THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

CASE NO: HCT-05-CR-SC-0211 OF 2002

UGANDA :: PROSECUTOR

VERSUS

A1. BBOSA GODFREY
A2. MWEBEMBEZI DAVID (alias DEO
A3. RA.No. 14717758 PTE WABULO KABIBU :::: ACCUSED
A4. BUKABEEBA AMOS
A5 TUMWEBAZE

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

JUDGMENT:-

Bbosa Godfrey (A) and Mwebembezi David alia Deo (A2) are indicted for aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act. Initially five persons were being charged. However at the close of the prosecution case A3, A4 and A5 were found with no case to answer and were acquitted.

Six witnesses were called by the prosecution in support of its case. These were Seeta Wilson (PW1), Brenda Arinaitwe (PW2), Joseph Karokora (PW3) Karikona Fred (PW4) Benon Baryamanya (PW5) and D.C. Ofwono John (PW6).

The brief facts of the prosecution case are that on the night of 30th June 2001 at Bwegiragye village in Bushenyi District the two accused and other at large robbed Seeta Wilson of cash Shs.50,000/=, a wall clock and a radio. Four days after the robbery A2 was arrested in possession of the clock within Ishaka Town. A1 also was arrested.

In defence A1 gave a statement on oath as did A2. Theirs was a defence of alibi. While A1 called no witnesses on his behalf, a witness was called on behalf of A2.

The prosecution has a duty to prove the case against the accused persons beyond reasonable doubt. See ***Okethi Okale & Others Vs Uganda [1965] EA 555.*** In particular the following ingredients ought to be proved:

a) That there was theft;

b) That there was violence;

c) That a deadly weapon was used or was threatened to be used; and

d) That accused participated in committing the crime.

It is pertinent to discuss the above elements in light of available evidence.

Regarding theft, both PW1 and PW2 testified that property was stolen from their house on the occasion. In particular PW2 was able to identify the clock that was stolen from their house with the name “Seeta” inscribed

on it. The defence itself does not contest that theft took place. I am satisfied that prosecution has proved this ingredient beyond reasonable doubt.

The second ingredient to be proved is whether there was violence accompanying the theft. Violence is defined in Black's Law Dictionary as 'unjust or unwarranted exercise of force, unusually with the accompaniment of vehemence, outrage or fury'. In this case the intruders broke two of the doors on PW1's house. They told PW2 to give them money if he wished to remain alive. They ordered PW1 and PW2 to lie on the ground. I am satisfied that the actions of the intruders point to the occasion of violence. The prosecution has proved this ingredient beyond reasonable doubt.

The third ingredient to be proved is whether there was use or threatened used of a deadly weapon.

Both PW1 and PW2 testified that the thugs had a gun with no butt and that it bore one magazine. That gun was neither shot at the scene nor was it recovered there. The fact that the thugs had a gun at the scene of crime is not sufficient in itself for purposes of the offence of aggravated robbery. A gun must have been fired at the scene of crime or when recovered must be test fired. See ***Wassaja Vs Uganda [1975] EA 181.*** Words or threats to use the weapon must also have been uttered. Given the circumstances of this case I find the prosecution has not proved this ingredient beyond reasonable doubt.

I am cognizant of the gun that was put in evidence as exhibit P1. Respectively I find no evidence to show it was the gun that was used in the robbery. To say that

because it had a shot butt and because it was recovered from a suspect is qualification enough would, to my mind, be armaturerism. I reject that piece of evidence.

Accused's participation must be proved. None of the two accused was arrested at the scene. They were arrested elsewhere four days after the incident. Both PW1 and PW2 testified that they recognized A1. PW1 stated that he had seen A1 before as an escort to Lt Col. Nyakaitana. Sadly for the prosecution case there was no identification parade as should have been the case. PW1 in his first statement to police had stated that he was attacked by people he did not recognize. He mentioned A1 after A1 had been arrested. Evidence of identification will not be reliable where a suspect is not mentioned in an earlier Police Statement but is named after he has been arrested. See ***Lt Mike Ocit Vs Uganda [1992-1993]***

HCB 19. Consequently I reject as erroneous and unsafe the evidence of identification by PW1 and PW2.

Proper investigation would have necessitated a properly conducted identification parade. See ***Uganda Vs Ntambazi Godfrey & Another [1996] HCB 29*** for full effect.

A2 in his defence denies having been arrested with the polythene bag containing the clock. His witness DW3 testified that A2 had the clock in his possession at the time of arrest. This testimony is supported by PW4. The time of arrest. This testimony is supported by PW4. Then there is the evidence of PW3 who testified that at about 2.00p.m. On 4th July 2001 he had been told by his wife that A2 had Seeta's clock in his house. The doctrine of recent possession is well settled. Where a person is found in possession of recently stolen property the court

may assume that the person is either the thief or that he or she has received the property knowing it had been stolen unless he or she can adequately account for his or her possession of that property. See ***Kigoye & Another Vs Uganda [1970] EA 402*** and ***Andrea Obonyo Vs R [1962] EA 542.*** Though there is overwhelming evidence A2 was found with the clock he denies being found with it. In the process he does not account for his possession of the clock. I am satisfied the prosecution has proved beyond reasonable doubt that A2 participated in the crime.

It is the prosecution case also that A1 and A2 were together at the time or about the time A2 came to be arrested. Section 22 of the Penal Code Act states:-

“Prosecute on unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that is commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

I do not find anything on the evidence available pointing to common intention. It cannot be my conclusion therefore that A1 had a common intention with A2.

Both accused put up defences of alibi. In the case of A1 the prosecution has not disproved his alibi but regarding A2 I find the alibi has been destroyed and disproved by the doctrine of recent possession already related to.

The two assessors have given in their joint opinion. They advise me to acquit A1 of this charge and convict him of simple robbery. They also advise me to acquit A2 wholly.

Respectively I do not agree with that opinion for the reasons I have given in the course of this judgment. I find A2 not guilty of aggravated robbery and acquit him of the charge but convict him of simple robbery contrary to sections 272 and 273 (1)(b) of the Penal Code Act. I find A1 not guilty and acquit him totally.

P.K. MUGAMBA

JUDGE

15/5/2003.