IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 100 OF 2008

BETWEEN

FELIX CHISAKASA …… APPLICANT

AND

THE REPUBLIC …….…… RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

: Thabo Nyirenda, Counsel for the Appellant
: Mninde, Counsel for the Respondent
: Mrs. Namagonya, Court Reporter
: Mr. P.H. Njirayafa, Court Interpreter

JUDGMENT

This is an appeal against the decision of the Senior Resident Magistrate sitting at Mchinji. The Appellant first appeared before the Senior Resident Magistrate aforesaid on a charge of robbery, contrary to section 301 of the Penal Code. The particulars of the offence were that the appellant and another on or about the 15th day of April 2007 at Kondowole Village in the District of Mchinji robbed Fidelius Zulu of K3,500,000.00 and at or immediately before or immediately after the time of stealing it used or threatened to use actual violence to Fidelius Zulu in order to obtain or retain the thing stolen or prevent or overcome resistance to its

being stolen or retained. The appellant pleaded not guilty to the charge. He was nonetheless found guilty of the charge and was convicted after full trial. He was sentenced to 7 years imprisonment with hard labour. He appeals against both conviction and sentence. I have not been able to see a separate document setting out the grounds of appeal. I have however looked at a 54 page typed document titled *"CASE FOR THE Appellant"* Filed by counsel for the appellant. Part 2 of that document sets out summary of the appellant's case. Paragraph 2.1 lists sixteen reasons for appeal against conviction and paragraph 2.2 states that the appellant appeals against sentence on the grounds that it was wrong in principle and manifestly excessive. The grounds for appeal against conviction may appear many but really most of them are a repeat of some grounds. For example ground (a) is that the learned trial magistrate erred in law in failing to exclude the identification evidence for unreliability, while ground (1) is that the trial magistrate erred in holding that the identification procedure was not flawed. These two could be merged with a third (n) which is that the trial magistrate erred in law in disregarding the evidence of *alibi* by the appellant, for all these grounds go to the identification of the appellant in connection with the commission of the crime. In short the grounds of appeal can be summarized as follows:

1. The trial magistrate erred in law in relying on insufficient evidence of identification of the appellant and in allowing evidence of an improperly conducted identification parade.

2. The trial magistrate erred in law in admitting hearsay evidence and evidence of accomplices, including confession statements of Dickson Banda and PW2.

3. The trial magistrate erred in law in finding a case to answer against the appellant which finding was against the weight of the evidence.

4. The trial magistrate erred in conducting the trial in unfair and impartial manner.

5. That the conviction was against the weight of the evidence.

6. That the sentence is wrong in principle and manifestly excessive.

The case for the prosecution was that complainant Fidelius Zulu was in bicycle hire business. On 17th April 2007 he and his colleague Fidelis Phiri were approached by a Mr. Mwale who did farming business. Mr. Mwale gave the complainant K3,500,000.00 and Fidelis Phiri K4,000.000.00 to take to a business colleague Ndarambe Ngomba. The money was counted and placed in cartons. As the two cyclists took the money to the agreed destination, they saw two other people moving towards them. The two strangers got hold of their bicycles and announced to them that *"you are finished today."* The attackers produced a panga knife and attempted to chop off the head of the complainant. The complainant avoided the chop by ducking and falling down. One attacker struggled with his colleague while the attacker who grabbed the complainant

untied the carton of money from the bicycle and disappeared with it. The second carton of money was also taken away. These events took place around midday. When the owner of the money was informed about the theft he quickly appeared but refused to accept or believe the complainant's story. He thought they were playing tricks, having hidden the money. So he assaulted them before handing them over to the nearest police which was Chipata Police Station in Zambia. It is to be noted that these events happened between the border districts of Mchinji in Malawi and Chipata in Zambia. The complainant and his colleague were both detained at Chipata Police for two days while investigations were being done. As the complainant was on bail he was informed by Malawi Police that there had been people arrested in connection with the commission of the robbery and that he would be required to identify the attackers from among other people. At a first identification parade he was unable to identify any one of the 10 people although his colleague identified the one who had robbed him. It was at a second and third identification parade that he identified the appellant as the person who grabbed him, struggled with him for about 10 minutes and took away the carton containing K3,500,000.00.

As to what led to the arrest of the appellant the prosecution led the evidence of Constable Manjeru Dengu of Gamba Police Unit in Mchinji. This witness identified the appellant as a fellow Policeman based at Mchinji Police and with whom he worked for about two years. In March, 2007 when this witness, who was PW2, went to get his salary at Mchinji Police he met the appellant and two others. As they drunk beer PW2 went outside and met Dickson Banda who told him that there was a certain 'move' being done to kill certain people who smuggle money

from Malawi to Zambia. Dickson Banda asked him to provide a gun. Later PW2 told the appellant about what Dickson Banda had said because the appellant was a senior to both him and Dickson Banda in the police service. He did not provide the gun requested for. The appellant said he would know what to do. Later he tried to call the appellant but the appellant appeared to be travelling. The appellant said he is in town following up the matter of Dickson Banda. Two weeks later he met Dickson Banda at Kamwendo in Mchinji. That time Dickson Banda was in a joyous mood, saying he was rich as he had done the move with the appellant. He was appreciative of the role played by PW2. Dickson Banda had K500.00 notes on him. Later still he learnt that about K8.5 million belonging to Mr. Mavale was stolen. By the time he tried to contact Dickson Banda again, the latter was in Kasiya and he moved to Msundwe, probably buying seed. When he contacted the appellant for a share of the loot, the appellant offered him K10,000.00 to be collected from Dickson Banda at Msundwe. Two vehicles were deployed and PW2 went in one of them with police personnel to Msundwe where upon his getting the money from Dickson Banda, the latter was arrested. Then the appellant called PW2 and asked him why he revealed the issues. Subsequently the appellant was arrested. The prosecution also led evidence to show that between 20th April and 23rd May, 2007 the appellant bought sofa set worth K35,000.00 and Hifi JVC Speaker, TV screen and DVD Player total value of K50,000.00. They also led evidence that the appellant said that he had a share of the stolen money. They also led evidence which was that Dickson Banda had said that the appellant had given him K300,000.00 from the stolen money.

The defense story begins by a confession by the appellant that indeed he met with PW2 informed him that Dickson Banda wanted PW2 to find a fun to be used in intercepting money being smuggled from Malawi to Zambia. The appellant then advised PW2 not to take part in the planned activity but to be on guard. On 15th April the appellant left for Lilongwe to meet a Zodiak Broadcasting Station reporter, Franklin Titani, and to arrange his wedding. While in Lilongwe PW2 called him to follow up on the matter concerning Dickson Banda. He told PW2 that he was following up the issue. He then gave his brother K75,000.00 for the wedding preparations and returned to Mchinji where he is based as a police officer. On 20th or 21st April he left for his home village for two seeks holiday. He called PW2 after two weeks and PW2 said that the money had in fact been stolen at the border. He thus told PW2 to start investigating the matter. PW2 later told him that Dickson Banda had been arrested. He then instructed PW2 to go and collect some K5,000.00 from Dickson as Dickson had taken his K3,000.00. The appellant called Dicken's and told him that PW2 would come to him to collect the money. Later PW2 told him that he had collected the money and arrested Dickens. He was not allowed to join the investigations when he returned to Mchinji. While he was at the police station, two people from Chipata arrived saying they had come for identification and one of the people identified Dickens as one of the attackers. He said that he watched the parade. In June PW2 and Dickens forced him at his house for discussions concerning the robbery and that the issue be dropped. But he said there is nothing he could do about it but that the matter should go to court. He then escorted them. On 23rd June, he was called to the office where he met PW2 and an officer from Lilongwe CID Office. PW2 then was asked to narrate what he knew, and he did. The following day

Dickens was called in the presence of PW2 and him but Dickens said nothing. On 25th June he was placed on identification parade where upon PW2, identified him without taking a second. He refused to sign the identification chart because he said the parade was not proper. Later he was taken to his house for search.

He had been planning to marry and was securing funds in February Mr. Haynes gave him K22,000.00 for helping recover his debt, he sold three bales of tobacco at K75,000. He used this to purchase sofa and the other items. He had not met Dickens since 2005. He went to meet a Zodiac Broadcasting Station Officer, not in his capacity as Public Relations Officer of Mchinji Police, but as an individual although he wanted to check how their cases could be publicized. He said that he booked himself at the counter on 15th April as he left for Lilongwe, leaving at 7.00 am and returning at 6.00 pm. During inquiries he omitted to tell PW9 that he had gone to Lilongwe on the material day because PW9 did not ask him. He called his brother to support his defense of alibi and the fact that on the material day the appellant gave the brother K75,000.00 for wedding preparations.

In arguing the appeal counsel for the appellant said that the identification parade during which PW1 identified the appellant was improperly done. He argued that PW1 himself was an unreliable witness because he was inconsistent. There was irregularity in the identification parade because the investigator participated in it. He observed that although the trial magistrate noted that the identification evidence was unreliable she did not exclude it. It was his further observation that the identification evidence lacked corroboration and ought to have been excluded.

Further PW1 never said why he remembered the appellant two months after the event, and only during a second parade.

Counsel also argued that the magistrate admitted and relied on hearsay evidence of a policeman. Further he argued that statement of Dickson Banda was improperly admitted in evidence as the defense were never served with it. In any case the prejudicial value of the said statement outweighs the probative value. Again Dickson Banda and PW3 were accomplices and the evidence of PW3 lacks corroboration. The evidence of the accomplices required corroboration.

On a finding of a case to answer counsel argued that this was done on the basis of inadmissible, uncorroborated and hearsay evidence. There was insufficient evidence on the basis of which the ruling of *prima facie* case would have been made, so argues counsel.

On the matter of unfair and a partial trial counsel stated that there was flagrant violation of the Constitutional rights of the appellant. The appellant was not supplied with lists of witnesses and statement being a summary of the prosecution's case against him. The appellant was in fact denied the list of witnesses and statement of witnesses until about five minutes before trial.

Counsel further argued that the learned magistrate proceeded on a presumption of guilt as against the appellant. The learned magistrate ignored evidence of the Occurrence Book that would have exonerated the applicant. The appellant's caution statement was not tendered in evidence and the assumption must be that

it was adverse to the prosecution's case. The statement of Dickson Banda tendered was an extra judicial confession which prejudiced and embarrassed the appellant. On unfairness court interrupted defense counsel during cross-examination that tended to incriminate prosecution witnesses. This unfair interruption rendered the trial unfair.

Counsel argued that the alleged offence was committed in Zambia and the trial magistrate had no jurisdiction over it. Then the learned magistrate warned counsel for defense against adducing evidence of character of witnesses. This meant that the trial magistrate gave extra weight to prosecution evidence. There was no sufficient opportunity for the appellant to be heard. The conviction was unsafe for want of evidence, so counsel argues. The irregularities in the trial can not be cured by sections 3 and 5 of the Criminal Procedure and Evidence Code counsel further argues. Counsel them stated that the decision of the learned magistrate was an affront to justice, a great travesty of justice, outrageous, abhorrent and a perversion of justice.

In arguing the appeal against sentence Counsel stated that seven years imprisonment with hard labour was on the high side considering the various mitigating factors in favour of the appellant. The appellant was of previous good character, was a public relations officer for Mchinji Police station, had lost his benefits and the appellant also teaches prisoners and he is of good use to the public. Counsel also said sentence be reduced considering that life expectancy in Malawi might have lowered to 33 years.

As for the State in response argued on the issue of identification evidence that the question is whether the case against the appellant wholly or substantially depends on the identification. Counsel for the State submitted that the case for the state did not solely stand on identification evidence.

On the question of hearsay evidence counsel argued that a substantial part of PW2's evidence does not contain hearsay. Further on accomplice evidence, PW2 did not participate in the robbery nor would Dickson Banda be referred to as an accomplice. He also argued that the statement of Dickson Banda was tendered in compliance with section 173 of the Criminal Procedure and Evidence Code and it is not pointing to Dickson Banda admitting the crime.

As to the question of jurisdiction, the offence occurred in Kondowe village in Malawi as the appellants were going to Mgabe in Zambia. For that reason the learned magistrate had jurisdiction.

On alibi, there was proof that the appellant was not in Lilongwe on the material day. PW10 may have appeared inconsistent perhaps because she was testifying against a fellow police officer. Section 231 of the Criminal Procedure & Evidence Code was complied with.

On sentence counsel for the State argued that the sentence was appropriate owing to the seriousness of the offence and that a substantial amount of the money stolen was not recovered.

In addition to the arguments both counsel for the appellant and the State made, there are on file extensive skeletal arguments. It would not serve any useful purpose for me to summarize those arguments. After all what was argued in court was by way of elaborating on the contents of the skeletal arguments. Suffice it to say that in the course of this judgment I will take those arguments I consider relevant for this appeal into consideration.

I must observe here that an appeal to this court from the lower court is by way of rehearing. This court is entitled to scrutinize the evidence afresh and to make its own findings. This court would not shy away from disagreeing with or overturning the findings and decision of the lower court where appropriate. Any observation made by the lower court would not bind this court.

In this appeal the appellant put up as the first ground of appeal the identification parade that was conducted at police during which the appellant was identified by PW1. Counsel for the appellant has tried to attack the identification parade and the identification evidence on various grounds. Reliance was placed on the celebrated English case of *R v Turnbull [1977] Q B 224*. That case is indeed a *locus classicus* on the question on identification of an accused person and has been applied and referred to in numerous cases in Malawi. But even before *R v Turnbull [1977]* Malawi had many cases which made pronouncements of the question of identification evidence. To my mind the case of *Turnbull* never changed the law on identification in Malawi. In any event Turnbull would only be persuasive in our courts. In *Gadeni v R 1961 – 63 ALR Mal 34 and 35* Chief Justice Spenser-Wilkinson said about identification parades that:

> *"... I must point out, for the benefit of police of future occasions, that the normal procedure is to hold one identification parade under the control of one police officer who should give evidence of the information of the parade, where the witnesses were kept whilst the parade was being formed, whether the accused were given the opportunity to change places between the inspections of the parade by each witness, and so on."*

Edwards, J. cited *Gadeni v R* with approval in *Andrew v Rep. 1971-72 ALR Mal 297*. He further elaborated by saying that an identification parade should be conducted by a police officer of a higher rank than Constable, preferably not the Officer-In-Charge of the investigations and such officer should give evidence of the formation of the parade, whether any of the participants were similar in build, height and dress to the accused whether the accused was allowed to choose position in the parade and where the witnesses were kept while the parade was being formed, but the evidence of an officer of higher grade than constable does not of itself initiate the identification.

The observations by Mwaungulu, J. in *Rep v Sopondo and Another* [1997] 1 MLR 470 regarding identification following fleeting glance or after passage of some time or indeed done in difficult conditions are pertinent and constitute a further explanation on the law of identification. The idea is not to make identification process a difficult process for the witness but simply to ascertain the accuracy of the identification. Circumstances in which an identification is made will differ

from case to case. In every case therefore identification is a matter of evidence. Counsel for the appellant referred this court to the English Police and Criminal Evidence Act, 1984 and PACE Code D. To begin with that Act is not a Statute of General Application. The Code referred to has no force of law and in any event it is not clear why counsel considered it relevant in the Malawi situation. I am unable to appreciate why it was cited at all.

The evidence before this court shows that the complainant did not identify the appellant during a first parade where his colleague identified one of the attackers. The appellants own evidence was that he only went to observe the first parade. That should provide the real reason why PW1 did not identify the appellant during the first parade, the reason being that the appellant was not on the line up for that parade. Thus taking issue with the identification as done on second and third occasion appears to miss the point. The evidence shows that this is not a case of fleeting glance or difficult conditions. The attacker approached from the opposite direction got hold of a bicycle, produced a panga knife from underneath scumber or shirt and uttered words that the complainant was finished. There was some struggle before the attacker overpowered PW1, untied the carton of money on the bicycle and made away with it. The events took place in broad day light, around midday, and the vision of PW1 was not impaired. Again the incident occurred two months before the identification parade. I would not subscribe to a view that two months is too long a passage of time for PW1 to forget the identity of the attacker.

The suggestion that the presence of an investigating police officer at the parade should necessarily initiate the identification parade is untanable. The case of *Andrew v Rep. (Supra)* shows that it is preferred that the investigating officer not be present. Whether the presence of the investigating at a parade initiates the parade or not will depend on all the circumstances of the case as was observed by *Edwards, J.* in *Andrew v Rep. supra*. In short whether a procedural flaw in an identification parade vitiates the result or not will depend on whether that procedural flaw occasion is a failure of justice or not. It is possible that a procedural flaw in an identification parade is cured by the provisions of section 3 and 5 of the Criminal Procedure and Evidence Code as was the case in *Gadeni v Rep. 1961-62 ALR Mal* (as per *Spencer Wilkinson CJ*) and as is the position in the present case. While it is true that the learned magistrate should have resolved doubt about whether the investigator was present or not in favour of the appellant, the position at law is whether such presence would have been so prejudicial to the appellant as to vitiate the result. I think not. In any case this case does not in my view wholly or substantially depend on the identification parade.

As regards the ground of hearsay evidence and evidence of accomplices including confession statements of Dickson Banda and PW2 it is not correct that PW2's evidence was all hearsay. In fact most of what Dickson Banda told PW2 about the appellant was confirmed by the appellant himself. For instance the issue of moneys passing from Dickson Banda to PW2 on instructions from the appellant was confirmed by the appellant himself. The arrest of the appellant was as a result of matters which he largely confirmed himself which matter tended to

connect him with the commission of the offence. The evidence clearly shows the appellant's own interest and involvement in the crime. He hosted discussions involving himself, Dickson Banda and PW2 in connection with the crime and later accused PW2 of trying to get a share of the loot at the same time trying to get rewards from the owner of the money for him assisting in investigating the crime. Even if PW2 were considered an accomplice, what he gave as evidence tending to incriminate the appellant was confirmed by the appellant himself apart from other prosecution witnesses. The second ground of appeal was not made out.

I can say at once that the third ground of appeal on a finding of a case to answer is not made out. By the time the lower court made the ruling of a case to answer there had been sufficient evidence on which a court properly directing its mind could find the appellant guilty and could convict. Further, I am not able to appreciate how the lower court could have been said to be partial and to have conducted the trial in a unfair manner. While it is correct that a court of law should recognize the position of an unrepresented accused person and render appropriate guidance, the court has no duty to conduct a case for an unrepresented accused. In fact the court would instantly lose its status of a neutral arbiter if it conducted a case on behalf of an unrepresented party.

The lower court rejected the defense of alibi because there was no evidence to support it. The Occurrence Book in which the appellant said was indicated his absence from Mchinji Police Station on the date in question has no such indication. The appellant indicated that he travelled to Lilongwe on the date in question. All the evidence shows that he must have travelled to Lilongwe on

personal business including giving money to his brother on a date that was well after the present incident. PW2 suggested that as he tried to contact the appellant on the question of the robbery, the appellant appeared to be travelling in a moving vehicle. Indeed the appellant informed PW2 to go and get a share from Dickson Banda while he was in Lilongwe or Ntcheu, according to the appellant's own evidence. In all the circumstances of the case the lower court was entitled to reject the defense of alibi.

All in all there was overwhelming evidence on which the finding of guilt was made against the appellant. The conviction was proper and it is upheld. The appeal against conviction fails.

I turn to the appeal against sentence. It has been stated that the sentence is wrong in principle. It is no clear to me why it was argued that the sentence was wrong in principle. I am aware that the appellant was described as a first offender. There was an argument that as first offender the appellant was entitled to a suspended sentence. Indeed section 339 (1) of the Criminal Procedure and Evidence Code provides for suspended sentences. Section 340 (i) of the same Code provides for imprisonment of first offenders in certain circumstances. Thus where the court is of the view that on good grounds there is no other appropriate way of dealing with the first offender but to sent that offender to prison, then the court will proceed to order a custodial sentence notwithstanding that the offender is a first time offender. Courts will normally not suspend the operation of a sentence where the crime is of a serious nature. In the present case robbery is a serious crime. More over this was an aggravated form of robbery where the

appellant was armed with a panga knife and was in the company of another. There were good grounds for not suspending the sentence. Then there was the argument that the sentence was manifestly excessive considering all the mitigating factors herein. Certainly the fact that the appellant is useful in prison as he provides good lessons to fellow inmates can not be a mitigating factor to affect a sentence that a court passes. Such conduct would only be known after the sentence and in any event it would only assist the prison authorities in recommending either remission of sentence or indeed an outright pardon. A sentence of three and a half years imprisonment with hard labour for a robbery where the accused was in the company of nine other and metal instruments used was enhanced to 8 years imprisonment with hard labour in the case of *Rep. v Allan Chididi Conf. Case No. 1266 of 1994*. Again in *Rep. v Fanasoni Paguza Vashiko Conf. Case No. 435 of 1994* a sentence of 4 years imprisonment with hard labour was enhanced to 9 years imprisonment with hard labour for an aggravated robbery. In *Rep. v. Beziria Amidu and Others Conf. Case No. 23 of 1993* a sentence of 5 years imprisonment with hard labour was enhanced to 9 years imprisonment with hard labour for an aggravated robbery. In the present case 7 years imprisonment with hard labour for an aggravated robbery appears to be on the lower end of sentences for that category of offences. It can not be described as manifestly excessive even in the light of the mitigating factors in favour of the appellant.

This appeal against sentence can not succeed.

All in all there is no merit in this appeal and it is dismissed in its entirety.

PRONOUNCED in Open Court this 15th day of September 2008 at Lilongwe.

R.R. Mzikamanda

J U D G E

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