IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Appeal Number 25 0f 2002

ALLAN GANGAWAKO

FRAZER PATSON DIMBA

REUBEN MILANZI

Versus

THE REPUBLIC

In the First Grade Magistrate Court sitting at Ntcheu being criminal case number 58 of 2002

CORAM: MWAUNGULU (JUDGE)

Ngwira, Legal Practitioner, for the Appellant

Mwenelupembe, Deputy Chief State Advocate, for the Respondent

Nthole, the Official Interpreter

Mwaungulu, J

JUDGMENT

The defendants, Allan Gangawako, Frazer Patson and Reuben Milanzi, appeal against the Ntcheu First Grade Magistrate's Court's judgment. The Ntcheu First Grade Magistrate Court convicted the appellants of robbery, an offence under section 301 of the Penal Code. The Ntcheu First Grade magistrate Court sentenced the appellants to eight years imprisonment. The defendants, unrepresented in the court below, now appeal, through counsel, against conviction and sentence. Determining this appeal has been far

from being easy. Quite some reasonable doubt lingered, doubt which, in my judgment I must resolve for the appellants.

Our Criminal Law, under the offence of robbery, prohibits theft and the threat or use of force to facilitate theft. There was no doubt in the court below about the robbery. The question, the very question before this Court, was whether the state proved beyond reasonable doubt the appellants committed the robbery. The prosecution's case hinged essentially on visual identification of the appellants by prosecution witnesses. The prosecution's evidence of the appellant's identity comprised essentially of the victim's testimony and an identification parade. The question before this whether the evidence and the way the lower court treated the evidence leaves this Court certain so that it is sure it is the appellants who robbed the complainant.

The facts the lower court found are not complicated and, if they help settle the appeal, are as follows. Mrs. Florence Chimpakati, a wealthy woman in Ntcheu District, was in the house with her two children and someone who visited for that night. When they attacked that night, the assailants, armed with a rifle and a panga knife, rounded and gagged the watchman, hacked the visitor with a panga knife, held the children captive and surrounded Mrs. Chimpakati demanding money and car keys. Mrs. Chimpakati surrendered the money and car keys. The assailants fled with the complainant's car. They abandoned the car after a short distance.

When Ntcheu police received the report of the robbery investigations commenced immediately. The police arrested the appellants and recovered some money. The police mounted an identification parade in which the watchman and one of the complainant's children identified the first appellant, another of the complainant's children identified the second appellant and the complainant, the visitor and one of the complainant's children identified the third appellant.

It is necessary, for reasons appearing later, to detail, apart from the identification parade, which I consider later, the evidence on the identification to determine the quality of identification the lower court based the judgment upon. When the assailants entered the complainant's room, the complainant switched on the lights, electric bulbs. The assailants got near to the bed where she slept. Two assailants stood at the base of the bed. One stood near the headrest. Where the assailants jumped into the fence and the watchman was, there was a security light. In the room where the complainant's children slept, it is unknown whether there was lighting and, if there was, whether it was on at the time the assailants attacked. One child told the court below that he did not identify any assailant. She told the court below that the assailant who entered their room was brown in complexion and had a scar on the cheek. The other, on the evidence on the record, set to see what happened to her mother. It is unclear whether she got to the room. She told the court an assailant asked her to go back to her room. If she went to her mother's room, on the complainant's evidence, there was light there. The court must resolve the doubt for

the appellants. In the room where the visitor slept, the assailants switched on the lights. The visitor told the lower court that he identified the man who attacked him. The other two were also in the room, it is clear that this witness did not identify these. The third complainant's child rushed out into the fence when she heard the watchman groan. Outside, as the prosecution evidence showed, there was a security light. She was bundled into the room where the visitor was. There too, there was light.

The prosecution, it seems, never intended to tender the evidence of the identification parade. The identifying witnesses raised the identification parade evidence only when cross-examined by the appellants. The lower court, just like this Court, never had details of the parade. All that there is on the parade, therefore, emanates from the appellants' evidence in the lower court. The appellants' evidence and defenses were essentially the same. All the appellants raised the defense of alibi; they were not at the scene of the crime.

The formidable points raised by Mr. Ngwira, legal practitioner for the appellant and Mr. Mwenelupembe, the Deputy Chief State Advocate, who vehemently, supports the conviction, requires restating principles guiding appellate courts on an appeal where, like here, the appellate court may revisit findings of fact of a trial court. The Supreme Court laid the principles in Pryce v Republic (1971-72) 6 ALR (Mal) 65. There is an apt statement of the approach by Skinner, C.J., a statement with which Chatsika and Barwick, JJA agreed:

"In our opinion the proper approach by the High court to an appeal on fact from a magistrate's court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, in the words of Coghlan v Cumberland (3) ([1898] 1 Ch. At 704 – 705; 78 L.T. at 540) – "… must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong."

The Malawi Supreme Court of Appeal followed Pryce Republic in Msemwe t/a Tayambanawo Transport v City Motors [1992] 15 MLR 302. In Makonyola v Republic Criminal Appeal case Number 13 of 2003, unreported, this Court said:

"This approach, to my mind, requires the appellate court, where there was no jury at first instances, to regard all evidence which is the basis of facts the lower court finds. Beyond the questions of credibility, the court, in my judgment, must consider whether the evidence, subject to section 5 (2) of the Criminal Procedure and Evidence Code, could have been excluded on any rules of evidence or otherwise. More importantly, the appellate court must scurry the record to see if there was evidence at all and, if there was evidence at all, whether it was sufficient to justify the finding of facts the lower court based its decision upon."

One point Mr. Ngwira takes for the appellant is that the police irregularly mounted the identification parade. In this matter, no doubt, the police were under a duty to mount an identification parade. The duty to mount an identification parade arises whenever prosecution witnesses state that they can identify the defendants and the suspect questions the identification. Just as there is a duty to mount an n identification parade there is also a duty to conduct the parade properly so that the evidence, if there be positive identification, is of a quality that points beyond reasonable doubt the guilt of the suspect. Where, like here, there should be and there is an identification parade, there is a duty on the prosecution to lead evidence of the parade and the manner in which it was conducted. A court will ignore evidence from an identification parade where the identification parade is flawed in material respects (Gadeni v R (1961-63) 2 A.L.R. (Mal) 34; Andrew v Republic (1971-72) 6 A.L.R. (Mal) 297; and Chibwana v Republic [1981-83] 10 M.L.R. 162) In Andrew v Republic at 299, Edward, J., in this Court, said:

"There is no evidence in the record that such an officer was present at the identification parade. If none was present, that circumstance does not of itself vitiate the identification parade which should certainly be conducted by a police officer of higher rank than constable; and if it is not, that is a matter for comment. It is also desirable that an officer conducting an identification parade should be an officer other than the officer in charge of the investigation in connection with which the parade is held. I would further point out that the [police officer under whose control an identification parade is held should give evidence of the formation of the parade, whether the persons on the parade were of similar build, height and dress to the accused's, whether the accused was allowed to choose his position in the parade, and so on.."

Andrew v Republic was a case where, like here, there was a marked inadequacy of the evidence concerning the holding of the identification parade; the only officer concerned in the conduct of the parade may well have been the constable investigating the case against the accused; there was little evidence against the defendant's complaint about the conduct of the identification parade. Edward, J., said;

"The learned magistrate was not, without investigating the accused's complaint in any way, entitled just to disbelieve it, albeit he accepted the complaint as a witness of truth. In a case like the present one, which turns on identifications, the failure to investigate the complaint in my judgment vitiates the conviction."

In this matter, the prosecution never called the officer who conducted the identification parade. The identification parade evidence only arose in cross-examination of prosecution witnesses, including the investigating officer. We have very little and unreliable account of the identification parade from the prosecution witnesses. The little that there is on the defense adds up to complaints, uninvestigated by the lower court, about the persons and the manner in which the parade was conducted. I do not think, with all these problems,

any importance can be given to the evidence of that identification parade.

That leaves the prosecution's evidence of identification I referred to earlier. Mr. Mwenelupembe, the Deputy Chief State Advocate, argues that there was sufficient evidence, most of it referred to by the lower court, to justify identification of the appellant. In my judgment, for all it is worth, the evidence leaves reasonable doubt. Mr. Ngwira, appearing for the appellants, thinks, correctly, in my judgment, that the complainant's own identification is doubtful. Early in her testimony she suggested identifying the assailants. Later it seems she relied on the watchman's identification. Her evidence was very critical to the lower court's findings because it was her who, at least, from the lower court's perspective, tallied longer with the assailants. I read the testimony of two children over and over. There is no evidence that there was or there was no light in the room. One of the two actually conceded not identifying any of the assailants. The visitor and one child had light in the room they eventually ended in. This child went outside where there was light. The lower court could properly rely on their evidence. There is no evidence to support the lower court's finding that the assailants did or never wear masks. The lower court's finding that the assailants wore masks is, therefore, not based on any evidence on the record.

The lower court, however, was oblivious to the Court of Appeal decision in R v Turnbull and Others [1977] Q.B. 224, a decision approved in this Court in Republic v Malikesi and Another Confirmation case number 640 of 1994, unreported, and re-emphasised in many decisions thereafter. Before this decision, there were previous decisions of this Court: Republic v Chauma, Confirmation case number 235 of 1981, unreported, and Ng'oma v Republic Criminal Appeal case number 51 of 1981, unreported. In the latter case Kalaile, J., applied the House of Lord's decision in Arthur v Attorney General of Northern Ireland (1971) Cr. App. R. 161. The House of Lord decided that where the case turns on the visual identification of an accused person by prosecution witnesses, the court should direct itself or the jury on all matters concerning identification. The House of Lord held that in that particular case the identification was faultless. It however left for future consideration whether there should be guidance and what the nature of the guidance should be (See Long v Reginam (1973) 57 Cr. App.R. 871, in the Court of Appeal, per Lawton, L.J.) R v Turnbull and Others supercedes Arthur v Attorney General of Northern Ireland, followed by Kalaile, J., in the Ng'oma case, and Long v Reginam and, as pointed out in Republic v Malikesi, considerably affects the law on visual identification.

In this particular case, on review of the prosecution evidence on visual identification and the court's approach to the evidence, there reasonable doubts, about the appellants' guilt. I am mindful of the State's argument that may be, for the lower court, the identification parade was not consequential. On the other hand, given the matter turned out on the identity of the assailants' by prosecution witnesses, it is difficult to separate the identification parade evidence from the overall picture affecting the identity of the appellants in the mind of the court. This inseparability, in my judgment, takes this case

out of the sort of considerations in section 5 (2) of the Criminal Procedure and Evidence Code.

The close connection between the identification parade and the identification evidence complicates determining whether rejection of the evidence of the identification parade would not have affected the verdict. Moreover, a finding of fact on the assailant's identity was not based on any evidence on the record: except for the suggestion that one assailant had scars, contrary to the lower court's finding that the appellants never wore masks, there was no evidence that the appellants wore or never wore masks. The lower court speculated on the appellants wearing masks just as he speculated, in the absence of a scintilla of evidence, the appellants made sexual advances on the complainant.

Clearly, the lower court, although it considered the evidence pertaining to the appellant's identity, never considered the R v Turnbull directions. In those circumstances, the verdict is unsafe. The direction ensure that there is no mistake as to the identity of the assailants and avoid miscarriages of justice. The R v Turnbull directions impose on a court at first instances to bear the warning and expose to itself the weaknesses and dangers of identification evidence generally and in the specific case (R v Keane (1977) 65 Cr. App.R. 247. The Privy Council in R v Beckford and Others (1993) 97 Cr.App.R 409 at 415 has held that failure to give a Turnbull warning "will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence." Although not bound by the decision, it is strongly persuasive and, in my judgment, represents good law.

I therefore allow the appeal against conviction and sentence. I therefore set aside the sentence.

Made in open court this 4th Day of August 2003.

D F Mwaungulu

JUDGE