IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation case number 1468 of 2001

REPUBLIC

Versus

MORGEN LAMUSESI

In the Second Grade Magistrate Court sitting at Thyolo Criminal Case number 339 of 2000

CORAM: D.F. MWAUNGULU (JUDGE)

Chimwaza, Deputy Chief State Advocate, for the State

Defendant, present, unrepresented

Kamanga, the official court interpreter

Mwaungulu, J

JUDGEMENT

The reviewing judge doubts the conviction in this matter. The Thyolo Second Grade Magistrate Court convicted the defendant Morgen Lamuseni for burglary and theft. Burglary and theft are offences under sections 309 and 278, respectively, of the Penal Code. The lower court sentenced the defendant to four and one and a half years' imprisonment, again respectively. The reviewing judge's comments prevaricate. The reviewing judge supports the conviction because, in evidence in defence, the defendant accepted being in the bush hunting mice. The state does not support the conviction. I am like minded because at the close of the prosecution's case, there was no prima facie case necessitating the defendant to enter into his defence. Even accepting there was such a case, namely, a prima facie case, the circumstantial evidence was not as to lead to leave proof beyond reasonable doubt. Moreover, the lower court's approach to the defendant's explanation should not have been what it apparently was. There are, therefore, three reasons for quashing the conviction.

First, there was, at the close of the prosecution case, no case to answer against the defendant. In subordinate courts, under section 254 of the Criminal Procedure and Evidence Code, the court, must at the close of the prosecution's case decide whether there is such a case requiring the defendant to enter into his defence. This Court stresses this duty in R v Raphael (1923-61) 1 ALR (Mal) 377; R v Hermes (1923-61) 1 ALR (Mal) 985; and Tarmahomed v R (No.2) (1964-66) 3 ALR (Mal) 457. If there is no case to answer, the court must acquit the defendant: R v Damson (1923-61) 1 ALR (Mal) 526; Harold v R (1923-61) 1 ALR (Mal) 538; and Zinyose v Republic (1966-68) ALR (Mal) 626. The statutory requirement replaces the Common law that the defendant elects whether or not to submit that there is no case to answer. Of course at this stage the prosecution need not raise a case beyond reasonable doubt; it suffices if, on the evidence, in the absence of an explanation from the defendant, a reasonable tribunal would convict: Republic v Chidzero [1975-77] MLR 94. There is no prima facie case where the evidence fails to establish an element of an offence or the evidence is so unreliable that a reasonable tribunal would not convict on it: Director of Public Prosecutions v Chimphonda [1973-74] 7 MLR 94. The evidence in the lower court was such that at the close of the prosecution's case a reasonable tribunal would not convict.

The prosecution proceeded on that certain prosecution witnesses saw the defendant in the morning at some place where, it was alleged, these prosecution witnesses found property stolen during the housebreaking. If at the close of the prosecution case the prosecution's evidence established all this, then the court's task was, as we see later, to consider the defendant's explanation. The prosecution's evidence at the close of its case far from established that the prosecution witnesses found the property where the defendant was earlier. Of course, one witness, who saw the defendant in the morning, testified to that effect. It is clear however that she was not among the search party that found the stolen items in the bush. She could not therefore testify to that the search party found the property where they earlier saw the defendant.

The lower court proceeded on her assertion that others who searched the place found the property where they saw the defendant earlier in the morning. Cardinal to the circumstantial evidence the prosecution relied on was proof the search party found the property where the defendant was earlier. The prosecution called none of those who in the search party to tell the court exactly where they found the property. The evidence of the witness the prosecution called is inadmissible on this point. She was not among those who found the property. That statement was inadmissible, as hearsay, if, as the lower court thought, the intent was to show that the property was found where the witness earlier saw the defendant. The hearsay is not saved by any of the exceptions to the hearsay rule. The evidence was wrongly admitted.

The question is whether the conviction is undermined by this wrongful admission of evidence. In Gulumba v Republic Misc.Cr.Appl. No. 51 of 2003, unreported, this Court said:

"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."

The question is whether at the end of the prosecution case, a reasonable tribunal would have convicted if this objectionable evidence was excluded. In my judgment, the tribunal would not have convicted if this evidence was excluded. Without it, all there is is that a prosecution witness saw the defendant at a place we are not sure was the place where the property was found. That doubt must be resolved in the defendant's favour.

Secondly, in my judgment, even accepting the defendant was seen at the place, there is no doubt, reading the record as a whole, that many passed where the property was allegedly found. In all, the evidence makes it probable the defendant stashed the property stolen during the burglary. Proof on a preponderance of probabilities is insufficient for the prosecution to discharge the otherwise onerous duty cast on it by law to prove the defendant's guilt beyond reasonable doubt. In Samanyika v Republic Cr.App. No. 33 of 2002, unreported, this Court said:

"Concerning circumstantial evidence, the burden of proof operates at two levels important for proof of guilt. First, the prosecution must establish beyond reasonable doubt the facts for the court's inference of guilt. Consequently, the prosecution fails to discharge the burden always on it to prove guilt beyond reasonable doubt by not proving beyond reasonable doubt facts it wants the court to infer guilt. On the other hand, although established to requisite standard, proven facts may be insufficient to establish guilt beyond reasonable doubt. The Supreme Court of Appeal in Jailosi v Republic (1966-68) 4 ALR (Mal) 494 stated that each link in the chain of evidence must be unassailable and the cumulative effect must be inconsistent with any rational conclusion other than guilt. In Nyamizinga v Republic (1971-72) 6 ALR (Mal) 258 this Court held that the prosecution must establish beyond reasonable doubt that guilt is the only inference. In Director of Public Prosecutions v Kilbourne [1973] AC 729 at 758, Lord Simon said circumstantial evidence 'works by cumulatively, in geometric progression, eliminating other possibilities. There must, in the words of Pollock, CB., in Exall (1866) 4 F & F 922:

"… be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit."

The circumstantial evidence the prosecution relies only raises a possibility. It is insufficient to discharge the duty of the prosecution to prove the defendants guilt beyond reasonable doubt.

Finally, even accepting that the prosecution witnesses found the defendant where the property stolen was stashed, the defendant's explanation could reasonably true. The defendant professed innocence all through. The lower court approached the matter from that it could not believe the defendant. Even if the court disbelieved the defendant, it was still for the prosecution to prove the case against the defendant beyond reasonable doubt. The state could still fail to discharge this duty even if the court rejects the defendant's story. Where, however, the defendant gives an explanation, the court must consider whether the explanation is reasonably true with the result that if it is the state will not have proved the case against the defendant beyond reasonable doubt. On this aspect I have found what Weston, J., said in Gondwe v Republic (1971-72) 6 ALR (Mal) 33 very helpful:

". . . the appellant gave an explanation, for what it was worth, and let me say at once that, like the resident magistrate, I do not think it was worth much. Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for the accused person to prove his innocence. This has been said so often as to be in danger of losing its urgency. As in every case where the accused person gives an explanation, in this case its application required that the court's approach to the appellant's story should not have been what it evidently was: 'Is the accused's story true or false?', resulting, if the answer was 'False', in a finding that the appellant must necessarily have had a fraudulent intent. The proper question for the lcourt to have asked itself was – 'Is the accused's story true or might it reasonably be true?' – with the result that that if the answer were that the appellant might reasonably have been telling the truth, then the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law"

The lower court would not have convicted the defendant if it had approached the matter as suggested. I therefore quash the lower court's conviction and sentence.

Made in open Court this 25th Day of September 2003

D F Mwaungulu

JUDGE