IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 5 OF 2000

(Being High Court Criminal Case No. 31 of 1995)

BETWEEN:

KILITASI CHIMWALA.....APPELLANT

- and -

THE REPUBLIC.....RESPONDENT

BEFORE: THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE MTEGHA, JA
THE HONOURABLE MR JUSTICE TAMBALA, JA

Gama, of Counsel, for the Appellant
Jaffu (Miss), of Counsel, for the Respondent
Chirambo (Mrs), Official Interpreter/Recorder

J U D G M E N T

Unyolo, JA

On 7th May, 1999, the appellant was convicted by the High Court sitting at Zomba of murder, contrary to section 209 of the Penal Code and was sentenced to death. He

appeals against the conviction on the ground that the verdict was unsafe and could not be supported, having regard to the evidence.

The deceased was a married woman. She was working as a Librarian at Chancellor College in Zomba and resided at Kalimbuka, in the same Municipality of Zomba. There was no dispute that the deceased was attacked in her house by some intruders during the early hours of 22nd December, 1994. The intruders gained access into the house by breaking a window. She received eleven stab wounds in the attack from which she died on 27th December, five days later.

The prosecution case was that it was the appellant and his friend, one, Michael Nkoloma, who burgled the house and attacked the deceased. The prosecution relied, first, on the evidence of the deceased's niece, PW2, who told the Court below that she was at all material times residing with the deceased when, at about 3.00 am on the relevant day, she heard the deceased screaming for help. She said that she came out from her bedroom and found the deceased lying in the corridor and someone hitting her using a weapon. She identified the appellant in Court as the person she saw assaulting the deceased.

Secondly, the prosecution relied on fingerprint identification evidence. It was in the evidence that one of the fingerprints which were lifted from the broken window pane at the deceased's house was found to be identical with the middle finger impression of the appellant.

The prosecution also relied on the caution statement the Police obtained from the appellant. In the statement, the appellant is recorded as having said that he and his friend, Michael Nkoloma, went to the deceased's house on the material day to steal and that it was actually Michael Nkoloma who went into the house, after breaking the window, using a stone. Further, he is recorded to have said that shortly after Michael Nkoloma had entered the house, he heard a woman screaming inside, that she was dying, and that when he heard this and shouts of "thief", "thief", he ran away.

The appellant's case was essentially an alibi. He told the Court below that he was in Blantyre, not Zomba, the day the incident at the deceased's house took place. He said he was staying with his uncle there. In cross-examination, the appellant said that he was unable to call his uncle as a witness, because he died while he was in prison. He said there was no one else who saw him in Blantyre.

With regard to the fingerprint identification evidence, the appellant told the Court below that the Police must have surreptiously got the fingerprint during a visit to the deceased's house, where they forced him to demonstrate how he and his friend entered the house.

Finally, concerning the caution statement, the appellant denied making the statement. He said that the police officer investigating the case just brought the document to him already written and forced him to sign it, which he did, to avoid being beaten. He told the Court that he knew Michael Nkoloma only in prison.

The usual process of Counsel's addresses and the Judge's summing-up followed. The jury retired, and before long, they came up with a unanimous verdict finding the appellant guilty of murder, as charged.

The first point taken by Counsel for the appellant was that the learned trial Judge erred in not warning the jury, in his summing-up, of the special need for caution before finding the appellant guilty in reliance on the correctness of PW2's identification of the appellant. Counsel pointed out that PW2's own evidence was that she saw the deceased's assailant only for ten seconds. Counsel argued that this was too short a time for the witness to see the assailant sufficiently and be able to say with certainty who it was. Counsel stated that this was more so in the present case, where there was no attempt made to have the witness identify the appellant before the trial, like at an identification parade, soon after the appellant was arrested, and not as was done, to ask the witness to identify the prisoner for the first time only during the trial. Counsel submitted that for these reasons, there was need for the learned trial Judge to warn the jury of the need for caution in relying on PW2's evidence when arriving at their decision.

Pausing here, it is to be observed that although dock identification in which a witness makes his or her identification of an accused for the first time only in court is legally admissible, it is generally considered to be a most unsatisfactory method of proof. Indeed, the whole question of visual identification of suspects by witnesses has for many years been acknowledged as problematic and potentially unreliable, considering, among other things, that visual memory may fade with passage of time, and the possibility of a genuine mistake: see **Bentley (1991), Crim LR 620**.

Turning now to the point specifically raised by Counsel for the appellant, we agree that the general rule is that where a case against an accused depends wholly or substantially on the correctness of the visual identification of the accused, which the defence claims to be mistaken, the trial judge's direction to the jury should include a warning of the special need for caution before finding the accused guilty, and the reasons for the caution. Such a warning has come to be known as the "**Turnbull**" warning, following the English case of **Regina vs. Turnbull & Another (1977), QB 224**. That case goes on to say that in addition, the trial judge should direct the jury to examine closely the circumstances in which the identification was made. In our view, these are vitally important matters.

Referring to the case in hand, the relevant part of the learned trial Judge's summing-up appears at page 44 of the record, where he said:

"The case for the State, Members of the Jury, is that the intruder is the accused person now in the dock. The State brought witness PW2, Miranda Nkunika. She said that she saw the accused person attacking the deceased, in her evidence she said that she had enough time to identify the accused person because of the light from the dining room and that the accused was facing where she was coming from. She also said that their eyes locked for 10 seconds before she retired to her bedroom where she started shouting to outsiders. It is for you to decide whether she could have identified the accused person there or not."

In all fairness, the learned trial Judge did his best in his summing up on this point, but with the greatest respect, he did not go far enough in terms of the principles enunciated in the **Turnbull** case, with which we agree. It was necessary, in our view, for the learned trial Judge to warn the jury of the dangers that are inherent in identification evidence, as we have shown, and the need, therefore, for caution before finding the appellant guilty in reliance on the correctness of PW2's identification of the appellant. In this regard, the learned trial Judge should have directed the jury to closely examine the circumstances surrounding the identification. There is, therefore, merit in Counsel's submission on this point.

The matter does not, however, end there. As we have indicated, the prosecution adduced further evidence relating to the similarity of the fingerprint that was lifted from a broken glass at the deceased's house on the very day the deceased's house was broken into and the fingerprint impression of one of the appellant's fingers obtained from him in the course of police investigations. We have also indicated that the prosecution tendered in evidence a caution statement where it is shown that the appellant admitted having gone to the deceased's house on the fateful night. We have also shown that the appellant's assertion was that the Police must have tricked him to go to the deceased's house during their investigations so that they should seize the opportunity to have his fingerprints somewhere at the scene. As regards the caution statement, it will be recalled that the appellant's case was that he signed the document under duress, without knowing what it contained. It is noted that the learned Judge did address all these matters in his summing-up, and the jury, who had the advantage of seeing and hearing the witness, believed the prosecution side of the story, not the appellant's.

In conclusion, we wish to comment on a further matter which the appellant raised in the initial grounds of appeal he drafted on his own. He argued there, between the lines, that the verdict of the jury could not be supported, having regard to the fact that the knife which was used to stab the deceased and the stone which was used to break the window were not tendered in evidence. The record is, however, clear on this point. PW1, a Court Clerk, explained that the items missed between the first trial, which ended in the jury failing to agree and being discharged, and the time the second trial, which is the subject of this appeal, commenced. It is to be observed that the witness emerged unshaken in his

evidence. Indeed, as we have already indicated, there was no controversy that entry into the deceased's house was gained by breaking a window, and there was no controversy that the deceased was stabbed.

We have considered the case carefully and we do not, having regard to the general feel of the case and for the reasons we have given above, think that the verdict returned by the jury could be impugned. Accordingly, the appeal must fail and it is dismissed.

DELIVERED in open Court this 15th day of August 2000, at Blantyre.

Sgd .....

L E UNYOLO, JA

Sgd .....

H M MTEGHA, JA

Sgd .....

D G TAMBALA, JA