IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation case number 423 of 2002

REPUBLIC

Versus

MABVUTO MCHOTSENI

In the Second Grade Magistrate Court sitting at Mwanza Criminal case number 137 of 2002

CORAM: DF MWAUNGULU (JUDGE)

Kalaile, Senior State Advocate, for the state

Defendant, present, unrepresented

Nthole, official court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter set it down to consider the conviction. The Mwanza Second Grade Magistrate convicted the defendant of the offence of breaking into a building and committing a felony therein. Breaking into a building and committing a felony therein is an offence under section 311 of the Penal Code. The lower court sentenced the defendant to four years imprisonment. The judge, and Ms Kalaile, Senior State Advocate, appearing for the state, agrees, thought, correctly in my judgment, the conviction was unsafe. The prosecution relied on the visual identification of the defendant by a prosecution witness.

In the lower court the states case was essentially that in the night of the 21st March 2002 the defendant broke and entered a maize mill. The complainant, the principal witness, was sleeping in the building. The defendant, when he entered the room, lit a bulb. The complainant woke up. The complainant using a knife opened the safe and stole K4, 800. The complainant woke up. He struggled with the defendant for some five minutes before the defendant escaped. The

complainant told the lower court that he knew the defendant because the defendant had been to the maize mill several times. He also recognized the clothes the defendant wore. The defendant put in the defense of alibi. He told the lower court that that night he was at a friend's house. The friend gave evidence in the lower court to that effect.

The lower court rejected the defendant's alibi. The lower court then went at length to consider the evidence on the identification of the defendant by the complainant. I reproduce what the lower court said when evaluating the prosecution evidence of identification:

"Now when this court looks at the prosecution evidence, the first prosecution witness said that she has been seeing the accused before the incident. She said that during the material night she could not make any mistake about the identity of the since the accused did not mask his face although he had put on his usual heavy hat. Further, they struggled for about five minutes while lights were on. The complainant also gave full details of clothes that the accused had put on. The court is aware that clothes could be similar but faces are very identical even if one is sick or drunk. In these circumstances, there is no reason to think that the first prosecution witness made a wrong identity of the accused."

I think the judge who reviewed this matter meant to test the conviction because of this lower court's reasoning. When a matter, as this one does, turns on the visual identification of a defendant by prosecution witnesses, the court has to be wary of miscarriages of justice denominated by the nature of the evidence before it. Most miscarriages of justice result from mistaken and wrong identifications. The difficulties for a court are to find an approach that ensures the guilty are convicted and the innocent absolved. This Court has for some time followed the guidelines in R v Turnbull [1977] Q B 224: see Chapingasa v Republic [78-80] 9 MLR 414; Bonzo v Republic Crim. App. No. 89 of 1996, unreported; and Republic v Sopondo conf. Cas. No. 788 of 1996, unreported. All these decisions, including R v Turnbull, have been approved by the Supreme Court of Appeal in Sanudi v Republic MSCA Crim. App. No 10 of 2000.

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 have 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. " (R v Turnbull)

Finally, the court should consider the specific weakness in the identification evidence. This pedantry considerably reduces the risks of miscarriage of justice inherent in this nature of evidence.

The lower court considered the circumstances in which the identification occurred. Certainly, the court did not warn itself in the manner suggested. The trial court, obviously, need not use any form of words. It suffices, in my judgment, if words are used which show that the trial court alerted itself to the danger of acting without caution. It is in this respect that the lower court's reasoning quoted earlier is wanting. The lower court's reasoning is further deficient in considering the weaknesses posed by the identification evidence. The lower court seems to have assumed the credibility question. Of course, the defendant was not masked. The lower court should have considered whether the defendant could, in those circumstances, have gone unmasked. The Privy Council in Beckford and Others v R ( ) 97 Cr. App. R 409, a case the Supreme Court of Appeal cited in Sanudi v Republic, suggests that the credibility question is just as important:

"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?

Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for 20 years and that he was conversing with him for half an hour face to face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule." (R v Turnbull)

The lower court relied heavily on the complainant's evidence of recognition. Even there, there is need for a warning:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." (R v Turnbull)

This was a case where the defendant's defense is that he was not at the scene of the crime.

Where the defendant admits being at the scene of the crime and only questions association with a crime must be distinguished from situations where the defendant questions the identification because he was not at the scene of the crime. The court must be careful not to think that by rejecting the alibi defense the defendant must be the one identified by the prosecution witness. Yet the lower court seems to have thought so, at least from what was said when dismissing the defendant's alibi:

"In the accused's defense it appears he would like this court to believe that because he spent much of his night at the tavern and thereafter went to the house of Elube near Mwanga Mosque to finish the remaining four night hours, therefore, he could not have time to go to Eliya village to commit the offence."

A trial court must not think that rejection of a defendant's alibi establishes the defendant's guilt. There are many reasons why a defendant may want to raise an alibi:

"Care should be taken by the judge when directing the jury about the support for an identification which might be derived from the fact they have rejected an alibi. False alibis might be put forward for many reasons; an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witness can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witnesses says he was." (R v Turnbull)

The lower court rejected the alibi because the defendant did not call a certain witness. The record however shows that the defendant wanted to call the particular witness. It is only that the defendant failed to trace the witness. The witness the defendant found testified in the lower court. The particular witness was vital to the defense. Of course, the defendant's failure to call such a witness would have undermined the alibi defense. Failure to call a material and available witness is fatal to a party's case. Here the defendant wanted to call the witness only that she was not available. This could not be a basis for deciding against him.

The conviction is unsafe. I set it aside. I also set aside the sentence the lower court passed against the defendant.

Made in open court this 8th August 2002

D F Mwaungulu

JUDGE