

IN THE HIGH COURT OF LESOTHO

In the matter between:

PHIRI MOHOLISA

v

REX

Before the Honourable the Chief Justice Mr. Justice  
B.P. Cullinan on the 17th day of March, 1989.

For the Crown : Mr. G.S. Mdhuli, Director of  
Public Prosecutions

For the Appellant: Mr. M. Mphutlane

JUDGMENT

Cases referred to: (1) R.v. Turnbull (1976)3 All  
E.R. 549

The appellant was convicted by the Resident  
Magistrate at Butha Buthe of robbery and was sentenced  
to four years' imprisonment.

Evidence was given by a police officer, the  
second prosecution witness, acting as an armed guard to

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a vehicle in which money, belonging to a concern called "Metro" was being taken to a bank, that shortly before the robbery he observed the appellant, whom he knew by sight, near the vehicle which he guarded. He observed that the appellant was wearing a balaclava helmet which was not pulled down over the face. Shortly thereafter, as he sat into the rear of the vehicle, a person wearing a balaclava helmet pulled over his face and wearing sun glasses, armed with a revolver, stood at the driver's door of the vehicle, demanding the keys of the vehicle from the driver thereof, that is, the Manager of Metro. The latter handed over the keys. The police officer was meanwhile attacked by another man, who was not masked and who after a struggle dispossessed him of his rifle. The police officer escaped.

Six days later another police officer found a bunch of keys in a van parked at the home of the appellant's parents. The police officer testified that he "found them to be similar to the keys allegedly taken at Metro ...", and subsequently testified that "These are the keys before Court". The witness then produced the keys in evidence, saying that they had been

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in police custody, that is for over six months.  
The Manager of Metro when giving evidence had testified that the keys taken from him "are the ones before Court".

The learned trial Magistrate observed "the cautionary rules applicable to ..... questions of identity". He observed that,

"P.W.2 is the only witness who claims he identified (the appellant) as one of robbers".

That must be a misdirection. The witness but testified that he had observed the appellant at the scene immediately before the robbery wearing a balaclava helmet. He testified that he did not recognize the assailant with the revolver at the driver's door, nor indeed could he identify the non-masked assailant who dispossessed him of his rifle.

The learned trial Magistrate observed that he "did not find it necessary to test the evidence extensively as required by law, the reason being that

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the witness said he knew (the appellant) by sight".  
But as the Court of Appeal in England observed in  
R. v. Turnbull (1) (per Lord Widgery C.J.) at p.552:

"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."

Those dicta apply a fortiori to the purported  
recognition of a person known by sight only. Quite  
clearly the evidence of identification was of the  
"fleeting encounter" variety, and was of poor quality.  
An identification parade in the circumstances was  
essential, but was never held, the probative value  
of any such parade being completely vitiated when, six  
days later, the appellant was presented, under arrest, to  
the second prosecution witness at the police station.  
What I term a "Charge Office identification" is of  
even less probative value than a court room  
identification.

The learned trial Magistrate found supporting  
evidence in the finding of the keys. The learned

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Counsel for the appellant Mr. Mphutlane submits that such keys were never properly identified by the owner thereof. The Manager of Metro, the driver of the vehicle, did testify that the keys were before the Court. The police officer who produced the keys testified that he found keys in the van which were "similar" to those stolen in the robbery. Again he said that the keys were "before Court". He testified however that the keys had been "in police custody" (for six months). He did not say in whose custody they had been, and I can only presume therefore that the keys were not in the witness' custody. An exhibit can only be produced from custody by the custodian thereof. I cannot see that, six months later, the police officer could be sure of recognizing a bunch of keys which were not his property, and which had not been in his custody. He made no attempt to refer to any distinguishing marks thereof. In particular the police officer adduced no evidence of ever presenting the keys to the Manager of Metro in order to establish ownership thereof, nor of attempting to ascertain whether in fact the keys fitted the locks on the vehicle from which the money had been stolen.

The learned trial Magistrate never once specifically adverted to the possibility of honest

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mistake. I am not satisfied that had he taken into account the matters to which I have referred and directed himself accordingly, that he would inevitably have convicted the appellant. It would be unsafe to allow the conviction to stand. The appeal is allowed therefore and the conviction and sentence of the Court below are set aside and the appellant is acquitted.

Delivered at Maseru this 17th Day of March, 1989.

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B. P. CULLINAN  
CHIEF JUSTICE