Chingota, court reporter

Mwaungulu, J

JUDGMENT

Charles Malinga, the defendant in the lower court, appeals against the judgment of the Balaka Second Grade Magistrate Court. The Balaka Second Grade Magistrate Court convicted the defendant for forgery, uttering and theft by servant, offences under sections 358, 360 and 278, respectively, of the Penal Code. The defendant, unrepresented in the court below, appeals against conviction and sentence. In this Court Mr. Mpando now represents the defendant. The state, through Mr. Chinangwa, Senior State Advocate, opposes the appeal. There was therefore formidable argument during the appeal.

The questions for this and the lower court are the same. The three offences the prosecution charged the defendant for reflect questions this Court must answer. The

general question is whether the prosecution in the court below established the defendant's guilt beyond reasonable doubt. The defendant contends the state had not. The defendant is right on two of the counts. He is, except to the extent of the theft, not right on the other. The state supported all the convictions. The lower court, as we see shortly, misdirected itself on the law on forgery and, consequently, uttering. On the law and facts, therefore, the appeal ought to succeed partly.

There is not much to this case. Agora Limited., a company that sells agricultural inputs and materials, employed the defendant as depot manager at the company's depot at Balaka. One, among many, method of collecting cash from the depot to the company's headquarters in Blantyre was though a security company, Securicor Security Services. On 18th February 2002 the security company collected cash from the Balaka depot. The security company collected the cash in a box. The defendant, without the security company official, packed the cash in the box. The defendant sealed, as was the procedure, the box with two seals whose serial numbers he entered on the delivery note. The defendant, as was the practice, enclosed in the box a cash voucher, cash voucher number 7072. The cash voucher included information on current stocks, the expenses of the month and the cash transactions. The defendant also issued delivery notes used to send cash to the company's headquarters. The officer from the security company signed the delivery notes. The officer from the security company did not and did not have to know the amount of cash in the box.

When the cash box arrived at the company's headquarters, the computer showed a discrepancy between the cash received and the documentation. There was no problem with the cash received, K209, 900.00 indicated in cash voucher number 7072. There were no problems with two delivery notes numbers 61838 and 61836. The company headquarters received the cash. Documents from the bank and the defendant showed the cash properly transacted. There were problems, however, with delivery note 61839 for K534, 115.

Delivery note number 61839 was not supported by documents from the defendants' depot. There was nothing at the headquarters to show that the company received the cash. The security company brought the document with the seals intact. The cash could not have missed at the headquarters. The box was opened in the presence of directors and the cashier who counted the money. The prosecution called the cashier as a witness. Curiously the delivery note showed that the cash was sent on fictitious box seals. The defendant, when asked by the general manager, insisted he sent the money to the company's headquarters.

At the police the defendant made a statement confessing the crime. In it the defendant conceded that he, contrary to the company's strict instructions, sold agricultural inputs on credit. He purloined some money he received from debtors. At the time he sent the collections for the month he had a shortage arising from money he purloined and unpaid

debts. He, therefore, proffered the fictitious delivery note to cover the shortage. The defendant, in his evidence, disowned the confession, suggesting the police used force to obtain. The policeman present at the making of the statement testified that the defendant gave the statement freely. The defendant never cross-examined the policeman on any aspect of the evidence. The defendant cross-examined the manager and the cashier at length. The lower court therefore accepted the confession as a voluntary statement from the defendant

The lower court, after reviewing the evidence and accepting the confession, convicted the defendant for all the offences the prosecution charged. The conclusions I draw and both counsels' argument turn on the lower court's view of the evidence. There can only be muted criticism of the lower court's view.

The appeal court reviewing the decision of a court of first instance, of course, proceeds by way of rehearing. The Court examines all the evidence in the court below, subjecting the evidence for relevance and admissibility and mindful that, unlike the reviewing court, the lower court has the advantage of seeing the witnesses and assessing credibility. Generally, where there is evidence to establish a fact one way or the other and a tribunal of fact, a judge or jury, as the case may be, decides one way, it is rare, and I think impossible, for an appellate court to reverse the finding of fact. A fortiori an appellate court will, as a matter of principle, reverse a finding of a tribunal of fact where there is no evidence to support a finding.

There is no evidence to establish a fact where, for admissibility, weight or credibility, a tribunal of fact rejects the evidence. Generally, a court reviewing a tribunal of fact should reverse a finding of fact based on evidence that should be excluded subject, of course, to section 5 (2) of the Criminal Procedure and Evidence Code:

"The improper admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised – (a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction, or (b) it would have varied the decision if the rejected evidence had been received."

It was important to restate these principles, most of them established in this Court in Patel v R (1923) 1 A.L.R. (Mal) 894; and R v Mamanya (1964-66) 3 A.L.R. (Mal.) 271, in the Federal Supreme Court in Chipembere v R (1962-63) 2 A.L.R. (Mal) 83 and the Supreme Court of Appeal in Pryce v Republic (1971-72) 6 A.L.R. 65; and Idana v R (1964-66) 3 A.L.R. 59, because of matters Mr. Mpando, the appellant's legal practitioner, raises for the defendant on the conviction.

The first point taken for the appellant on the evidence is that the lower court erred in law and fact in admitting the confession statement. The lower court faced one situation this Court anticipated in Jasi v Republic, Cr. App. Cas. No. 64 of 1997, unreported: the question of force having been used in obtaining a confession arises for the first time in the course of defence evidence. That the defendant was unrepresented in the court below, again as anticipated in Jasi v Republic, compounds the situation. That the defendant was not represented affected the defendant in two ways. First, whether the defendant knew his right to object to such evidence being given sufficiently as to object or to elect the options Jasi v Republic suggests. Secondly, the defendant never cross-examined the policeman on the use of force. The lower court's findings on the confession are in this excerpt from the judgment:

"The accused during the time of defence, stated that he was beaten up, showing that the confession statement was obtained by force. Such would have been looked into by the court if the tendering of the confessio document were impeached by the accused in cross-examination. Therefore this Court cannot believe that the confession statement was obtained from him by force. Such is dismissed by this court."

Jasi v Republic reminds us the difficulties an unrepresented defendant may face concerning confession evidence. The difficulties stress the duty courts have to unrepresented defendants to ensure that at the stage the prosecution proffers the confession, particularly a confession obtained by people in authority, the defendant knows his right and options. Generally, a defendant will be prejudiced if he is not informed at that stage of his right to object and elect. Everything, however, turns on the circumstances of the case. A rule presuming prejudice every time a court omits informing a defendant of his right and options may cause miscarriage of justice where, like here, persons without intense legal training try and prosecute serious offences. A court on appeal has to consider the whole matter and consider the possibility of prejudice occurring because of the omission.

In this particular case, it was not enough, in my judgment, to approach the matter only from that the defendant omitted to cross-examine the policeman. There was enough in the circumstances however to dispel any prejudice that may be perceived. The policeman stated in his evidence that the authority obtained the statement freely. The defendant never cross-examined him on the point. This was not a case therefore where the statement was tendered without explanation as to the circumstances in which it was obtained. The presumption of legality would not avail the state where the statement is tendered without explaining circumstances in which it is obtained. Section 176 of the Criminal Procedure and Evidence Code requires the state to prove beyond reasonable doubt that the statement was made by the defendant and the statement is materially true. The policeman's assertion required questioning. The defendant was aware of his right to cross-examine and cross-examined the other witnesses at length and intelligently. The circumstances in which the statement was obtained was critical to the statement which was incriminating him. It is precisely for that reason that the defendant raised the circumstances in which

the confession was committed in his evidence in chief. On the whole, the lower court's approach agrees with what this Court said in Republic v Chizumila Conf Cas. No. 316 of 1994, unreported, repeated in Jasi v Republic and Palitu and others v Republic Cr.App. Cas. No. 30 of 2001, unreported.

A court faced with a confession that the defendant rejects as being obtained in violation of her rights under the Constitution in that the statement was obtained by force must first decide whether the confession was so obtained. If it was, the court must attach no weight to it. If it was not so obtained, the court must treat the confession like any other evidence and decide whether it is conclusive in the light of all the evidence before it. A court can however convict on it alone. Mr. Chinangwa is right, relying on R v Mallinson (1977) Cr. App. R. 161, that a statement against oneself must be true because nobody would make such a statement if it were not true. 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."

Apart from the confession, there was damming evidence about the circumstances around the crime. It is contended that much of that evidence, which would have been pointers to the confession, was hearsay. I had a bit of problems appreciating the argument on this aspect. There were three prosecution witnesses to establish much of what I tried to summarise earlier in the judgment. The prosecution case was essentially that the defendant introduced a delivery note to cover monies he never remitted to the company's headquarters. The general manager is an officer of the company and testified on the procedures affecting the transactions. The cashier received the money and the documentation in the box. She gave evidence on those aspects. There was a security officer who testified about collecting the box from the defendant and delivering to the company's headquarters. Of course one critical question was whether the company received the cash on the disputed delivery note. The General Manager's evidence on that aspect was as admissible as the one of another in the company. The company documents show no such transaction. There is documentation for the other two transactions. Moreover, the defendant in his confession statements admits that the money collected from debtors never reached the company's headquarters. He purloined it. He also said in the confession statement that he never recovered part of that money from the debtors. All this shows that the money under the doubtful delivery note never reached the company's headquarters. Moreover, the seals entered on the dubious delivery note were fictitious.

This was not the conduct of a man who had acted properly in remitting cash to the company's headquarters. There was therefore evidence that the money on the dubious delivery note never reached the company's headquarters.

Of course, the defendant's explanation in the statement to the police that part of the money was with the debtors is self-servicing. The persuasive authorities on this matter are R v Sharp [1988] 1 WLR 7; and R v Duncan (1981) 73 Cr. App. R. 359. Both cases, however, dealt with the situation where the defendant elected not to give evidence in his defence. In the former the House of Lords approved this statement by Lord Lane, C.J., in R v Duncan:

"Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanation, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state."

There is no reason in logic why the rule should not apply to a situation where the defendant elects to give evidence. In R v Sharp Lord Havers thought it unfair, where an admission is made which is qualified by an explanation or excuse, to admit the admission and exclude the explanation. The rule, it was said in R v Jones (1827) 2 C & P 629, is that 'if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another.' In R v Sharp the House of Lords again approved this statement by Lord Lane, C.J., in R v Duncan:

". . . where appropriate, as it will usually be, the jury may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses may not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

The court must therefore consider the excuses or explanations in a mixed statement. The lower court did not consider that aspect of the defendant's statement that some money could still be with debtors.

The general manager was adamant that giving credit was out of question in the company. If, in attempt to boost sales, he gave credit, the defendant breached the company's directions. There was no conversion, an actus reus for theft, if the defendant intended to recover the money. There was conversion if the defendant dealt with the

property as suggested and intended to use proceeds to his own use. The evidence suggests that the former was the case. There was conversion, however, where the defendant used to his own use monies received from debtors. It matters less that the defendant intended to replace the money. Section 271 (2) of the Penal Code provides:

"A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with . . . in case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner."

Despite the suggestion in the confession the Prosecution never investigated from the records how much of the money remained with debtors. The prosecution never ascertained whether the debtors existed. The prosecution never ascertained how much remained with debtors and how much cash from debtors the defendant received. The defendant in the statement admits stealing some money. We do not know how much. He is not guilty of stealing money he never received from the debtors.

In my judgment on the facts as found and on the law the defendant is not guilty of forgery and uttering a forged document. All the defendant did was to enter false information in a document. This is not forgery under statute or common law and our criminal, under section 3 of the Criminal Procedure and Evidence Code, is informed by English criminal law. Even by the definition the lower court adopted from Blackstone's Criminal Practice, 1995 edition, the facts in this case far from establish forgery:

"A person is guilty of forgery if he makes a false instrument with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

Unfortunately, this is not an author's definition of forgery. The authors were quoting section 1 of the Forgery and Counterfeiting Act, 1981, UK. Section 351 of the Penal Code defines 'forgery':

"Forgery is the making of a false document with intent to defraud or to deceive"

'Making a false document" is defined in section 353

"Any person makes a false document who

(a) makes a document purporting to be what in fact it is not

(b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document

(c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document

(d) signs a document

(i) in the name of any person without his authority whether such name is or is not the same as that of the person signing

(ii) in the name of any fictitious person alleged to exist whether the fictitious person is or is not alleged to be of the same name as the person signing

(iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person

(iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identify between the person signing the document and the person whom he professes to be."

It is cardinal to the offence of forgery and hence uttering that the document 'tell a lie' about its authorship, origins or history. In that sense there is likely to be an overlap between false accounting and forgery but, as R v Dodge [1972] 1 Q.B. 416, suggests, it would be wrong to suggest that every case of fraudulent false accounting involves forgery. The entry of false information on the delivery note and the cash voucher did not alter the effect of the cash voucher or the delivery note. They remained such delivery note or cash voucher albeit with false information. It is cardinal to forgery that there should be a making of a document or alteration or introduction into an existing document. The defendant must make a document purporting to be what it is not as, for example, when he makes a document purporting to be a certificate when it is not or when he alters or introduces information on a cheque, for example. There is no forgery where, the defendant in order to conceal a theft, enters false information in a document of accounts. There was no forgery and consequently no uttering of a forged document.

I therefore allow the appeal against conviction for forgery and uttering of a forged document. The conviction for theft remains only to the extent that the state has not proved beyond reasonable doubt that the defendant stole K534, 115.00. The defendant is guilty of stealing some money, albeit we do not know how much. To that extent alone the appeal succeeds.

There was a long address on the sentence which it is unnecessary to rehearse in view of the conclusion I have reached. Among other things, the sentence for theft by a servant depends on the amount of property stolen. The state has not established how much was stolen. In that case the sentence can only be one for a threshold crime. I think that the sentence that the defendant has served is sufficient. I pass a sentence as results in the

defendant’s immediate release.

Made in open court this 30th Day of October, 2003.

D F Mwaungulu
JUDGE