THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. MR. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO. 129 OF 2002

AHARIZIRE SILIVERIO……APPELLANT

VERSUS

UGANDA……RESPONDENT

(Appeal from the judgment of the High Court sitting at Kabale (Maitum J) dated the 16th August 2002 in High Court Criminal Session Case No. 6 of 2003)

JUDGMENT OF COURT

This appeal is against both conviction and sentence. The appellant, Aharizire Sliverio was convicted of attempted rape contrary to section 125 of the Penal Code Act. He was sentenced to 10 years imprisonment.

The relevant facts of the case are that on the 1st August 1999, one, Lydia Rukokori, the complainant, was going to visit her mother. At Kakomo Trading Centre, Kitumba Sub County, Kabale District she

met Sunday Runyasi (PW3), Stewart Mutana (PW4), Birahaire (PW5) and Richard Mugisha alias Kijinji. Richard Mugisha was accused No. 2 in the original High Court (Kabale) Session Case No. 6 of 2003 and we shall, herein, refer to him as such for convenience purposes. The group was drinking beer at a bar at about 6p.m. They requested the complainant to wait and go home with them later since they were all relatives and neighbours. The complainant complied. PW3 bought her a soda which she drunk.

At about 8.30p.m. they all decided to leave the bar but the complainant and A2 went ahead of the others. As PW3 followed A2 and the complainant, he met the appellant who asked him where A2 was. PW3 told him that A2 was just ahead on the road. The appellant went fast ahead of PW3 and caught up with the complainant and A2. For sometime, PW3 could still see the three ahead in the distance moving together but later lost sight of them.

After walking for some 70 metres, the complainant heard a voice say "I want to kill you today". A2 caught her and started pulling her into the bush while the appellant held on to her neck. A struggle ensued between the complainant, A2 and the appellant as the two dragged her further into the bush. The two eventually overpowered the complainant, threw her on the ground, tore her half petticoat and knickers as they forcefully pulled them off her. She lost one of her shoes. She suffered injury to her knees, neck and to three of her lower teeth rendering them loose.

A2 had sexual intercourse with the complainant as the appellant held her on to the ground by the neck and urged A2 to finish quickly so that he too could have a go at their victim. Passersby who heard the commotion in the bush responded by throwing stones towards the scene of crime which caused the appellant and A2 to run away. The complainant's ordeal lasted about an hour. Kenneth, son of Kakonye, rescued the complainant from the scene, helped her to walk and took her to his home where she spent the night.

The following morning, the complainant arrived home walking awkwardly and with injuries, clothes and a shoe as described above. She informed PW3, PW4 and PW5 of what had befallen her the previous night at the hands of the appellant and A2. She also reported to the Police.

Later, A2 led PW3, PW4, PW5, Kabachenga, a Local Defence Unit personnel and Kasheka the area Secretary for Defence to the home of the appellant and told them that he had committed the offence with him. The two were arrested and subsequently charged with rape. A2 was convicted as charged and sentenced to 13 years imprisonment.

In his defence at the trial, the appellant denied having committed the offence. The learned trial judge did not believe him but had a doubt as to whether he had actually raped the complainant. She gave the

benefit of this doubt to the appellant but found him guilty of attempted rape basing on the evidence on his role in the complainant's ordeal. She convicted and sentenced the appellant to 10 years imprisonment, hence this appeal.

There is one ground of appeal namely: -

1. **The learned trial judge erred in law and in fact when she misdirected herself on the evidence on record and found out that the appellant's participation in dragging the complainant to the bush and tearing her clothes so that A2 was able to rape her amounts to attempted rape.**

At the hearing of the appeal, Mr. Tiishekwa Ambrose represented the appellant on state brief and Mr. Alule Gilbert, Principle State Attorney appeared for the respondent.

Arguing the appeal, counsel for the appellant submitted that the complainant's identification of the appellant was mistaken as darkness, fear and drunkenness, hampered her vision and ability to properly identify her attackers. He relied on **Hitlar Ojasi Vs Uganda S.C Appeal No. 1 of 1998** and **Abasi Ssali and another Vs Uganda SC Cr. App. No. 7 of 1998.**

Counsel attacked the prosecution's use of the confession by A2 against the appellant, a co-accused, which confession, according to Mr. Tiishekwa, had been made to officers who knew about the

commission of the offence and had participated in the arrest of the appellant. He relied on **The King Vs Baskaville 1916 2 K B 658.** He further attacked the charge and caution statement as having been recorded in English and translated into Runyankole and that the appellant was forced to sign it. In his view, it is only this statement that was relied upon by court to convict and there was no credible evidence to implicate the appellant.

Counsel for the respondent did not agree. He supported the conviction and sentence. He submitted that the appellant had been properly identified and there was enough evidence on record to implicate him and support his conviction.

We are mindful of our duty as a first appellate court to subject the entire evidence on record to fresh scrutiny, review and re-appraisal and make our own inferences. See **R. 30 of the Judicature (Court of Appeal Rules).** Directions **S.1. 13 – 10** and **Pandya Vs R [1957] EA. 336, Ruwala Vs R 1957 EA 570**, **Bogere Moses and Another Vs Uganda Cr. App. No. 1 of 1997 (SC)** unreported, **No. RA 78064 Cpl. Wasswa and Ninsiima Dan Vs Uganda Cr. App. No. 48 & 49 of 1999** (SC) (unreported).

The gist of the sole ground of appeal is that the learned trial judge erred when she found that the evidence on the role of the appellant in the ordeal the complainant suffered at the material time amounted to attempted rape by the appellant.

Considering the identification and participation of the appellant the learned trial judge had this to say in her judgment: -

> **"The third ingredient that of the identity of the accused persons…….prosecution witness, PW3, when he was following the complainant and A2, he met A1 who asked him where A2 was, PW3 told him that A2 was just ahead of him. A1 then went to join A2 who was walking together with the complainant. There was a bright moonlight and PW3 clearly identified A1. The identity of A1 is further corroborated by A2 on his arrest. A2 led the L.D.U, PW3 and PW4 to the home of A1 admitted to have committed the offence together with A1. To this extent, the prosecution successfully put A1 at the scene of the crime."**

Convicting the appellant, the learned trial judge stated: -

> "The Participation of A1 dragging the complainant to the bush helping in tearing her clothes so that A2 was able to rape her amounts to attempted rape. I therefore find A1 guilty of the offence of attempted rape. I convict Aharizire Silverino of attempted rape contrary to S. 119 of the Penal Code Act. This is a minor cognate offence envisaged by S. 86 of the Trial On Indictment Decree" (sic).

We find no cause to fault the above findings by the learned trial judge.

The complainant gave very clear evidence narrating how she together with A2, left the drinking place at Kakomo Trading Centre at about 8.30p.m. that fateful day. After walking for about 70 metres she was held from the back by A2 while some one held her by the neck. She heard A2 say he wanted to kill her that day. She testified as to the struggle that ensued between herself, A2 and that other person whom she knew by sight and as the son of her cousin Kamena. The two, A2 and the appellant dragged the complainant into the bush passing through what she called three strips of land to a place some 100 metres from the road. There, according to her testimony, they put her down, tore her clothes including her knickers and A2 had sexual intercourse with her while the appellant held her on the ground by the neck. She heard the appellant urging A2 to finish quickly so that he, too, could have a go at her. The two, according to the evidence on record, severely assaulted her. They inflicted severe injuries on her neck, knees and teeth.

All this happened to her in an ordeal lasting a whole hour during bright moonlight by the assistance of which she was able to clearly recognize the appellant at close quarters playing his role in the ordeal. She had also known him before for a long time as they came from the same area.

In addition, the evidence of the appellant's identification was to be found in the testimonies of A2 and PW3. On his part, PW3 testified as he had met the appellant who asked him where A2 was in a

conversation the two had. He saw the appellant speeding fast to catch up with A2 and the complainant under bright moonlight. He saw the three moving together ahead of him for some time. Then there is the admission of A2 in which he clearly implicated himself and the appellant as participants in the ordeal to which the complainant was subjected. We shall, later in this judgment, deal with this admission in some detail.

We find the cases of **Hitler Ojasi and Abasi Sali** (supra) cited to us by learned counsel for the appellant in support of his submission of possible mistaken identity of the appellant distinguishable from the instant appeal. In both of those cases, bullets were fired by the assailants. The gun shots were, in our view, a most serious cause of the fear that negatively impacted on the state of the mind of the victims of the attacks. This diminished the ability of those victims to properly identify their attackers.

The attacks in each of the two cases were sudden and did not avail the victims long periods of observation to favour their correct identification of the attackers. This was not the case for PW3 and the complainant in the instant case.

In the case of **Abasi Ssali,** (supra) the small room in which the victims were attacked, the only light there was from 2 wick lamps (tadoba) as compared to the bright moonlight that helped both PW3 and the complainant to properly identify the appellant. Further, in

that case, the court found that there were serious contradictions in the prosecution evidence but here the complainant is very consistent in her evidence about the identity of the appellant and his role in the ordeal. We also find PW3's evidence on the matter very solid and, together with that of PW2 unchallenged.

Further still, in **Abasi Sali** (supra) the already over crowded small room inside which the victims of the attack were drinking alcohol was further over crowded by the intrusion of the three violent attackers. This enhanced the chances of mistaken identity by the victims arising from the utter confusion that prevailed therein. The circumstances under which the appellant was identified by PW3 and the complainant did not share this factual situation.

We are not persuaded that drunkenness hindered the prosecution witnesses' ability to identify the appellant. The victim drank only one soda and the others a beer or two each. We find no convincing evidence on record to support the submission by counsel for the appellant that any of the relevant prosecution witnesses was so drunk as not to be able to properly identify the appellant.

We are satisfied that unlike in both **Hitler Ojasi** and **Abasi Sali (supra)** the possibility of mistaken identification of the appellant in the instant appeal can be safely ruled out.

We now return to the admission by A2 to PW3, PW4 and PW5 at the

time of his arrest. He told them that he had committed rape against the complainant and that he committed the offence with the appellant. We find this to be a confession within the principles enunciated in the **King Vs Baskaville** (supra). A2 fully implicated himself and to the same extent the appellant. The learned trial judge found A2's confession admissible in evidence after properly conducting a trial within a trial and she was, in our view, justified to do so. This being a confession by a co-accused, the same can properly be taken into consideration against the appellant under **S. 27** of the Evidence Act though it is evidence of the weakest kind. See **Anyangu V R [1968] E A 239** at page **340**. Such evidence is used to lend assurance to the other evidence against the co-accused. **Anyuna s/o Omolo and another V R [1953] 20 EACA 208.** Such other evidence, as indicated above is not lacking in the instant appeal. See also **Gopa s/o Gidumenbanya VR 1953 EACA 255.**

As to the admission of A2 having been made to officers who knew about the commission of the offence, though undesirable we find nothing fundamentally objectionable with this. What is important, in our view, is the fact that the charge and caution statement was recorded in accordance with the principles relating thereto by the then AIP Kabuye. This witness did not take any direct part in the investigations of the case. It is true, according to the evidence on record, the statement was recorded in English and then interpreted in Runyankole/Rukiga. There is unchallenged evidence on oath by PW6 however that there was effective communication between him and the appellant as the latter recorded the statement of the former. Ideally,

a charge and caution statement should be recorded by a Police Officer who knows nothing about the offence the suspect faces and the same should be recorded in a language the suspect understands. Failure to comply with these two requirements, in our view calls for adverse comment but they, per-se, are not fatal to the prosecution case. See **1 NO RA 7864 C.PL Wasswa & 2 Ninsima Dan Vs Uganda S.C. GR. APPL No. 48 & 49 of 1999 (unreported);**
A. Asenau Vs Uganda Cr. Appl. No. 1 of 1998 (SC), Muzayo Thomas and Mukasa George Vs Uganda Cr. Appl. No. 03 of 2006 (SC).

On hearing that A2 had implicated him in the commission of the offence, the appellant, who first resisted his arrest, submitted to the same expressing the wish to have the matter amicably settled. This conduct of the appellant, in our view, lends support to his participation in the ordeal. It also corroborates the evidence of PW1, A2 and PW3 in that respect.

Further, when the appellant rose to his defence, there is overwhelming evidence that he told obvious lies. He denied having known the complainant and all those prosecution witnesses who were also his relatives born in the same area as the appellant and staying together within each others' neighbourhood. He also denied knowledge of his co-accused A2, another relative. Where an accused is proved to be a liar, his lies can support the prosecution case. See this Court's judgment in **Nestoli Francisco Tibamwenda Vs Uganda Cr**

Appl. No. 177 of 2002, Kibale Isma Vs Uganda SCCA No. 21 of 1982 (unreported) **and Nabugo Vs Uganda [1965] EA 71.** The appellant's lies in this case work against him.

We do not accept counsel for the appellants' submission that in convicting the appellant, the trial court only relied on the confession of A2 and that there was no credible evidence to support the conviction. As indicated above, there was the unchallenged evidence of PW2, PW3 and the complainant herself. That evidence was duly considered and properly evaluated by the trial judge alongside the confession before she convicted the appellant. We also find the principles of corroboration evidence set out in the **King Vs Baskaville** (supra) fully satisfied.

As for the offence of attempted rape, of which the appellant was convicted, we are satisfied, as was the learned trial judge, that the evidence on record against the appellant is enough to support his conviction as a minor cognate offence under **S. 87** of The Trial On Indictment Act which provides: -

"87. Person charged may be convicted of minor offence.

When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."

Our own careful review and scrutiny of the evidence on record further leads us to the conclusion that the appellant's conviction is also sustainable under **s. 88** of the Trial On Indictment Act read together with sections **125** and **386** of the Penal Code Act.

The three sections provide: -

"Section 88. Conviction for attempt.

When a person is charged with an offence, he or she may be convicted of having attempted to commit that offence, although he or she was not charged with the attempt."

Section **125** provides: **-**

Attempt to commit rape.

"Any person who attempts to commit rape commits a felony and is liable to imprisonment for life with or without corporal punishment."

Section **386** provides: - Attempt defined.

> **"(1) When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfillment, and manifests his or her intention by some overt act, but does not fulfill his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.**

2) **It is immaterial –**

(a) **except so far as regards punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfillment of his or her intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention;**

(b) **…….”**

We have already, analyzed the evidence on record as regards the appellant’s role in the ordeal the complainant was so brutally subjected to by his assailants. Suffice it to emphasize that the complainant clearly testified as to how the appellant urged A2 to finish raping her quickly so that he too could have a go at her. This, in our view, was a clear declaration by the appellant of his intention to commit the offence of rape against the complainant. He was, however, frustrated by A2 who took long to ‘finish’ and the intervention of the passersby who caused A2 and the appellant to flee the scene of crime before he could accomplish his ill-conceive mission of actually raping the complainant.

The entire role of the appellant in the complainant’s ordeal, in our view, is a series of overt acts by him in manifestation of his resolve to execute his intention to rape the complainant. These include his

participation into dragging the complainant into the bush, in struggling with her and throwing her on the ground, in assisting in the stripping the complainant off her clothes including her knickers and tearing them at the spot which protected the complaint's private parts in the process and in assaulting her.

The learned trial judge was, in our view, fully justified in finding that the evidence on record against the appellant proves, beyond reasonable doubt the offence of attempted rape against him and we find no reason to fault her on this. The sole ground of appeal herein, therefore, fails.

In the result, we dismiss the appeal for want of merit. We accordingly confirm the conviction and sentence by the lower court. It is so ordered.

Dated at Kampala this 2nd day of December 2008.

A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL.

S.G. Engwau
JUSTICE OF APPEAL.

S.B.K. Kavuma
JUSTICE OF APPEA.