The Hon Justice Tsekoko.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 17/1995
ORIG. IGANGA MJ. 369/94

ALI MUGODA ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

This is an appeal by the appellant, Ali Mugoda, against the judgment of the Magistrate grade I sitting at Iganga. The appellant was charged with the offence of theft c/s 252 of the Penal Code Act. He was convicted and sentenced to 2 years imprisonment. He appealed against both the conviction and sentence.

The facts leading to his conviction and sentence are briefly that the appellant was employed by the complainant one Rahema Baligeya to work in her shop at Oboja road in Iganga town. During the time the appellant was serving in that shop he stole some 100 bags of cement which he sold and did not account for proceeds of the sale. He is also said to have stolen some 31 iron sheets together with cash of 300,000/=.

In his defence at the trial the appellant admitted having been employed by the complainant, he also admitted having disposed of the 100 bags of cement but according to him this was an ordinary sale on credit. He also admitted that 30 iron sheets which had been entrusted to him got lost and he did not know how they got lost.

The learned trial magistrate found as a fact that the appellant had stolen 100 bags of cement and 30 iron sheets but he found that theft of 300,000/= had not been proved, he (magistrate) accordingly convicted the appellant of theft and sentenced him to 2 years imprisonment.

The appellant gave 5 grounds of appeal which were as follows:-

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1. That the learned trial magistrate erred when he failed to believe the defence story, given the contradictory evidence of the prosecution witnesses.

2. That the learned trial magistrate erred to find and hold that an offence of theft had been proved and disregarded the defence that a credit sale had been transacted of which I had received part payment. That accused had no intention to deprive prosecution witness one permanently of the properties as held by the trial magistrate.

3. That the learned trial magistrate was wrong to ignore the mitigating factors as advanced by the accused at the trial and further given consideration that accused is a first offender the sentence of 2 years was not only excessive but unjustifiable.

4. That the appellant also wishes to advance his ill health for he is otero positive which calls for some attention.

5. Without prejudice for the foregoing reasons appellant prays this honourable court of the High Court be sympathetic under the present circumstances to allow this appeal to set aside/quash the sentence or consider an alternative or lesser sentence.

When the appeal came up for hearing the appellant who appeared in person argued the 5 grounds of appeal generally. His contention was that the learned trial magistrate was wrong to disbelieve the appellant's story that he had been given the property by the complainant, therefore he did not break any store or shop to steal the property. He also argued that there was no evidence that he had any intention of permanently depriving the complainant of her property. He finally maintained that this was a civil matter not a criminal matter for which he should have been tried in a criminal court. On the issue of sentence he felt that the sentence of 2 years was excessive considering the fact that he was a first offender that he was a young man of 21 years old and that he had been on remond for 7 months before his trial, he also had a blind father to look after in addition to 2 wives and 3 children of his own together with 6 children who are orphans. He also lamented that he was a victim of HIV.

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On his part Mr. Okwanga the learned Senior State Attorney who appeared for the respondent supported the conviction and sentence. It was his view that the appellant was properly convicted and that the sentence of 2 years imprisonment was quite lenient considering the fact that the maximum sentence for theft is 5 years imprisonment.

It is trite law that a court of first appellate jurisdiction has the power to evaluate and reassess the evidence as given in the lower court and come to its own conclusion; it must however be borne in mind that the trial court had the benefit of seeing the witnesses in the witness box a benefit which the appellate court does not have: Williamson Diamond v. Brown (1970)EA 1 and Pandya v. R. (1957)EA 336. In compliance with this proposition of the law I will try to examine the evidence as adduced in the lowercourt and come to my own conclusion according to the evidence on record.

Since the appellant and the learned counsel for the respondent dealt with the 5 grounds of appeal generally I propose to follow the same pattern, it has however to be pointed out that the 5 grounds of appeal can conveniently be reduced to 2 since the first 2 grounds deal with the same issue and the last 3 grounds also cover the same issue of sentence.

Both in his submission and in his written grounds of appeal, the appellant has bitterly complained that the learned trial magistrate went astray when he disbelieved his story that the property had been lawfully given to him and that he had given away the property on credit and that there were some contradictions in the evidence as given by the prosecution. As pointed out earlier it is not in dispute that the appellant was entrusted with cement and iron sheets to sell on behalf of the complainant PW1, there is however evidence from PW1 and PW5 to the effect that the appellant in fact sold 100 bags of cement to PW5 who paid him all the money except the balance of 60,000/=. In his own evidence the appellant testified that he sold the cement on credit, he did not obtain permission from his employer to do so. The evidence on record shows clearly that the appellant did not account to the complainant the proceeds of the sale of the cement even after his arrest. He did not

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bother to pass the money over to the complainant. The learned trial magistrate found as a fact that the appellant had in fact stolen 100 bags of cement. I am inclined to agree with the finding of fact by the learned trial magistrate that the appellant certainly committed the offence of theft within the meaning of section 245 of the Penal Code Act the moment he converted money from the sale to his own use. The mere fact that the cement had been originally entrusted to him for sale does not mean that he could not steal it or steal the proceeds therefrom, the appellant became a thief the moment he kept the proceeds of the sale of the cement and failed to account for it.

As to the appellant's contention that his act only amounted to a civil not criminal wrong, it must be pointed out to him that several acts or omissions constitute both criminal and civil wrongs and theft is one of such wrongs. A person cannot escape from criminal prosecution simply because his act is a civil wrong as well as a criminal offence.

The next point to be considered is that regarding to the appellant's contention that he never intended to deprive the complainant of the property permanently. The court can only infer somebody's intention from his conduct. In the present case the conduct of the appellant clearly showed that he had no intention of returning the cement or the iron sheets to the complainant. He had already sold the cement and according to him he did not know where the iron sheets were. This fact indicates that his intention was permanently to deprive the owner of both the iron sheets and cement. I reject the appellant's allegation that he sold these articles on behalf of the complainant on credit; in the same way I do not accept his allegation that he never intended to deprive the owner of the property permanently.

Regarding the issue of contradictions appearing in the evidence as adduced by prosecution, it is true that prosecution witnesses did not agree on certain matters. The law is that where there are contradictions or inconsistencies in the prosecution case they should be resolved in favour of the accused if they are major and go to the root of the case but if they are minor and can be explained away they should be ignored: Uganda v. Dusman Sabuni (1981)HCB 1. In the

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instant case the contradictions concern the gauge of the iron sheets stolen, according to some witnesses the gauge of the iron sheets found at the home of the accused were 30 while the gauge of the iron sheets which were stolen were 32, this contradiction would have been regarded as major if the accused himself did not admit in his evidence the loss of the iron sheets, since he admitted the iron sheets having gone missing the gauge of iron sheets found at his home and those lost or stolen from the complainant's shop became immaterial since as the learned trial magistrate stated he (appellant) could have exchanged the iron sheets with those of a different gauge. The other contradiction was with regard to the denomination of the money which PW5 is alleged to have produced at the police as the balance of the money still remaining to be paid to the appellant. According to him the 60,000/= was in the denomination of 1,000/= notes 20,000/=, 500/= notes 20,000/=, 100/= notes in 20,000/= but according to PW2 the denominations were: 50,000/= in denominations of 10,000/= notes then 10,000/= in denominations of 5,000/= notes. This descripancy was not covered by the learned trial magistrate in his judgment. In my view this descripancy was minor since the accused in his sworn evidence did not dispute the fact that he had sold the cement and some balance had remained. Finally there was the disagreement over the exact number or how many bags were stolen. The learned trial magistrate addressed his mind to this matter and resolved that the number of bags which was proved as stolen was 100 and not 186 as indicated in the charge sheet. I think his finding on this point was quite correct, at any rate the number of the bags stolen did not really go to the root of the case since the fact remains that some cement was stolen and the accused in his evidence also agreed that he had taken away 100 bags which he sold on credit. It is my finding that the contradictions or descripancies observed in the evidence as established by prosecution were minor and did not go to the root of this case.

The last point raised by the appellant in his argument in court and his 3 last grounds of appeal was that the sentence of 2 years was harsh and excessive. With due respect I agree with the learned counsel for the respondent when he says that the sentence was rather lenient considering the value of the property involved and the fact that the maximum sentence for this sort of offence is 5 years imprisonment.

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The points raised by the appellant in his appeal which he considered to be mitigating factors were considered by the trial court before the sentence was passed. In all these circumstances I find that the sentence as imposed by the lower court was appropriate in view of the fact that the accused/appellant abused the position of trust reposed in him by the complainant.

The final outcome of this appeal is that there is no merit in it, it is accordingly dismissed.

C. M. KATO
JUDGE
14/3/1996