REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 2 OF 2016
(BEING NCHALO FGM COURT CRIMINAL CASE NUMBER 363 OF 2015)

MULLI MAITEN! — 1st APPELLANT

THOM DICK — 2nd APPELLANT

AND

THE REPUBLIC — RESPONDENT

CORAM: JUSTICE M.A. TEMBO
Domasi, Counsel for the appellants
Munthali, Counsel for the State
Chanonga, Official Court interpreter

JUDGMENT

This is the decision of this Court on the appellants' appeal against both their conviction and sentence before the lower court.
The Appellants were jointly charged with the offence of robbery contrary to section 301 of the Penal Code.

The particulars of the charge were that appellants during the night of 25th to 26th June 2015 at Nchalo Trading Centre in the District of Chikwawa robbed Francis Matchado of two cell phones, assorted clothes, TNM and Airtel airtime and K 10,

000 cash and all assorted items to the value of K 1 00, 000 and at or immediately before or immediately after the time of the said robbery used or threatened to use violence to the said Francis Matchado in order to obtain or retain the things stolen or prevent or overcome resistance to its being stolen or retained.

The appellants pleaded not guilty to the charge whereupon the State paraded three witnesses to prove its case. After the State's case the court found the appellants with a case to answer.

The appellants then testified in their own defence. They also called four witnesses. After a full trial the lower court found the appellants guilty and sentenced each one of them to 10 years' imprisonment.

The evidence of the prosecution before the lower shows that the complainant never saw the two appellants at the time of the commission of the offence. The complainant was only informed that his shop had been broken into by unknown criminals on the night in question. When the complainant went to his shop he found that the thieves had left and his guard had been tied up by the said assailants.

While the complainant was at the shop, a guard from his house came to report to him that robbers had also attacked his house during the same night. The police who had arrived at the shop then rushed to the house but the robbers were gone by that time.

The second prosecution witness, Bismas Francis Matchado told the lower court that he was at the house of his father the complainant at the time the robbers attacked. He was in his room when he heard his sisters and auntie crying. He woke up and switched on the lights in his bedroom. He also opened his bedroom door and one of the robbers came into his bedroom. The first robber was followed by another one who then asked him that they were looking for money. He told them he had no money. The two robbers then called other robbers into his bedroom.

He stated that the two robbers were followed by the 1st appellant who was carrying a long stick. He identified the 1st appellant as the third person to enter his bedroom and as the one who used the long stick to beat him up after the demands for money were not met. He added that the 2nct appellant was the fourth to enter his bedroom

after he was called in by the 1st appellant. He stated that the 2nct appellant was armed with a panga knife which he used to beat up Bismas Matchado using the side of the panga knife which is not sharp.

The lower court was informed that the robbers went away with phones, a travelling bag with a passport, assorted clothes and other valuables for a visitor from Mozambique.

Further, that the robbers beat up Bismas Matchado severely and he sustained injuries on his back and he showed the lower court two scars on his back.

Bismas Matchado told the lower court that the first robber to enter his bedroom was the one who was giving orders to the rest of the group. He could not identify the leader of the robbers between the appellants. The leader of the robbers locked Bismas Matchado in the room and left. He was released by the police who arrived sometime later. Four doors to the house were damaged during the robbery. Bismas Matchado and a guard were treated for their injuries.

The lower court was informed that after a few weeks, police arrested some suspects in the robbery after a tip from members of the public. Bismas Matchado went to Nchalo police and eight or nine suspects were put on a parade and he managed to identify the appellants herein as some of the robbers who attacked him. He identified the two through their facial and physical appearance during the parade as seen during the time of the robbery. The evidence before the lower court, according to the police sub-inspector who testified for the prosecution, was actually that the identification parade involved eight suspects from which Bismas Matchado identified the appellants herein.

The evidence of the 1st appellant was that he had been released from prison on 24th June 2015. He stated that he went straight to his parents and stayed at his brother's home and never went anywhere during his stay there. However, the 1st appellant's brother informed the lower court that the 1st appellant never came back to him after he had gone to Miseu folo. Further, that the 1st appellant has never been to his parents as he claimed.

The 2nd appellant told the lower court that he was at work at the time of the offence and he brought witnesses in that regard. There was however further evidence to the effect that at one time the 2nd appellant had similarly reported for work but was later arrested for criminal trespass and was taken to police.

The appellants being dissatisfied with both the conviction and sentence appealed against the same. The appellants set out the grounds of appeal and the relevant law and arguments in relation to the same. The following are the grounds of appeal.

That there was no evidence against the appellants to support the verdict in that the main prosecution witness, Bismas Matchado, could not focus as he was under attack.

That the identification parade was unprocedural and therefore illegal.

That there was no corroboration of identification evidence when circumstances required such corroboration.

That the lower court failed to take sufficient cognizance of an alibi.

That the sentence of 10 years' imprisonment was excessive in circumstances where the appellants are young and first offenders.

The appellant seeks reversal of the conviction and setting aside of the sentence imposed.

The appellant then submitted on the relevant law and arguments relevant to each ground of appeal.

This Court notes that when it is considering an appeal from the court below it proceeds by way of rehearing as rightly submitted by the parties. This court will consider whether the court below directed itself to the facts and law applicable in arriving at the verdict. This Court will interfere with the verdict if, on the law applicable, the verdict could not be had. Equally it will do so where there was a misdirection on the law applicable. See *Mulewa v Republic* [1997] 2 MLR 60. These principles are also expounded in the case cited by the appellants of *Pryce v Republic*

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(1971-72) 6 ALR (Mal) 65.

The burden of proof and standard of proof in criminal matters is also as submitted by the parties. The burden of proof is on the prosecution and the standard of proof required is beyond a reasonable doubt, in terms of section 187 (1) and 188 (b) of the Criminal Procedure and Evidence Code respectively.

This Court has the following powers, on criminal appeals like the present one, in terms of section 353 of the Criminal Procedure

> (2) After perusing the record of the case and after hearing the appellant or his legal practitioner if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-
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> (a) in an appeal by any aggrieved person from a conviction-
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> (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial;
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> (ii) alter the finding maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;
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> (iii) with or without such reduction, or increase and with or without altering the finding, alter the nature of the sentence;
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> (b) in an appeal by any aggrieved person from any other order, alter or reverse such order;
>
> (c) in an appeal by the Director of Public Prosecutions from a finding of acquittal-
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> (i) if the finding of acquittal was arrived at without the defence having been called, remit the case to the subordinate court with a direction to proceed with the trial and to call on the defence;
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> (ii) in any other case, convert the finding of acquittal into one of conviction and either make an order under section 337, 338 or 339 or pass sentence or remit the case to the subordinate court for sentence, and in any of the cases mentioned in this subsection the court may make any amendment or any consequential or incidental order that may appear just and proper.
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> (3) Where the appellant does not appear at the hearing of an appeal, the court may-
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> (a) if the appellant is the Director of Public Prosecutions , dismiss the appeal; or
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> (b) if the appellant is the convicted person, adjourn the case.
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> (4) Nothing in this section shall authorize the High Court to impose a greater

> punishment for the offence, which in the opinion of the High Court the accused has committed, than the trial court could have imposed.
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> (5) When any person is acquitted of the offence with which he was charged but is convicted of another offence, whether charged with such offence or not, the High Court may, if it reverses the finding of conviction, itself convert the finding of acquittal into one of conviction.

The appellants first submitted on the law on identification.

They correctly submitted that the guideline on the evidence of identification evidence without corroboration was well stated in an English case of *R vs. Turnbull* [1977] 2QB 244, which was approved to be law in Malawi by the Supreme Court of Appeal in *Sanudi v Republic* MSCA Criminal Appeal number 10 of 2000 (unreported), where the court stated that

> Essentially, a trial court faced with a prosecution based on visual identification of a defendant by prosecution witnesses must do three things. First, the trial court must warn itself or, where sitting with a jury, the jury about the need for caution before convicting on such evidence. Secondly, the trial court must direct itself or the jury to consider closely the circumstances in which the identification is made: "How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapses between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution has reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asked to be given particulars of such descriptions, the prosecution should apply them.

The appellants further rightly submitted that, in the case of *Republic v Mchotseni* Confirmation case number 423 of 2002 (High Court) (unreported) Justice Mwaungulu, as he then was, stated that the court should consider the specific

weakness in the identification evidence. Further, that this pedantry considerably reduces the risks of miscarriage of justice inherent in this nature of evidence.

The appellant further submitted that, in the case of *Beciford and Others v R* (1993) 97 Cr. App. R 409 the Privy Council had to comment on the creditability of the prosecution witness who identified the accused person, and the court said that

> The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make identification, namely, is he right or could he be mistaken?

The appellants then submitted that in the case of *R v Turnbull* 1977 QB 224 directions were imposed on a court at first instances to bear the warning and expose to itself the weaknesses and dangers of identification evidence generally and in the specific case.

The appellants further submitted that in the case of *R v Beciford and Others* (1993) 97 Cr. App. R 409 at 415 the Privy Council warned failure to give a *Turnbull* direction will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence.

The appellants then submitted that in *Chinyamunyamu vs. R* Criminal Appeal No. 100 of 2006 (High Court) (Unreported), the Court observed that

> If identification of an accused person is done during day time it may refer to such factors as complexion, the attire and other features of an accused person. However, the court sounded a warning to an identification done at night time and the court pointed out that such identification should be accepted with caution.

The appellants then submitted on corroboration of evidence of identification.

The appellants submitted that in the case of *John v Republic* Criminal Appeal Case No. 81 of 2006 (High Court) (unreported) Justice Singini, as he then was, stated that

> In point of law for identification of a person seen during night time to ground a conviction against such person requires sufficient corroboration. Person's identification must not be a matter of conjecture or guessing, standard of corroborative evidence that is required must be such that it leads to the clear and definite identification of the accused. 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.

The appellants then submitted on the conduct of an identification parade.

They submitted that the duty to mount an identification parade arises whenever prosecution witnesses state that they can identify the defendants and the suspect questions the identification. Just as there is a duty to mount an identification parade there is also a duty to conduct the parade properly so that the evidence, if there be positive identification, is of a quality that points beyond reasonable doubt to the guilt of the suspect. Where, like here, there should be and there is an identification parade, there is a duty on the prosecution to lead evidence of the parade and the manner in which it was conducted. A court will ignore evidence from an identification parade where the identification parade is flawed in material respects. The appellants referred to the cases of *Gadeni v R* (1961-63) 2 A.L.R. (Mal) 34; *Andrew v Republic* (1971-72) 6 A.LR. (Mal) 297; and *Chibwana v Republic* [1981-83] 10 M.L.R. 162. They stated that in *Andrew v Republic* at 299, Edward, J., the Court said

> There is no evidence in the record that such an officer was present at the identification parade. If none was present, that circumstance does not of itself vitiate the identification parade which should certainly be conducted by a police officer of higher rank than constable; and if it is not, that is a matter for comment. It is also desirable that an officer conducting an identification parade should be an officer other than the officer in charge of the investigation in connection with which the parade is held. I would further point out that the police officer under whose control an identification parade is held should give evidence of the formation of the parade, whether the persons on the parade were of similar build, height and dress to the accused's, whether the accused was allowed to choose his position in the parade, and so on..

The appellants then submitted that the lower court record indicates that the parade was conducted by the police at the police station, but a proper procedure of identifying the appellants was not followed which supports the fact that the Bismas Matchado, the second prosecution witness, was not accurate in his identification.

The appellants submitted that in the case of *Gadeni v R* (1961 - 63) ALR Mal 34 at 35 Chief Justice Spenser-Wilkinson said the following on identification parades

> I must point out, for the benefit of police on 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.

The appellants submitted that this procedure was not followed at all. They emphasized that the idea behind the procedure on an identification parade is not to make identification process a difficult process for the witness but simply to ascertain the accuracy of the identification. The contended that in the circumstances the possibility of mistaken of identity by Bismas Matchado could be high.

The appellants then submitted on the law on alibi.

They submitted that in the case of *Bonzo v Republic* criminal appeal number 89 of 1996 (High Court) (unreported) Justice Mwaungulu, as he then was, said that

> The defence of alibi in our law is just like any other defence that the defendant can raise to criminal charges. Once the premise has been laid by the defendant, the defence becomes part of the overall picture and the burden remains on the prosecution to prove the case against the defendant beyond reasonable doubt.

The appellants further submitted that there is no obligation on the defence to give particulars of alibi. And they referred to the the case of *Lewis* (1969) 2 QB 1. They noted that, evidence may amount to an alibi even through it comes from the accused only and is to the effect that, at the relevant time, he was by himself at a location other than the scene of crime. They referred to *Jackson* (1973) Crim LR 356.

The appellants then submitted on the issue of resolving conflicting versions of events as narrated by the prosecution and the defence.

The appellants submitted that in the South African case of S *v Singh* 1975 1 SA 227 (N) the court discussed the approach of a court where there is a conflict of fact. They submitted that the learned judge says the following at p228F-H

> it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the state witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the state and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.

The appellants further submitted that an extremely helpful summary also appears in the case of in *S v Radebe* 1991(2) SACR 166 (T) at 167j-168h where a summary reads

> A criminal court does not judge an accused's version in a vacuum as if only a charge-sheet has been presented. The state case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. It is perfectly correct that the state case cannot be determined first and if found acceptable regarded as decisive. The state case, if it is the only evidentiary material before the court, must in all cases be examined first in order to determine whether there is sufficient evidentiary material in respect of all the elements of the offence and whether there is not perhaps in any event a reasonable possible alternative hypothesis appearing therefrom. Precisely the same approach is applicable if the defence puts forward a version. Taking into account the state case, once again it must be established whether the defence case does not establish a reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest of the various possibilities (that is, the most probable) as that would amount to ignoring the degree and content of the state's onus. The state's case must also not be weighed up as an independent entity against the defence case as that is not how facts are to be evaluated. Merely because the state presents its case first does not mean that a criminal court has two separate cases which must be weighed up against one another on opposite sides of the scale. The presentation of the two cases in that sequence is the result of considerations of policy and effectivity. The criminal court ultimately has a conglomerate of evidentiary material before it which is indicative of facts against or in favour of the innocence of the accused. Some exculpatory facts may appear from the state case whilst incriminating facts might appear from the defence case, for example admissions made during cross-examination. The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in

> order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis. In so doing, the criminal court does not weigh one 'case' against another but strives for a conclusion (whether the guilt of the accused has been proved beyond a reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented any evidence, whether the state, taking into account the onus, has presented a prima facie case which supports conclusively the state's proffered conclusion; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the onus, supports the state's proffered conclusion. Where there is a direct dispute in respect of the facts essential for a conclusion of guilt it must not be approached: (a) by finding that the state's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the state case against the defence case as independent masses of evidence; or (c) by ignoring the state case and looking at the defence case in isolation.

The appellants then submitted that, from the foregoing, it is clear that there is no onus on an accused to convince a court of any of the propositions advanced by him. It is for the state to prove the propositions false beyond reasonable doubt. The appellants referred to *R v Difford* 1937 AD 370 at 373 where the court stated that

> It is not disputed on behalf of the defence that in the absence of some explanation the court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, ...

The appellants then referred to the case of *Gondwe v Republic* (1971-71) 6 A. L. R. Mal. 33, 37 where the Court said

> Where an accused person gives an explanation for his behaviour which if true would establish his innocence, the court's approach to the accused's story should not be: "is the accused's story true or false?" resulting, if the answer were "False," that the accused is guilty. The proper question for the court to ask itself is: "Is the accused's story true or might it reasonably be true?" - with the result that if the accused might reasonably be telling the truth, the prosecution would not in that case

> have discharged the burden of proof beyond reasonable doubt imposed upon it by law.

The appellants then submitted on whether the appellants were positively identified as the robbers in this matter.

The appellants noted that at page 2 of the judgement of the court below reads as follows

> It was however in the evidence of Bismas Francis Machado(PW2) who told this Court that he was at the house of his father when the robbers raided his father's home. He was in his room when he heard his sisters, aunt crying, shouting whether woke up and switched on the lights in his bedroom, he also opened the door and then one of the robbers came into his bedroom, he was followed by another who the asked him that they were looking for money but then told them he had no money then with him. They then called others into the room and they were followed by first accused person who had a long stick with him. He went on to identify the third person to enter into his bedroom as being the first accused who entered into his bedroom and used the stick to beat him up after demands of money were not met. Again, he was followed by second accused person after he was called by the first and he was the fourth to enter into the bedroom. The second accused person came into the room armed with a panga knife which he used to beat PW2 using the side which was not sharp.

The appellants then submitted that when they look at this statement, it shows that the witness woke up and all he did was to switch on the light and open the door. They stated that they are not sure why he opened the door but probably he intended to help his sisters and aunt. The note that surprisingly, the witness went nowhere and decided to stay in the room. They added that they believe the witness did not manage to help his relatives because one of the attackers came. The two had a conversation regarding payment of money yet the witness fails to identify this person.

The appellants observed that after the conversation had failed the first attacker called his friend and a second attacker comes in. they observed further that at this juncture, the focus of the witness is on two people. Further, that a third person comes in and this means that the focus of the witness is now clouded. The appellants observed that, shockingly, the witness manages to identify only the third and the fourth attacker who coincidentally happen to be the appellants. But that the witness is

unable to tell us how many attackers were there in total in the room or why he was not able to identify the other attackers. In the appellants' view, they believe Bismas Matchado was unable to identify the attackers.

The appellants then submitted on whether there were factors that would impair Bismas Matchado in identifying the attackers.

The appellants observed that Bismas Matchado was awakened by cries and shouts for help. Further that such a situation alone would make one feel jittery and helpless. Then he switched on the lights and opens the door. Suddenly, an unknown man comes in his room. The appellants opined that a stranger coming to your room at midnight should be frightening as you are not sure if death is next. They observed that then Bismas Matchado realised that the stranger is not alone but is calling other people. The people come in with panga knives and long sticks. Naturally, his body changes. They observed that he must have been too afraid of the unknown as he does not know if these people will leave him alive or not. The appellants observed that one does not have the opportunity to see things soberly in such circumstances and one's testimony is clearly doubtful. The appellants then submitted that, on that basis alone, they believe that the fear that engulfed Bismas Matchado makes his testimony unreliable.

The appellants pointed to other factors that make Bismas Matchado's testimony unreliable namely, that there was electricity light which deceives; that there were so many thugs in a room making identification difficult; that Bismas Matchado was sleepy as he had just come from deep slumber and that he was beaten and threatened with more violence if he did not comply.

The appellants then submitted on whether corroboration was necessary in the circumstances.
The appellants charged that the lower court did not take full consideration of the decision of *Sanudi v Republic* and *Tinazari v Republic* [1964-66] ALR Mal 184 at 192. The appellants submitted that in *Tinazari,* the court made the following important pronouncement

> After the warning has been given, an examination of the evidence must be carried out to

determine whether or not there is material amounting in law to corroboration of the complainant's account. If none is found two courses are upon to trial court. It can acquit the accused person on the grounds that it is dangerous to convict on the uncorroborated evidence of the complainant or in a suitable case it can accept the testimony given notwithstanding the lack of corroboration. One would think, with respect, that the latter course should be adopted only in rare instances which the trial court must expressly record:

I. That there is no corroboration
II. That it is well aware of the danger of convicting in such circumstances and
III. That despite the defect it is nevertheless satisfied beyond reasonable doubt that complainant is telling the truth.

Where the trial court fails in an appropriate case to direct itself as to corroboration and there is in fact no corroboration as it is in this case, any conviction recorded will normally be quashed on appeal".

The appellants submitted that they believe that in the circumstances, the prosecution should have brought in corroborative evidence. The appellants submitted that they were not found with any of the stolen materials or the weapons used in the robbery.

They submitted further that, in any case, Bisimas Matchado never identified the assailants. The appellants submitted that at pages 5 and 6 of its judgement, the court below stated that

> in the matter before us PW 2 was able to identify the two from those lined up about 9 to 10 on average and that he was able to identify both on the role they had played on the said night.

The appellants also submitted that, however, in the same paragraph on line 9 and 12, the court below said

> It is on record the second state witness only managed to identify the two from those lined up for the identification parade. He did not however identify the one who was giving orders during the said night from those lined up from the parade."

The appellants then submitted that evidence of identification need to be water tight to support a conviction. They contended that from the record of the lower court, the court failed to eliminate possibilities of mistaken identity and ensure that evidence of identification is water tight. They observed that in these two conflicting statements made by Bismas Matchado, he told the court that he identified the

appellants based on the role they played but it is on record that he could not identify the one who was giving orders yet he claim to know their roles. They reiterated that a witness can be honest but not accurate when it comes to identifying the accused person as it is in this case.

The appellants submitted that in cases of this nature, standard corroborative evidence is required that can lead to the clear and definite identification of the accused. Such evidence as, the clothes which the appellants put on the said night, whether the goods claim to be stolen were found in the possession of the appellant or someone close to them. The appellants stated that in this case there is no such evidence. They submitted that this raises some doubts as to the true identity of the appellants and any doubt should be construed in favour of the appellants.

The appellants submitted that the lower court went ahead to conclude that it was safe to infer that it was an unmistaken identification by Bismas Matchado because he could benefit nothing by incriminating them when in fact there was a doubt against the identity of the appellants as his evidence was uncorroborated.

The appellants then submitted on whether the appellants had a defence of alibi.

The appellants noted that the 2nd appellant said that he was at work and he brought witnesses to prove that fact. However, the Court did not consider his evidence even though the prosecution did not challenge that fact. On page 5 of the judgement, the lower court rejected the alibi of the 2nd appellant and stated that

> It was difficult to appreciate where the issue of his being at work during the said night is coming from. Actually, it did not come very clearly when he was at work but it is even on record he was at one night arrested by G4S guards and handed over to Nchalo Police on criminal trespass. In others words, what this means is that it as possible for second accused to commit criminal offences even when he was supposed to be at work during a particular night.

The appellant then submitted that the lower court here rejected evidence of alibi with an assumption which was wrong. They argued that the State was supposed to bring evidence that the appellant was not at work. Further, that since this was not done, the alibi evidence remains unchallenged.

The appellants contended that the lower court failed to the principles in the *Gondwe*

case above on the need to give reasons for rejecting the testimony of the defence. And that this was the same as forcing the accused to prove a fact beyond reasonable doubt which is wrong.

The appellants then submitted on whether the sentence 1s excessive m the circumstances.

The appellants submitted that they are young offenders who came into conflict with the law for the first-time. They also lost jobs as a result of the conviction. And that this is a proper case where the court was supposed to impose a lesser sentence. The argued that a fine, community service or custodial sentence would be proper in the circumstances.

In view of the foregoing, the appellants submitted to this Court that the prosecution did not prove that the appellants committed the offences alleged and indeed any other offence. Further, that the lower court did not properly consider the evidence before it. And that the conviction is against the weight of the evidence and is unsafe.

The appellants therefore prayed that in these circumstances their conviction be quashed and the sentences be set aside.

On its part the State first submitted on whether the lower court properly convicted the appellant.

The State referred to section 300 of the Penal Code which defines robbery as follows

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, shall be guilty of the felony termed "robbery".

The State further referred to section 301 of the Penal Code which provides for the punishment of robbery as follows

> Any person who commits the felony of robbery shall be liable to imprisonment for fourteen years.
>
> If the offender is armed with any dangerous or offensive weapon or instrument, or is in

company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person, he shall be liable to be punished with death, or with imprisonment for life with or without corporal punishment.

The State then referred to the case of *Festa v R* [2001] HCA 72; (2001) 208 CLR 593; 185 ALR 394; 76 ALJR 291 in which Justice McHugh referred to forms of identification in this Australian case. He described the first two forms of identification evidence in the following way

> Most cases concerned with identification evidence are cases of positive identification. That is to say, cases where a witness claims to recognise the accused as the person seen on an occasion that is relevant to the charge. Positive-identification evidence may be used as direct or circumstantial proof of the charge. A positive identification of the accused is direct evidence of the crime when it identifies the accused as the person who committed one or more of the acts that constitute the crime in question. A positive identification is circumstantial evidence when its acceptance provides the ground for an inference, alone or with other evidence, that the accused committed the crime in question. A witness gives direct evidence of the charge when she testifies that the accused ordered her to hand over the takings. A witness gives circumstantial evidence of the charge when she testifies that the accused was the person who ran out of the bank immediately after other evidence proves it was robbed.

The State then submitted that an identification parade was explained in the case of *Bonzo v Rep* [1997] 1 MLR 110 (HC) by Mwaungulu, J, as he then was, at 113-114 where he stated that

> The law on the matter is that once the police officer thinks that on the facts before him it is useful to hold an identification parade, unless it is impracticable, one must be had (R v Nagah 92 Cr App R 344). Evidence of an identification parade is useful to the defence and the prosecution. A good identification strengthens the prosecution case and avoids a miscarriage of justice. Where there has been a failure to hold an identification parade, the court should warn itself or the jury, as the case may be of the dangers of identification without an identification parade (R v Graham [1994] CLR 213).

The State added that Mwaungulu J. continued to say that m considering the appropriateness of identification

> ...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification at the police? *R v Turnbull* [1977] QB 224) and *Chapingasa v Rep* [1978-1980] 9 MLR 414.

The State further submitted that in *Phiri and others v Republic* criminal appeal case number 6 of 1996 (High Court) (unreported) it was stated that the court must then take some time to weigh and consider the circumstances in which the identification was made. That these circumstances will have a bearing on the quality of identification. Further, that the court has to regard the time of observation, the distance, the illumination, obstruction, whether the defendant was seen or known by the witness, reasons for remembering the recognition. And that the list is endless and depends on the particular case.

Further that where the witnesses for the prosecution rely on recognition of the assailant, it is important to remind oneself that this is better than identification. And that the court must be aware that recognition of friends and relatives can also be mistaken. And finally, that it is not unoften that people have thought that the person they saw in the streets was a friend or relation, only to discover at close range that they were grossly mistaken.

The State then quoted the following from the case of *R v Turnbull* [1977] QB 224

> A failure to follow the guideline is likely to result in a conviction being quashed if, in the court's judgment on the evidence, the verdict was either unsatisfactory or unsafe. The Court below was oblivious to all these considerations. The only question before me is whether on the circumstances of this case the evidence is safe and satisfactory to uphold the conviction notwithstanding that the court did not warn itself of the danger of convicting on mistaken identity. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or

> identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

The State then referred to *Arthurs* v *Att Genfor Northern Ireland* 55 Cr App Rep 161 (1970) in which Lord Morris said that even for cases where a conviction would depend wholly or substantially on the visual identification of the accused, it would be undesirable to seek to lay down as a rule of law that a warning in some specific form or in some partly defined terms must be given. The difficulty is that particular cases vary enormously. This type of evidence may be quite poor in some cases but in others, it can be the strongest of all evidence upon which the court can rely.

The State further submitted that the court in the case of *Mehta* v *R* 3ALR 83 stated that the burden of proof on the prosecution goes beyond setting up a preponderance of probability and requires the crown case to be established beyond reasonable doubt; and that when the crown case rests on circumstantial evidence the court must be sure there are no co-existing circumstances which would weaken or destroy the inference.

The State then submitted that lies made by accused in court may amount to corroboration. The State referred to *Rep* v *Musisya* Confirmation case number 210 of 1975 where it was stated that such a lie would amount to corroboration if it is of such a nature and made in such circumstances as to lead to an inference in support of the evidence of the complainant or if it gives to a proved opportunity a different complexion from what that opportunity would have borne if no lie had been told.
The State also referred, on that point, to the case *Rep* v *Kaluwa* 3 ALR MAL 356.

The State then submitted that after perusing the lower court record, it is evident that the lower court did not warn itself against the dangers of identification evidence. However, that at page 4 of the judgment, the lower court did weigh and consider the circumstances in which the identification was made. The State then contended that according to the *Turnbull* case, a conviction made in these circumstances can be over turned if the court is satisfied that the verdict was unsafe or unsatisfactory

The State then submitted that the first thing to note is that the offence was committed at night, and it is on record that Bismas Matchado switched on the lights in the room. Further, that the distance between the perpetrators and Bismas Matchado was short as the two perpetrators were close enough to beat him. And further, that the perpetrators were in the room with Bismas Matchado for long enough to hit him and long enough to call the second identified person to come into the room.

The circumstances of this identification, are in the view of the State, reasonable and ideal for a proper identification to be made, as it was within proper lighting, the appellants got close enough to the witness to be able to beat him and there was enough time for a reasonable man to identify someone.

It is therefore the state's view that although the lower court did not warn itself of the guidelines in the *Turnbull* sense, the conviction was still satisfactory and safe. The State contended that Bismas Matchado's failure to identify the other two assailants does not mean that these two appellants herein were not properly identified.

The State conceded that there is no other evidence which ties the appellants to the crime. It however observed that, from the judgment of the lower court, the lower court came to the conclusion that the appellants lied about their whereabouts during the material time. The State reiterated that lies of an accused person can amount to corroboration. The State does not agree that Bismas Matchado made contradicting statements. On the contrary, the State asserts that he was able to identify the two appellants but it doesn't mean his failure to identify the other ones makes the identification of the two appellants faulty.

The state argued that it brought evidence that placed the two appellants at the complainant's home on the material day. And that, this obviously challenges the evidence of alibi, which the lower ably analyzed on page 5 of its judgment.

The State submitted that the lower court did not reject the evidence of alibi based on assumption, but rather based on evidence before the court. Firstly, on evidence from the prosecution that placed the appellants at the crime scene. Secondly, on evidence that even the appellants' own accounts were rebuttable and still left holes on where

they were. For instance, that the 2nd appellant once got arrested whilst supposedly at work.

The State submitted that after a perusal of the lower court judgment, the State is of the view that indeed the appellants were convicted on identification evidence in its broad sense. That there was no other evidence brought before the lower court that implicated the appellants to the crime. Further, that the lower court erred in law by not warning itself against the dangers of convicting on identification evidence or considering the circumstances of the identification. However, the state is of the view that this does not automatically mean the conviction be quashed as the conviction was still safe and satisfactory and the prosecution evidence supports the conviction. As such, the State is of the view that there is no merit in the appellants' grounds of appeal against the conviction.

The State then submitted on whether the lower court erred in law by meting out a 10-year sentence for the armed robbery.

The State submitted that in *Republic v Kabango and another* Confirmation case number 623 of 2007 a 6-year sentence was enhanced to 10 years' imprisonment. The convicts were first offenders and young. The offence was properly planned and executed and violence was used. On sentencing, Justice Chipeta, as he then was, stated that

> On point of sentence, while I am aware that the Convicts were paraded as first offenders in the lower Court, I do not agree that they should have got as short a sentence as the 6 years' imprisonment they each got. This remains so even though the Convicts are relatively youthful. As was observed by the lower Court they came in a group, they were armed, they also injured some watchmen in order to achieve their objective, and apart from being found in possession of the car keys that were part of the property stolen, the rest of the valuable property robbed has not been recovered. Giving them benefits of being first and young offenders, I believe the justice of this case will be served by a 10 years sentence of imprisonment with hard labour for each. I accordingly quash the sentences they each got in the Court below, and sentence them to that new term of imprisonment, which will run from the date the initial sentences was ordered to run.

The State further referred to the case of *Republic v Kasondo* Confirmation Case

Number 447 of 2007 in which a 7-year sentence for the offence of robbery was confirmed because the offence was committed in a group and actual violence was used.

The State further submitted that in *Republic v Misoya* Confirmation Case Number 70 of 2008 the convict was sentenced to 5 years' imprisonment for the offence of robbery. He was young and a first offender. The sentence was enhanced to 7 years' imprisonment because no recovery of the stolen items was made, the offence was planned and committed by a group, there was cooperation of the group members during the commission of the offence, there was violence by use of bricks to assault victims, the first complainant lost some teeth due to assault, the second complainant fell unconscious due to the assault. The court further said that due to the seriousness of the offence, pleas like that the convict is a first offender and young should not be given much weight.

The State then submitted that the circumstances to be considered in this case are the value of the things that the convicts robbed namely, K l 00,000.00, the appellants were armed with a panga knife and a stick, they used actual violence by hitting Bismas Matchado, the offence was committed in a group and the appellants pleaded not guilty. To top it off, armed robbery is a very serious offence whose maximum sentence is death or imprisonment for life. The only mitigating factor is that the second appellant is a first offender. With the above discussion in mind, the State is of the view that the sentence be slightly reduced to 8 or 9 years IHL. As such, the state submits that there is merit on this ground of appeal and the sentence of 10 years' imprisonment be set aside.

This Court agrees with both the appellants and the respondent that in the present matter the prosecution case wholly depended on the identification of the appellants by Bismas Matchado. It was therefore indeed necessary that the court below warn itself of the dangers of convicting the appellants on such evidence as given by Bismas Matchado. The lower court did not warn itself of the danger of convicting the appellants on identification evidence only when there was no other evidence telling against the appellants herein. This was contrary to the dictates of the law in cases of the nature at hand where the prosecution case wholly depends on visual identification as expressed in the many cases cited by the parties and well captured

in the *Sanudi v Republic.*

As rightly submitted by the State, this Court does not automatically quash the conviction in such circumstances where there is no requisite warning pertaining to identification evidence but this Court must look at all the circumstances of the case and determine whether the conviction based wholly on identification evidence was safe and satisfactory. See *Phiri and others v Republic* [1998] MLR 307.

This Court notes that, as rightly submitted by the State, the lower court in its judgment, did consider the circumstances surrounding the identification in the present matter. The lower court considered closely the circumstances in which the identification was made. It stated that it had to consider how long the witness had the accused persons under observation? At what distance? In what light? If there were any impediments?

The witness had switched on lights in his room. This meant that he could clearly see the assailants who were at close range and were asking him questions about money and then assaulted him when he told them he had no money. So, that the observation of the appellants by the witness herein was at close range and in an adequately lit room.

The lower court was also convinced by the witness as he was able to describe the roles played by the appellants in the robbery. That one carried a long stick and the other carried a panga knife.

The lower court however did not consider any weaknesses in the identification evidence since the witness had, as rightly noted by the appellants, only been awakened to cries for help and an invasion of his room after he had opened the door to the same.

It is also not clear for how long the witness had the appellants under observation. However, at most, the assailants must have been face to face with the witness for several minutes when they asked for money and assaulted the witness.

The lower court did not consider how long elapsed between the original observation

and the subsequent identification of the accused persons to the police. The lower court simply stated that the relevant witness identified the appellants at an identification parade some weeks after the robbery. It is not known precisely how many weeks had elapsed between the robbery and the identification parade. However, all that it means is that what elapsed is some weeks and not months since the encounter and the subsequent identification.

There was no evidence as to the similarity between the description of the accused given to the police by the witness when first seen by him and their actual appearance.

The appellants wanted this Court to find that the identification parade was flawed in material respects. This Court is however satisfied that there was an identification parade herein at which the witness identified the appellants as being part of the assailants. The police officer who conducted the identification parade explained to the lower court that on the parade there were eight people including the two appellants.

In that connection, this Court finds the appellants' submission that the witness failed to identify the leader of the assailants is not well placed because that leader was not among the people on the identification parade. That cannot therefore be used as a reason to suspect the witness identification of the appellants at the identification parade.

The appellants insisted that there should have been corroboration of the identification evidence. This Court takes the contrary view. Corroboration is necessary when the identification evidence is of poor quality such as where it was done at night as rightly held in the cases cited by the appellants such as that of *John v Republic.* However, in the present matter, the identification was done in a well-lit room so that the quality of the identification was not poor as suggested by the appellants who emphasize that the witness must have been so intimidated that he could not clearly see the assailants. Obviously, the witness must have been under distress but he was face to face with the assailants in a well-lit room and at close range for the time it took them to ask him questions and assault him.

This Court therefore agrees with the State and finds that the identification evidence

in this matter was of such a nature as to be reliable in the absence of the requisite warning of the danger of convicting solely on the basis of identification evidence. The conviction on the basis of the identification evidence was safe and satisfactory.

The fact that the appellants each put up the defence of an alibi does not detract from the safe and satisfactory nature of the conviction. The alibi was disproved by the evidence of the State in that the 1st appellant was found to be lying as to his whereabouts after he was released from custody a month earlier after serving an earlier sentence. He lied that he had gone to his parents and was thereafter staying with his brother. His brother in fact stated that the 1st appellant left from his place a while back for a place called Misewufolo and never came back until his arrest herein. The lie of itself was aimed to deceive the lower court. The lower court also noted that fact.

The 2nct appellant too, though he brought evidence that he had reported for work on the material night, was shown to be capable of committing offences even when he so reported for work given that previously he had been arrested for criminal trespass when he had in fact reported for such work. The lower court therefore properly considered the appellants' defence of alibi and found that the State had disproved the same.

In the circumstances, this Court agrees with the State that the conviction was safe and satisfactory despite the lack of a warning by the lower court for caution to be exercised in convicting an accused person where the prosecution case wholly or solely depends on identification evidence. The appeal against the conviction herein therefore fails.

This Court has considered the arguments against the sentence of 10 years' imprisonment. The State agrees to a slight reduction of the sentence to eight or nine years. However, this Court does not think that the 10 years' imprisonment is out of order for a robbery committed by a group of people who invaded a home at night whilst armed with dangerous weapons and who clearly traumatized their victim by visiting him with violence. All the stolen property was not recovered.

The appeal against the sentence also fails.

The appeal against the conviction and sentence therefore fails in its entirety. Made in open Court at Blantyre this 13th December 2016.