

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 81 OF 2006

(Being Criminal Case No. 84 of 2006 before First Grade Magistrate Court, Lilongwe)

BETWEEN

NICE JOHN----- APPELLANT
AND
THE REPUBLIC----- RESPONDENT

CORAM : **SINGINI, J.**
 :
 : Mr. Kumange, of counsel for the Appellant
 : Mr. Kachule, Senior State Advocate, of counsel for
 : the Respondent
 : Kaferanthu, Court Official/ Interpreter

JUDGMENT

The appellant was convicted on 28th June, 2006, after trial by the First Grade Magistrate Court sitting at Lilongwe, of the offences of burglary and theft and was sentenced to three years imprisonment for the offence of burglary and to twelve months imprisonment for the offence of theft. He had pleaded not guilty to both offences.

The case of the State was that during the night of 26th / 27th April, 2006, the appellant broke into the house of the complainant, Rizwana Khani Seudi, at Chitipi just outside the City of Lilongwe on the Lilongwe/Mchinji Road. The complainant, a business lady, resides in the house and was in the house on that night. She heard noises and got up and saw a person outside the house but inside the fence of the house carrying her TV set, taking it towards the brick fence. She shouted for help to stop the thief and at the same time she run after the person and managed to touch the

person by his trousers as he was jumping over the fence. She was able to see the person with the lights of the security lights of the house and also saw that he had first pushed the TV set over the fence before he jumped over the fence. She also saw that the person was wearing short trousers and a black T-shirt. From her shouts for help, a young male person in the house, Hastings Anthony Chipande, got up and gave chase to the thief and pursued the thief outside the house to a point near a graveyard where the thief disappeared from his sight.

Two other young men had joined Chipande in the chase for the thief but only after the person Chipande was chasing had disappeared from sight. Chipande and his colleagues decided to hide nearby the graveyard to watch if someone would emerge from the graveyard. By that time Chipande, as with the complainant, had identified the thief to have been wearing short trousers and a black T-shirt.

In their evidence in court, the complainant and Chipande gave the time when the incidence occurred as from around four o'clock in the morning on 27th June. Chipande's evidence was that later when day light was breaking he saw someone coming face to face towards him and his colleagues at the graveyard whom he identified to his colleagues as the one he was chasing, except that the T-shirt this person had on his body was of "greenish" colour. The three of them then apprehended this person and brought him to the house of the complainant.

A third witness, one Mussa Jukwa of the same area, gave evidence against the appellant and stated that he had been woken up by the calls by his neighbour, the complainant, for help to stop the thief. He joined the group of Chipande in waiting around the area of the graveyard for the thief to emerge from hiding. He too joined in asking the appellant, when they saw the appellant coming towards them, questions that led him to believe the appellant was the thief in question.

That is as much as the evidence presented by the State went in identifying the

appellant as the thief that night. His identification was on the evidence of the complainant and Chipande who both claimed to have seen the thief that night close enough to correctly identify him as being the one and same person as the appellant. None of the three witnesses that testified for the State had seen or known the appellant before the incident. The only other witness for the prosecution was the police officer who handled the matter and who testified about the duties he performed in connection with the complaint and with the appellant as the suspect.

For his part, the appellant stated in his testimony in the lower court that it was around six o'clock in the morning of 27th June that he was coming from some place in the area when he saw Chipande and his colleagues at the place near the graveyard who then followed him as he was walking past them and asked him where he was coming from and complained about the criminal behaviour of some boys in the area as they were walking along with him and then accused him of being the one who had committed the crime. He was then apprehended by the group and later found himself taken to the police station. The complainant had reported the matter to the police by the time the appellant was brought to the police. The appellant gave a caution statement in which he was recorded to have admitted the charges, but in his evidence in the lower court he testified that he had been severely assaulted during police interrogation and decided to admit the charges as a way to end his ordeal.

The complainant also reported to the police a number of other items of electronic equipment, apart from the TV set, that were stolen from her house that night, including a radio set. The TV set and the radio set were recovered that night. They were found abandoned outside the fence of the house in the case of the TV set and by the way side in the case of the radio set.

The appellant appeals to this Court against both conviction and sentence on both counts. The main ground of appeal against conviction is that the trial court erred in finding that the appellant was correctly identified as the person who committed the

offences he was charged with. Counsel for the appellant has argued that the only evidence of identification of the appellant is that of a single person namely, Chipande, claiming to have chased after the thief in the night when it was dark and this is uncorroborated by other independent evidence.

Quite clearly in my judgment I find the evidence in this case rather shaky regarding the identification of the appellant as the person who that night broke into the complainant's house and stole the items as reported to the police. There was a long gap of some two hours between the time the chase ended, still during darkness, and the time the appellant was sighted by his accusers at around six o'clock when daylight was breaking. There is some discrepancy regarding the colour of the T-shirt the person that was being chased was wearing said to be black and the "greenish" T-shirt the appellant was seen with. None of the reported stolen items were found in the possession or on the body of the appellant or around the exact place the person that was being chased was said to be hiding.

The evidence of the complainant is that the thief must have gained entry into the house through one of the windows by removing some four glass louvers on that window. However, there is no evidence of finger prints taken from any of the removed glasses or any part of the window, or indeed from the recovered items of the TV set and the radio set, to connect the appellant to the scene.

The police officer also gave evidence in the lower court that the police failed to confirm the appellant's proper place of abode from the particulars he gave them which he changed a few times. However, I hold that finding or failing to find the appellant's proper place of abode would not assist to confirm his identification as the one who broke into the complainant's house that night. The fact of his place of abode had no connection to him being the thief that night.

I also refuse to give weight to the testimony of the other witnesses than Chipande in that they, too, were told by Chipande that the appellant was the person that Chipande had given chase from the house. Their evidence has therefore no additional or independent value to corroborate Chipande's evidence as to the

identification of the appellant.

I hold that in point of law identification of a person seen during night time to ground a conviction against such person requires sufficient corroboration. If, as was held in the case of *Hawkins v. Dowling (1860) 10 L CLR 236*, a person's identification must not be a matter of conjecture or guessing, then in my judgment the standard of corroborative evidence that is required must be such that it leads to the clear and definite identification of the accused. The present case is, to my mind, a classic case why the law requires corroboration of evidence of identification of someone seen only during the night, particularly if such person is a total stranger to persons testifying as to his identification as was the case here. I do not find that there was sufficient corroborative evidence in this case to support the identification of the appellant as definitely the person that broke into the house of the complainant and I consider his conviction to have been unsafe, and I allow his appeal against conviction.

I accordingly quash the convictions and sentences against the appellant and I acquit the appellant on both counts.

PRONOUNCED in open court at Lilongwe District Registry this 1st day of November, 2007.

E.M. SINGINI, SC

JUDGE