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IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CONFIRMATION CASE NO. 477 OF 2007

REPUBLIC

V

CARTON MPHANDE

[Being Criminal Case Number 6 of 2006 in the First Grade Magistrate's Court at Mzuzu]

CORAM: HON. JUSTICE L P CHIKOPA
T Kayira, Senior State Counsel for the State
T C Nyirenda, Senior Legal Aid Counsel for the Convict
I Zimba Bondo (Mr.), Official Interpreter
Msimuko (Mr.), Recording Officer

Chikopa, J.

ORDER IN CONFIRMATION

INTRODUCTION

The convict was charged with Theft by Servant contrary to section 286 of the Penal Code. He was convicted and sentenced to 6 years IHL. The matter was set down to consider the propriety of the conviction.

THE ISSUES

The main issue is of course the propriety of the conviction. In discussing the conviction we touch on other issues raised by the parties herein.

THE PARTIES' HEADS OF ARGUMENTS

The State is of the view that both the conviction and sentence herein be confirmed. In its view there is no doubt that the convict was a servant at all material times. There can also be no doubt that fertilizer was found to be underweight at his place of work. The conclusion has to be therefore that the conviction was proper. The sentence was also thought proper considering the gravity of the loss to the complainant.

The convict has the opposite view. He raised various issues in support of his position.

Firstly, he contends that the charge was bad for duplicity and lacked sufficient particularity thereby adversely affecting his right to be heard; secondly that the trial court erred in finding a *prima facie* case against him when none could be justified on the evidence; thirdly that the trial magistrate erred in not excluding hearsay evidence from its record; fourthly that the trial court failed to properly direct itself as to the elements of the

offence and standard of proof; fifthly that the trial court erred in deliberately and unjustifiably ignoring the convict's testimony and finally that the sentence was wrong in principle and manifestly excessive.

THE COURT'S CONSIDERATION OF THE ISSUES

Defective charge

According to the convict the indictment failed to include the words '**section 278 of the Penal Code**'. The convict feels that such omission misled or prejudiced the convict in the conduct of his defense and asks this court to quash the conviction entered by the trial court. He cited the case of **Ayres** [1984] AC 447 where Lord Bridge in the House of Lords said a conviction based on a defective indictment will only be upheld if;

> *'in all the circumstances it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant'.*

We discussed defective charges and the effect thereof on ensuing proceedings in the case of **Witney Douglas Selengu v The Republic** Criminal Appeal Case Number 26 of 2004 [High Court Mzuzu Registry]. We do not intend to re-discuss the issues therein for there is no shift in our opinion. Suffice it to say however that there clearly was a defect in the charge in so far as the indictment made no reference to section 278 of the Penal Code in the statement of offence. Whether such defect should result in a quashing of the conviction is a matter we discuss hereinafter.

The second defect is the allegation that the charge was bad for duplicity. If we may duplicity arises where the particulars of a charge raise more than one allegation against the accused. In the instant case the particulars alleged that the accused stole various listed items including cash. A total sum of the loss was then stated which grossed the value of the items allegedly stolen and the cash. Was the charge bad for duplicity? We think, not with the greatest respect.

Failure to Provide the Accused with Sufficient Particulars of the Case against Him

The particulars of the charge alleged that the accused stole a total of K242386.40 which was the sum total of cash and property allegedly stolen by the accused. In its judgment the trial court found the theft of the properties proven but not that of the cash and convicted him accordingly. The convict thinks the trial court thereby proceeded in error. The correct way forward was to, after it became clear that the cash theft was not proven, amend the charge so that it reflected the fact that only the properties were stolen. Proceeding as was done misled the accused as to the exact nature of the allegations against him. He thought it was K242286.40 only to find out at the close of the trial that it was in fact a lesser sum. To that extent the accused thinks the charge against him lacked sufficient particularity and should on the basis of the Serengu case and section 42(2)(2)(f)(ii) of the Constitution be quashed. He also cited the case of **R v. Kingston** 1961 - 63 ALR Mal 59 which says that an indictment which omits in its particulars the elements of an offence is not satisfactory and any plea thereon is imperfect and cannot found a conviction.

We said this in the Serengu case and also in **R v Given Visomba** Confirmation Case Number 627 of 2007 [High Court, Mzuzu Registry]. We will say it again now. Those that proceed with criminal trials in disregard of the Constitution do so at their great peril. Whereas it was before 1994 permissible to regard the CP&EC as the alpha and omega of criminal procedure and practice in Malawi the same can not be presently. Now there is the Constitution to contend with. And because the Constitution takes precedence over the CP&EC [see section 5 of the former] it is even more important that practitioners of the law take careful notice of whatever the Constitution says *vis a vis* criminal practice and procedure. Under section 42(2)(f)(ii) of the Constitution for instance an accused has, as part of the fair trial regime, the right to be ***'informed with sufficient particularity of the charge against him'*** [**our emphasis**]. This informing, in our view, must be before the commencement of trial. And when we talk of the immediately foregoing we do not want to believe that merely telling the accused that 'you are charged with Theft by Servant' is enough. The particulars must in our judgment be such as to provide the accused with sufficient information of the allegation[s] against him. That is why these days people talk of witness statements, names and full disclosures.

In the instant case the convict was informed that he had stolen various items and cash. These were specified. The trial proceeded on that basis until both parties closed their cases. The trial court then and in the privacy of its chambers during judgment writing decided to effectively amend the particulars of the offence by taking out the cash and remain only with the properties. That, we must say with the greatest respect to the trial court, ..as not to proceed correctly. Firstly and as we have said before it is part of the accused's right to a fair trial that he be informed of the charge against with sufficient particularity at the beginning of the trial. In the instant case the accused surely cannot be said in view of what the trial magistrate did, to have been informed at all of the particulars of the charge. In fact it might in our view be properly said that the accused was convicted on particulars with which he was not charged. It might be asked but what is a trial court to do when faced with a situation like the instant one where the evidence is at variance with the particulars of the charge. We think that it must at all times be remembered that it is the duty of the prosecution to prosecute an individual and for what offence. The assumption is always that the prosecution does its homework before commencing the proceedings and continues to keep on its toes during the trial so that whatever charge it

prefers against an accused accords with the available evidence. So that should it appear during the trial that the evidence is not supporting the particulars it should be up to the prosecutor, and not the trial court, to amend the charge accordingly. Were the law to be that the trial court should amend the charge where the evidence does not accord with the former we are of the view that questions would be properly asked whether such court would at all times indeed be independent and impartial as envisaged in section 42(2)(f)(i) of the Constitution. Questions might be asked, and properly too in view of our foregoing sentiments, regarding alternative verdicts. Surely they are allowed by the law.

The CP&EC indeed allows the entering of alternative verdicts. But we have doubts, serious doubts, whether the present constitutional dispensation allows them too. To begin with, and like we have said above, the alternative verdict unless brought at the commencement of the trial, is on a charge not brought by the prosecution against the accused. It is something literally sprung at him by the trial court in its attempt to do substantial justice or pay little regard to technicalities. It is clear therefore that he is never informed [it is mayhap impossible to do so] of it with sufficient particularity or at all. It can not be claimed therefore that the accused was fully heard

[or at all] in respect of such alternative charge. More importantly and as we have said in respect of amendments to the charge at the instance of the trial court it is for the prosecution to prosecute. It is for the prosecutor to know that the evidence is not going the way of the particulars and to therefore amend the charge accordingly. If he fails to follow the proceedings with the result that the evidence goes one way and the particulars the other he/she should pay the price. It should not be for the court to rescue the day for him by entering an alternative verdict or indeed by suggesting an amendment or amending the charge on his behalf. That flies in the face of a trial court's independence and/or impartiality.

We do agree with the convict therefore that the amendment by the trial court of the particulars and the [effectively] entering of a conviction on a charge other than the preferred adversely affected the accused's right to a fair trial. It was also against the Constitution. Trial courts in so far as we are concerned should limit themselves to answering the question whether or not the accused is guilty of the charge against him as specified in the charge sheet at the commencement of the trial or subsequently after an amendment at the instance of the prosecution. If it be yes so be it. If it be

no so be it as well. It is not for trial courts to be entering convictions on charges or particulars other than the ones alleged.

In passing let us say that we are aware of the Supreme Court judgment in **Chikakwiya v R** MSCA Criminal Appeal Number 28 of 2005 [unreported] where having found the appellant not guilty on the charges initially brought against him in the trial court the august court went on to find him guilty of an alternative offence. Was the accused charged with that offence? Was he heard in respect thereof? Was he made aware of such charge with sufficient particularity? We are of the most considered opinion that Their Lordships must have proceeded in disregard of section 42(2)(f)(ii) and that at an appropriate time they will find time to revisit their decision.

It might also be said that 'but surely sections 3 and 5 of the CP&EC should be able to take care of situations where the prosecution makes mistakes of the nature that faced the trial court in this case'. We will say like we did in the Selengu case that sections 3 and 5 of the CP&EC can not and should not be allowed to limit an accused's constitutionally guaranteed right to a fair trial. They can not therefore be called in to justify a departure from the right to a fair trial. Further it is not enough we think just to cite the sections and hope that an appellate or review court will agree that any

defects did not cause injustice or embarrassment to the accused's defense. It is for the prosecution to show, in our view beyond doubt, that such defects did not cause injustice or embarrassment to the accused's defense. In the instant case there was no proof that the amendment of the particulars during judgment did not cause embarrassment or injustice to the accused. The conclusion therefore has to be that there was such embarrassment and/or injustice caused.

Failure to Exclude Hearsay and Opinion Evidence

The convict contends that the conviction herein be set aside because the trial court admitted large amounts of hearsay evidence.

We doubt whether a conviction must, as a matter of course, be quashed just because there is on record hearsay evidence. The correct approach on appeal or review, we think, is for the appellate or reviewing court to exclude the hearsay evidence and still ask itself whether or not the conviction is still tenable the hearsay evidence having been expunged. If it be it will be the hearsay notwithstanding. If it is not it will not be. Whereas we do agree therefore that the trial court admitted hearsay evidence on to the record we are of the view that the convict's argument that the conviction must be

quashed merely because there was hearsay evidence on record must fail. But if it is the sufficiency of evidence he is worried about i.e. whether or not the conviction can still stand if we expunge the hearsay evidence from the record we invite him to read on.

Standard of Proof/Failure to direct no case to answer

"We think [and the convict agrees albeit by implication] that the trial court directed itself properly as to the burden and standard of proof. It is the application of the latter to the facts that the convict contends was faulty. He alleges that the evidence before the trial court was not such as to prove the case against him beyond reasonable doubt. Further that the evidence could not even have grounded a *prima facie* case against him. So that it was wrong in law for the trial court to find a *prima facie* case against him.

The issue really is that of sufficiency of evidence. Was the evidence before the trial court such as to warrant the finding of a case to answer indeed the grounding of a conviction against the accused?

The allegation against the convict is that he stole:

'two iron sheets, one bag azam bread flour, two packets of DK 8071, one bag of urea fertilizer, two bags of D compound fertilizer, one panga knife, two hurricane lamps, two lisse mesh No 1, three lisse mesh No 4, one natural mesh No 1 and cash K86447.50 all valued to K242386.40 the property of Farmers World Mzuzu Branch'. [Sic]

The first thing that one notices in that witnesses dwelt heavily on the allegation that the accused stole 25 bags of fertilizer by tampering with some bags thereof. This fertilizer was sent to the complainant's Bolero market where the alleged tampering/theft were discovered. This fertilizer, and the alleged theft thereof, should not have been the business of anyone not least the trial court, It was not alleged in the particulars and should not have been the subject of any proof. The trial court should have cast it out of its mind as we hereby do.

Secondly we notice that the alleged theft was discovered as a result of an audit. An audit conducted by PW2 and 3 in the absence of the accused. This it must be borne in mind of a shop manned by three other persons apart from the convict all of whom was directly involved in the handling of stock by way of selling. In so far as the law is concerned where theft is alleged in

ircumstances like the present one it is vital that we differentiate between heft as understood at law and a mere shortage. In our view there can only ›e a theft if there is proof that the goods did not just miss from the shop ›ut that they were actually stolen by the accused. Was such the case ıerein?

Γhere is undisputed evidence that sales were initially being done by some ady. ‹here is no evidence on record that there was a handover between that ady and the accused. There is no way of knowing therefore what property was left in the shop by the lady at the time the accused took over. There is equally no way of knowing whether there was since the lady left a shortage and therefore a theft in the shop. Because of the lack of a handover it is impossible to rule out the possibility that the lady, or the other three workers, were the authors of the shortage or theft of the items allegedly missing from the shop. All had unlimited access to the shop and therefore its stock. How do we rule out the possibility that they could have taken out certain things from the shop? After all it was in evidence that the accused was not directly involved with sales. Only with banking and documentation. It is our considered view therefore that the evidence before the trial court

while capable of proving a shortage was incapable of proving a theft beyond doubt.

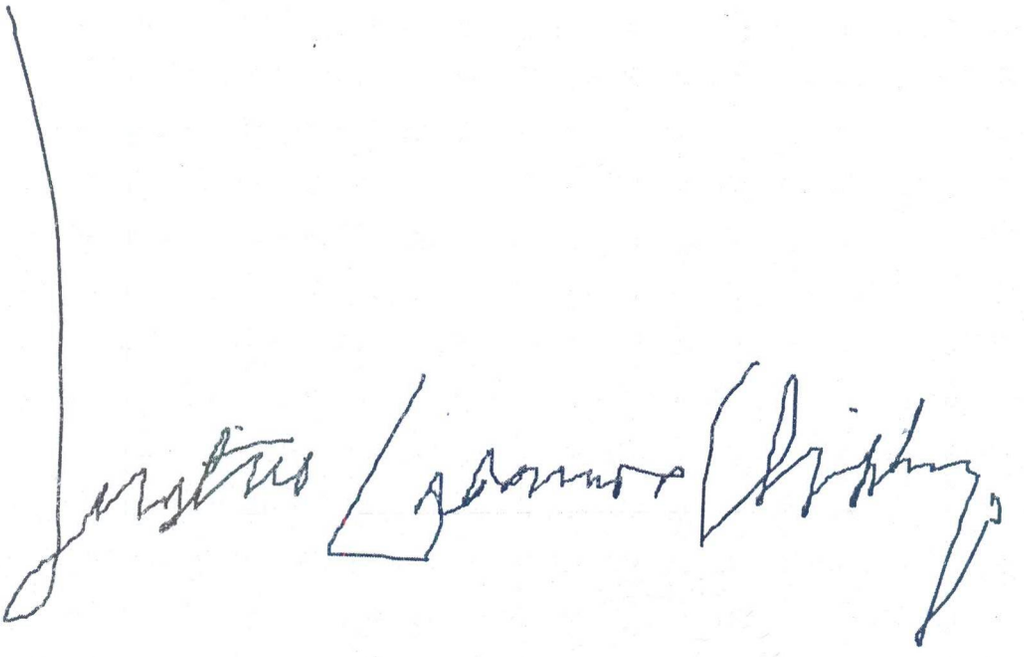
Now that we are talking of proof let us say that the trial court seems, with the greatest respect, to have gotten the application of the burden of proof wrong. It gave the impression that it expected the accused to prove something in the course of trial. There were several instances where it concluded certain things because the accused did not cross-examine a witness or never disputed an allegation. It is trite knowledge that the burden of proving a criminal allegation rests with the prosecution. Never in the course of trial does it move to the defendant. It is wrong therefore to expect the accused to prove his innocence. Similarly it should be understood that in the present constitutional dispensation the accused is not at any stage of the trial expected to say anything. And the fact that an accused says nothing in response to anything or about anything does not mean and must not be construed to mean that he admits his guilt or any allegation against him. To the extent therefore that the trial court proceeded in such fashion we should say that it proceeded in error.

quash the conviction entered herein against the convict and set aside the sentence. Such is our order and the convict will be released from custody unless there be any other reason for not so doing.

CONCLUSION

In so far as the breaches of constitutional guarantees of fair trial are concerned we would have proceeded as we did in Serengu's case. We would have put the accused in the same position he would have been if the full gamut of his constitutional rights had been accorded to him. We would most likely have ordered a retrial. But that can not be the case herein. More needs to be ordered. Quite apart from all else there was insufficient evidence against the accused to ground a conviction we daresay even a finding of a case to answer against the accused. The remedy therefore is to quash the conviction entered herein against the convict and set aside the sentence. Such is our order and the convict will be released from custody unless there be any other reason for not so doing.

this June 2, 2008, 2008 at Mzuzu.



L P Chikopa

Judge