

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPEAL No. 0013 OF 2016
(Arising from Arua Chief Magistrates Court Criminal Case No. 1163 of 2015)

ANGODUA KEVIN APPELLANT

VERSUS

UGANDA RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Appellant was on 29th December 2015 together with his boyfriend charged with Conspiracy to Commit a Felony c/s 390 of *The Penal Code Act* before the Chief Magistrate at Arua. It was alleged that the appellant on 24th July 2015 at Ezova village, in Arua District, together with a one Muguni Bob alias Raga Python, conspired to commit a felony, to wit Unlawfully Doing Grievous Harm c/s 219 of *The Penal Code Act* to Adinan Majid alias Petit.

The prosecution case in the court below was that on 24th July 2015 at around 4.50 pm, the complainant received a call from the appellant, fixing an appointment for the two of them at Yellow House at Pajulu Trading Centre. The meeting was meant for a discussion as to how the appellant would help the complainant to secure a lenient sentence for her sister who was then facing a criminal charge in the court where the appellant was employed as a law clerk. When 15 minutes later the complainant returned the call, it was received by the appellant's boyfriend, he co-accused who told him that the appellant had directed him to her second home and he gave him directions. When the complainant arrived at the location, he found the appellant's boyfriend by the roadside who directed him towards a nearby bush where he picked a log and assaulted him repeatedly with it beating him indiscriminately all over the body. The complainant sustained multiple injuries including a broken collar bone. Sometime after the assault, he received a text message from the appellant asking him whether he had not been injured. It is on that account that

the prosecution contended that the assault of the complainant was as a result of conspiracy between the appellant and her boyfriend.

In her defence, the appellant testified that her co-accused is her boyfriend. Unknown to her, her boyfriend became suspicious of the complainant when the appellant met him in his presence at Nsambya in Arua Municipality on 23rd July 2014 when they agreed to meet the following day for discussion of a criminal case then pending in court against the complainant's sister. The appellant worked as a court clerk at the time. The following day, from her residence but in the presence of his co-accused, he called the victim to confirm their meeting at Yellow house in Pajulu Trading Centre as agreed the previous day. Unknown to her, her co-accused shortly thereafter without her knowledge and consent, used the same phone to call the victim and instead directed him to a different location. She realised after about ten minutes of making the call that her phone was missing and the accused had left the residence. Twenty minutes later when her co-accused returned, he beat her up questioning her relationship with the victim and also told him he had achieved what he wanted by assaulting the victim

In his judgment, the trial magistrate found that it is the appellant who had persuaded the complainant to meet her boyfriend; hence there was a conspiracy between the two to harm the complainant. In texting the complainant, she only sought to confirm that their plan had been accomplished. He rejected her defence as a pack of lies, convicted her and sentenced her to serve two years' imprisonment.

Being dissatisfied with the decision, the appellant appealed both conviction and sentence on the following grounds, namely;

1. The learned trial magistrate erred in law and in fact by not properly evaluating the evidence on record thereby finding that the prosecution had proved the case against the second accused and now appellant beyond any reasonable doubt as is required by law.

2. The trial Chief Magistrate erred in law and fact when he proceeded to convict the appellant for conspiracy to commit a felony without any such evidence being adduced on record by the prosecution to the prejudice of the appellant.
3. The learned trial Chief Magistrate erred in law and fact by passing a sentence of two years' imprisonment which is harsh without taking into consideration mitigating circumstances in favour of the appellant thereby occasioning miscarriage of justice to the appellant.
4. The learned trial Magistrate erred in law and fact by disregarding the evidence on record of the appellant indicating that she was not at the scene of crime thereby arriving at a wrong and unfair decision.

At the hearing of the appeal counsel for the appellant, Mr. Madira Jimmy, argued that there was no evidence adduced during the trial of a conspiracy between the two accused persons. The only evidence against the appellant was that she had called the victim to fix an appointment with him at yellow house in Pajulu Trading Centre. About ten minutes later, her co-accused had used her phone to call and lure the victim to a different place from where the victim was severely assaulted. Later, the appellant had used the same phone to call the victim to find out whether he had not been hurt. This evidence did not establish a conspiracy between the two considering that her defence was that her co-accused had used the phone without her knowledge and consent and upon return from assaulting the victim, her co-accused had assaulted her as well on suspicion of an affair between her and the victim. It is the reason she called the victim to find out whether he too had been assaulted. Regarding the second ground, he submitted that the appellant was sentenced the appellant without giving her the opportunity to make an allocutus. Therefore the sentence was harsh and excessive.

Submitting in opposition to the appeal, the learned Senior Resident State Attorney Ms. Harriet Adubango submitted that that the trial court properly evaluated the evidence and came to the right decision. The sequence of calls made using the appellant's phone was indicative of a conspiracy between the two. Regarding the second ground, she argued that the trial magistrate

considered both the aggravating and mitigating factors and therefore the sentence ought to be sustained, the conviction upheld and the appeal be dismissed.

This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”).

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Grounds one, two and four of the appeal assail the decision of the court below on grounds of failure to properly evaluate the evidence. Since there is no standard method of evaluation of evidence, an appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed.

Under section 390 of *The Penal Code Act*, the offence of conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. The offence is complete the moment such an agreement is made. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means (see *Director of Public Prosecutions v. Nock*, [1978] 2 All E.R. 654). Not only is the prosecution required to prove the intention but also that there was an agreement to carry out the object of the intention, which is an offence. The offence of conspiracy has three elements: (1) an agreement, (2) which must be between two or more persons by whom the agreement is effected and (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished.

In *Papalia v. The Queen*, [1979] 2 S.C.R. 256, at p. 276, Dickson J. (as he then was) described the offence of conspiracy as “an inchoate or preliminary crime”. In setting out the necessary elements of the offence, he noted at pp. 276-77 that:

The word “conspire” derives from two Latin words, “con” and “spirare”, meaning “to breathe together”. To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. R.*, at p. 168. The *actus reus* is the fact of agreement: *D.P.P. v. Nock*, at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. (emphasis added).

The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. It is noted that conspiracy is hatched in secrecy and in many cases it is impossible to adduce direct evidence of its existence. The offence of conspiracy is normally

proved from inferences drawn from acts or illegal omissions committed by the conspirators in pursuance to a common design. In this case, the prosecution relied entirely on a series of occurrences between the two co-accused centred around the use of the appellant's mobile phone that day. Since the important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy, existence of such an agreement hinged on proof of the fact that the appellant's co-accused's access to the appellant's phone was with her knowledge and consent and was for purposes of furthering their common intention of unlawfully doing grievous harm to the victim. Without such proof, the inference of such an agreement would be based on a fallacy. The prosecution was simply required to prove a meeting of the minds with regard to a common design to do something unlawful, not the other way round.

What the prosecution relied upon is essentially circumstantial evidence as proof of the agreement, constituted by the fact that the appellant had called the victim to fix an appointment to meet with him at yellow house in Pajulu Trading Centre. About ten minutes later, her co-accused had used the same phone to call and lure the victim to a different place from where the victim was severely assaulted. Later, the appellant had used the same phone to call the victim to find out whether he had not been hurt. Where agreement among the conspirators is to be inferred by necessary implication, the inference can only be drawn on the parameters in the manner of proved facts, in the nature of circumstantial evidence. The prosecution had to show that these circumstances from which the inference of that agreement was to be drawn had, in the first instance, been proved beyond reasonable doubt and secondly that they are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of the existence of such agreement between her and her boyfriend.

Where the prosecution case rests entirely on circumstantial evidence, it is the requirement of the law that in order for the court to sustain a conviction on basis of such evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's

responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609).

To sustain a conviction, each circumstance has to be fully and firmly established beyond doubt. The circumstances must form strong links in a chain of circumstances. The law requires that there has to be a chain of circumstances which presupposes several links or a web of circumstances which consist of several strands, all of which have to be individually established, in other words, every one of them has to be of equal strength. It has often been said that the strength of the chain is the strength of the weakest link in the chain. The links must hence be strong in order to constitute a strong chain of circumstances. The chain of circumstances must necessarily, clinchingly and unerringly point to the guilt and only the guilt of the accused alone. The circumstances must effectively exclude any reasonable hypothesis of innocence of the accused.

In the instant case, the appellant in her defence testified that her co-accused is her boyfriend. He became suspicious of the victim when the appellant met him in his presence at Nsambya in Arua Municipality on 23rd July 2014 when they agreed to meet the following day for discussion of a criminal case then pending in court against the victim's sister. The appellant worked as a court clerk at the time. The following day, from her residence but in the presence of her co-accused, she called the victim to confirm their meeting at Yellow house in Pajulu Trading Centre as agreed the previous day. Unknown to her, her co-accused shortly thereafter without her knowledge and consent, used the same phone to call the victim and instead directed him to a different location. She realised after about ten minutes of making the call that her phone was missing and the accused had left the residence. Twenty minutes later when her co-accused returned, he beat her up questioning her relationship with the victim and also told him he had achieved what he wanted by assaulting the victim.

This was a plausible version attributing the attack on the victim to the independent act of a jealous boyfriend, which version was not disproved by the prosecution. If believed, it has the

capacity of weakening the inference of the existence of any agreement between the appellant and her co-accused. The prosecution's circumstantial evidence then becomes incapable of irresistibly pointing to the existence of such agreement. Circumstantial evidence must always be narrowly examined yet the trial magistrate did not advert to this requirement at all. In my view, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on record. The strength of a chain is invariably to be tested on the basis of the weakest link and the law with regard to circumstantial evidence requires that every link has to be significantly strong as it has to inextricably fasten the accused with the guilt of the offence. The weakest link in the chain of circumstances in the instant case is the failure to establish that the appellant's co-accused's access to the appellant's phone was with her knowledge and consent and was for purposes of furthering their common intention of unlawfully doing grievous harm to the victim. This circumstance was not fully and firmly established beyond reasonable doubt. Had the trial magistrate properly directed himself, he would have come to the same conclusion.

A conviction cannot be sustained on the basis of a series of links some strong and some weak, they have all got to be equally established. That missing link is absolutely fatal to the prosecution. I have evaluated the evidence as required at great length and there is nothing to connect the appellant irresistibly to the attack on the victim, except mere suspicion. I am, therefore, unable to uphold the conviction. Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The suspicion may be strong but the prosecution must prove the case against the accused beyond reasonable doubt. Since grounds one, two and four of the appeal have succeeded, I find it unnecessary to consider the third ground. In the final result, the appeal is allowed. The conviction is quashed and the sentence set aside. Instead the appellant is acquitted of the offence of Conspiracy to Commit a Felony c/s 390 of *The Penal Code Act*. She should be set free forthwith unless held for other lawful reasons.

Dated at Arua this 9th day of February 2017.

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Stephen Mubiru
Judge