

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CRIMINAL APPEAL NO.97 OF 2004

LT. SERWANGA JUUKO & ANOTHER.....APPELLANTS

V E R S U S

UGANDA.....RESPONDENT

**[Appeal from the judgment of
the High Court of Uganda (Tinyinondi, J)
dated 23-7-2004 in High Court Criminal Appeal No.64 of 2002]**

JUDGMENT OF THE COURT:

This is a second appeal from the decision of the High Court [on appeal from the Court of a Magistrate Grade I] whereby the 1st appellate court upheld the conviction by the trial court of the two appellants for the offence of being accessories after the fact to a felony c/s 376(1) and 377 of the Penal Code and the sentence of 6 months imprisonment.

The two appellants were intelligence officers employed with the Internal Security Organisation (ISO). On 26th December 1999 they went to Entebbe International Airport allegedly to arrest a Pakistani national called NASAR AHMED. They had received information that he would be arriving at the airport that morning on a Gulf flight from Dubai. The Pakistani was a suspected terrorist. At the same time, the Criminal Investigations Department (CID) of the Uganda Police Force had received similar intelligence information that the same Pakistani would arrive at the airport

with prohibited drugs (cocaine). Three CID officers went to the airport to arrest him, if they found him with the drugs. After protracted searches by both the officers of ISO and CID, a bag was found on the conveyer belt where the suspect had deliberately left it. Both ISO and the CID officers wanted both the bag and the suspect. Eventually the CID officers succeeded in retaining the bag which was found to contain the cocaine while the ISO officers took away the Pakistani. Despite various assurances by the ISO officers, the appellants, that the CID officers would find the suspect in Kampala, he disappeared and was never arrested by the police. The two ISO officers were arrested and charged with two offences of abuse of office and assisting the Pakistani to escape punishment. The trial Magistrate at Buganda Road Court acquitted them on the charge of abuse of office but convicted them on the charge of assisting the Pakistani to escape punishment. He sentenced them to 6 months imprisonment. The appellants appealed to the High Court which upheld the conviction and the sentence, hence this second appeal.

The memorandum of appeal has two grounds of appeal as follows:-

1. **That the learned trial judge erred in law when he held that the State had proved the ingredients of the offence charged beyond reasonable doubt.**
2. **That the learned trial judge erred in law when he as the 1st appellate court failed to make an evaluation of the evidence and simply went ahead to confirm conviction and sentence.**

At the hearing of the appeal before us, Mr. Kabega of Tumusiime and Kabega Advocates represented the appellants while Ms Josephine Namatovu, a State Attorney with the Directorate of Public Prosecutions represented the respondent.

Arguing the first ground of appeal, Mr. Kabega submitted that the offence on which the appellants were convicted had two ingredients, namely:

- a) Knowledge that someone is guilty of an offence,
- b) Assisting that person to escape punishment.

He submitted that in his view, the prosecution did not prove any of these ingredients. He contended that the appellants did not know that the Pakistani had actually committed an offence. Though they saw the whitish substance which was found in the bag carried by him, they could not know that he had committed any offence till the Government Chemist established that the substance was cocaine, which result came long after the Pakistani had escaped.

On assisting the Pakistani to escape, Mr. Kabega submitted that there was a lot of evidence to show that the appellants did not arrest the Pakistani nor did they leave the airport with him. There was no way they could assist him to escape when he was not in their custody.

On the second ground of appeal, Mr. Kabega attacked the 1st appellate judge for failing to do his duty to subject all the evidence to fresh scrutiny as he should have. In counsel's view, this led him to come to a wrong conclusion not supported by the evidence on record. He asked us to find that this omission by the appellate court occasioned a miscarriage of justice and to quash the conviction and set aside the sentence.

Ms Namatovu did not agree. She invited us to look at the conduct of the appellants from the time Nasar (the Pakistani) arrived till he disappeared as narrated by the evidence of PW2, PW3, PW4 and PW5. She submitted that the evidence established that the appellants had gone to the airport to arrest Nasar for terrorism. After the police's first search proved fruitless, Nasar was set free but was taken by the appellants who claimed that their Headquarters wanted him to answer charges for terrorism. When a second bag was found to contain cocaine, they attempted to take it with Nasar. When the police retained it, the appellants refused to produce the suspect but assured the police that they would produce him in Kampala. They never did. In Ms Namatovu's view, the appellants clearly knew that the suspect had come in the country with prohibited drugs and assisted him to escape punishment.

On whether the appellate judge had re-evaluated the evidence as a whole, Ms Namatovu argued that the judge did consider at length the evidence of PW2, PW3, PW4 and PW5 along with the evidence of the appellants and came to the conclusion

that the trial magistrate was right to convict the appellants. She invited this court to do the same and to arrive at a similar conclusion.

We wish, for convenience sake, to consider first the second ground of appeal in which it is contended that the learned first appellate judge did not evaluate the evidence as he should have. With respect to learned counsel for the appellants, we think this criticism of the judge is grossly unfair to say the least. The learned judge put on record a full account of the submissions of both counsel. He reminded himself of the duty of an appellate court of first instance. He then engaged in a lengthy and thorough exercise of evaluating all the evidence on record. It is possible to disagree with the conclusion he arrived. But to say that he failed to evaluate the evidence is not justified at all. On the contrary, we are satisfied that the judge did all in his power to subject the evidence to fresh scrutiny and independently arrived at the same conclusion as the trial Magistrate. We find that the second ground of appeal to the effect that the trial judge did not re-evaluate the evidence cannot be sustained, and it fails.

Regarding the first ground of appeal that the judge wrongly held that the prosecution had proved all the ingredients of offence charged beyond reasonable doubt, we have fully carried out a similar exercise of re-evaluation as the learned appellate judge. The judge considered the evidence of prosecution witnesses and the appellants' witnesses at great length. In their own evidence, the appellants stated that they were given instructions to pick-up the Pakistani called Nasar Ahmed on the suspicion of being a terrorist. Yet when they arrived at the airport, they appeared more concerned with the luggage the suspect was carrying. Even when the appellants were shown that Nasar Ahamed was carrying a whitish powder likely to be cocaine, they refused to surrender him to the police. Before the appellants left the airport, they knew as a fact that Naser Ahmed had carried prohibited drugs into Uganda. It is not the law in this country that knowledge only be imputed after the substance has been established to be a drug scientifically. If that was the case, nobody would be arrested for assisting a criminal to escape. In the instance case, it was enough knowledge when strange substances were discovered in the luggage of the suspect. As security officers, they had the duty to hand over the suspect to the police for further

investigation. We agree with the trial magistrate and the 1st appellate judge, that when the suspect was released by the police at the airport, he got into contact with the appellants and told them that his second bag had remained on the conveyor belt. When they stormed back inside the airport looking for the bag, they informed the police that the suspect had remained outside under the control of their agents. Before the cocaine was discovered, the policemen demanded that the suspect be produced to witness the opening of his bag. It was then that the appellants started saying that he had already left the airport and that it was useless to bring him back. They assured the policemen that they would take them to where he was to stay in Kampala. In the end he disappeared.

This sequence of events shows that the appellants were prepared to keep pretending that they had come to the airport to arrest the suspect while it seems they had come to collect the luggage of the Pakistani. When the police refused to release it, the appellants did everything possible to ensure that the suspect does not fall in the hands of the police. In so doing, they assisted Nasar Ahamed to escape punishment, which they knew would follow if he got arrested by police. It is amazing how the appellants appear to have lost interest in Nasar Ahmed when they were denied his bag containing cocaine. All along they were claiming to have gone to the airport to arrest the suspect as a suspected terrorist. After being denied the luggage, they lost interest in that mission. They never arrested him. Instead they actively ensured that he was not arrested by police.

After carefully re-evaluating all the evidence on record, we have no doubt that the charge against the appellants was proved beyond reasonable doubt. This appeal fails. We uphold the conviction and the sentence.

Dated at Kampala this 20th day of April 2009.

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

Hon. Justice C.N.B. Kitumba
JUSTICE OF APPEAL.

Hon. Justice S.B.K. Kavuma
JUSTICE OF APPEAL.