THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Kakuru, Egonda-Ntende, Madrama, JJA*]

CRIMINAL APPEALS NO. 221 & 227 OF 2017

(Arising from High Court Criminal Session Case No. 49 of 2017 at Kampala)

BETWEEN

Masika Fina Nicky==========Appellant No.1
Okot Alponse==========Appellant No. 2
Ssentongo Paul==========Appellant No.3

AND

Uganda==========Respondent

(*An appeal from the judgment of the High Court of Uganda [Murangira, J] delivered on 22nd June 2017*)

REASONS FOR JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120 and in the alternative the offence of conspiracy to murder contrary to section 208 of the Penal Code Act. The particulars of the offence of murder were that the appellants on 8th March 2013, at Kiwafu central zone, Entebbe Municipality in Wakiso district with malice aforethought murdered Derrick Coggon, a British national. For the alternative offence, the particulars were that on 8th March 2013 within Entebbe municipality in Wakiso district, the appellants conspired to kill Derrick Coggon. Appellant no.2 was also charged with the offence of neglect to prevent a felony contrary to section 389 of

the Penal Code Act. The particulars of the offence were that on 8th March 2013 at Kiwafu central zone, Entebbe municipality in Wakiso district, appellant no.2 knowingly that a felony was to be or being committed failed to prevent the commission of the felony. The appellants were eventually convicted of the offence of murder and were each sentenced to a term of imprisonment for 35 years.

[2] Being dissatisfied with the decision of the trial court, the appellants have now appealed to this court. The appellants filed separate memoranda of appeal. Appellant no.1 and appellant no.3 appealed on similar grounds which are as follows:

> '1.That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the Appellant as a joint offender together with others had a common intention to murder Derrick Coggon without evidence of association or with connection with the assailants who actually shot and murdered Derrick Coggon.
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> 2. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the ingredient of participation by the Appellant had been proved beyond reasonable doubt.
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> 3. The learned trial judge erred in law and fact when he failed to state the reasons from departing from the opinion of the assessors in his judgement.
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> 4. That the learned judge erred in law and fact when he convicted the appellant on inconsistent and circumstantial evidence and hearsay evidence and thereby failed to discharge the burden of proof beyond reasonable doubt.
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> 5. The learned trial judge erred in law and fact when e sentenced the Appellant to imprisonment for a term 35 years which in the circumstances is a harsh sentence.'

[3] The grounds of appeal for appellant no.2 are as follows:

> '1.That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the Appellant as a joint offender together with others had a common intention to murder Derrick Coggon without evidence of association or with connection with the assailants who actually shot and murdered Derrick Coggon.

2. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the ingredient of participation by the Appellant had been proved beyond reasonable doubt.

3. The learned trial judge erred in law and fact when he convicted the appellant on inconsistent and uncorroborated circumstantial and hearsay evidence and thereby failed to discharge the burden of proof beyond reasonable doubt.

4. The learned trial judge erred in law and fact when he sentenced the appellant to imprisonment for a term of 35 years which in the circumstances is a harsh sentence.'

[4] The respondent opposed the appeal for appellants no.1 and 2. The appeal for appellant no.3 was conceded for lack of any evidence to link him to the crimes in question.

[5] After hearing of the appeals, we allowed the same, quashed the convictions against the appellants, set aside the sentences imposed upon them and ordered their immediate release. We promised to provide the reasons for our judgment on notice and we now do so.

Submissions of Counsel

[6] At the hearing, appellant no.1 was represented by Mr. Andrew Sebugwawo, appellant no.2 was represented by Mr. Ogwado Xavier and appellant no.3 was represented by Ms Sylvia Namawejje. The respondent was represented by Ms Fatina Nakafeero, Senior State Attorney in the Office of the Director of Public Prosecutions.

[7] Ms Namawejje submitted on grounds 1 and 2 that the prosecution failed to prove the participation of the appellants in the death of the deceased as an ingredient of the offence. It was her submission that the case was mainly theoretical and that appellant no.3 was only connected to the murder because of his relationship with appellant no.1 who was the wife to the deceased. She averred that PW6, who was the major respondent witness stated that she was unable to identify the assailants and neither was the deceased. Ms Namawejje further submitted that none of the appellants was at the crime scene and that there is no evidence implicating appellant no.3 in the shooting of the deceased.

[8] Ms. Namawejje submitted that whatever the nature of relationship appellant no. 3 had with appellant no.1 does not prove the alleged participation of the former in the murder of the deceased. She argued that there ought to have been evidence connecting appellant no.3 to the murder and that the relationship between the appellants could only prove motive if there was some corroborating evidence supporting the participation of appellant no. 3 in the murder. She further stated that although the evidence of appellant no.1 and appellant no.3 having a relationship was overwhelming, this does not prove that appellant no.3 participated in the murder of the deceased. She was of the view that without proving the participation of appellant no.3 in the murder of the deceased, the principle of common intention cannot stand.

[9] Counsel for appellant no. 3 chose to abandon ground 3. With regard to ground 4, she submitted that there were inconsistencies in the prosecution evidence with regard to the relationship that existed between appellant no. 3 and the deceased. Counsel for appellant no. 3 also submitted that court cannot uphold a conviction of murder where the evidence that was adduced was largely circumstantial with no direct evidence.

[10] Counsel for appellant no.2 argued grounds 1 and 2 together and abandoned ground 4. Counsel for appellant no.2 submitted that in arriving at his decision, the learned trial judge relied on sections 19 and 20 of the Penal Code Act but failed to apply the law to the evidence adduced. Mr.Ogwado submitted that appellant no.2 explained in his testimony as to why he did not shoot back and instead took cover while the deceased was being shot at. He stated that appellant no.2 explained that he was holding the gate for the deceased to drive out and that the deceased was not shot at the gate.

[11] Counsel relied on Katende Semakula v Uganda [1995] UGSC 4 where the Supreme Court stated that circumstantial evidence should be narrowly examined because evidence of this kind may be fabricated to cast suspicion on a person. He submitted that the Supreme Court held that it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there is no other co-existing circumstances which weaken or destroy the inference. He argued that the co-existing circumstances at the time was that the life of the appellant no. 2 was equally in danger and that the best thing he could do was to let the deceased flee the scene and that he acted diligently because the deceased did not die at the scene

where was he guarding. He stated that the evidence of PW6 and PW11 was to the effect that the bullets came from outside the gate when the deceased had already left the premises. Counsel prayed that appellant no. 2's conviction be quashed and sentence set aside.

[12] Counsel for appellant no.1, Mr. Sebugwawo submitted that there is no evidence on court record to show that appellant no.1 participated in the murder of the deceased. He stated that in spite of the facts that appellant no.1 had threatened to kill the deceased, there is no evidence that she carried out the threat. He also submitted that the deceased never made a dying declaration to PW6 that appellant no.1 wanted to kill him. He argued that the fact that appellant no.1 and appellant no.3 did not say anything in their defence does not amount to evidence of their guilt. He submitted that this was not an admission that the evidence that had been led against them was sufficient to merit a conviction. He prayed that this court quashes the conviction and acquit the appellants.

[13] In reply to counsel for appellant no.3' submissions, Ms Nakafeero stated that there was sufficient circumstantial evidence to establish a connection between the appellant and the assailants. She submitted that the participation of appellant no.2 was largely based on his deliberate actions and omissions. She referred to the evidence of PW6 who stated that appellant no.3 was unbothered by the shootings at the time they entered the compound. She also submitted that PW6 stated in her evidence that at the time the appellant started opening the gate, the dogs were already barking which ought to have put appellant no.3 on alert as a trained security guard. He argued that the fact that appellant no.2 hid the assailants inside the gate, took cover when the assailants started shooting and he did not come to the window when the deceased wanted to talk to him indicates that he conspired with appellant no.1 and appellant no.3 to murder his boss.

[14] She stated that the link between appellant no. 1 and appellant no.3 to the murder of the deceased was the love relationship between the two parties. Ms Nakafeero submitted that PW2 and PW3 stated in their evidence that the deceased told them about the threats of murder from appellant no.1. She was of the view that evidence of previous threats shows an expression of intention. It goes beyond mere motive and tends to connect the accused with the killing. She also stated that the proximity between the time of murder and when the threats were made points to the guilt of appellant no.1. Counsel argued that the fact that appellant no.1 wilfully surrendered herself to the police after the death of the deceased indicates that she was guilty of causing the unlawful death of the deceased. Counsel for the respondent conceded to the fact that there was no evidence linking appellant no.3 to the crime. She

prayed that this court revaluates the evidence on record and uphold the sentence and conviction of appellant no.1 and appellant no.2.

Analysis

[15] As a first appellate court, it is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusion, bearing in mind that this court did not have the same opportunity, as the trial court had to hear and see the witnesses testify and observe their demeanour. See Rule 30(1) (a) of the Rules of this Court, Pandya v R [1975] E.A 336, Kifumante Henry Vs Uganda, [1998] UGSC 20 and Bogere Moses & Anor, v Uganda [1998] UGSC 22.

[16] We shall now proceed to do so.

[17] The facts of this case are that appellant no.1 and the deceased married in 2007. They settled in Entebbe town and set up a number of businesses including Four Turkeys Pub. During the course of the marriage, the couple had marital differences and eventually separated in 2012. During the night of 8th March 2013 at around 10:30 pm, the deceased left his bar with PW6 and drove to his home. The gate was opened and he entered. Apparently, some shots were fired and he turned his car round and drove out immediately. His passenger, PW6, dropped out at or near the gate as the deceased drove out. It is believed that he was shot by unknown assailants around his home. He died in his car at the entrance of the St Mercy's Medical Service hospital in Entebbe. During the shooting, appellant no.2, who was a guard to the deceased did not shoot back at the assailants even though he was armed with a gun containing live bullets. The post mortem report revealed that the deceased died of gunshot wounds.

[18] Grounds one and two of the memoranda of appeal are similar, inter-related and therefore will be handled jointly. The main issue to determine here is whether the appellants were implicated in the commission of the offence. The learned trial Judge relied on section 20 of the Penal Code Act to infer that the appellants jointly participated in the murder of the deceased.

> '20. **Joint offenders in prosecution of common purpose.**
> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the

prosecution of that purpose, each of them is deemed to have committed the offence.'

[19] The learned trial judge, among other evidence, relied on the evidence of previous threats issued by appellant no.1 to implicate her in the murder of the deceased. Such evidence included the evidence of PW2, PW3, PW4, PW5 and PW6. PW2 was a girlfriend to the deceased. She stated in her testimony that the deceased had misunderstanding with appellant no.1 and that the deceased used to tell her that appellant no.1 would threaten to kill him through phone messages. She never read any of the alleged messages. PW3, a friend to the deceased in his testimony stated that deceased once came and stayed at his home for a night, the deceased told him that appellant no.1 was trying to kill him and that he showed him the kitchen knife she had used to try to kill him. He also stated that he signed the deceased's will in which he had excluded appellant no.1 as a beneficiary. On cross examination, he stated that the deceased stayed at his home that night because he had business to run and that the deceased had as many women as he could get. He also stated that the deceased told him that he reported the threats to police but it did not nothing. PW3 also stated that the deceased shared the threatening messages with him.

[20] PW4 (a former employee of the deceased)'s testimony was to the effect that appellant no.1 and appellant no.3 were in a sexual relationship before the death of the deceased. Prior to that, the two appellants had lied to the deceased that they were related and at one-point appellant no.3 was a friend to the deceased. She also stated that on several occasions the deceased used to return to Four Turkeys bar when he had earlier on gone home and when she asked him why he does so, he informed her that he was being followed home by people in cars and that he would pass home and just return to the bar. PW4 testified that the deceased showed her photographs of Toyota cars following him though he did not know the people who were following him.

[21] PW5 was also a former employee to the deceased who stated that whenever the deceased was in his bad moods and she asked as to why, he would not hesitate to complain that his wife wanted to kill him. She stated that for that reason, the deceased stopped going back home after sometime until 7:00 am in the morning. PW6 stated that the deceased on the day of his death while they were drinking at the bar with other people told them that his Congolese wife wanted to kill him and also later before she was shot.

[22] Other than the alleged threats made by the appellant no.1 to kill the deceased, as recounted by the deceased to various persons, there is no other evidence pointing to the participation of appellant no.1 in the murder of the deceased.

[23] In Waihi and another v Uganda [1968] 1 EA 278 at page 280, this court stated:

> 'Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think, capable of corroborating a confession.'

[24] Evidence of previous threats can be used to corroborate other evidence to implicate an accused person according to the circumstances of the case. The evidence of previous threats that was relied upon by the trial judge is hearsay evidence which is inadmissible in the first place and the trial court should neither have admitted it nor relied upon it. There is no reason as to why the police did not extract the alleged messages of the threats from the deceased's phone and there is no evidence that such threats were ever reported to the police.

[25] The fact that appellant no.1 wilfully surrendered herself to the police following the death of the deceased has no bearing on her participation in the crime. The statement made by the deceased to PW6 during the shooting that his Congolese wife wanted to kill him does not amount to a dying declaration. According to the evidence of PW6, the identity of the assailants was neither known to her nor the deceased. There is also no evidence pointing to the fact that appellant no.1 was aware of the contents of the deceased's will.

[26] Further, the fact that appellant no.1 kept quiet in her defence and did not testify does not point to her guilt as the learned trial judge inferred.It is well established that in all criminal cases, the burden of proof is upon the prosecution to prove the guilt of the accused person beyond all reasonable doubt. The burden never shifts save in exceptional cases provided by law. See Woolmington v D.P.P, (1935) AC 462, Miller v Minister of Pensions, [1947] 2 ALL E.R372. By the accused's plea

of not guilty, the accused puts in issue each and every ingredient of the offence with which he or she is charged and the prosecution has the onus to prove each and every ingredient of the offence before a conviction is secured. See Ssekitoleko v Uganda, [1974] EA 531.

[27] It is also important to bear in mind, as cautioned in Simoni Musoke vs. R. [1958] E.A. 715 at page 719 that circumstantial evidence is quite susceptible to fabrication to cast suspicion on a person. See also Katende Semakula v Uganda [1995] UGSC 4. On that note, before the court draws any inference of guilt from circumstantial evidence, it must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt. Therefore, it is the duty of the court to apply well-established tests, to establish whether the circumstantial evidence adduced before it proves the guilt of the accused person beyond reasonable doubt as is required by law. In Byaruhanga Fodori vs. Uganda [2004] UGSC 24 the Supreme Court expressed itself clearly on the position of the law regarding circumstantial evidence, as follows: -

> 'It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480).'

[28] The participation of appellant no.2 in the commission of the offence was circumstantial construed from his conduct during the shooting at the deceased's home and his alleged relationship with appellant no.1. The learned trial judge relied on the testimony of PW6, PW8, PW11, PW12 and the appellant no.2's testimony to convict him. Appellant no.2 stated in his testimony that he opened the gate for the deceased but before his car reached the parking yard, bullets started being fired at him and when the deceased asked what was happening, he told him that he was being shot at. Immediately the deceased turned his car and drove out of the residence and then he took cover behind the gate. He could not react at the time because one of his hand was on the gate while the other hand was holding the gun. He stated that the shooting happened outside the gate and that he did not know that the deceased had been shot until he was informed by his colleague. He also stated he did not notify anyone of the shootings because he did not have airtime.

[29] PW6 testified that the vehicle the deceased was driving that night was bullet proof and in fact the first shot bounced off the car. The deceased then turned the car around and headed towards the gate to get out of the compound. He lowered the window glasses to be able to talk to the guard. It is then that the second bullet came and hit PW6 on her lips. She stated that it came from the direction of the deceased. She felt pain and she bled. She did not state that the deceased was shot too. She decided to jump out of the car when they got outside the gate and abandoned the deceased's car. The deceased drove off leaving her behind. She got on a *'boda boda'* and was taken to Entebbe Hospital.

[30] There is no direct evidence to suggest that the deceased was injured in the shooting that occurred at his compound. By the time they parted with PW6 it was only PW6 that was injured. It is possible but unlikely that the deceased would have been shot in his car in the presence of PW6 and PW6 would not know or hear the deceased exclaim in pain or shout that he has been shot.

[31] PW8, the investigating officer stated that they recovered a cartridge inside the wall near the sentry box and another cartridge outside near the gate. He stated that appellant no.2 never informed anybody of the shootings and learnt of the death of the deceased after the police visited the deceased's home, the scene of the crime. PW11 reiterated the evidence of PW8 and stated that the cartridge found inside was shot from inside the gate and that the assailants fired from inside and also accessed the inside from outside. PW12 also visited the deceased's residence and took photographs. He stated that the assailants started shooting from the main gate entering inside of the gate.

[32] The above evidence does not point to the guilt of the appellant no.2. It may raise strong suspicion. It is not uncommon that appellant no.2 would seek to save his life in the circumstances. Gun shots were being fired and there is no way he would have fired back while holding the gate and seeking to protect himself at the same time. By the time the deceased left the gate, he was alive and appellant no.2 thought he was alive until the news of his death got to him.

[33] The circumstances surrounding the escape of PW6 from the scene of the crime were not investigated, given her presence at the scene of crime. She stated that as the ' *'boda boda"* carrying her drove away, a lady's voice in a car parked near the residence of the deceased called her to come to the car. The *'boda boda'* man who took her to hospital is never heard from. Neither is the presence of the car she

testified about investigated. It is possible it brought the assailants to the scene and drove them away. There was another *'boda boda'* mentioned by PW6 that she stated the deceased had told her he had seen following his car. This too is never investigated.

[34] It is clear that the investigation of the murder of the deceased was poorly carried out. The prosecution clutched at one possible theory of the case and ignored all other leads that were evident. The evidence on record is insufficient to prove beyond reasonable doubt that the appellants were involved in the murder of the deceased. Neither was there any single iota of evidence to point to common intention in the commission of those crimes by the appellants. The prosecution failed to discharge its burden of proof.

[35] For those reasons we allowed the appeals of the appellants.

Signed, dated and delivered at Kampala this 10th day of March 2020.

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Christopher Madrama
Justice of Appeal