THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR JUSTICE S.T. MANYINDO, DCJ
HON. MR JUSTICE G.S. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA

CRIMINAL APPEAL NO.82 OF 1999

SSERWADDA MUHAMED :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

(An appeal from the Judgment of the High Court (Bossa J.) dated 28/6/1999 in Criminal Session Case No. 101/99 at Kampala)

JUDGMENT OF THE COURT:

Sserwadda Muhamed the appellant was jointly indicted with Edisa Kitegesi, to whom we shall hereinafter refer to as the "second accused" for the offence of murder, contrary to sections 183 and 184 of the Penal Code Act. The appellant was convicted as charged and was sentenced to death. The second accused was convicted of being an accessory after the fact, contrary to section 377 of the Penal Code Act and was sentenced to 2 years imprisonment. She did not appeal against her conviction and sentence. Apparently she has already served the sentence.

The prosecution evidence as accepted by the learned trial Judge was that Yowana Sekamana, now deceased, was the father of the appellant and husband of the second accused who was his senior wife. The deceased had a home at Lugazi village Bukera Sub-county, Mubende District where he lived with the appellant the second accused, Maniraguha Joseph PW2, who was his son and Mukamaana Christine, PW3, who was his daughter. The deceased had another wife, Zabeti Nassau, who lived at Kitaama village. The two homes were not far from each other.

On Friday the 231 August 1996 the deceased left his home at Kitaama village with a crate of soda and returned to his home at Lugazi. He directed Maniraguha Joseph (PW2) and Mukamaana Christine, (PW3), to go and sell soda at a wedding party. The deceased retired to his bed for the night at around 8.00 pm. Maniraguha Joseph (PW2) and Mukamaana Christine (PW3) left the appellant and the second accused at home and went to sell soda as they had been directed by the deceased. When the two returned home at around midnight, they found the appellant and the second accused standing out-side. The second accused asked them whether they had seen their father going away to his second home with a mattress. They replied that they had not seen him. The appellant insisted that they return to the wedding party and sell the remaining bottles of soda. As they were tired they refused and went to sleep. On the following day which was a Saturday nothing happened. On Sunday the second accused told PW2 and PW3 to go to the home of her co-wife at Kitaama and find out whether the deceased was there. Zabeti Nassali informed them that their father had left her home on Friday at around 1.00pm with a crate of soda. They returned to their home at Lugazi and informed the second accused. On Monday the appellant went to the Local Council 1 authorities and reported that Zabeti Nassali had caused the disappearance of his father. On the August 1996 the chairman and the Secretary for Defence of the Local Council 1, Godfrey Mutesasira, PW4, arrested Zabeti Nassali and took her to Mityana Police Station in the company of the appellant. The appellant made a report to Detective Assistant Inspector of Police, Bossa Leonard, PW1, that Zabeti Nassali had caused the disappearance of his father. Zabeti Nassau was detained by the police as a suspect. After two days the appellant went to the police to check on the progress of the case. He was arrested and detained by PW1, on information received.

On the 31st of August PW1, together with other policemen, the appellant and Zabeti Nassali went in a police patrol vehicle to the deceased's house at Lugazi. The local council authorities and the neighbours were summoned. After the local drum "Gwanga mujje" had been sounded many other people from neighbouring villages gathered at the scene. The appellant led the police to a place behind the house where the body of the deceased had been buried. This was an old pit latrine. PW1 ordered the people to dig up the place. The decomposing body of the deceased was found there on a mattress. It was removed and put on the veranda. Dr. Muchunguzi carried out the postmortem examination at the scene. He found a deep cut wound on the frontal area of the

head. The head was completely smashed. The private parts had been removed. In his opinion the deceased had been cut by an axe. The cause of death was cerebral contusion. Zabeti Nassali was released and the appellant and second accused were taken to the police and charged with the murder of the deceased.

On the 1st September 1996 both of them made extra judicial statements to PW1 which were admitted in evidence at their trial.

At the end of the prosecution case the appellant refused to make any defence on the ground that he had been forced to plead and had not been allowed to be represented by his own lawyer. The second accused made an unsworn statement in her defence. She pleaded compulsion. She stated that the appellant and another person threatened her with death and so she lit the torch for them as they disposed of the body of the deceased.

The learned trial Judge accepted the prosecution case rejected the defence and convicted the appellant and the second accused with the result already stated.

There are three grounds of appeal namely:-

"1. That the learned trial Judge erred in fact and law when he found that the offence of murder had been proved beyond all reasonable doubt

2. That the learned trial Judge erred in fact and law to convict on the basis of circumstantial evidence and evidence of a co-accused alone.

3. That the learned trial Judge erred in law when he based conviction on an extra judicial statement and confession which were irregularly taken".

The appellant was represented by Ms Eve Luswata Kawuma. The respondent was not represented. There was proof of service on the Director on Public Prosecutions. In the circumstances the Court decided to proceed with hearing of the appeal in the absence of the respondent.

Ms. Eve Luswata Kawuma, learned counsel for the appellant, argued all the three grounds of appeal together. Her arguments centered on confession by the appellant, lack of corroboration of accomplice's evidence, (of the second accused), common intention and circumstantial evidence.

We shall deal with all the grounds of appeal in the same manner. This being a first appeal, it is the duty of this Court to evaluate all the material evidence which was before the trial court and make up its own mind, bearing in mind of-course the fact that it has neither seen nor heard the witnesses See Okeno V R 1972 E.A 32 and Pandya V R (1957) E.A 336.

On confession counsel contended that the confession was wrongly admitted in evidence. She argued that the appellant denied signing the alleged confessionary statement. The trial Judge admitted it in evidence without holding a trial within a trial. This was in counsel's view fatal. The duty was on the prosecution to prove that the confession was properly recorded, she submitted, and urged this court to discard the confession.

On perusal of the judgment we observe that the learned trial Judge relied heavily on the appellant's extra judicial statement to convict him and said as follows:

"Al's extra judicial statement willingly made is sufficient without more to convict him of the murder"

According to the record of the proceedings, counsel for the appellant objected to the admissibility of the extra judicial statement on the ground that it had not been signed by the appellant. The State Attorney retorted that he had evidence that the appellant signed the statement. PW1 who was then testifying said that he saw the appellant signing the statement. Counsel for the appellant left it up to the court to make a ruling. The court ruled that as PW1 saw the appellant signing the statement it should be admitted in evidence. Accordingly it was received as exhibit P2.

With due respect, the learned trial Judge did not follow the correct procedure. It is trite law that when the admissibility of an extra judicial statement is challenged, the court must proceed to hold a trial within a trial. The purpose of trial within a trial is to decide upon evidence of both sides whether or not the confession is admissible. It is not open to court to admit the statement casually, as was done in this case. The duty is upon the prosecution to prove that a confession was properly recorded and was made voluntarily. See Amos Binue & Others V Uganda Supreme Court Criminal Appeal No. 23 of 1989, 1992-1993 HCB 29, Aloni Safari V Uganda, Court of Appeal Criminal Appeal No. 40 of 1996 (unreported.)

With regard to evidence of an accomplice, Counsel contended that having found as a fact that the second accused was an accomplice, the trial judge erred in convicting the appellant on his co-accused's evidence without directing herself on the need for corroboration of that evidence.

We find that as the appellant and the second accused were jointly charged with murder, they were rightly found by the learned trial Judge to be accomplices. In her unsworn statement the second accused implicated the appellant that she was with him and another man when the men killed the deceased and that she assisted them in disposing of the body. The learned trial Judge in her judgment should have directed herself on the need for corroboration of the second accused's evidence, but she did not. As a matter of practice which has almost become a rule of law there is need for corroboration of an accomplice's evidence. The court must warn itself of such a need before convicting, but in exceptional cases, a court, having warned itself properly can convict. See Fabiano Obeli and others v Uganda [1965] E.A. 662. Canisio s/o Walwa V R (1956)23 E.A CA 453.

Ms. Kawuma's complaint on common intention was that the learned trial Judge should have considered the issue of common intention but did not. According to the evidence on record at least three people participated in the incident. However, the learned trial Judge did not in her judgment direct her mind to the issue of common intention. That consideration was in law required before convicting the appellant of murder. In our view this point was well taken.

As the evidence on record indicates that the appellant was with another man when he allegedly killed the deceased, the learned trial Judge had the duty before convicting the appellant to consider whether from the available evidence there was common intention between the appellant and another man to kill the deceased. In our view it was incumbent upon the trial judge to determine whether the appellant and the other man had common intention to kill the deceased.

Ms. Kawuma also complained that the circumstantial evidence which was relied on by the learned trial judge to convict the appellant was insufficient to warrant the conviction. The fact that the appellant led the people and the police to where the body of the deceased was buried stood on its own and was not sufficient to warrant a conviction of murder, she argued.

After dealing with the confession of the appellant the learned trial Judge evaluated the evidence on which she based the conviction of the appellant as follows:

"But there is also his admission to the villagers, the evidence of PW2 and PW3 who heard Al insist that they go back to sell sodas on the fateful night. There was the deliberate intention of Al to cast suspicion on Zabeti Nassali his other stepmother. Then Al and A2 tried unsuccessfully to paint a picture that the deceased had left his house and gone to his second wife. Al led the Police and the villagers to the exact spot where the body was discovered. All these were not acts an innocent man."

With due respect, the learned trial Judge misdirected herself on the evidence. There is no evidence on record that the appellant admitted the killing of his father to the villagers. With regard to circumstantial evidence, the law is that before drawing the inference of guilt of the accused person from circumstantial evidence the circumstances must be such that they point to the guilt of the accused and are incapable of explanation upon any other reasonable hypothesis than the guilt of the accused. See Simoni Musoke v R [1958] E.A 715.

In the instant case the circumstantial evidence referred to above does not, in our view, measure to such a standard. That the appellant tried to cast suspicion on his step mother that she was responsible for the disappearance of the deceased or that he forced PW2 and PW3 to go back to the wedding party and sell soda, does not irresistible point to the fact that he killed the deceased.

It is true that appellant pointed out to the people the spot where the deceased was buried. We note that, the appellant had already been arrested by the police and was brought back to the village. PW1 told all the people not to have weapons and not to attack the appellant because he was going to show them something. All the people agreed and the appellant moved behind the house and pointed to the spot. When the place was dug up the body of the deceased was found there.

In our view although this piece of evidence shows that the appellant knew where the body of the deceased was buried it does not alone conclusively prove that he is the one who killed the deceased. Ground 1, 2, and 3 succeed.

Before we take leave of this matter we would like to point out that the learned trial Judge was wrong to proceed with the trial of the appellant in the absence of counsel of the appellant's

choice inspite of the protestations by the appellant. On 15th June 1999 when the case came up for mention, the counsel who had been assigned to defend the appellant on state brief declined to do so, and rightly so in our view, because she had dealt with the case when she was a State Attorney. Another counsel was assigned to the appellant. The appellant did not accept him because he did not know him and his brother was going to engage a lawyer for him. The learned trial Judge gave the appellant up to the following day to get another lawyer. The appellant informed the Judge that he would not be able to secure the services of counsel. The Judge ruled that the appellant was to be tried during that session. He had to be represented by counsel assigned to him. The reasons which the learned trial Judge gave for her decision were, firstly, that the case had been adjourned on the two previous sessions because the appellant wanted to be represented by counsel of his choice. Secondly, that the second accused had a two year old baby in prison, and had been on remand for a long time. When the trial commenced the appellant pleaded to the indictment. He refused to defend himself at the end of the prosecution case and categorically stated as follows:

"I will not make a defence. I was forced to plead I had my lawyer. So I will not make a defence."

After conviction the appellant said nothing before sentence. In those circumstances we find that the appellant was tried under protest. The trial in the absence of counsel of his own choice was a grave violation of his constitutional rights as provided by article 28 (3) (d) of the constitution. As the learned trial Judge appears to have been concerned about the long stay on remand of the second accused with the 2 year old baby, she could have released her on bail.

In the result this appeal is allowed, the conviction is quashed and the sentence is set aside. We are satisfied that the trial was defective in that there was no trial within trial when it was required, the appellant was not represented by counsel of his choice and that he did not present his defence on that account.

Accordingly it is ordered that the case shall be retried by another judge as quickly as it is practicable. In the meantime the appellant shall remain in custody.

Dated at 14th this day of August 2000.

S.T. Manyindo
DUPUTY CHIEF OF JUSTICE

S.G Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL