IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CRIMINAL APPEAL NO. 120 OF 2018

Being Criminal Case No. 40 of 2017 in the FRM's Court Sitting at Rumphi

SIMON PHIRI

VERSUS

THE STATE

CORAM: HON. JUSTICE T.R. LIGOWE
W. Nkosi of Counsel for the State
W. Chirwa of Counsel for the Appellant
G. Msukwa, Official Interpreter
J. Chirwa, Court Reporter

JUDGMENT

Ligowe J

1 The First Grade Magistrate's Court at Rumphi convicted Simon Phiri of the offence of robbery under section 301 of the Penal Code and sentenced him to imprisonment for 11½ years with hard labour. He appealed against the conviction and the sentence on the ground that the lower court had not properly directed itself on identification evidence, and that the sentence is manifestly excessive for a first offender.

2 The appellant was charged jointly with Emmanuel Mbewe, but he was acquitted when the court found no sufficient case had been made requiring him to defend.

3 The allegations before the trial court were that Simon Phiri and Emmanuel Mbewe, on or about 9th January 2017, at Makunguluka village in Rumphi, being armed with a panga knife, robbed Abisolomu Chivyamba Harawa of K400 000 cash.

4 The evidence was given by Abisolomu Chivyamba Harawa, Nelias Msiska, Constable Njaya and Mike Kachali for the State, and Simon Phiri in defence.

5 What came out is that Abisolomu Chivyamba Harawa and Nelias Msiska are husband and wife and were very old at the material time. They had a maize mill and Simon Phiri was working there as an operator from September 2016. Emmanuel Mbewe was Simon Phiri's brother and he used to visit at the maize mill so often. On 8th January 2018 while Mr Abisolomu Harawa was at the maize mill, he received a call from his son at school asking for the balance of his school fees amounting to K50 000. It appears he came home with money. He testified that he kept K400 000 ready for banking separately from the K50 000 for the school fees.

6 In the night, before Nelia Msiska slept, she noticed some thieves breaking the door into her house. Then she saw light from a torch at the sitting room. She woke up her husband and then went to hold the door to their bedroom as thieves were trying to force it open. The husband joined her. She testified that she saw Simon Phiri had a torch on his forehead and a panga knife in the right hand. He was also wearing a cap from the back. As they struggled with the thieves over the door to the bedroom, Simon Phiri struck Mr Abisolomu Harawa on the head with the panga knife through some opening that was created in the process. He fell down. As Nelias Msiska wanted to go out, she was cut on the right ear and shoulder and started bleeding heavily. She then went underneath their bed. The thieves came to her to show them the money. When she hesitated to reveal, they threatened to strike her with the knife again. She kept quiet, and the thieves started looking for the money under the mattress. She saw Simon Phiri taking the money and giving it to his friends. When the thieves left, she sought help from from a NyaMkandawire and they were taken to the hospital at Lura.

7 The case centred on the identification evidence of Nelia Msiska because her husband had not identified any of the thieves. Neither the appellant nor his co-accused had been found with any incriminating material. Because she only identified the appellant and no other witness gave evidence connecting Emmanuel Mbewe to the crime, the lower court found him with no case to answer.

8 The appellant's evidence in defence was that his brother and co-accused, Emmanuel Mbewe had just been discharged from prison. The appellant called for his brother to start working with him. Later the brother got married and his wife would also come to the maize mill to chat. After his boss had talked with his son on the phone regarding school fees, he talked about rising school fees as against the slow progress of the maize mill business with the appellant in the presence of Emmanuel Mbewe and his friend Pearson Phiri. At the time Emmanuel Mbewe and Pearson Phiri left the maize mill that day, they said they wanted to look for money in order for them to travel to Nkhatabay. From the maize mill that evening, Emmanuel Mbewe went past the appellant's house and left around 7.00 pm going to his house. The appellant however thought he went where he had agreed with Pearson Phiri to look for money, because in the morning, Emmanuel Mbewe's child complained that he came home around 1.00 am while wet and had a wound on the leg. The same morning Pearson Phiri came to his house and told him they had found the money and were thus going to Nkhatabay with Emmanuel Mbewe.

9 When he went to work that morning, he noted, his boss delayed to come. He went back to his house for a while and then went back to work. That is when he was told his boss had been injured. He went to his boss's house and there he was told by the boss's daughter that he had been wounded at night. He then went to Emmanuel Mbewe's house to inform him what happened. The reception at Mbewe's house was so jovial and Mbewe said they had taken tea with milk that morning. As they discussed the matter of the robbery at his boss's house, he noticed Mbewe was restless with it. He also noted that Mbewe really had the wound the child spoke about. Thereafter they went to their tomato garden and somewhere to see pigs together and parted. Afterwards, the appellant decided to go to Mhuju to see his first wife and children. On his way, he met Emmanuel Mbewe again. He asked Mbewe for

K500 but Mbewe stopped a motorbike taxi which they boarded together to Mhuju. He had left Mbewe at the trading centre, but he didn't find him after seeing his wife. Later he learnt Mbewe had gone to Nkhatabay. When he reached his house he was told the police had been looking for him on allegations of the robbery at his boss's house. He told the police that he had no knowledge about it. He strongly believed Emmanuel Mbewe and Pearson Phiri committed the offence because they heard his boss responding to the phone about the issue of money. When Mbewe as arrested, he admitted having gone to Nkhatabay to see his child and that he had bought new things, a memory card, a phone and had K41 000.

10 All this evidence in defence was to show that Emmanuel Mbewe could be the culprit. He had just been released from prison. He had no money the day before the incident. That day he saw that Mr Abisolomu Harawa had money. He planned to look for money together with Pearson Phiri in order to go to Nkhatabay. By the next morning he had found the money. He had tea with milk at his house. He was restless with the issue of the breaking at the complainant's house and had a wound on the leg. He provided the appellant with transport to go to Mhuju. He managed to travel to Nkhatabay and he bought new things.

11 When cross examined however, he admitted being so well known to the complainant and his wife, that they could not mistake him for anybody else at any time. But that the complainant's wife may have seen Pearson Phiri and not him. He was not discredited regarding his lack of knowledge of the robbery at his boss's house and that in view of this he actually went to the maize mill twice that day to work, but realised his boss was not coming. His evidence about Emmanuel Mbewe having money and his restlessness upon being told of the robbery had also not been discredited.

12 In his judgment, the First Grade Magistrate found that robbery had indeed been committed on Mr Abisolomu Harawa and his wife. Violence had actually been used in order for the thieves to steal the money. It was the identity of the robber that was in issue. He considered that the torch on the forehead of the thief provided light, and that the appellant's cross examination did not discredit Nelia Msiska's evidence. He just asked for where the thief may have taken the cap from. He also considered the appellant's defence and found that it

was just meant to shift the blame to the others. He therefore found that the appellant had been rightly identified and convicted him.

13 The appeal against the conviction is that the lower court had not properly directed itself on identification evidence. The lower court did not warn itself, as was held in *Chimwala v. Rep* (2000 -2001) MLR 89, of the special need for a caution before convicting on a case depending wholly or substantially on the correctness of the visual identification of the accused which the accused claimed was mistaken. The principles in *R v. Turnbull* [1977] QB 224, approved in *Chapingasa v. Republic* (1978 -1980) ALR Mal 414 had not been applied. Apart from the need for caution, the principles require that the court should closely consider the circumstances in which the identification was made. How long did the witness observe the accused? At what distance? In what light? Was there any impediment to the observation? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering him? How long did it take from the time of observation to the time of subsequent identification? Was there any material discrepancy between the description of the accused given by the witness and his actual appearance? The court must also take note that although recognition of a person the witness already knows is more reliable than identification of a stranger; mistakes are sometimes made to recognise close relatives and friends.

14 Counsel for the appellant argues in his skeleton arguments that the only source of light was the torch on the forehead of one of the robbers, and it was reflecting on Mr Abisolomu Harawa and his wife. As such, it was difficult for the wife to identify who it was. If anything, the only time Nelias Msiska could have seen the robber is when she went under the bed, which was also difficult in the absence of clear light. Even if the appellant was well known to her, the court has to remember that mistakes can be made in the recognition of close relatives and friends. More so considering that Nelias Msiska is elderly.

15 The state however contends that the appellant was a worker of Nelias Msiska and her husband, was well known and used to see them so often. That she was injured by the

robbers means that she saw them very close to her. They even had a conversation. Meaning she had some time with the robber under observation. So, the identification was proper.

16 My own view of this case is that the conviction was based on the recognition of the appellant by Nelia Msiska. As earlier noted, although recognition of a person the witness already knows is more reliable than identification of a stranger; mistakes are sometimes made to recognise close relatives and friends. It is therefore important that the Turnbull principles should still be applied with regard to recognition. It must come out clearly in the evidence, what made the witness recognise the accused person. Recognition is even more liable if based both on recognition of appearence and voice.

17 The case of *Rep v. Sopondo and Another* [1997] 1 MLR 470 well elucidates the approach a court has to take in handling matters of identification evidence. The case holds as follows:-

(a) A trial court must warn itself of the special need of caution before convicting on the correctness of identification. This duty arises when it is clear that the case is based wholly or substantially on the identification of the defendant. A mistaken witness can be very convincing.

(b) The court must take some time to weigh and consider the circumstances in which the identification was made. These will have a bearing on the quality of identification. 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. The list is endless and depends on the particular case.

(c) It is important to note that recognition of the assailant is better than identification but the court must be aware that recognition of friends and relatives can also be mistaken.

(d) When the quality of the identifying evidence is poor, as for example, when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should direct an acquittal unless there is other evidence which goes to support the correctness of the identification.

(e) Where the case turns on visual identification, the evidence before the court must be such as the court is certain so that it is sure that the defendant committed the offence.

18 The period from the time the robbers broke into the bedroom to the time they found the money and went away was long enough. Nelias Msiska had indeed come so close to the robber at the time she was cut on the ear and shoulder with the panga knife. It does not come out that the light from the torch was so dazzling that she could not see and recognise who it was. The indication is that she had some conversation with the robbers in the process. And the appellant admitted that he was so well known to the complainant and his wife, that they could not mistake him for anybody else at any time. Without any evidence regarding any similarities between him and Pearson Phiri, it is difficult to believe the appellant that the witness may have seen Pearson Phiri.

19 At this point I need to bring forth section 188 (1) (b) of the Criminal Procedure and Evidence Code.

> "Where a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him; but so however that—
>
> (a) ...
>
> (b) the accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence."

20 The question now is whether there is reasonable doubt created by the appellant's defence.

21 Of course, as well-known as he was to his bosses, he would not ordinarily have been expected to go to work the following morning, knowing he had robbed them in the night

and the wife had seen him and conversed with him. But that is not impossible for a determined criminal to do. Emmanuel Mbewe might have been in prison for a criminal offence before. He might have had no money the day before the incident and he might have had it the next day, but the same does not affect the witness's recognition of the appellant during the commission of the robbery. It is in view of this that I find the conviction by the court below, impeccable.

Sentence

22 As for the sentence, it is important to note that simple robbery under section 301 (1) of the Penal Code is punishable with imprisonment for 14 years. But aggravated robbery under section 301 (2) is punishable with death or imprisonment for life. The provision states: -

> "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."

These are two separate offences and it is important that prosecutors should specify in the charge which one of the two the accused person is charged with. This has a bearing on the conviction and the attendant sentence.

23 The charge in the present case did not specify the provision. The conviction also did not specify the provision against which the appellant was convicted. The record shows that the sentence was approached like it were for a simple robbery. I addressing the court on antecedents the prosecutor referred to the offence as attracting a penalty of imprisonment for 14 years. The Magistrate said nothing about it. Yet the circumstances are clear that it was an aggravated robbery. That was not proper.

24 As against a maximum of 14 years, then 11½ years is indeed manifestly excessive. Although in arriving at it, the court below considered the prevalence of robbery in Rumphi and the need to reduce it; that the money was not recovered and the complainants had been wounded; and that the robbers had well planned to commit the offence. The starting point

for sentencing simple robbery according to the *Magistrates' Court Sentencing Guidelines, Malawi Judiciary 2007,* is five years. Staring at five years considering the aggravating factors and the mitigating factors, 11½ years is, in my view not justifiable. I reduce it to six.

25 The appeal is partly allowed in that the sentence is reduced to imprisonment for six years with hard labour.

26 Delivered in open court this 16th day of September 2020.

T.R. Ligowe

JUDGE