

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CO-0055-2001

UGANDAPROSECUTION

-VS-

A1 MBAZIIRA SIRAGI)

A2 BAGUMA HENRY alias KARUNA)ACCUSED

A3 MBABAZI COSMAS)

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

The three accused persons are indicted for aggravated robbery, contrary to sections 272 and 273 (2) of the Penal Code Act on two counts. In support of *its* case the prosecution called a total of seven witnesses. These were Turinawe Erineo (PW1), Katarina Kikabahenda (PW2), Fred Kwizera (PW3), Gumisiriza Sadi (PW4), Herbert Karamagye (PW5), Winnie Turinawe (PW6) and D/C Erifazi Turyahikayo (PW7).

In summary the prosecution case is as follows. On the night of 23 September 2000 the three accused persons namely Mbaziira Siragi (A1), Baguma Henry alias Karuna (A2) and Mbabazi Cosmas (A3) acted together in committing acts of aggravated robbery against Turinawe Erineo (PW1) and Katarina Kikabahenda (PW2). The first count concerns robbery against PW 1 and involved one radio cassette, 17 bottles of beer, 1 jerrican of enguli and cash Shs.30,000/z. The second count concerns robbery against PW2 involving Shs.75,000/, shop items and a mattress. Both robberies took place at Kidunduma Trading Centre, Mbarara District. A gun was allegedly used on both occasions.

All the three accused persons denied knowledge of the offences alleged against them. In their defence each made a sworn statement but called no witnesses. They set up alibis.

The prosecution has the burden of proving the case it alleges against the accused persons beyond reasonable doubt. Any gap in the prosecution evidence should be resolved in favour of the accused. In aggravated robbery the prosecution must prove beyond reasonable doubt:

- (a) that there was theft;
- (b) that the theft was accompanied by violence or threat of violence;
- (c) that a deadly weapon was used during the robbery; and
- (d) that the accused persons were responsible.

Concerning the element of theft, there is the evidence of PW1 who testified that the attackers took with them 17 bottles of beer, a radio cassette, 30 music tapes, a jerrican of waragi, a pair of trousers together with some money from his premises. This testimony is supported by PW6, wife of PW1. Their testimonies are supportive of the theft alleged in the first count. In support of theft in the second count, there is the testimony of PW2 who stated that the intruders took her cash Shs.75,000/=, a mattress and various items from her shop. Some of the items that were stolen by the robbers were later recovered, such as the radio cassette which was returned to PW1 and the mattress which was returned to PW2. I am therefore satisfied that there was theft as alleged in both counts and that the prosecution has proved this ingredient beyond reasonable doubt.

The second ingredient relates to whether or not there was violence or threat of violence in the course of theft.

Both PW1 and PW6 testified to the attackers tying them up and beating them up besides forcing them to lie on the floor. The intruders also stepped on PW1's back. This was in regard to the charge in count 1. Concerning count 2 it is the testimony of PW2 that she was hit with the butt of a gun on the arm as the intruders demanded for money. PW1 also testified that PW2 was beaten. I am satisfied that the prosecution has proved beyond reasonable doubt that theft was accompanied by violence.

See *Kenan Owori & Another - vs- Uganda [1975] HCB. 223.*

The third ingredient the prosecution must prove beyond reasonable doubt is that a deadly weapon was used during the robbery. The testimony of PW6 is to the effect that she saw the intruders with a gun. This is not the evidence of PW1 who was also at the scene of the robbery regarding

count 1. I must also note that even if there was a gun the gun was not used on the occasion. Concerning count 2 the position is different. While PW2 testifies that she was beaten with the butt of a gun on the night in issue she states also that she heard a gun being fired outside her house as the intruders left. This is also the evidence of PW1 and PW6. However none of the witnesses saw who fired the gun and it is not clear whether the gun shot outside was the gun that was recovered eventually and exhibited in court as exhibit P1. The gun which was recovered had a magazine with 30 rounds of ammunition. According to PW4 when the gun was recovered it had 25 or 26 bullets. Later he testified that he could not recall whether there were 27 or 29 rounds of ammunition. Whether the number that was exhibited in court are 30 rounds of ammunition - a full magazine. I find also that it was never ascertained whether the gun that was heard being shot outside PW2's premises was that earlier seen with the robbers. This would have advanced the position of the prosecution in light of Wasajja - vs. Uganda 119751 EA 181. As it is I find that the prosecution has failed to prove this ingredient beyond reasonable doubt.

The last ingredient concerns the identity of the people who participated in committing the offences alleged in both counts. None of the prosecution witnesses identified any of the intruders. As such there is lack of direct evidence concerning their identity. The prosecution case is premised on circumstantial evidence. In a case depending exclusively upon circumstantial evidence court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

See Simon Musoke v R [1958] EA 715.

The possession of property recently stolen in absence of explanation by the accused to account for his possession gives rise to a presumption that the accused was either a thief or a guilty receiver.

See Andrea Obonyo v R [1962] EA 542.

In this case theft had occurred on the night of 23rd September 2000 and within a week property stolen from PW 1 and PW2 had been recovered. There was 'no explanation given by any of the persons from whom the recovered property was got concerning how they came to be in possession. On the other hand there is evidence of PW4 showing that he recovered PW1's radio

cassette from the home of A1 and that it was A1 who had told his wife to produce the cassette. PW4 further testified that upon information from A2 he had recovered the exhibited gun from the wife of A1 after A2 had admitted that that was the place where they kept the gun they had used. What's more, the mattress identified by PW2 to be the one stolen from her premises was recovered from the home of A2. From A3's place PW4 testified they found 1 kilogram of sugar, one box of dry battery cells, and one tin of body cream. There were also two empty bottles of beer at A3's home. While I find the discovery of the radio cassette and the gun on his premises incriminating A1 and the discovery of PW2's mattress incriminating A2 I do not make such finding of the articles that were found on the premises of A3. These items in the absence of proper identification as being particular are the type that can be found in any home as counsel for the accused submitted. But PW2 told court that such were the items that were stolen from her premises on the night in issue. The articles were not exhibited and A3 was not given opportunity to explain how he had come by them. As I have observed their amounts are such that they are most likely to be present in any home. I find the doctrine of recent possession does not apply to him (A3).

In their defence all the accused persons set up alibis. They state they were arrested in connection with matters relating to state security and not robbery. An accused person who sets up an alibi as a defence does not assume any burden to prove it.

See *Sekitoleko - vs- Uganda [1967] EA 531*

The prosecution must disprove the alibi and destroy it by placing the accused persons at the scene of crime. In the instant case I find that through the doctrine of recent possession A1 and A2 must be held guilty of the robbery on PW1 and PW2 and I find that they acted in concert as it was on information from A2 that the gun Exhibit PT came to be recovered from A1's premises. I find the prosecution has not proved beyond reasonable doubt that A3 was party to the robbery on any of the two counts and I find him not guilty and acquit him.

Having found as I have concerning A3 and that there is no proof that a lethal weapon was used in any of the two occasions, I find A1 and A2 guilty of robbery contrary to sections 272 and 273 (1)

(b) of the Penal Code and convict them accordingly on both counts. I differ with the joint opinion of the assessors for the reasons given in the course of this judgment.

I so find

P.K. Mugamba
Judge

21st August 2002

Mr. Murumba State Attorney

Ms Ahimbisibwe for accused persons

All 3 accused persons in court

Ms Tushemereirwe court clerk/interpreter

Court: Judgment read in court.

Judge

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State Attorney:

The convicts have no previous record. They are first offenders. The offence is a serious one which carries a maximum sentence of imprisonment for life. There is a big problem of robberies countrywide. This court should play its role in safeguarding society and enforcing the law. I pray for a stiff sentence. They have been on remand since March 2001.

Ms Ahimbisibwe:

Both convicts are repentant. A1 has a very big family of 6 children and a wife. His family and mother are dependent on him. A2 is the elder son in his big family. He looks after the mother and children. They have spent 1 1/2 years on remand. I pray for a lenient sentence.

Convict 1:

I have spent a long time on remand. It has been 1 1/2 years. I pray for lenience.

Convict 2:

I pray for lenience. I have been on remand. I have my mother, my children and children of my elder brother.

Sentence:

The two accused persons have been convicted of simple robbery which carries a maximum sentence of life imprisonment. There is a growing public outcry against robberies which are on the increase in this country. Thank God there was no aggravation in the incidents on which this case is premised. I take what both convicts, the State Attorney and their lawyer have had to say into account. In particular I take the period both have spent on remand into account. I sentence each of the accused to 15 years' imprisonment on count I and to 15 years imprisonment on court 2. The sentences to run concurrently.

P.K. Mugamba

Judge

21st August 2002

Court: Right of Appeal explained.

P.K. Mugamba

Judge