THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO. 0025 OF 2003

UGANDA:::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

LUWUM CHARLES :::::::::::::::::::::: ACCUSED

BEFORE:THE HON. MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The accused Luwum Charles stands indicted for aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act. It is alleged in the indictment that the accused and others still at large on the 18th day of March 2001 at Musajjalumbwa village, Social Centre Area in Kampala District they robbed Wamala Ismail Kaye of cash UGS. 300,000/=, Crown, colour 14 inches TV, two electrical shaving machines all valued at 440,000/=, and Graduated Tax Tickets from the year 1996 – 2000 and that at, immediately before or immediately after the said robbery they threatened to use a deadly weapon to wit a pistol on the said Wamala Ismail Kaye. The accused pleaded not guilty to the indictment.

The substance of the case for the prosecution is that on 18/3/2001 Kaye was attacked by armed thugs. They robbed him of cash and household property. The accused was arrested by L.C. Officials as he allegedly tried to sell off a shaving machine identified as one of the stolen property. He was accordingly charged with this offence.

The burden of proving the guilt of the accused is on the prosecution. The accused does not bear the burden of proving his innocence.

In a case of robbery, the prosecution must prove beyond reasonable doubt that:

(i) There was theft of property;

(ii) There was violence involved;

(iii) There was a threat to use a deadly weapon or actual use of it; and

(iv) The accused took part in the robbery.

As to whether there was theft of property, there is evidence of Wamala Ismail Kaye and that of PW6 Namugerwa Sulaina that on 18/3/2001 at night they were attacked by thugs who robbed property from their home. The offence was investigated by Police according to the evidence of PW4 D/C Wafula. I have seen no cause to doubt the evidence of these witnesses. The assessors had no any doubt either. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt

that theft was committed on 18/3/2001 to the prejudice of PW1 Kaye and his wife PW6 Namugerwa.

As to whether or not there was violence, both witnesses (PW1 and PW6) testified that they heard a bang on the door. PW1 woke up and moved out of their bedroom. As he was doing so, he came face to face with a man who was by now opening another door. That man put him at gunpoint and ordered him to go back to the room. He complied, went back and lay on the bed, face down. In law, where a demand is made at gunpoint, there is a threat implicit in the very act of brandishing such a gun at the victim. It is my considered opinion that these acts of the attackers upon PW1 Kaye and PW6 Namugerwa amounted to violence within the meaning of section 272 of the Penal Code Act. The second ingredient of the offence has also been proved beyond reasonable doubt.

This leads me to the issue of whether or not there was use of a deadly weapon or a threat to use it. A deadly weapon is defined in section 273 (2) of the Penal Code Act as anything made or adapted for shooting stabbing or cutting and any instrument which, when used for offensive purposes is likely to cause death. Where gunshots are fired during a robbery, the court finds it easier to hold that a deadly weapon was used. See Wasajja vs. Uganda (1975) EA 181. In the instant case, not a single shot was fired at the scene of crime. In these circumstances, the prosecution conceded through Learned State Attorney Mrs. Bukenya that used use of

a deadly weapon or a threat to use it was not proved by the prosecution. In view of that concession, I find that this ingredient of the offence has not been proved beyond reasonable doubt. As to whether the accused took part in the robbery, the whole issue hinges on the question of identification made by PW1 Kaye and PW6 Namugerwa. There is also the issue of accused's alibi and the doctrine of recent possession of stolen property.

I will start with identification evidence. It is contained in the testimony of PW1 Kaye and PW6 Namugerwa. PW1's evidence is that he met face to face with an assailant in the doorway. It was a matter of seconds, not along time. It is his evidence that the assailant he came face to face with who threatened to kill him if he did not comply with his instructions was accused herein, Luwum Charles. PW6 Namugerwa also testified that the thug who entered their room and ransacked it was accused herein. Their evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

(i) The length of time the thug was under observation;

(ii) The distance between PW6 and PW1 and the suspect;

(iii) The lighting conditions at the time; and

(iv) The familiarity of the witnesses with the accused.

As regards the length of time the thug was under observation, both witnesses said that it was for a short time. And for the distance between them, both witnesses said that the distance was short. This was in a small room. As for the source of light at the time, both witnesses said that electric light had been left on and when the robbers attacked, they had no time to switch it off. As to the familiarity of the witnesses with the accused, both witnesses said they had seen the accused in the area before the incident. In his defence, the accused said that he had one time met PW1 with his wife and he reprimanded him, implying that the two were not strangers to each other. In my view, this was identification made under difficult conditions. In Moses Kasana vs. Uganda S.C.CR. APPEAL NO. 12 of 1981, court under scored the need for supportive evidence where the conditions favouring correct identification, as in the instant case are difficult. Other evidence may consist of a prior threat to the deceased, if the offence is that of murder, naming the assailant to those who answered the alarm, and of a fabricated alibi. In the instant case, the accused was never arrested until much later when the issue of a shaving machine arose. If the witnesses had unreservedly recognized the accused during the attack, the most natural thing would have been to report him to the police for immediate search. In these circumstances, I am of the view that the two witnesses themselves had doubt in the identity of the accused as the person who robbed them until other evidence came to light.

I now move to the issue of the shaving machine. The prosecution case is that a day after the incident, a boy was caught selling a shaving machine, one of the items robbed from the home of PW1 and PW6. The boy did not appear as a witness. PW2 Abdu Kamulegeya reported him dead. The law is that evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and in admissible when the object of the evidence is to establish the truth of what is contained in that statement. To the extent that Jackson said that he got the machine from accused, that evidence is hearsay. Such statement is not hearsay and it is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made. See: Subramaniam vs. Public Prosecutor (1956) IWLR 965 at 969.

I have considered the evidence of PW2 Kamulegeya, PW3 Ibrahim Habib and PW8 Bangi on this point. I am satisfied that upon the issue of machine being put to accused, he told PW2 the area chairman, that he had just picked the same in the morning along Butikiro Road and that he had given it to Jackson to sell it for him. I accept the evidence of PW3 Ibrahim, PW6 Namugerwa and PW8 Bangi that accused stated so in their presence. It was consistent and truthful evidence and I saw no reason to disbelieve it. This evidence brings into focus the doctrine of recent possession. The law is that if the accused is found in possession of

stolen property, for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief or the receiver of stolen goods. The evidence of PW3 Ibrahim proves beyond reasonable doubt that the shaving machine was his. He had put marks on it and he showed them to court. I also accept as truthful the evidence of PW1 and PW6 that the machine was among the property robbed from their home in the night of 18/3/2001. Possession is of two types. It may be immediate or mediate. Immediate possession is possession retained personally; mediate possession or custody is possession retained for or on account of another. See: **A Concise Law Dictionary by P.G. Osborn, 5th Edn. At P.245.** In the instant case, I am satisfied that Jackson had mediate possession of the machine in question. It was in his custody on account of the accused. Once an accused has been proved to have been found in possession of stolen property, it is for the accused to give a reasonable explanation. He will discharge this burden on a balance of probabilities, whether the explanation could reasonably be true. If he does so, then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence. See: Erieza Kasaija vs. Uganda, S.C. CRIM. APPEAL NO. 21 of 1991.

In the instant case, the accused has completely distanced himself from the shaving machine. In view of the credible evidence of PW2 Kamulegeya, PW3 Ibrahim, PW6 Namugerwa and PW8 Bangi about what accused said

on arrest, I don't hesitate to say that accused's defence is false. It has been destroyed by the credible evidence of the prosecution witnesses. I therefore reject it. The machine was traced to the accused just a day after the robbery. This is in my view strong circumstantial evidence, which corroborates PW1 Kaye and PW6 Namugerwa's evidence of identification under difficult conditions. In these circumstances. I am satisfied that accused did take part in the robbery.

The prosecution case is that other items were in fact recovered from the accused's home. PW1 Kaye, pw2 Kamulegeya, PW3 Ibrahim and PW8 Bangi said that property was recovered from accused's home that very evening of his arrest. However, PW6 Namugerwa said that recovery of the property was in her presence the following day. I found this a major contradiction in the prosecution case. Since all prosecution witnesses agree that the purported search was conducted in accused's absence, I am constrained to disregard this aspect of the prosecution case that more property was recovered from him. In deciding whether or not to believe the prosecution evidence especially that of PW1 Kaye and PW6 Namugerwa, I have had to consider the grudge mentioned by the accused. He testified that he found PW1 and his (accused's) wife together and he did not hesitate to express his displeasure about it. Accused's woes started when a shaving machine was found with Jackson. Neither PW1 nor PW6 started it off. In these circumstances, I have failed to see the

connection between such a grudge and this case. I am of the view that it is a fabricated grudge.

From the evidence of PW1 Kaye and PW6 Namugerwa, they saw two robbers. Others could have been outside. Each of them had a role to play in the robbery. It was a joint action of offenders prosecuting a common purpose as stipulated in section 22 of the Penal Code Act.

Both assessors in their point opinion advised me to find the accused guilty of simple robbery. From my own analysis of the evidence in this case, I am in full agreement with their opinion. In view of my conclusion regarding use or threat to use a deadly weapon, I acquit the accused of the offence of aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act. However, I find sufficient evidence to support a conviction for simple robbery. I therefore find him guilty of simple robbery contrary to sections 272 and 273 (1) (b) of the Penal Code Act and in accordance with Section 86 of the Trial on Indictments Decree, 1971, I convict him of that offence.

Yorokamu Bamwine

JUDGE

23/5/2003

23/5/2003

Accused present.

Ms. Tumuheki for state.

Mr. Bwengye for accused.

Both assessors here.

Court:

Judgment delivered.

Yorokamu Bamwine

JUDGE

23/5/2003

Ms. Tumuheki:

We have no past criminal record of the convict. We assume he is a first offender. At the time of his arrest, convict said he was 27 years. He has been on remand for 2 years. He has been convicted of an offence-carrying sentence of life imprisonment. Cases of this nature are rampant. I therefore pray for a deterrent sentence.

Mr. Bwengye:

He is a first offender. No Criminal record. Remand for 2 years. We can look at the nature of the offence. The convict should be looked at as an individual. So the issue of rampancy of offences does not arise. He has

children to look after. His wife disappeared. Harm caused to complainant and the young kid can be balanced. Any thing exceeding 5 years would be excessive in circumstances of a convict with dependants who include an old mother. Give him a lenient sentence.

Convict:

I have an old mother. My children have suffered for 2 years without me. I had other dependants whom my father left when I was young. I therefore pray for leniency.

Court:

The convict is a first offender. He committed a serious crime of robbery. He has been on remand for two years, a fact I must take into account when assessing the appropriate sentence to impose. I do so. Property was stolen in the incident. However, no one was hurt. The offence for which he has been convicted carries up to life imprisonment sentence. In these circumstances, I consider a sentence of seven (7) years imprisonment adequate punishment for a person of accused/convict's age. I therefore sentence the convict to seven (7) years imprisonment after taking into account all the above factors. In addition, he will pay a sum of shs. 200,000/= to the complainant as compensation. He will also be subjected

to Police Supervision for a period of three years after serving the custodial sentence in accordance with section 123 (1) of the Trial on Indictments Decree.

Yorokamu Bamwine

JUDGE

23/5/2003

Court:

Right of appeal explained.

Order:

Exhibits shall be restored to the complainant.

Yorokamu Bamwine

JUDGE

23/5/2003