IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 4 OF 2000

CHANCY OSMAN MTALIKA

VERSUS

THE REPUBLIC

From the First Grade Magistrate's Court at Mzuzu, Criminal Case No. 265 of 1998.

CORAM: Chipeta, J.

Kandako Mhone, of Counsel for the Appellant

Manyungwa, of Counsel for the State

Ngwata, Official Interpreter

JUDGEMENT

On 16th February, 1999 the Chief Resident Magistrate Sitting at Mzuzu convicted Chancy Osman Mtalika, the Appellant in this case, of the offence of Armed Robbery under Section 301 of the Penal Code and sentenced him to seven years IHL with effect from the date of his arrest. Initially the Appellant's appeal was against both conviction and sentence. On the day of hearing, however, amended grounds of appeal were filed. These were completely dedicated to the conviction. The arguments at the hearing were equally specifically concerned with the conviction. I take it therefore that the Appellant opted to and actually abandoned his appeal against sentence.

There are in all three grounds available for consideration in this case. The first is that there was insufficient evidence before the lower court to warrant a conviction. The second ground is that the lower court misdirected itself on the evidence of alibi, and the last ground of appeal is to the effect that the lower court misdirected itself on the burden of proof.

A careful reading of the record of the lower court seems to bear the learned Magistrate out on the view he took that essentially there was only one issue to resolve in order to put this matter to rest. It emerges quite vividly, despite slight variations in account by the

victims of the incident, that on 15th December, 1998 a car registered number MG 324P driven by PW IV John Honde and carrying, inter alia, PWI Portia Chiyombo, PWII Lyton Saini, and PWIII Tiwonge Msukwa was ambushed by four or five masked or otherwise disguised men. The attackers first tried to force the car to come to a halt by blocking its passage on the road just after a bend with a log. When the driver unexpectedly diverted the car to the right side of the road and continued to drive away, the attackers were complled to give chase and to fire at it.

In the course of this escape PWIII Tiwonge Msukwa was heard to cry out why Mtalika was trying to kill them. No other occupant of the car verified if indeed the person named was one of the attackers The joy of escape at reasonable speed was however short-lived as the car soon got stuck in a ditch and the driver had to get out of it in order to engage the four wheel drive facility. In the course of doing so a second shot was fired by the robbers and the driver got hit and injured. Thus the attempted escape by car abruptly there and then came to an end. At this stage every occupant of the car had to take to his/her heels to save dear life as the attackers were fast gaining ground on them. PWI who is an Accounts Clerk at Choma Livestock Center ended up abandoning in the car a briefcase she had carried containing K108,559.96 meant for salaries and wages of staff at her workplace. The robbers then successfully made away with all the money. All this took place during day light in the mid-afternoon of the material day.

In my view the evidence that a robbery took place and that it involved the use of firearms was quite overwhelming as the lower court's record clearly demonstrates. Indeed the sole issue for resolution, as the learned Chief Resident Magistrate correctly put it, was whether or not Mtalika, the Appellant, was truthfully linked to it. The crucial witness on this point was no doubt indeed Tiwonge Msukwa who claimed she had identified the Appellant amongst the robbers as the lower Court well observed. It logically followed that if the Court found the evidence of this witness convincing the meaning necessarily was that, regardless of who the other members of the group were, the Appellant was participes criminis in the spirit of Section 21 of the Penal Code and accordingly fully guilty of the offence as a principal offender and thus deserving of a conviction. It also equally followed that if the Court entertained reasonable doubts about the witness identification of the Appellant in the group of robbers, whether by reason of the Appellant's plea of alibi or otherwise, then the accused would be taken as not having been proven guilty, at which point he would rightly deserve to be acquitted.

I should here point out that the position taken by the State in this matter was one of not opposing the Appellant's appeal. In fact the State indicated that it did not support the conviction entered in this case. It conceded the points raised by the Appellant in the appeal wholesale and felt that there were indeed doubts lingering in the case that needed to have been resolved in favour of the Appellant and to lead to his acquittal at the end of the trial. The State also held the view that the defense if alibi raised by the Appellant in the court had not been disproved by the prosecution and that accordingly the case had not been proved to the requisite standard against him.

I will say right away that having myself read the record of the Court below in

considerable detail, the position the State took in the case struck me as being quite odd. I got the impression even as this stand unfolded that either the State did not read the lower Court's record or only did so superficially. I thus feel bound in the circumstances not just to accept the State's concessions in this appeal on face value as I decide the case. I will therefore, without aid of this stand,independently, as indeed I am duty-bound to do, evaluate the grounds and arguments advanced herein on behalf of the Appellant before finally allowing or dismissing this appeal.

Now although, as I indicated earlier, there are three grounds proferred in this appeal, the way I see it the grounds are quite intervooven. It is thus my intention to deal with them together in omnibus fashion. Much has of course been said on each ground separately on behalf of the Appellant, but in a nutshell, what the Appellant is really saying is that he is a victim of mistaken identity as he claims that PWIII was not sufficiently acquainted with him to identify him as she claims to have done, that due to this his plea of alibi ie. that at the time if the robbery he was at Zolozolo and not at the scene of crime thus stands unimpeached, and that as a result it cannot therefore be taken that it was proved beyond reasonable doubt before the lower court that indeed he was one of the group of persons who committed the robbery complained of herein.

In the argument of the appeal, learned Counsel for the Appellant placed great emphasis on the point that it is only Tiwonge Msukwa who does not work with the Appellant who claims to have identified the Appellant on the occasion of the robbery and not the Appellant's three workmates who were in the same car with her at that time. It was also forcefully argued that Tiwonge Msukwa could not be more familiar with the Appellant's looks than his own workmates for her to beat them on the Appellant's identification on the material day. To fortify this argument great reliance was placed on the point that Tiwonge stayed at her parent's place some 500 meters away from the Appellant's house. The fact that she at times also stayed with PW1 her aunt in a house next door to the Appellant's was very much down-played.

Further, while it was acknowledged that Tiwonge said she was only able to identify the Appellant because in the chase on the car at some point the hat he wore which partly covered his face fell off and that she thus secured the chance to identify him before he put it on again, it was querried on behalf of the Appellant why the other occupants of the car failed to turn and look behind, as PWIII did, to observe the man whose hat fell down before he could put it on again.

It was also argued on behalf of the Appellant that failure to precede Tiwonge's identification of the Appellant in Court with conduct of an identification parade rendered her evidence on this aspect suspect. Both learned Counsel in the matter were on this point united in the argument that case authorities including Chapingasa vs Rep. (1978-80) 9 MLR 414 and Macholowe and others vs Rep Criminal App. No. 28 of 1999 brand this type of dock identification suspect and that they thus discourage it.

On point of the alibi consistently raised by the Appellant from arrest to trial, it was contended that once such defence had been raised it behoved the prosecution to disprove

it and that they did not do so. The lower court was in fact accused of having on this point shifted the onus to the Appellant to prove his alibi, which is not supposed to be the case, and that in so doing it misdirected itself on the point. The case of Mcarthy vs R(1980) 71 Cr. App. R.142 was cited in support of the contention that if on confrontation about a crime a suspect immediately indicates that he was elsewhere rather than at the scene then that is something worth taking into account. Besides it was argued that on the authority of what Weston, J said in Gondwe vs Rep (1971-72)6 ALR Mal. 33 about the manner in which a Court ought to view defence testimony, it was wrong for the lower court in its judgement to pose the question whether or not to believe Tiwonge Msukwa rather than just evaluating the appellant's story on the alibi for what it was worth.

As I have earlier already made it plain I have read the record of the lower court including the judgement of the court in this matter quite thoroughly. On the issue which the lower court correctly isolated as the one on which the outcome of the case was pivoted, I find the Magistrate's analysis of the material evidence that was before him quite detailed and impressive. I equally observe that in taking the precautions he is required by the law to take where evidence of identification is so vital in the decision of a case, he so closely and almost religiously followed the lucid guidelines Topping, AgJ laid down in the Chapingasa case after a thorough review of preceding English cases on the point from as far back as the case of R -vs - Chapman (1911) 7 Cr. APP. R. 53.

It is clear to me from the lower court's judgement that is was satisfied, and justifiably so, on the evidence before it that prior to the robbery, Tiwonge Msukwa had had ample occasion to see and to know the Appellant. There was evidence which the lower court accepted as true that in the three to four years preceding this robbery Tiwonge had either lived with her aunt, PW1, next door to the Appellant or with her parents at a house only some 500 meters away from that of the Appellant. Definitely I think it is pedantic in this scenario to fervently argue that despite the opportunity the witness enjoyed of knowing the Appellant by living within his vicinity she should be disqualified from getting to know him just because she was not his workmate. What is clear is that if Tiwonge had been seeing the Appellant from the near places covered in evidence and for the length of time also covered in evidence, then the Appellant cannot pose as a stranger to her and was in fact no stranger to her. As for the failure of the workmates to identify the Appellant or anyone else among the robbers, credit for that simply goes to their ability to manage a successful disguise in that had it not been for the hat falling off the head of one of them even Tiwonge would have completely failed to identify any of them. I here equally see pedantry in argument to the effect that since the other car occupants did not see one of the robbers exposed on the fall of his hat then Tiwonge should be lying in her claim that the person she then saw was the Appellant.

In my recollection it has been pronounced in cases too numerous to mention including in the case of Gondwe cited herein on behalf of the Appellant, that a trial Court enjoys the benefit not normally available to an appellate court of hearing and observing the witnesses that come before it and assessing their demeanour. Where from this position of

great advantage the lower court makes a decision of who and what to believe, an appellate court ought to be slow to interfere with such finding unless it is so obvious that the lower court went astray in its findings. In this case it strikes me that the learned Magistrate seized of the case was as cautions as he could legally be in assessing the credibility of PW111 vis-a-vis her identification of the Appellant based on her prior knowledge of the man, her opportunity to examine the exposed man when per chance a hat fell off one of the robbers, and the fact that the robbery took place in broad day light. I am amply satisfied in consequence that the learned Magistrate's assessment of the evidence of this witness was impeccable and I do not see myself interfering with the findings the lower court made following this analysis.

I should here also take the opportunity to point out that in my understanding of the law both learned Counsel in this case were quite mistaken in arguing as if the conduct of an identification parade is a mandatory preamble to every dock identification. The correct position is that an identification parade will be essential where the witness purporting to identify the person in the dock is diong so only from the experience of having seen him/her for the first and last time on the day of the incident under complaint. The facts in the Chapingasa case itself very clearly demostrate why such a parade is important in such situations. As happened in that case the complainant who had just arrived in Lilongwe from Mzimba was robbed by complete strangers. To test his recollection of his assailants before being called upon to testify on his ordeal the best test is to see whether he is able to select the correct people in a group paraded before him. Where, however, as in the case of Tiwonge and the Appellant, the witness in her life already personally knows the suspect, it becomes hard to comprehend how an identification parade can best test such person's recollection of her assailant.

To my mind all argument about the identification by PW111 being questionable in the absence of a prior identification parade was quite unhelpful it being that PW111 and the Appellant had lived within the vicinity of each other and at times even next door to each other for a number of years.

On the defense of alibi the premise on which the allegation is founded that the lower court shifted the burden of proof to the Appellant eludes me. I do not see it anywhere in the judgement that the lower court indicated that the Appellant had to prove his alibi. Definitely, however, in the situation presented by evidence in the case the lower court had one of two options to take after digesting the evidence . It could believe, as it ended up doing, that the robber whose hat fell off was the Appellant. It however also could doubt that identification. Now it would amount to stretching matters a bit too far to claim or allege that since the lower court believed that Tiwonge really saw the Appellant at the scene of the robbery then it means that the Appellant was given an undeserved burden to prove his alibi.

Equally bewildering to me was argument which was conceded by the State itself that the prosecution had failed to disprove the alibi raised by the Appellant. The record shows that the State managed to offer to the lower court evidence that convinced it that although all others were not known one man who was present and participating in the robbery and who suffered the misfortune of his hat falling off and being identified in the process was

the Appellant. I wonder what better evidence the State needed to adduce beyond this to expose the alibi claimed as false.

Definitely in the absence of possibility of the Appellant being at more that one place at the same time the fact that the lower court was convinced by prosecution evidence that he was at the scene and took part in the crime necessarily meant that he could not have been at Zolozolo at that very moment. I fail to appreciate the foundation for the assertion that the alibi plea was not disproved in this case.

It follows from the forgoing that in my judgement the Appellant's appeal on all the grounds he raised lacks merit. As I have said before the evidence concerning this robbery was overwhelming from what I see in the lower court's record. The acceptance, which I endorse, of Tiwonge Msukwa's evidence of identification of the Appellant at the scene of the crime and as a participant not only amounted to formidable disproof of an alibi so persistently stuck to, but was a confirmation beyond reasonable doubt of Appellant's guilt of the offence charged. I accordingly see no basis for faulting of the Appellant's conviction for Armed Robbery Contrary to Section 301 of the Penal Code as entered in the court below. I accordingly dismiss the appeal the Appellant lodged against convition herein.

Turning to sentence which the Appellant did not argue against I equally see no reason for interfering with it. For an offence carried out in the brutal manner this one was carried out I myself would have been inclined to pass a higher sentence than the lower court did. In view of the age of the Appellant and the fact that this was his first offence I will not ask him to show cause why the sentence should not be enhanced. I thus confirm the 84 months IHL the lower court imposed with effect from the date of arrest. I further direct the court below that the K6,000.00 recovered from the house of Appellant on the night following the robbery, which it was holding pending the outcome of this appeal should be returned to Choma Livestock Center in Mzuzu.

Pronounced in open court this 8th day of December 2000 at Blantyre.

A.C. Chipeta

JUDGE.