

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0122 OF 2017

UGANDA **PROSECUTOR**

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VERSUS

**1. ADRIKO ISMAIL }
2. ADUKULE ALI } ACCUSED**

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Before: Hon Justice Stephen Mubiru.

RULING

15 This case came up on 4th April, 2018 in a special session for plea bargaining. The accused was indicted with the offence of Murder c/s 188 and 189 of the *Penal Code Act*. It was alleged that on 18th March, 2017 at Agoraku village in Yumbe District, the accused murdered Anguparu Jesca.

20 When the case was called, the learned State Attorney, Mr. Emmanuel Pirimba reported that he had successfully negotiated a plea bargain with the accused and his counsel. The court then invited the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on state brief, Mr. Onencan Ronald. The court then went ahead to ascertain that the accused had full understanding of what a guilty plea means and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms
25 of waiver of the constitutional rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after he had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record. The accused was then allowed to take plea whereupon a plea of guilty was entered.

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The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon he narrated the following facts; on 3rd December 2016 at around 9.30 pm at Kampala Trading Centre at Aligo village in Maracha District. There was a scuffle between A2 and Osega Gadi. The deceased intervened and successfully stopped the two from fighting. A2 was not

happy with the intervention and he retorted that he would injure the deceased. The deceased went home. A1 arrived at the home of the deceased at round midnight, knocked at the door whereupon the wife of the deceased Betty Ajoni opened the door and got out and found A1. She re-entered the house and woke up the deceased who was the Chairman of the village to whom A1 had reported a case of assault. They instead began boxing the deceased was he told them to return the following morning and A1 began beating the deceased in the mouth. He fell down and A1 continued to kick and box him as he raised an alarm and the accused fled to Malaba to a disco dance till morning. On the morning of 4th December at around 8.00 am, A1 came to the home of the deceased armed with clubs and stating that the deceased is to be killed. The villagers ran after the accused and had him arrested and taken to Oleba Police Post where the deceased had reported a case of assault. He was charged before the magistrate's court of Koboko with the offence of Assault and A1 pleaded guilty and was sentenced to 6 months imprisonment. The deceased meanwhile was admitted to Maracha hospital and later to Mulago Hospital complaining of chest pain and headache. At Mulago Hospital a blood clot was found in his head. He was given medication but passed on, on 7th February, 2017 and the cause of death was subdural haematoma. The accused was examined on P.F 2A.

The summary of facts as narrated by the learned State Attorney revealed that the first accused served a six months' sentence of imprisonment upon a conviction on his own plea of guilty for an offence arising out of these facts. The onus of proof rests with the accused on the balance of probabilities and the court must be satisfied that there has been a former conviction for the same criminal offence arrived by a court of competent criminal jurisdiction following a trial on the merits. Although section 32 of *The Trial on Indictments Act* provides that a previous conviction may be proved by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order, or alternatively either by a certificate signed by the officer in charge of the prison in which the punishment or any part of it was inflicted, or by production of the warrant of commitment under which the punishment was suffered, a previous conviction may not only be established by the production of a certified record of the trial court, but also by other evidence if necessary (see *Connelly v. DPP [1964] AC 1254 at 1306 - 1307*).

There is no explicit bar to separate prosecutions for different offenses arising under the same "criminal transaction" (although s.24 (d) of *The Trial on Indictment Act* permits the joint prosecution of persons accused of different offences committed in the course of the same transaction while s.24 (c) permits the joint prosecution of persons accused of more offences than one of the same kind committed by them jointly within a period of twelve months), but it is not permissible for the prosecution to re-litigate facts already determined by a court. This is because Article 28 (9) of *The Constitution of the Republic of Uganda, 1995* provides that;

A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal

Accordingly, section 61 (1) (a) of *The Trial on Indictments Act* provides that any accused person against whom an indictment is filed may plead that he or she has been previously convicted or acquitted, as the case may be, of the same offence. This provision engenders the principle that where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. If all elements of a lesser offense are relied on to prove a greater offense, the two crimes are the "same offense" for double jeopardy purposes, and the doctrine will bar the second prosecution. The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Where the same evidence is necessary to prove both offenses, then in effect there was only one offense. The practical effect of the common law principle against double jeopardy is the proscription against retrials for the same criminal offence following an acquittal or conviction. It is a rule which prevents the harassment of an accused person through successive trials for the alleged commission of the same criminal offence.

A plea of double jeopardy in essence entails; (i) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (ii) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (iii) that

the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (iv) that one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or
5 whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty (see *Connelly v. DPP [1964] AC 1254 at 1305* and *DPP v. Nasralla [1967] 2 AC 238 at 249*).

10 It is generally accepted that there are three essential criteria to be satisfied:

- i. The accused had formerly been in jeopardy (or peril) of a lawful conviction before a court of competent criminal jurisdiction;
- ii. The former criminal trial must have concluded with a final determination of the facts at issue, i.e. that there has been a final verdict, either of acquittal or
15 conviction, following a trial on the merits;
- iii. The criminal offence for which the accused has been charged on the second occasion is the same or substantially the same offence as that for which he had formerly been acquitted or convicted.

20 Double jeopardy, properly understood, is best described in the phrase "No man should be tried twice for the same offence". I emphasise the word "tried." The issue is whether a plea of guilty serves same purpose as a trial in the context of the double jeopardy rule and a subsequent plea in bar of *autrefois convict*; in other words whether for the purposes of the common law there is any parity between a trial and a plea of guilty such that the double jeopardy rule is capable to arising
25 in the latter at all.

The general rule in most common law jurisdictions is that the attachment of jeopardy in the legal sense only arises following a lawful acquittal or conviction on the merits of the particular case. This is because a trial is deemed to begin when the trial court begins to hear evidence ().
30 Nevertheless jeopardy is deemed to have attached following a plea of guilty which effectively results in a conviction once it has been formally accepted by the trial court. This is because what

is essential to a plea of *autrefois convict* is proof of a final verdict of conviction recorded by a court of competent criminal jurisdiction, not so much that the accused had been in peril of conviction for a particular offence (see *DPP v. Nasralla* [1967] 2 A.C. 238 at 250 per Lord Devlin (P.C.) and *R. v. Grant* [1936] 2 All E.R. 1156).

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That notwithstanding, the rationale for the development of double jeopardy being the proscription against retrials for the same criminal offence following an acquittal or conviction or as a corollary against the imposition of multiple punishments upon conviction. The rationale is that it would be unfair to punish an individual twice if he or she has only committed one act that results in one harm. The central issue, therefore, is whether the accused has previously been convicted or acquitted of the same or substantially the same criminal offence as that charged in the subsequent indictment. The accused cannot be said to have been in jeopardy if the former criminal court did not have jurisdiction to try the criminal offence subsequently charged. The second indictment must be for the same criminal offence both in fact and in law (for example in *Connelly v. DPP* [1964] 2 All E.R. 401 at 433 (H.L.) Lord Devlin observed that an acquittal on a charge of murder could not be raised in bar to a subsequent trial for robbery, even though the murder had been committed in the course of the robbery). Accordingly, there must be both a factual and legal nexus between the two criminal offences in order to be considered the same offence for the purposes of double jeopardy jurisprudence.

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For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same criminal offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. It would be an affront to the criminal justice system if an accused could successfully raise the pleas in bar because he had already been convicted of an offence of lesser gravity.

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The rules of double jeopardy jurisprudence proscribing a second trial for the same criminal offence are not applicable where the consequences of the accused's criminal activity have changed. Thus, in *R. v. Thomas*, [1950] 1 K.B. 26 the Court of Criminal Appeal held that where an accused had been convicted of wounding with intent to murder and the person wounded

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subsequently died of the wounds inflicted, a plea of *autrefois acquit* may not be raised against a subsequent indictment for murder, as in these circumstances the accused is not being twice tried before a court of criminal jurisdiction for the same criminal offence. In these circumstances, there is a separate and distinct new criminal offence (i.e. separate defining elements) that may be prosecuted without violating the common law double jeopardy prohibition. The court observed that to allow the accused to successfully raise the pleas in bar in these situations would amount to an affront not only to the victim, but also to the requirements of a just and ordered society.

Similarly, in *R. v. Tonks [1916] 1 K.B. 443 at 450*, Lord Reading L.C.J., delivering the judgement of the Court of Criminal Appeal, explained that: “In our view it is wrong to say that a person indicted for the manslaughter of a child whose death has occurred after the conviction of the same person for the wilful neglect of that child is twice put upon his or her trial for the same criminal offence.” Thus, the evidence adduced by the prosecution in order prove the offence charged in the indictment may also be used at a subsequent trial of the same accused for a different offence, even if this latter offence arose out of the same factual situation as the initial offence charged. This is because the test used to determine sameness of offences is whether the defining elements of criminal offences are the same, not whether the factual circumstances are the same.

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I therefore find that the plea of *autrefois convict* is not available to A1 and therefore hearing of the case against both accused may proceed.

Dated at Arua this 9th day of April, 2018

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Stephen Mubiru
Judge,
9th April, 2018.