21

Copy

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MBALE**

**HCT-04-CR-CN-0023/2003**

(From original Tororo crim. Case No. 169 of 2003)

1. **BABIRYE HELEN }**
2. **AMINA ADAM AGUTU }.....APPELLANTS**
3. **NANYONJO FATUNA }**

**VERSUS**

**UGANDA.....RESPONDENT**

**BEFORE THE HON. MR. JUSTICE RUGADYA ATWOKI**

This appeal arises from the judgment and orders of the grade I Magistrate sitting at Busia in the Tororo Chief Magisterial area, in which he convicted the appellants of doing grievous harm c/s 212 of the Penal Code Act and sentenced each to a fine of sh. 300,000/- or imprisonment for one year and a half. They appealed to this court against both the conviction and sentence.

The facts from which the appeal arises are set out in the judgment of the trial court. On 11th May 2003, the three accused persons (the appellants herein) and the complainant one Nabukonde Grace were having drinks in a bar after a meeting of their social club in Busia town. There were many other people in the bar and the time was 6 pm.

The complainant was inebriated and was dancing and shouting. The appellants demanded that she apologises. She went and knelt before them to apologise. It would appear that in the process, she tipped their table and their

drinks poured. From that point on, the versions differ. According to the prosecution, the appellants assaulted the complainant thereby causing her injuries. According to the appellants, they were so annoyed that they moved out and went their respective ways.

The prosecution adduced the evidence of the complainant who told court that when she knelt before the appellants, they respectively assaulted her, tore her blouse and she sustained serious injuries, which the doctor later classified as grievous harm.

The 2nd prosecution witness told court that she was in the bar and saw the complainant go and kneel before the appellants, but she did not witness any assault and that if there was any fighting, it must have taken place after she left. This eye witness told court that the complainant returned from the table where she had been kneeling before the appellants, and that her dress was torn. She did not know who tore the dress yet she was right there in the bar with all the light on, and it was 6.00 pm, meaning there was still brilliant sunshine. The witness told court that she talked to the complainant after this and advised her to go home, but she refused. She only learnt later that the complainant was beaten and was in hospital, meaning that the beating must have taken place after she left.

The trial magistrate found her to be an elusive witness. The other witness for the prosecution was the sister of the complainant who only went to see her sister in hospital after the assault. The doctor examined the complainant. His opinion was that she sustained grievous harm. That was the prosecution case upon which the trial magistrate convicted the appellants.

The prosecution evidence in respect of the assault was therefore from a single identifying witness. This was a pathetic situation considering that the assault allegedly took place in a public place, inside a bar which was teaming with hordes of people, and this took place at 6.00 pm, during broad daylight. The only prosecution eyewitness did not witness the assault. But she later learnt that the complainant was assaulted and even visited her in hospital.

Clearly the prosecution case hinged evidence of identification. The evidence that the appellants assaulted the complainant was from the complainant alone. She was the sole identifying witness. According to her testimony, the assault took lace when she went and knelt before the appellants in the attempt to apologise to them for her wayward behaviour in the bar, where she was reportedly shouting and even undressing.

But this evidence was contradicted by the 2nd prosecution witness PW2. She was the one who advised the complainant to go and apologise to the appellants. She saw her actually do so by kneeling before the appellants, and saw her return after making the apology. She even talked to her, and gave her further advice to go home. But this witness did not see the appellants or indeed any other person assaulting the complainant.

There was no other evidence by the prosecution in respect of the identity of the people who assaulted the complainant. The trial court observed that the complainant was drunk at the time of the alleged assault. She told court that she had a grudge with the appellants prior to the event. She was the only person who said that the appellants were the people who assaulted her.

Nobody else did so, yet there were so many people present. That alone would put a lot of doubt in the mind of the court as to the truthfulness of the complainant. Her own eyewitness did not see appellants assault her as she alleged. It is surprising that the appellants were even put to their defence.

I would agree with the submissions by the appellants that the court appears to have decided to test the defence to see if the defence evidence would fill in the gaps in the prosecution case. The learned trial magistrate fell in the very danger which the court warned against in the case of *Bhatt v. Rep.* [1957] E.A. 332.

It is a cardinal principle of criminal law that the burden of proving the guilt of an accused person lies upon the prosecution throughout the trial. The burden is on the prosecution to prove the each ingredient of the offence charged beyond reasonable doubt. *R. v. Johnson* [1961] 3 All E.R. 969 and *Sekitoleko v. Uganda* [1967] E. A. 531.

An accused person has no duty to prove his or her innocence. Even where he or she opts to keep quiet throughout the trial or offers a weak or incredible defence he or she cannot be convicted on account of any of those factors. He or she can only be convicted upon the strength of the prosecution's case against him or her. *Uganda vs. Asaph Tahikwa* H.C.Cr.S. No. 267 of 1997 (unreported).

The prosecution will not be said to have proved the case beyond reasonable doubt if an essential ingredient of the offence charged is not proved by the

evidence. The above cannot be put in better perspective than to quote *Bhatt (supra)*, when explaining what is meant by a prima facie case.

The court said thus, "remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the prosecution case."

That was precisely what the learned trial magistrate did. He analysed the defence evidence and found contradictions therein and because of those contradictions, he decided that the prosecution evidence was the more credible. Because of that finding, he convicted the appellants.

With respect that was a wrong approach. The court had to consider whether or not the prosecution evidence was credible in the first instance, and that it justified putting the appellants on their defence. The prosecution evidence should not be found credible because of the contradictions in the defence evidence. In other words, a weak or contradictory defence case should not be used to bolster an otherwise weak prosecution case, and use that as a basis to found a conviction.

Even if the court found contradictions in the defence evidence, as it did, that on its own would not suffice to found a conviction. The appellants could

only be convicted if the prosecution evidence was such as made out a prima facie case as set out above in the *Bhatt case* (supra).

From the analysis of the evidence, there was no evidence that the appellants were the people who assaulted the complainant. The prosecution evidence in the identity of the assailants was far too wanting to make out a prima facie case, let alone sustaining a conviction against the appellants.

For the above reasons, the appeal is allowed. The conviction of the appellants in the trial court is quashed and the sentence set aside. Any fine which the appellants may have paid should be refunded to them.

RUGADYA ATWOKI
JUDGE
04/09/2008.