previously been held. While there was no need for such parade as far as the complainant was concerned, quite clearly the absence thereof rendered the identification by the domestic servant, as the learned Senior Crown Counsel Mr. Thetsane concedes, a courtroom identification, some 21 months after the event and was clearly, in all the circumstances of no probative value whatever.

The appellant testified that he had spent the night in question, one month before his arrest, at his mother's home sleeping with his wife. Such aspect was put to the domestic servant, though extremely late in the day, immediately before the Crown closed its case. Technically speaking therefore, the Crown had notice, very short notice, of the appellant's alibi, which was in turn corroborated by his wife.

When it came to identification, the learned trial Magistrate's judgment was lacking in proper direction. In this respect the learned Counsel for the appellant Mr. Mda, who represented the appellant in the Court below, refers to the cases of **Moholisa v R** (1) and **R v Makhetha & Anor.** (2) to which I would in turn refer the learned trial Magistrate. Quite obviously the complainant's identification was of the "fleeting glance" variety, under the pressure of fear and excitement. There is the

aspect that the appellant was subsequently recognized, but that was a month later. Further, it is clear that the sight of the familiar blanket and skipper was what attracted the complainant, leading surely to an association of ideas. The learned trial Magistrate failed altogether to consider these aspects and in particular the possibility of honest but mistaken identification and I am not satisfied that had she done so she would inevitably have found that the appellant had been identified beyond reasonable doubt.

There is however the aspect that the appellant was found in recent possession of 22 stolen items. The complainant identified them as her family's property, and so also did the domestic servant, who testified indeed that she had been accustomed to washing the particular clothing. On the other hand, the appellant and his wife testified that the items were their property.

Mr. Mda submits that the complainant had no difficulty in identifying the property, as it had been released to her by the police. Nonetheless the point is that she first identified the property in the home of the appellant's mother.

In this respect the complainant testified that the appellant, while handcuffed, had on the pretence of

wishing to urinate, run away from his mother's home, had fallen and had been recaptured by a police officer. The particular police officer, who appeared as a witness, gave no such evidence however, and the appellant denied the complainant's evidence. The complainant's evidence has a ring of truth about it. It may well be that the police officer did not consider the aspect important and did not cover it. It may be of course that, as the appellant claims, the complainant's evidence was untrue. But even if that was the case, it indicates that the Police Trooper did not seek to falsely incriminate the appellant. The Police Trooper however testified that the appellant did not contest the complainant's claim to the property. Indeed he maintained that it was the appellant himself who produced the stolen clothing from a trunk and a case, which the appellant denied.

The appellant maintained that when he entered the bus, a male passenger accompanied by three ladies claimed the appellant was wearing his blanket, one of the ladies agreeing therewith: the man assaulted him assisted by a CID officer: hence he had subsequently, while handcuffed, escaped from them and approached police in a nearby police van.

The appellant claimed that the person who assaulted him in the bus, apparently the complainant's husband, was

then present in Court. It was put to him that such person "was not in the Country at that time". The appellant maintained he was telling the truth, but nonetheless failed altogether to indicate in Court the person who had claimed the blanket as his.

Again, he maintained that the male bus passenger made reference only to the blanket he wore. He never admitted that anyone, much less the complainant, had laid claim to the "skipper" which he wore at the time. In answer to the question, "Did the man and P.W.1 (the complainant) refer to the blanket only?", he answered, "Yes". Therein he admitted that the complainant was on the bus and had laid claim at least to the blanket he wore, specifically denying thereafter that she also laid claim to the skipper, maintaining that she was lying. It was put to him that she had pointed out the skipper in Court, which he admitted. He also conceded that it had not been put by the defence to the complainant that no reference was made in the bus to the skipper which he wore. Further, he subsequently conceded that the police had taken from him "the skipper I was wearing". I cannot imagine why the police would take such skipper, unless it was the case that the complainant had identified the skipper as her husband's property. The appellant was clearly not telling the truth, therefore, and his evidence on the point can only be regarded as an effort

on his part to avoid the double coincidence of wearing a blanket and a skipper similar to that owned by the complainant's husband.

The learned trial Magistrate rejected the evidence of the appellant and his wife. There is no doubt that she placed some reliance on demeanour, which as has been said so often, is the least reliable of factors. The learned trial magistrate observed however that the appellant's wife "did not seem to know all the property which she alleged was hers", which is borne out by the fact that the wife claimed that *inter alia* "four dresses" were taken by the police, subsequently conceding that four skirts had been taken.

The evidence for the defence was rejected on the basis of disbelief as such. That is not the proper test of course. In view of the unsatisfactory evidence of identification the appellant's alibi could reasonably be true, but in view of the points I have detailed above, the appellant's claim to the property cannot reasonably be true, and I am satisfied that had the learned trial Magistrate correctly directed herself she would have so found.

Two inferences flow from the appellant's possession of the stolen property. As his alibi could be reasonably

true, the inference of housebreaking must be discounted. In all the circumstances, the only reasonable inference is that the appellant received the property, knowing it to be stolen.

The appeal against conviction is allowed therefore. The conviction in the Court below is set aside and there is substituted therefor a conviction of receiving stolen goods knowing them to have been stolen.

As to sentence, the appellant has been in custody since his arrest in December, 1988. His trial, involving five witnesses, having commenced in March 1989, took one year and five months to complete, that is, after some 35 adjournments, in respect of which no reasons whatever are recorded for granting such adjournments. In this respect I would refer the learned trial Magistrate to Judicial Circular No.1 of 1989.

I consider that the appellant, a first offender, has more than paid his debt to society. In all the circumstances therefore the appeal against sentence is also allowed. The sentence in the Court below is set aside and there is substituted therefor a sentence of one year's imprisonment, to be served with effect from 17th August, 1990 the date of sentence in the Court below.

Delivered at Maseru This 29th Day of November, 1991.

B.P. CULLINAN
CHIEF JUSTICE