IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 89 OF 1996

MUDZANDIFUNA BONZO

VERSUS

THE REPUBLIC

From the Resident Magistrate's Court at Chiradzulu
Criminal Case No. 89 of 1995

CORAM: MWAUNGULU, J
Manyungwa, State Advocate, for the State
Accused, present and unrepresented
Ngwata, Official Interpreter
Marsen, Recording Officer

Mwaungulu, J

JUDGMENT

Here, Mudandifuna Bonzo and Daison Mwase appeal against the judgment of the Second Grade Magistrate Court in Chiradzulu.The appellants were convicted of the offence of robbery contrary to section 301 of the Penal Code. They were sentenced to twelve months imprisonment with hard labour. The appellants have filed a joint petition of appeal.

The appellant's grounds of appeal, five of them in number, cover the findings of fact of the Court below. In the first ground of appeal it is said that the Court below erred in law in convicting the appellants when there was no evidence on which to convict them. In ground two they raise the defence of an alibi. They contend that when the offence was committed they were in Zomba where they were working. In ground three it is said that those who actually committed the offence denied that the two appellants were involved. Those who were involved were properly convicted and sentenced. In ground four it is said that the complainant failed to identify the appellants during an identification parade. The appellants, therefore, contend that the complainant must have been induced to tell lies in Court. Finally they contend that their houses were searched and nothing had been recovered.

On the 1st of May 1995 there was a robbery at Mr. Wellings Mangani's grocery at Simika village in Chiradzulu District. A group of six raided the grocery at around 3.00 o'clock in the morning. Two intruders came to the complainant demanding money while the rest took away with merchandise. The complainant actually handed over cash to the intruders. The matter was reported to the police.

There were arrests. We now know that four of the assailants were convicted of the crime by the First Grade Magistrate at Limbe. We also now know that the four mentioned the appellants as having been with them in the robberies. The appellants were, therefore, arrested. At the police, just as in the Court below, they denied the charge.

During the trial the complainant and his wife gave evidence on the robbery. Both of them told the Court below that they recognised or rather identified the appellants because the appellants came very close to them when the offence was committed.

Both defendants denied the robbery and could only account their surprise when the police arrested them and accused them of the crime in question.

For the sole purpose of dealing with all the grounds risen in the appeal I will deal with the first ground last. In the second ground of appeal the defence of alibi is raised. The defence was actually canvassed by the appellants in their defence. The defence was clear from the statements that the appellants gave at the police. The Court below resolved the matter in the following words:

"Defendants have failed to call any witness to support them that they were away at the time of the incident. This being the case I find them guilty and will be convicted accordingly."

The conclusion of the Court below on the alibi is obscure. It can be said that the Court below did accept the evidence but turned it down because it was not supported. Here the Court would have erred. The appellants having led evidence themselves in the defence there was no need to have it supported. If the Court below accepted that evidence from the appellants, cadit questio. Equally it could be said that the Court below rejected the appellant's evidence on the alibi outright because it was not supported by other evidence. If so, evidence in support would be superfluous. 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 prosecution has to disprove the defence. This may entail calling evidence in rebuttal. Sometimes, however, all that the prosecution has to do is by cross-examination show that the defence although raised is untenable. It must never be thought that there is any burden on the accused to prove the alibi. Once the defendant raises it the prosecution must disprove it. (**R. V. Wood** (52 Cr.App.R. 74; **R. v. Anderson ((**1991 Crim.L.R. (1991) Crim.L.R.361; **R.v. Pearce** (96 Cr.App.R.264)

Here the doubt must be resolved in the appellant's favour. It must be taken that the appellants had laid a sufficient premise for the alibi. It was not for the appellants to support it. It was for the prosecution to rebut it as part of their overall burden to prove the case against the appellants beyond reasonable doubt. The approach of the Court to the defence was erroneous.

In the third ground of appeal it is said that those who committed the offence denied that the appellants were involved. None of these were called in the Court below. The Court below seemed to have relied on what the investigating officer had said that the others, who were convicted for the offence mentioned the appellants. This evidence is inadmissible and should not have been received in the first place. The Common law tradition does not accept hearsay. Where a fact is in issue, those have direct knowledge of it who can establish it by evidence in a Court of law. This is a general rule. A statement made by another cannot be used in a Court of law to establish if the fact raised by the statement is true:

"Former statements of any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them. The rule at Common law applies strictly to all classes of proceedings, and there is no special dispensation for the defendant in a criminal case."(Phipson on Evidence 14th ed., 1990,para. 21-02)

Here the issue is whether the appellant's committed the offence. A statement by the other defendants to the police cannot establish the fact in issue. The Court below admitted hearsay to establish the guilt of the appellants.

In the fourth ground of appeal there is mention of an identification parade conducted at the police. It is said that at that parade the complainant failed to identify the assailants. The identification parade was not raised in the Court below.

The prosecution did not lay before the Court evidence of identification by parade. 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). It is necessary to have one if the defendant asks for one (**R. V Brown** (1991 Crim. L.R. 212). The defendant is entitled to demand an identification parade if a witness indicates that he can identify a suspect or there is a reasonable chance that the witness could do so.(**R. v. Rutherford and Palmer**(98 Cr.App.R.191). For the defendant to exercise his right he must be informed of the existence of such evidence and his entitlement to have a parade. (**R. V. Jones(M.A.) And others**, The Times, January 13th 1994). 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) Crim.L R. 213). Here the evidence of the existence of an identification parade was not introduced by the prosecution. It was there. The Court could have considered it. The court should have commented on the failure to introduce it. It can be assumed that the only reason why it was not introduced was that it was averse to the prosecution case. If that was the case, if the defendants were represented, the evidence should have been turned over to the defence.

It is now time to consider the first ground of appeal. Here the appellants contend that the Court below erred in law in convicting them without any evidence. In fairness to the Court below, there was evidence. It is the way that evidence was treated which casts grave doubt on the conviction and justifies allowing the appeal. This case turned out on the visual identification of the assailants by prosecution witness.

Convictions based on visual identification of the offender risk miscarriages of justice because of the risk of mistaken identity. Clearly the policy of the law cannot be to suspect any such evidence outright. This would be inimical to public policy for many would escape criminal liability through such a senseless policy. Having said that, one must also not underrate that such evidence is a volatile premise for miscarriage of justice. The Courts approach has been pragmatic. It is the approach that the full Court of the Court of Appeal in England laid in **R v Turnbull** (1977) Q.B.224). This decision has been followed in this Court in **Chapingasa v Rep** (1978-80) 9M.L.R. 414. In the **Turnbull case** the Court of Appeal said:

"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 warning and should make some reference to the possibility that a mistaken witness can be a convincing one.

“Secondly, 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? Was there any material discrepancy between the descriptio 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 discretion the police were given. In all cases if the accused asked to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.”

There are still problems even where the witness is relying on recognition. It is not unoften that a man has set out thinking that he has recognised another only to discover to he was mistaken. The jury should be equally reminded. The Court of Appeal said:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The purpose of all this is to test the quality of identification. If the quality is good the conviction will be without a miscarriage of justice.

Here the visual identification was of a poor quality. The crime occurred at night. There is no mention of the means of illumination. The Court below did not warn itself of the dangers of mistaken identity. The Court similarly did very little to deciding whether the quality of identification was good.

I would, therefore, allow the appeal and set aside the sentence.

Made in open Court this 27th day of March 1997 at Blantyre.

D.F. Mwaungulu

JUDGE