IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NUMBER 40 OF 2004

CHIMWEMWE MSANDUKENJI

Versus

THE REPUBLIC

(From the Second Grade Magistrate Court sitting at Blantyre being criminal case number 52 of 2004)

CORAM: Hon. Katsala, J
Tukula, of Counsel for the Appellant
Chinangwa, State Advocate for the State
Kamuloni, Official Interpreter

JUDGMENT

The appellant was charged with the offence of theft by trick contrary to section 321 of the Penal Code. He pleaded guilty and was convicted and sentenced to 2 years imprisonment with hard labour. He now appeals against both conviction and sentence. Under section 348 of the Criminal Procedure and Evidence Code no appeal lies against conviction following a plea of guilty, but on the strength of case authority I allowed him to argue his appeal against conviction since it was contended that the plea was defective and a failure of justice had been occasioned.

The facts of the case are that the complainant and the appellant were in a love relationship. On 10th June 2004, the appellant borrowed his lover's cell phone saying he wanted to use it for one week. After the agreed one week the complainant asked for her phone but the appellant could not produce it. It later transpired that he sold it to unknown persons. He was asked to pay the value of the phone but he failed and or refused to do so.

Six grounds of appeal were filed. In the first ground the appellant contends that his "plea of guilty and admission of the offence was not voluntary but was made under undue influence from the police who advised him that a plea of guilty and admission of the offence would be in his favour as he would only get a fine or a suspended sentence as such he did not appreciate the nature of the charges and the effect of a plea of guilty to the charge laid

against him". Clearly this ground of appeal relates to what may have transpired outside the courtroom and/or before the court convened. Obviously whatever may have been said then is not part of the record of the court proceedings. There is nothing on the court record to show or even suggest that the appellant was unduly influenced to admit the charge. It is my considered view that the appellant should not complain if he decided to take advice, whether solicited or unsolicited, from the police or any other person, and ended up with a custodial sentence, which was contrary to his expectations. He needs to take full responsibility for his decision. And in any event I find it inappropriate for the appellant to ask this court to inquire into what may have been said between the appellant and the police or any other person prior to the hearing of the case in the lower court. Appeals must be decided on the basis of what is contained in the record. I will therefore confine myself to what is contained in the court record and determine whether the conviction is proper or not.

Further it is difficult to accept that a person can agree to plead guilty and suffer punishment when he has not committed the offence he is charged with. How can he agree to be punished with a fine or a suspended sentence when he is innocent? What is it that he would accept to be punished for? It appears to me to be out of this world for a person to agree to taint his personality with a record of a criminal conviction when he is innocent? In my view the fact that the appellant pleaded guilty with the view that the court should be lenient with him clearly shows that he acknowledges that he is guilty of the offence he was charged with. I do not believe that there was any undue influence on the appellant as contended. This ground must fail.

In the second ground of appeal the appellant states that the court erred in law in that it failed to ascertain whether he understood the nature and consequences of his plea of guilty and whether he intended to admit without qualification the truth of the charge. This ground is related to and can be dealt with together with the third ground where the appellant contends that the court erred in law in that it did not ask the appellant whether he had anything to say, add or take away from the facts narrated by the prosecution in order to ascertain whether he admitted to have committed the offence in the manner outlined in the facts.

It is difficult to appreciate that the appellant did not understand the nature and consequences of his plea of guilty. If one accepts what he has said when arguing the first ground of appeal that he was advised by the police to plead guilty so that he could be fined or given a suspended sentence then it is apparent that he knew the nature and consequences of his plea. He knew that such a plea would lead to an immediate conviction and sentence. He knew that that would mark the end of the case. He knew that no witnesses would be summoned to testify in the case. Obviously, as he has confessed, he knew that such a plea would make the court mete out a more lenient sentence than it would if he were convicted after a full trial.

Further, after the facts were narrated the appellant confirmed to the court that they were correct. Surely, if he had anything to say or add or subtract he would have done so at this point. And indeed the question would be, why did he confirm that the facts were correct if he had some additions or subtractions to make? These two grounds of appeal must likewise fail.

In the fourth ground of appeal it is contended that the court erred in law in convicting the appellant when the facts do not make out a case of theft by trick. It is argued that there is no evidence to show that the appellant employed fraudulent trick or device to obtain the cell phone from the complainant. He cannot therefore, be convicted of theft by trick contrary to s.321 of the Penal Code. I have considered the section carefully in the light of the facts, the

arguments and also case authority. In *Republic v Phiri (J.P.)*11 MLR 257, when considering this section Mtegha, J (as he then was) said at 258;

> "A trick is something done in order to deceive or outwit somebody. Similarly, a device is a plan or scheme which one designs in order to perpetrate something, either criminal or not … It would also appear to me that, for a person to be convicted of cheating, the victim invariably does not wish to part with ownership of the thing obtained."

From the facts there is no doubt in my mind that the appellant really intended to steal the complainant's cell phone. Otherwise how does one explain his selling the phone without the complainant's knowledge and or consent, and his failure and or refusal to pay for it when asked to do so? The purported borrowing was the appellant's plan or scheme designed in order to perpetrate the theft. It is also clear that the complainant did not intend to part with ownership of the phone when she 'lent' it to the appellant. In short, in my judgment the facts as outlined sustain the charge of theft by trick under s.321 of the Penal Code. This ground too must fail.

All in all having considered all the arguments on the grounds attacking the conviction, with respect, for the reasons I have given and the fact that I do not see any defect in the procedure followed by the lower court, I do not agree that the plea of guilty was defective or that the conviction can be faulted. I therefore dismiss the appeal against conviction.

With regard to the appeal against sentence it is contended that the sentence is manifestly excessive. It was argued that the offence is a misdemeanor punishable with a maximum sentence of 3 years. The appellant is a first offender, he pleaded guilty and he is young, 24 years old. These are factors in his favour as such he deserves a lesser sentence. On the other hand he breached the trust that was there between him and the complainant. Also he benefited from the proceeds of his crime. The cell phone has not been recovered. The complainant has therefore been put to permanent loss. These are aggravating factors. Considering all the factors, I would not say that the sentence of 2 years brings a sense of shock to me. I do not think it is manifestly excessive. It may lean towards the higher side but it is not manifestly excessive. Therefore, the appeal against sentence is also dismissed.

In the circumstances I do not think that there is any failure of justice as was argued in ground number 6. As I have already said the appeal fails in its entirety. And I confirm both the conviction and the sentence.

Pronounced in open court this 6th day of August 2004 at Blantyre.

J. Katsala
JUDGE