IN THE COURT OF APPEAL

AT MENGO

(Coram: Manyindo, V.—P., Lubogo, Ag. J A., Odoki, J.A.)

CRIMINAL APPEAL NO.23 OF.1985

BETWEEN

CHARLES BENON BITWIRE……...……..…… APPELLANT

AND

UGANDA ……...RESPONDENT

(Appeal from a judgment of the High
Court of Uganda Holden at Kabale
(Mr. Opu. J.) dated. 20th May, l985
IN
Criminal Session Case No.33/84)

JUDGMENT OF THE COURT

The appellant was on 20/5/85 convicted in the High Court at Kabale of the murder of one Henry Rusatsi, to be referred to hereinafter as “the deceased”. He was sentenced to death. His four co-accused were acquitted at the close of the prosecution case following a successful submission by their counsel, that they had no prima facie case to answer. The appellant now appeals against both conviction and sentence. Seven grounds of appeal were filed and argued by his counsel.

Briefly, the facts as found by the trial judge were as follows. The appellant and the deceased were prominent businessmen in Kabale town. They were related to each other by marriage in that their wives were sisters. The two men were friends and got on well with each other. As the learned trial judge put it, “their relations appeared normal, befitting men married to sisters.” In August, 1981 the appellant, according to the prosecution, for no apparent reason asked, Sowedi Sinandugu (P.w.2) to find him people who were willing to kill the deceased for reward which the appellant would provide.

Sowedi found three such men in Kampala. He took them to Kabale and handed them over to the appellant who duly commissioned them to kill the deceased, but the men abandoned the mission and returned to Kampala. This allegation was, of course, denied by the appellant.

The trial judge also found that on 29/10/81 at night, the deceased was visited by unknown persons who apparently wanted to kill him. They were somehow prevented from entering the deceased's house so that their mission aborted. On the night of 1/11/81 the appellant went to the home of the deceased to congratulate him upon having survived the attempted attack on him on 29/10/81. The appellant took with him same beers which they drank to celebrate the occasion.

At about 8.30 p.m. the appellant left for his house. He was seen off by the deceased up to the courtyard. As the deceased returned to his house he was shot by an unknown person who had clearly been waiting for him outside the house. The deceased was rushed to Kabale hospital where he died later that night. The prosecution's case was, to use the trial judge's own words, "that either the assassins from Kampala (who had allegedly been brought in by P.W.2 in August, 1981) or others shot and killed the deceased."

The prosecution called seven witnesses in all. However, their testimony, save that of Sowedi was of little or no import. Indeed the conviction of the appellant was grounded solely on the evidence of Sowedi. And. the trial judge was alive to this fact because right at the outset of-his judgment he said this,

"The evidence in this case is both direct and circumstantial. Most important if it were not for the evidence of P.W.2 SOWEIDI SINANDUGU, those behind the deceased's death would never have been discovered."

As already noted, Sowedi's evidence was, in the main, that two months before the deceased was killed, the appellant had commissioned him (Sowedi) to find the would be killers. Sowedi did not witness the killing and did not claim to know who the actual assailants were. Again, as already noted, even the prosecution was not sure whether the deceased had been killed in November 1981 by men allegedly hired by the appellant in August, 1981 or by other persons. In the circumstances, we uphold the submission by counsel for the appellant that the prosecution had

led no direct evidence whatsoever to implicate the appellant in the actual killing of the deceased. Mr. Kabega who represented the State in the appeal quite rightly conceded this fact.

Learned counsel for the appellant did also contend that there was no circumstantial evidence either. With respect, we cannot agree. There was the evidence of Sowedi (assuming it was true) that on a previous occasion the appellant had used him to procure the deceased's would be assassins. Then there was the undisputed evidence that on the fateful night the appellant visited the deceased and that the latter was murdered just as the former was departing.

In our view the trial judge was right in treating that evidence as circumstantial. We reject the submission by counsel for the appellant that the evidence regarding the alleged attempt by the appellant to kill the deceased in August 1981 was not circumstantial but merely evidence of previous conduct. It seems clear to us that evidence of previous conduct is circumstantial evidence. Obviously whether the circumstantial evidence in this case was sufficient to warrant the conviction is a separate question to which we shall revert later. This disposes of the appellant's third ground of appeal namely, that there was no evidence, direct or circumstantial, adduced by the prosecution against the appellant.

His first ground of appeal that the trial judge erred in believing the evidence of Sowedi before scrutinising it and the second ground (that Sowedi should not have been find to be a witness of truth) were argued together by counsel, we find it also appropriate to consider them together.

We agree with counsel for the appellant that the stand taken by the trial judge right at the beginning of his judgment that was it not for Sowedi's evidence the killers of the deceased would never have been found out, was unfortunate as it clearly shows that the trial judge had believed that evidence without first evaluating it. But, in fairness to the learned trial judge, it must be remembered that towards the end of his judgment he directed himself on Sowedi's evidence, and gave reasons, albeit contradictory, for believing that evidence. This is what he said:

> "The defence has argued that SOWEDI SINANDUGU is an accomplice hence no conviction should be based on his evidence without corroboration. Here let us be careful. The question is, is SOWEDI SINANDUGU an accomplice and if he is, in respect of which events? I concede SOWEDI SINANDUGU is an accomplice as far as the abortive

> attempt to kill the deceased is concerned. I observed SOWEDI SINANDUGU in the witness box. He was steady. He gave forthright evidence. He explained he entered into this not to kill the deceased who was caring for one of his sons but he hoped to get money and employment out of it. I have no hesitation in holding that SOWEDI SINANDUGU was a witness of truth. Even if he is an accomplice, I have warned myself of the danger. Arising from the evidence of SOWEDI SINANDUGU I find as a fact that sometime in October 1981, the accused commissioned SOWEDI SINANDUGU to recruit assassins to kill the deceased. It is clear that the first attempt failed."

The finding that in October, 1981 the appellant had tried to kill the deceased using hired thugs was, of course a mis-direction on the evidence. Sowedi had testified that that incident, took place in August, 1981. Was Sowedi really a truthful witness? This court is entitled to evaluate his evidence in order to determine its value and, therefore, his own credibility. The law on this point was, we think very ably stated by Law, Ag. V-P in a judgment that was read for him by Sir William Duffus, P., in Okeno v. Republic (l972) E.A. 32 at page 36 when he said:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R, (1957) E.A. 336) and to the appellate court's on decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, (1958) E.A. 424."

Now, this man Sowedi seems to us to be or at least to have been of dubious character. On his own admission he had no job and simply wandered the streets of Kampala for many years before

this incident. He also admitted that he had easily and willingly agreed to find criminals to kill the deceased because, that would earn him some money. We cannot agree with the finding of the trial

judge that in so doing Sowedi was after the appellant's money, and not the deceased's 'life. It seems quite clear to us that he was after both. Had the attempt succeeded, Sowedi would have been a principal offender under section 21(2) of the Penal Code.

Then there is the fact that although the deceased was minding his (Sowedi's) son, Sowedi was not bothered whether the deceased lived or died. His explanation (in cross-examination) that he was prepared to betray the deceased because he needed the money badly is lame and hard to comprehend. But perhaps most important of all is the fact that this fellow was not a good witness (as claimed by the trial judge) as he had to be led by the prosecuting counsel on very crucial matters without, surprisingly objection from either counsel for the appellant or the trial judge.

We will cite but a few examples — 'On l0/8/8l did Bitwire (appellant) send any person to you? You mean you were sent to come to Kabale? By who, by Bitwire? Did Bitwire give you money?"

Counsel for the appellant referred to the discrepancies in the evidence of Sowedi and critisised the trial judge for not having considered them at all. We think this criticism was justified Sowedi said that he could not remember the month when the appellant allegedly sent a man to him, requesting him to return to Kabale for consultations with the appellant. He said he could not even remember that messenger's name although the man used to visit him in Kampala and had even spent a night with him there.

Under pressure of cross—examination he stated that he used to call him any name - MAYIGASHI, RUSINGAZIKI or RAMANZANI or even "my brother". 'We agree with counsel for the appellant that in view of that shaky evidence, and the fact that the alleged messenger was not called as a witness by the prosecution, he might not have existed stall. The appellant gave his defence on oath. He denied knowledge of either Sowedi or the alleged messenger. He said he had never tried to kill the deceased and that he had no hand in the depth of the deceased. It is remarkable that Sowedi did not attend the talks between the men he had allegedly taken from Kampala and the appellant. What, those men allegedly told him afterwards, concerning...the, talks was obviously hearsay evidence which should, not have been admitted. Clearly the appellant's evidence, should -have been seriously weighed against that of Sowedi but was not.

The trial judge considered the appellants defence casually and dismissed it just like that. This is all he said about it:

> "The accused has denied the offence. I consider his denial and evidence as utter lies. On the evidence as a whole, I am satisfied beyond any reasonable doubt that it was the accused who planned and ordered the murder of the deceased."

Finally, on this point, it should be remembered that the deceased was at the time of his death married to Sowedi's former wife. It was suggested by the defence, and it may well be true, that the deceased had in fact "grabbed" her so that Sowedi had a motive for helping whoever wanted to kill the deceased.

However, we do not see how this fact could possibly be argued in favour of the appellant since Sowedi would, naturally, have been happy at the death of the deceased and would have most probably protected rather than exposed the killers. Be that as it may, we are satisfied that in the circumstances, the trial judge should have scrutinised Sowedi's evidence but did not. Had he done so he would most probably have found that Sowedi was not a reliable witness. We thus find merit in the appellant's first and second grounds of appeal.

The fourth ground of appeal was that once the trial judge had held that Sowedi was an accomplice to the conspiracy to murder the deceased (in August, 1981), his evidence should have been disregarded all together. With respect, we see no merit in this submission. The prosecution led this evidence to show that the appellant wanted to kill the deceased and that presumably, after the first attempt to do so failed, he must have tried again, this time successfully. And so that evidence was not, in our view, misplaced or irrelevant. But, as Sowedi was an accomplice to the conspiracy, his evidence required corroboration. See (1) Ayo and Another v. Uganda (1968) E.A. 303, (2) Jethwa and Another v. R (1969) E.A. 459 and (3) Fabiano Obeli and Another v. Uganda (1965) E.A. 622.

But of course Sowedi was not an accomplice to the killing of the deceased because there was no evidence whatsoever, to the effect that the men he had procured for that purpose in August 1981 (if he infect did) were the same people who killed the deceased on 1/11/81. No wonder then that

even the trial judge at best found that the deceased was shot dead by “either the assassins from Kampala or others”.

In view of that finding, he no doubt misdirected himself on the evidence when he went onto hold that the people who tried to attack the deceased three days before the fateful day were agents of the appellant. There was of course no evidence to support that proposition or finding. We now return to the question whether the circumstantial evidence was enough to support the conviction.

The learned trial judge held that the fact that the appellant had tried to kill the deceased in August, 1981 and (quite wrongly of course) October, 1981, plus the fact that he had visited the deceased shortly before the latter was murdered, led to the irresistible conclusion that the appellant was responsible for the murder of the deceased on 1/11/198l. As we have already pointed out, much of that finding was, based on sheer speculation which was in itself based on unproven allegations.

The law regarding circumstantial evidence has been repeatedly stated by this court to be this. A conviction based on circumstantial evidence can only be justified where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that .of his guilt. See: (1) Tumuheirwe v. Uganda (1967) E.A. 328, (2) McGreevy V. U.P.P. (1973)57 CR. APP. R. and (3) Musoke v. R (1958) E.A. 715.

In the case before us, assuming that the trial judge would have believed the evidence of Sowedi after carefully examining it (which we doubt) , that evidence pointed to only one circumstance that the appellant had attempted to liquidate the deceased in August, 1981. That was three months before the actual murder took place. The only other circumstantial evidence was the visit by the appellant to the deceased on the night of incident.

We see nothing wrong in that visit two men were friends and related to each other by marriage. It would have been natural, in our opinion, for the appellant to go and congratulate the deceased who had escaped an apparent attack on his life.

All the evidence showed that the two men had a wonderful evening before the departure of the appellant which was followed by the murder of the deceased. This circumstantial evidence in our

view does not lead to the irresistible inference that the appellant had a hand in the death of the Deceased although it raises strong suspicions. This takes care of the first ground of appeal namely, that the trial judge erred in law "in convicting the appellant without first answering the question who killed the deceased." Of course the learned trial judge found, by implication, and wrongly at that for the reasons we have stated, that it was the appellant or his agents who did so.

In his sixth ground of appeal the appellant attacks some remarks that were made by the trial judge in his judgment tending to show, firstly, that the appellant had attempted to kill the deceased on 29/10/81 and, secondly, that the appellant had interfered with a prosecution witness who had disappeared before the trial of the case. Regarding the disappearance of the witness, the trial judge said:

> "The disappearance of the accused's driver RAMANZANI KAMPALANYI despite the fact that he had been served to appear in court as a prosecution witness suggests interference from some quarter.
>
> It is unbelievable a man who resides in KABALE and knows he is required as a witness in a case of such magnitude would just disappear into thin air"

The prosecution's laid no claim to such allegation and made no attempt to lead evidence to establish it. We, therefore, feel that the trial judge was not justified in making those remarks which ware clearly prejudicial to the appellant. As, was pointed out in Okeno v Republic (supra) sarcastic and denigratory remarks about the defence should have no place in a judgment. We find that this ground of appeal was well taken. There was no evidence to warrant these remarks.

The seventh and last ground of appeal was that the trial judge had erred in not taking into account the fact that the prosecution had failed to establish any motive for the killing on the part of the, appellant. Counsel for the appellant argued this ground with force. With respect, the learned trial judge did consider the question of motive 'and directed himself properly on it. This is what he said:

> "The defence raised the issue of lack of motive with persistence. However, our law is clear that the prosecution need not prove motive on the part of the accused for committing a crime. The reasons which lead men to kill as in this case may be million."

We agree and would only add this in a weak case, like the instant one, the absence of motive ought to be considered in favour of the accused because a sane person does not normally kill another for no reason at all.

In the result we find that prosecution did not prove the charge against the appellant beyond reasonable doubt. He was wrongly convicted. We quash the conviction and set aside the sentence. The appellant is to be released from custom, forthwith unless he is being held for ether good reason.

DATED at Mengo this 11th day of July 1986.

SIGNED S.T Manyindo
VICE PRESIDENT.

D.L.K Lubogo
AG. JUSTICE OF APPEAL.

B.J. Odoki
JUSTICE OF APPEAL.

Mr. P.S. Ayigihugu of M/s Ayigihugu & Co. Advocates for the Appellant
Mr. Kabega, Senior State Attorney for the State.

I certify that this is a
true copy of the original

M.K. KALANDA
REGISTRAR COURT OF APPEAL.