



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 31 OF 2002

BENSON JOHN AND GEDION SANKIYONI

VERSUS

THE STATE

From the First Grade Magistrate's Court Sitting at Limbe
Being Criminal Cause No. 372 of 2002

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Miss S. Nayeja, of Counsel for the State
Appellants Present and Unrepresented
Mrs P. Mangison, Official Interpreter/Recording Officer

Date of hearing: 10th July 2003

Date of judgment: 10th July 2003

Kapanda, J

REASONS FOR JUDGMENT

The two appellants, Benson John and Gedion Sankiyoni, were convicted of the offence of armed robbery. They appealed against both their conviction and the sentence imposed on them by the court below. This court allowed their appeal on 10th July 2003. We reserved our written judgment.

We promised to give our reasons for accepting the appeal in a written decision. We are now handing down this judgment so that the reasons for allowing the appeal should be given.

As mentioned earlier, in the court below the State had preferred a count of armed robbery against the appellants. They pleaded not guilty to the allegation made against them. Following their pleas of not guilty the State called witnesses to prove the case against them.

At the closure of the prosecution's case the court found that the appellants had each one of them a case of armed robbery to answer. The appellants, chose to exercise their constitutional right to testify in their defence and called witnesses to testify on their behalf.

At the end of the trial the court found both of them guilty of the offence of armed robbery and convicted them accordingly. They were then sentenced to a custodial term of imprisonment of six (6) years.

The appeal

As pointed out earlier, the appellants are dissatisfied with the decision of the court below. Hence, they appealed against both their conviction and sentence. To this end they filed with the court some grounds of appeal. We do not intend to set out in full the said grounds of appeal but only a sketch of same.

In a nutshell, the appellants criticise the court in the way it handled the evidence that was offered by the State. It is their argument that there was no sufficient evidence on which they could have been convicted.

The petitioners are also of the view that the sentences meted out on them are manifestly excessive.

Issues arising in this appeal

From the grounds of appeal set out in their petitions of appeal the following are the issues that must be decided by this court:-

- (a) Whether or not there was sufficient evidence to support the convictions entered against the appellants;
- (b) Whether or not the sentences that were imposed on the appellants are manifestly excessive in the circumstances of this case and those of the appellants.

The issues stated above can only be meaningfully answered by first revisiting the facts of the case as established by the evidence on record.

Facts of the case

It is now necessary that we set out the facts of this case.

The said facts, as gathered from the testimony of the witnesses, are as follows:-

The complainant, Fexter Namangale, stays at Likangala Estate in the district of Thyolo. The complainant's house was broken into during the night of 30th March 2002 by a group of people. The complainant told the court that one of those who came to rob him at his house had a rifle. He alleged that the rifle was actually used at the time he was robbed at his house. The complainant further claimed that he identified the two appellants as being part of the group that committed the robbery at his house. He further told the court below that he recognised the first appellant through a light from a torch the people were using. As regards the second appellant the complainant said he recognised him outside the house. The complainant did not say what lighting was used to identify the second appellant.

As against the statements of the complainant there was the testimony of the defence witnesses. These were security guards at the estate where both the complainant and the second appellant were working. The essence of the testimony of these witnesses was that the complainant told the police that he could not identify any of the people who robbed him. Further, one of the security guards told the court that the second appellant was at his house when the incident happened. This latter piece of evidence was not discredited. Indeed, the State failed to disprove the defence of an alibi that the second appellant raised.

Consideration of the grounds of appeal

Having given the summary of the facts of the case we will now, without delay, proceed to consider the questions for determination in this appeal.

Identification evidence

With the facts of this case in mind, it would be safe to conclude that the prosecution's case rested on identification evidence. The indictment against the appellants had to stand or fall on the correctness of identification of the appellants. We find that the trial court convicted the appellants on identification evidence that does not meet the principles set out in **Regina vs. Turnbull** [1977]QBD 224. Why do we say so?

There was no proper visual identification of the appellants at the house of the complainant. The court was not given evidence as regard the following important elements: for how long the complainant observed the appellants, at what distance, whether there was any impediment on the part of the complainant when he allegedly identified the two appellants. Moreover, we have searched the record and found out that the magistrate did not direct himself to the warning in **Turnbull's** case. Indeed, the court below did not warn itself of the danger of convicting on identification evidence. Furthermore, the trial court does not appear to examine the said identification

evidence. In view of the above shortcomings the conviction of the appellants is suspect.

Further, there was no evidence offered in respect of the source of the light that was used to identify the second appellant. Yet the robbery at the house occurred during the night.

Alibi of the second appellant

We fail to comprehend how the second appellant could have been at the house of the complainant during the night the incident occurred at the house of the complainant. We say this because, as stated earlier, there is evidence of the defence of an alibi on the part of the second appellant. This defence was not disproved by the state.

Conclusion

It is because of the reasons given above that the appeal against conviction succeeded. The prosecution's case centred on identification evidence. Unfortunately, the identification evidence was poor. The court did not help matters by not warning itself of the danger of convicting on such evidence. Naturally, the appeal against sentence succeeded as well.

Made in open Court this 10th day of July 2003 at the

Principal Registry, Blantyre.

F.E. Kapanda

JUDGE