



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CAUSE NUMBER 7 OF 2014

BETWEEN:

ALUMANDO RICHARD

APPELLANT

AND

THE REPUBLIC

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

M'bwana, Counsel for the Appellant

Munthali, Counsel for the Respondent

JUDGMENT

The appellant, Alumando Richard, was convicted of the offence of aggravated robbery, contrary to section 301 of the Penal Code by a First Grade Magistrate Court sitting at Blantyre. He was sentenced to ten years imprisonment with hard labour. The appellant now against both the conviction and sentence.

The grounds of appeal are three fold namely that the visual identification of the appellant by the prosecution witness was not safe and satisfactory in law to result into his conviction, that the conviction was against the weight of the evidence advanced in court and that the sentence is manifestly excessive in the circumstances.

The record of the lower court shows, from the evidence of three people present at the time of the robbery, that the offence of robbery was committed at O.Y. Investments shop at Machinjiri in Blantyre. The robbery took place around 15.00 hours on 1st December 2011. The shop is a container where drinks are sold through a window. Customers are not supposed to enter into the container. According to three employees from the shop who testified at the lower court, on the day of the robbery, the appellant is said to have been in the company of others and brandishing guns they ordered the saleslady at the shop to hand over cash in the sum of K90, 000.00 and her other personal items.

The accused person was identified by the three prosecution witnesses. The first prosecution witness stated that at the time of the robbery she saw a person who was light in complexion and had put on sun glasses and resembled the appellant. In cross-examination she insisted that it was the appellant. She also said that she heard the appellant argue with the third prosecution witness who was denying the appellant entry into the shop since sales were done through the window. The third prosecution witness stated that he had a conversation with the appellant before the appellant forced his way into the office at the shop herein. In the conversation the third prosecution witness initially spoke with the appellant about the availability of drinks and whether the appellant had empty crates for the drinks. Then the third prosecution witness was denying the appellant entry into the shop since sales were done through the window only for the appellant and his accomplices to show guns and force their way inside the shop where they demanded the cash which the saleslady the first prosecution witness threw outside and was collected by the appellant and his accomplices. The third prosecution witness therefore had a face to face interaction with the appellant. He stated that the incident took between three and ten minutes.

On the first ground of appeal, the appellant submits that the visual identification of the appellant by the prosecution witnesses was unsafe and unsatisfactory in law to result in the appellant's conviction. The appellant argued that the first prosecution witness in her testimony stated that the appellant resembled a person she saw at the time of the robbery who put on tinted glasses. Further, that the second prosecution witness in his testimony stated that there came four thieves and that one of them was the appellant whom he spoke to and he had identified for putting on tinted glasses. And further, that the third prosecution witness in his testimony stated that

he could identify one of the robbers who was light in complexion who put on tinted glasses and had a pistol. The appellant argued that in view of the foregoing the nature of the observations by these prosecution witnesses is questionable since none of them testified as to whether they ever saw the appellant before the robbery and how often they saw him. The appellant argued further that in view of the lack of prior visual identification there is a high risk of mistaken identity.

The appellant cited the following cases in support of his case on the visual identification. *Chimwala v Rep* [2000-2001] MLR 89 where it was held 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 a special need for caution before finding the accused guilty and the reasons for the caution. He also cited the case of *Sanudi v Rep* [2002-2003] MLR 211 and *R v Turnbull and others* [1977] Q.B. 224 which was quoted with approval by the Malawi Supreme Court of Appeal in the *Sanudi v Rep* case where the following passage was quoted

First, wherever the case against an accused person 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.

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 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 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 asks to

be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

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.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can be left to assess the value of the identification evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur . . .

When, in the judgment of the trial Judge, 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 situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification . . .

The trial Judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so.”

The appellant also cited the cases of *Rep v Spondon and another* [1997] 1 MLR 470 and *Rep v Paulo and another* [1995] 1 MLR 225 where the Court held that where the quality of identification evidence is poor the court should acquit unless there is other evidence which goes to support the correctness of identification.

All the above cases point to the fact that a trial court has a duty to warn itself of special need of caution before convicting on correctness of identification. This duty arises when it is clear that the prosecution case is based wholly or substantially on identification of accused. A trial court must take time to weigh and

consider circumstances in which identification was made. It has to regard time of observation, distance, illumination, obstruction, whether defendant was seen or known by the witness, reasons for remembering the recognition. Where witnesses for the prosecution rely on recognition of assailant, it is important that this is better than identification. The court must be aware that recognition of friends and relatives can also be mistaken. If quality of identification in such circumstances is poor then a court should direct an acquittal, unless there is other evidence which goes to support correctness of identification.

The State was of the view that the conviction herein was safe and satisfactory. This was on account of the fact that the appellant was identified by the prosecution witnesses after a conversation in good lighting conditions. The conversation about availability of drinks and later about demanding money. That the incident herein was not a split second one.

The State argued that although the lower court did not warn itself of the danger of convicting herein on identification evidence alone the identification evidence was good and therefore the conviction is safe and satisfactory.

This Court notes that the prosecution's case before the lower court depended substantially on identification evidence. As such the lower court ought to have warned itself of the need for caution before convicting on such evidence. However, this Court agrees with the State that despite the absence of the relevant warning by the lower court on the danger of convicting on identification evidence herein when the record is examined it is clear that the identification evidence was good. The appellant had a conversation during day light at close proximity with the third prosecution witness about the drinks and his insistence to enter the shop. It is only after guns were produced that the situation changed to a distressing one. In such circumstances, this Court is of the view that there is reliable evidence on the identification of the appellant as one of the assailants herein. In view of that the appellant's first ground of appeal fails.

On the second ground of appeal the appellant's argument was firstly, that the caution statement of the appellant should not be relied upon in upholding the conviction. This is because the said statement was disowned by the appellant in court. Further that there is no connection between the theft of money and use of

violence herein to constitute a robbery as defined under the law. According to the State the evidence is clear that the assailants in this matter had guns though the same are mixed up as rifles and pistols. However, no cross-examination was taken up on that issue. The assailants demanded money. The State submitted that there is therefore clear evidence that the assailants armed with dangerous weapons namely guns demanded money. This Court has examined the record of the lower court and finds in agreement with the State that there is clear evidence herein that a robbery was committed herein even if the caution statement of the appellant is disregarded. The second ground of appeal therefore fails too.

In view of the foregoing circumstances the conviction herein is upheld and what remains is for this Court to consider the third ground of appeal namely, whether the sentence herein was manifestly excessive.

The appellant was sentenced to ten years imprisonment with hard labour. He contends that the sentence was manifestly excessive given that he is a youthful first offender. The appellant stated that youthful offenders call for consideration for short and sharp sentences. The State asked for a reduction to eight or nine years imprisonment thereby agreeing to a limited extent with the appellant.

This Court took note of the views of the reviewing Court in the case of *Rep v Chikakuda and others* [1997] 2 MLR 288 in which a convict was similarly armed with a gun and in the company of others at the time of the commission of the offence and was sentenced to six years imprisonment for the aggravated robbery. These two factors were considered as serious aggravating factors to require enhancement of the sentence and Mwaungulu J., as he then was, had the following to say on the insignificance of the plea of youth and being a first offender for such serious offences as aggravated robbery

The sentence of the court below is apt for the criticism of the Judge who reviewed the matter. This is the sort of sentence that encourages you to reiterate, without fear of criticism of being repetitious, what others and I have said so often. There are certain offences, either because of their nature or the circumstances in which they are committed, to which a plea of guilty, the fact that this was the offender's first offence or the youth of the offender, can have but negligible consequences to the sentence to be imposed. In *Rep v Makanjila* Conf Case No. 597 of 1996 (unreported) the court said:

“I have always agreed with the observation of Ewbank J in R v Richardson and another The Times 10 February 1988, that there are some crimes so heinous that a plea of youth, a plea that the crime was a first offence or that the prisoner has not been to prison before are of little relevance. Those who participate in them, even if they pleaded guilty, even if they were young, even if they had no previous convictions, even if the victims were not brutalised in the presence of young children, should know that they will eventually be subjected to long and immediate custodial sentences. If the victims are young or old the sentences would be even longer.”

In view of the foregoing, the sentence of ten years passed by the lower court does not appear to be manifestly excessive at all and this Court shall therefore not interfere with the same.

In conclusion, the appeal herein fails in its entirety.

Made in open Court at Blantyre this 12th January 2015.

M.A. Tembo

JUDGE