IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., PLATT, AND J.S.C.)

CRIMINAL APPEAL NO.24 OF 1984

B E T W E E N

FRANCIS MASABA :::::::::::::::::::::: APPELLANT

AND

UGANDA ::::::::::::::::::: RESPONDENT

(Appeal from Judgement of the High Court

of Uganda at Mbale by (Justice M.Opu)

dated 25/10/83)

IN

H/C CR.SS. CASE NO. 5 OF 1983

REASONS FOR THE ORDERS OF THE COURT

On 19th July, 1989, this Court dismissed the Appellant’s appeal against conviction for manslaughter (contrary to section 182 of the Penal Code), but allowed the Appellant’s appeal against sentence to the extent that the term of imprisonment imposed on the Appellant of fifteen years , was reduced to one of 10 years. We now give our reasons for those orders.

On 27th November 1976, there was a circumcision dance in the area of Bugwagi village, Mbale District, which was attended by the sons of Sepatia Mwangu (PW1) who were called Michael Walimbwa, Samuel Walimbwa and Sulaiti Mudebo. These young men visited the bar of one Bwaisa, where the Appellant Francis Masaba worked as a barman. The young men entertained themselves, some dancing, some drinking, and Michael Walimbwa bought some drink. It is said that he paid for sbs.10 worth of drink with a sh.100/— note and later on expected to get back his change. The appellant denied owing Michael any change, and a fist fight erupted in the bar. Michael left the bar and the appellant followed him. He caused Michael to fall down, and while the latter was on the ground or getting up, the appellant allegedly stabbed him three times on the chest. Reports were made, but Michael died in the road near the bar. Michael’s father was called and he found his son dead, a sad event as Michael was only 16 years of age. The appellant disappeared from the area. He was next seen five years later on 7th November, 1981, by Lawrence Makibwe (pw4) at Makiwonde market at Budadiri. Lawrence reported the matter to the Police and the Appellant was arrested.

The appellant's defence was that he had been arrested as alleged, but he had not committed the homicide charged. He knew nothing about it.

The High Court nevertheless held that the brothers of Michael the deceased had genuinely identified the appellant as the person who had stabbed and caused Michael's death. But having in mind that the appellant had been in the bar where a quantity of liquor had been consumed, it was proper to give him the benefit of the doubt, that he might have stabbed the deceased due to drunkenness. Accordingly, although in disagreement with the Assessors, the learned Judge found the Appellant - guilty of the lesser offence of manslaughter, rather than of murder, the offence with which he had been indicted, and sentenced him to fifteen years imprisonment, as we have said above. Mr. Kabega for the State, only grudgingly dealt with the appeal on the basis of manslaughter.

Mr. Kahungu, for the Appellant, in a stalwart address, to be applauded in many respects for its appeal for overt and conscientious adherence to the statutory rules of procedure argued two main lines. The first was procedural and the second concerned the merits of the case on the evidence as recorded. So it was that on the first line Mr. Kahungu submitted that the learned Judge had not recorded notes of his summing up to the Assessors, and secondly, that after the prosecution base had closed, the learned Judge did not make, or did not record that he made, a finding, that the appellant had a case to answer, before putting the Appellant on his defence. This ground was extended to mean that the Judge had not explained what he had said when telling the Appellant what his rights were as to his defence. We should of course add that there had been another complaint that the Assessors had not been sworn; but that was actually carried out, and the typed record was merely defective in not stowing that that was so. We will deal with the second line presently.

Nothing that we are about to say, should be understood as indicating any disagreement, as to the necessity for following the statutory procedure in an open and satisfactory manner. Indeed, if the procedure was properly followed, these appeals would be less numerous or less onerous. But we are bound to observe certain provisions governing these appeals, which aim at preserving the convictions of the Courts below, unless there has been a miscarriage of justice. Let us refer to the provisions of section 137 of the Trial on Indictments Decree which give this Court the discretion not to alter or reverse a finding on appeal,

"On account of any error, omission irregularity or misdirection in the ……..judgement or other proceedings before or during the trial unless such error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."

The proviso which follows provides for consideration to be given whether the objection could or should have been raised at an earlier stage of the proceedings, when deciding whether or not there has been a failure of justice.

These provisions recognise that with the best will in the world, there will be inattention to some matters, while other aspects of a trial receive prominence. There are some irregularities which it is the duty of litigants or their counsel, to point out to the Court, at the time for example complaints of duplicity, or the Court's omission to take some step in the procedure. It is another matter if the Court has erred on a point on which Counsel cannot react. But when Counsel can act he must do so, which is a duty to the Court quite different from the defence position, where the prosecution may have left a gap in its case, and so fails to prove its care to the requisite standard. Similarly on appeal, counsel cannot usually simply assert that this or that point of procedure was not carried out by the Judge, because that matter does not appear in the record. Counsel may well be handicapped by not having appeared at the trial, and so may not know exactly what took place. Nevertheless Counsel must find, out as best he can from the record or from his client. This is well illustrated by the abandoned complainant in this case, that the assessors were not sworn. As a matter of fact they had been, as the original record shows. Counsel should seek instructions. Moreover, when the Court has stated that it has complied with a point in procedure that statement must stand unless it is challenged as false. If in fact an appellant admits that the procedure was carried out as stated in the record, but that it was carried out improperly, the impropriety must be alleged. it is not only that there is a general presumption that official acts have been carried out lawfully, but in this case, if there was an error in the procedure and no objection was taken at the time, as envisaged by the proviso to Sec. 137 (supra), it is reasonable to conclude that the act was carried out as prescribed by law. That is especially well illustrated by the complainant in this case, that the judge merely stated that he had explained the appellant's rights to him. If he did not do so, counsel could and should have asked for clarification, unless the matter was of no consequence, because Counsel had advised his client correctly.

We have set out the position at some length, because of especially pointed assertions of Mr. Kahungu that counsel could rely on the record and the court could not presume anything. It will be clear from the section 137 (supra) that it is not the law.

On the other hand, the lack of summing up notes is a very much more important lapse, and on occasion might jeopardise a trial, if injustice is caused. It is for the Appellant to show that there has been a miscarriage of justice, nevertheless. In this case, it is not alleged that there was no summing up to the assessors; it is not known what was said apparently,

(although it is not clear whether the defence counsel at the trial, or the appellant, was consulted on this question). That is not sufficient. Judging from the remarks of the assessors the following issues in the trial were answered by them.

1. The prosecution had proved its case beyond reasonable doubt;
2. the evidence of the prosecution witnesses was accepted;
3. the cause of the fight was the failure of the appellant to return Michaels change;
4. the appellant was net drunk but intended to kill the deceased;
5. the appellant was guilty of murder.

According to the Judge the assessors were wrong not to give the Appellant the benefit of the doubt that he was drunk at time. This summary of the case appears to have covered the issues adequately except for one aspect, and that aspect Mr. Kahungu did not grasp, probably because he might have been embarrassed, and so he concentrated on a complete acquittal on the basis of the issues in the second line of his submission.

The situation is, however, that the Assessors were quite right on the question of drunkenness. There was no witness who admitted that the Appellant had been drinking. Neither the deceased nor the appellant were accepted as having taken, liquor. It is difficult to see on what evidence the learned Judge could have based a defence of drunkenness.

On the other hand it was open to the learned Judge to consider that there had been a sudden quarrel over the change which Michael expected to receive. In this connection we accept that the law is well stated in ARCHIBOLD: Criminal Pleading Evidence and Practice 37 Ed, at para 2492. It must be presumed that the appellant ought to have returned the change, since no explanation was made by the appellant as to this matter in his defence. But the terms of the altercation are not known, which caused these two men to box each other in the bar and continue to fight outside. There had been no time for cooling. There was accordingly an issue which ought to have been left to the assessors whether the appellant was guilty of manslaughter. Perhaps in was. Perhaps the finding by the Assessors that the Appellant intended to kill the deceased was meant to decide that issue. But as there is no mention of this possibility in the judgement, we take it that this was not an issue left to the assessors, or one on which the learned Judge directed himself. In these circumstances we felt that this was a question which should be resolved in favour of the appellant. Consequently we would have been prepared to uphold the conviction fox manslaughter on these grounds, unless the second line of the appeal was successful.

In the grounds of appeal dealing with the merits of the decision, in which the prosecution evidence was accepted and the defence rejected, Counsel for the Appellant

attacked the evidence of the brothers of the deceased, who had been watching the progress of the fight. The first point concerned the change of the Appellant's name, secondly, the inconsistencies were pointed out, and thirdly, the knife used to kill the deceased was not produced. It is difficult to see any real merit in these criticisms. Francis Masaba, the appellant, can also be called Muwonge Mafabi. This was not a fanciful idea. Mafabi is the name of the Appellant's father and he sometimes added that name to his other names. This was the evidence of Sepatia Mwanga and Lawrence Makibwe as well as the deceased's brothers Samuel Walimbwa and Sulaiti Mudebo. The latter had incidentally changed his name from Francis Musika on being converted to Islam. There was evidence which the learned Judge could and did accept.

Then as to the inconsistencies, they were of the category where different people see things differently, and were not great. Perhaps the most difficult question for Counsel for the Appellant to get over was the Police statement made by Samuel Walimbwa. Counsel sought to show that other persons had been reported as involved in the fight. The rule is that if a witness is to be contradicted by reference to an earlier statement, that statement need not be produced if the witness accepts what is written. If the witness does not accept the statement, it must be produced. In this case, it was not accepted and not, produced by George Sesagu (DW2), who did not record it. If the statement is not produced the defence is bound to accept the answers given. Consequently, the statement did not afford a reason for describing the evidence as inconsistent (See: BHARAJ and Another V.R. (1953) 20 E.H.C.A. 134 and TRAIRU MUHORO (1954) 21 E.A.C.A 187). The third point was that the knife alleged to have been used had been lost by the Police.

The whole sequence of events was described as incredible and unrealistic. Judging from the record, the way the witnesses described the scene seemed to the Assessors and the learned Judge to be the truth. We felt unable to impose any other solution.

We noticed and invited Counsel's attention to the fact that the post mortem examination report was not produced, and that the identifying witness, relied upon by the Doctor, was not Sepatia Mwanga, who testified that he had identified the body of his son to the Doctor. It often happens that there are two identifying witnesses. But should the doctor's evidence be discarded, we felt able to conclude that the deceased had died due to the stab wounds to the chest. He died at once after these blows which were serious.

Consequently we upheld the appellant's conviction for manslaughter.

But with regard to sentence, having in mind that this was a sudden fight, that the appellant, a first offender had remained in remand for two years before Judgement, it seemed

that 15 years imprisonment was manifestly too harsh. We substituted a term of ten years imprisonment.

These are the reasons for our orders.

DATED at Mengo this 3rd day of August. 1989.

S.W.W. WAMBUZI

CHIEF JUST ICE

A.H.O. ODER

JUSTICE OF SUPREME COURT

H.G. PLATT

JUSTICE OF SUPREME COURT

I CERTIFY THAT THIS IS

A TRUE COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA

REGISTRA SUPREME COURT