THE REPUBLIC OF UGANDA **IN**

THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., MANYINDO, D.C.J., ODOKI, J.S.C., PLATT, J.S.C AND SEATON, J.S.C.)

CRIMINAL APPEAL NO.32 OF 1989

BETWEEN

1. SGT. SHABAN BIRUMBA ============================ APPELLANT
2. LONGI ROBERT

AND

UGANDA=== RESPONDENT

(Appeal against conviction and sentence of High Court of Uganda holden at Kampala (Hon. Justice M.K. Kalanda) dated 19/10/89)

IN

HIGH COURT CR. SS. CASE NO.31 OF 1989

JUDGMENT OF THE COURT

The appellants, who were under 18 years of age at the time of the trial, were convicted on two counts of aggravated robbery contrary to Section 272 and 273(2) of the Penal Code Act, and pursuant to Section 104(1) of the Trial On Indictments Act, they are detained in safe custody pending the order of the Minister. In the meantime, they appealed to this Court against their convictions.

The appeal was brought on a first ground that challenged the dismissal by the learned Judge of the alibi defences of the Appellants. That ground was abandoned. The sole remaining issue for determination arose out of the second ground of appeal, namely, that the learned Judge erred in law when he ruled that the pistol was deadly weapon. This involved a. consideration of the decision in ***Wasaja v. Uganda*** (1975) E.A. 181 where it was held **inter alia** that:

"The vital consideration is that the weapon must be shown to be deadly in the sense of "capable of causing death". As we have indicated, toy pistols, broken guns incapable of discharging bullets, or guns without ammunition, or imitation guns are not and cannot be, deadly weapons".

That opinion was founded upon the following statutory provisions:-

"272. Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

273 (1) Any person who commits the robbery felony of shall be liable: (a On conviction by a Magistrate's Court, to imprisonment for ten years;
(b) on conviction by the High Court to imprisonment for life.

(2) Notwithstanding the provisions of paragraph (b) of subsection (1), where at the time of or immediately before or immediately after the time of the robbery an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced do death.

In this subsection "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting, and any instrument which when used for offensive purposes, is likely to cause death."

We shall pass on for the moment to observe the opinion of the learned Judge, from whose decision this appeal emanates. Towards the end of his judgment, the learned Judge described the factors which in his opinion proved that the Appellants had committed capital robbery.

Both the complainants (P.W.I.) on the first count and his son (P.W.3) the complainant on the second count, had been forced at gun point surrender their property. It was held that the gun was a pistol as seen by these witnesses. Later, when the first Appellant made his escape, he was kept in sight during the chase until he was arrested. He was found in possession of a Biretta type of pistol - No. 025049 M, loaded with *5* rounds of ammunition. The Judge thought that the identification of this weapon by S.I.P. Mathias Mugirima (P.W.7) was sound beyond doubt. It was concluded that the pistol found in the possession of the first Appellant was the same pistol as that seen by the complainants at time of the robbery. It did not matter that the pistol was not produced in evidence. The Judge held that the evidence before the Court was sufficient to prove that the pistol was a deadly weapon, in the sense that it was capable of causing death. It being a deadly weapon, it was sufficient if the pistol had been used to threaten the complainants. The learned Judge referred to the actual decision on appeal ***John Wasaja V. Uganda*** Appeal No. 19 of 1975.

The situation was not quite as clear as the learned Judge found it to be. The non-production of the pistol found with the first appellant, had important ramifications. First of all, from the judgment it might be surmised that the witnesses had identified the pistol found with the first Appellant. They were not shown the pistol found at the time of the first Appellant's arrest, nor in Court. But from all the evidence, it would be a reasonable conclusion, that the First Appellant had used the pistol that he was found with, to threaten the two complainants. We assume that this is what the learned Judge intended to infer.

Secondly, as the pistol was not fired at the time of the robbery, nor examined and test-fired, we cannot say in what condition it was. The presence of the ammunition, though suggestive of the fact the pistol could be used, is not conclusive. For all that is known, the pistol may have been out of order, and incapable of discharging the ammunition. A weapon of this nature, when taken into custody should always be carefully examined and test-fired, if it has not been fired at the scene of the crime. It was in fact impossible on the evidence, to find that the gun was a deadly weapon, within the reasoning of **Wasaja**'s case.

That is the central point in this appeal. In reliance on Wasaja's case, Counsel for the Appellants asserted that the pistol was not a deadly weapon. On the other hand the Ag. D.P.P.

countered that submission by referring to Section 31 of the Firearms Act (Act No.23 of 1970) which provides as follows***:***

"31(1) Any person who,

(a) makes or attempts to make any use whatsoever of a firearm of imitation fire arm with intent to resist or prevent lawful apprehension or detention or himself of any other person ; or

(b) While carrying a firearm or limitation firearm, threatens violence to any person.

Commits an offence and shall be liable to imprisonment for a term not exceeding fourteen years.

(2) Any person who displays or attempts to display any firearm or imitation firearm in a public place in such manner as to cause alarm to any member of the public commits an offence and shall be liable to a fine not exceeding six thousand shillings or to imprisonment for a term not exceeding six months, or to both.

(3) Any person who discharges any firearm deliberately or negligently in a public place thereby causing alarm to any members of the public commits an offence and shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or both.

(4) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purpose of Sections

273 and 274 of the Penal Code Act.

(5) ***In this section, imitation firearm means anything which has the appearance of a firearm whether it is capable of discharging any short bullet or other missile or not."***

The Ag. D.P.P. was able to point out that Section 31 above had not been brought to the attention of the Court of Appeal in the course of the arguments in Wasaja's case. Certainly one would expect to find such provision as subsections (4) and *(5)* above inserted in Section 273 of the **Penal Code Act,** where a definition of a deadly weapon was set out. It was easy to miss Section 31. Nevertheless, the Ag. D.P.P. submitted that had Section 31 been brought to the attention of their Lordships, they would have been bound to conclude, that it did not matter what kind of gun it was, whether usable or not usable; these were by definition all guns deemed to be those referred to in Sections 273 and 274 of the **Penal Code Act.** Consequently he asked that Wasaja's decision be overruled.

Counsel for the Appellants took the view that a dangerous weapon within Section 31 of the Firearms Act was not the same thing as a deadly weapon the terms of Section 273 of the Penal Code Act Section 31 had repeated as earlier provision and must be considered a mistake. The Ag. D.P.P. submitted that a dangerous weapon must be the same deadly weapon; or, at all events, as Section 31 had been enacted after the new Section 273, Section 31 must be included in the definition of a deadly weapon contained in Section 273 of the Penal Code Act.

The Ag. D.P.P. submission required us to take a historical view of the legislation, hence the canon of construction upon which the Ag. D.P.P. must rely in that a later act may impliedly modify a former Act. We must been in mind the directives of Section 3 of the Penal Code, that the interpretation of the Code shall be in accordance with English Principles.

In Maxwell on Interpretation of Statutes 12th Ed. p. 191 the matter is put these words:-

> ***"A later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favoured by the Courts. "For as much" said Coke, "as Acts of parliament are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated." If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done And when the later act is worded in purely affirmative language, without any negative purely affirmative language, without any negative expressed or implied, it becomes even less likely that it was intended to repeal the earlier law."***

Maxwell has given examples of occasions where both Acts were able to separate together; cases where there were Implied repeals; and in another area where were mistakes in drafting. In the latter case, Maxwell sets out his views as follows at p.228.

> ***"When the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meanings of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to the particular words, or <u>by rejecting them altogether,</u> on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. When the main objects and intention of the statute are clear, it must not reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: "the canons of construction are not so rigid as to prevent a realistic solution."*** (Underlining ours).

(See ***Crams Properties, Ltd v. Conaught Fur Trimmings Ltd.*** (1965) W.L.R. 892 & 899). Examples of obvious oversights are given.

Together with the above rules there is one other which much be borne in mind. Whatever may have been said in ***Opoya v. Uganda*** (1967 E.A). 752 that the approach to the interpretation of a criminal matter is not a matter of ordinary interpretation of statutes; that is not quite so. No doubt Maxwell commences the discussion of this topic in the same vein as Sir Clement de Lestang in **Opoya's** case. But the theme of strictness is developed clearly by Maxwell until it is said at pp.239-240:

> ***The strict construction of penal statutes seems to manifest itself in four ways; in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfillment to the letter of statutory conditions precedent to the infliction of punishment and in insisting on the strict observation of technical provisions concerning criminal procedure and jurisdiction."***
>
> (Underlining ours)
>
> (See also HALSBURY's LAWS OF ENGLAND 4TH ED. VOL 44 PARA 910)

It comes to this. The conflict in this case concerns the interpretation of a penal provision introducing mandatory capital punishment. The element of the charge and condition precedent that a deadly weapon must be used are not clear. The approach should be to interpret the words strictly. This involves the question whether there has been an implied repeal or whether there has merely been careless language on the part of the draftsman. In the end we can join hands with Sir Clement de Lestang in Opoya's case in that part of his opinion at p.753 where he states:-

> ***"... and, subject to the general preposition that where an equivocal word or an ambiguous sentence leaves a reasonable doubt as to the meaning of the law which canons of construction fail to solve, the benefit of the doubt should be given to the subject."***

Bearing these principles in mind, the history of this matter may be pursed with two special interests in mind;

(a) what is to be made of the conflicting statutory provisions; and

(b) does **Wasaja's** case represent a reliable interpretation of Sec.273 of the **Penal Code Act,** without the influence of Section 31 of the **Firearms Act.**

There was the **Old Penal Code** which existed up to its revision by Act 12 of 1968 the latter **Act** being entitled the **Penal Code Act**

The **Old Penal Code** existed, we suppose harmoniously, with the **Old Firearms Act Cap. 310**. The relevant provision may be contrasted as follows:-

1. In Opoya's case sections 272 and 273 of the Penal Code are set out as follows: -

"Definition of robbery 272. Any person who steals anything and, at or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Punishment for robbery 273 (1) Any person who,
(a) commits the felony, shall on any public highway, shall

be liable on conviction to imprisonment for a term not exceeding fourteen years and not being less than ten years;

(b) ***commits the felony of robbery at any place, other than on a public highway, shall be liable to imprisonment for a term not exceeding four teen years.***

(2) ***Notwithstanding the provisions of the preceding subsection, where at the time of the commission of the felony of robbery the offender,***

(a) ***is armed with any dangerous or offensive weapon or instrument,***

(b) ***is in company with one or more persons,***

(c) ***wounds, beats, strikes any persons, at, immediately before or immediately after the time of robbery, he shall be liable on conviction to suffer death."***

The Court of Appeal held that S.273(2) of the Penal Code must be read conjunctively; but what is important at this point is that Sec.273(2)(a) provided that the offender must be "armed with any dangerous or offensive weapon or instrument."

Comparing Section 32 of the **Old Firearms Act** Cap 310 we find the following provisions:-

"32. (1) Any person who -

(a) ***makes or attempts to make use whatsoever of a firearm or imitation firearm with intent to resist or prevent the lawful apprehension or detention of himself or any other person;***

(b) ***while carrying a firearm or imitation firearm, threatens violence to any person.***

Shall be guilty of an offence and shall be liable on conviction of imprisonment for a term not exceeding fourteen years.

(2) ***A firearm or imitation shal4 notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be dangerous weapon or instrument for the purposes of sections 273 and 274 of the Penal Code.***

(2) ***In this Section, "imitation firearm" means anything which has the appearance of a firearm whether it is capable of discharging any shot, bullet or other missile or not"***

The description of the dangerous weapon or instrument is, as a matter of descriptive words ***perse,*** harmonious enough. The concept of a dangerous weapon or instrument is not quite as harmonious with the idea of imitation or useless guns. For example, the definition of a "firearm" in the **Firearms Act** shows that it is a weapon capable of causing injury by discharging a bullet (inter alia) or any noxious liquid, gas or other thing dangerous to human beings, "but does not include any antique firearm which has been rendered incapable of use as a firearm." After the deeming previsions of section 32, the antique firearm which is not a firearm, though it has the appearance of one, becomes a dangerous weapon or instrument. That would seem artificial.

There are other instances in the Penal Code Act where a dangerous or weapon instrument is provided for. Section 284 A, for instance, provides for a higher punishment when an offender commits house breaking or breaking into a building armed with a "dangerous or offensive weapon". Similarly Section 285 relies on a "dangerous or offensive weapon or instrument". Such cases as ***Smaje v. Balmer*** (1965) 2 ALL E.R. 248 considered that word "any dangerous or offensive weapon or instrument" dealt with "weapons or instruments adapted or intended

for causing injury to a human being."

The general meaning of dangerous weapons in the case of firearms must be that they are capable of causing injury. However the deeming provisions bring into consideration the artificial concept of inoperable weapons. This adaptation is followed in Section 285 A (2) of the Penal Code Act, Looking at Section Section 273 (2) of the Penal Code, before it was amended, it must surely have been intended that in aggravated robbery, the dangerous or offensive weapon or instrument would be one capable of causing injury.

The presence of one or more other persons, the actual violence be "wounds, beats or stokes" any person, continues the idea that the victim will be caused injury. If one then introduces the deeming provisions of Section 32 of the **Fire Arms Act** artificial though that may be, the provisions can be fitted in, the gun being useless, other people must be present, and the victim wounded, beaten or struck otherwise than being shot. But it may be that as a firearm need not be lethal, that capital punishment was not mandatory.

Opoya's case caused a change in the law. Section 273 was entirely recast. Subsection (1) is no longer concerned with the place where the robbery takes place, either on or not on a highway. The present subsection (1) is concerned with the Court in which the conviction is passed. Presumably the prosecution is encouraged to place less serious examples of robbery before a Magistrate's Court, rather than the High Court since the punishment in the Magistrate's Court is limited to 10 years imprisonment.

In the High Court the maximum term is imprisonment for life. These Courts have discretion how much imprisonment to mete out. That is not so in subsection (2). There the sentence of death is mandatory. Subsection (2) is quite different from its predecessor. Dangerous or offensive weapon or instrument is replaced by deadly weapon. Wounding, beating or striking, is replaced by causing death or grievous harm to any person. The presence of other people becomes a case of the other person jointly concerned in committing the robbery also being sentenced to death. It is a much more severe section. It is a deliberate repeal of the old section 273 of the **Penal Code.**

Section 379(1) of the **Penal Code Act** repeated the **Penal Code** with savings for the past operation of the **Code** and it the Penal Code thus repealed "the said Code". There follows section 389(2)

> ***"(2) Whenever reference is made in any enactment now in force or in any document to any provision in the said Code for which other provision is made by this Code, such reference shall be construed as a reference to the other provision made by this Code if such reference is consistent with the context in which it occurs."***

That appears to mean that Sec. 273 of the **Penal Code** (the "said Code") provided for a dangerous or offensive weapon or instrument in subsection (2)(a) thereof. Section 32 of the Firearms Act widened the definition of a dangerous or offensive weapon or instrument. That was a reference "made in any other enactment." then in force, to the provisions of Section 273 of the "said code." Section 32 of Firearms Act was then to apply to Section 273 of the **Penal Code** Act, since Section 273 is the "other provision made by this Code". But Section 32 of the Fire Arms Act is only to apply to the new provisions of Section 273 if it is consistent with the context in which it occurs.

It is not consistent, because the new Section 273 is an entirely different section with a new definition of deadly weapon, unlike the old section 273 with which Section 32 of the Firearms Act was consistent. Hence, as at the date on which the **Penal Code Act** came into operation, the concept of a dangerous weapon in Section 32 of the Firearms Act was not relevant to the concept of a deadly weapon in the new Section 273 of the **Penal Code Act.**

Section 379(2) does not of course operate to bring into play, Section 31 of the Firearms **Act** 1970, since the latter was not "then in force" when the 1968 **Penal Code Act** came into existence.

Since Section 32 of the Firearms Act was inconsistent with Section 273 of the **Penal Code Act** of 1968, the partial repetition of Section 32 in Section 31 of **the Firearms Act** 1970 can

hardly fare any better. A dangerous weapon simply does not extend as far as “deadly” weapon. Looking at the Shorter Oxford Dictionary, one finds that ever since 1490, dangerous has meant “Fraught with danger or risk; perilous, hazardous, unsafe (the current sense).” “Deadly is concerned with death... (4) Causing or having the capacity of causing death”. . . (6) Aiming and involving an aim to kill or destroy, implacable;”... “in a way that causes death.” That understanding of the central concept of “deadly”, is in balance with the other example of aggravated robbery -causing death or grievous harm. A dangerous weapon may endanger life, a deadly weapon causes death or has the capacity of causing death If the situation is so clear, then why has Section 31 of the **Firearms Act** 1970 applied this concept of dangerous to Section 273 of **Penal Code** Act 1968 which is concerned with a deadly weapon?

It would be consoling to say that it was simply a draftsman’s error. It not as easy as the Section 31 of sub paragraphs (2) and (3). It refers to Sections 273 and 274 of the Penal Code Act, thus noting the title of the 1968 Act. Yet in essence Section Cap 310 and Section 31(4) of the 1970 **Firearms Act** are the same. The same wording is used throughout except that **Penal Code** is replaced by **Penal Code Act**. It is clear that the repetition of Section 32(2) of Cap.3 10 in Section 31(4) of the 1970 Act brings forward once again the conflict between a dangerous and a deadly weapon. Is it possible to include an imitation firearm, or one unloaded, or otherwise incapable of discharging a shot (inter alia) deemed to be a dangerous weapon, within the definition of a “deadly” weapon in Sec.273(2) of the **Penal Code**?

How then should the provision be seen? It seems to us that as a general description, the death penalty attaches where a deadly weapon is used or is threatened to be used or where death or grievous harm is caused. Where a dangerous weapon or an imitation or impotent weapon is used that may attract as such as life imprisonment in the High Court. Less serious examples of robbery may attract less imprisonment in the High Court or Magistrate’s Court.

It is not possible to read both provisions together, as if a dangerous or offensive weapon had relevance to some part of Section 273(1), and not Section 273(2). That would need to be the case if it were thought that the 1970 **Fire Arms Act** being a later Act, impliedly amended the 1968 **Penal Code Act.** But the fact is that the **Penal Code Act** in Section 273 was inconsistent with Section 32 of Cap 310. That deliberate amendment of Section 273 surely

cannot have been overruled by words which do not apply to the present Section 273.

The matter is at least ambiguous, and the intention of Parliament cannot be ascertained. In these circumstances, no citizen should lose his or her life until Parliament has reconsidered these provisions and made clear its will.

In the result we decline to apply Section 31 of the **Firearm Act** to Section 273 of the **Penal Code Act.**
Looking back then at Wasaja's case, it may be that it would be desirable to use the exact words or the section. But the Court of Appeal has extracted from "deadly" weapon the essence of that word, capable of causing death, as may be seen from the Dictionary definition.

It is clear from the same source that a dangerous weapon has the original meaning of capable of causing injury. The deeming provisions are artificial, however kindly the intention may have been to avenge the victim, duped by an imitation gun. The deeming provisions were deliberately replaced by a new definition in Section 273(2) clearly indicating that the weapon would be likely to cause death. The Court of Appeal was quite right to give the ordinary direct meaning to deadly weapon, and there is no need to apply any artificial meaning. The death sentence is mandatory in cases where the death of the victim is likely. That seems a satisfactory situation, unless Parliament directs otherwise. Until then, we uphold Wasaja's decision.

On that basis, the final question is whether the pistol was a deadly weapon. It is unfortunate that the investigation of the case, did not include proof that the pistol was such a weapon, capable of causing death. By the time that the trial opened the gun was missing and the Court was unable to insist on proof. A pistol, though it may have been together with ammunition, yet it may not have been an operable gun. Consequently, the case fell within Section 273(l)(b) and not 273(2) of the **Penal Code.**

Consequently we quash the convictions of each accused on each count and set aside the orders under Section 104(1) of the **Trial on Indictments Decree.** We substitute convictions for the lesser offence of robbery contrary to section 273(l)(b) on each count for each accused.

With regard to sentence, the First and Second Appellants, were fond to be under 18 years of age at the time of conviction (they have stated that they were 16 years and 13 years of age respectively).

It appears to the Court that having regard to their ages, reform should be aimed at. In accordance with Section 5 of the **Reformatory Schools Act** (Cap.111), the appellants are sentenced to five years imprisonment, but they are ordered, instead of undergoing sentence, to be sent to a reformatory school and then to be detained for a period of not less than 3 years and not more than 5 years.

Dated at Mengo this 20th day of June 1991.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE OF THE SUPREME COURT

E.E. SEATON
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE
COPY OF THE ORIGINAL,

W. MASALU MUSENE **REGISTIRAR,**
THE SUPREME COURT.

JUDGMENT OF WAMBUZI. C.J.

I have not signed the majority judgment and I think I should briefly give my reasons.

I agree that the central issue in this appeal is whether the gun in this case was shown to be deadly weapon within the reasoning of the case of **Wasaja v. Uganda** 1975 E.A. 181. It was held in that case at page 182 as follows;

> ***"The vital consideration is that the weapon must be shown to be deadly in the sense of 'capable of causing death.' As we have indicated, toy pistols, broken guns incapable of discharging bullets, or guns without ammunition, or imitation guns are not, and cannot be deadly weapons.***
>
> ***There was no evidence in this case that the gun held by the appellant was a deadly weapon. For all we know it may have been harmless imitation."***

This Court had notice that the Respondent was going to rely on the provisions of section 31 of the Firearms Act, 1970 and would request this Court to overrule **Wasaja's** case. Accordingly a full bench was convened for the purpose. I am fully aware that a full bench has

no more jurisdiction or powers than the usual bench of three Judges but we held the view that a numerically stronger bench is preferable if this Court is to consider over-ruling its own decision.

The provisions of section 31 of the Firearms Act have been set out in full in the majority judgment and I need not re-state them here. The question I ask is, what is, what was the intention of the Legislature when it enacted subsections (4) and *(5)* of the Firearms Act, 1970? These provisions read as follows,

> ***"(4) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or any missile, be deemed to be a dangerous weapon or instrument for the purposes of sections 273 and 274 of the Penal Code Act.***
>
> **(5)** ***In this section "imitation firearm" means anything has the appearance of a firearm whether it is capable of discharging any shot, bullet or other missile or not."***

In so far as is relevant, section 42 of the Firearms Act defines a firearm as follows:-

> ***"Firearm" means any barrelled weapon (other than an imitation firearm) from which any shot, bullet or other missile capable of causing injury can be discharged, adapted for the discharge of any such shot, bullet or other missile, and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing dangerous to human beings………but does not include any antique firearm which has been rendered incapable of use as firearm."***

It would appear form this definition that essentially a firearm is a weapon designed or adapted for the discharge of anything dangerous to human beings. Imitation firearms are specifically excluded because they are not so made or adapted. Antique firearms within have

been rendered incapable of discharging any missile or noxious matter are also not firearms within the meaning of this definition.

The effect of subsections (4) and (5) of S.31 of the Firearms Act must be to say that although normally an imitation firearm is not a weapon it is nevertheless a weapon and a dangerous weapon where the provisions of sections 273 and 274 of the Penal Code apply.

The offence of robbery is created by section 272 of the Penal Code which sets out the ingredients of that offence which are theft and use or threatened use of actual violence. The section does not refer to any weapons.

Section 273 (1) of the Penal Code provides the penalty for the offence of robbery in paragraph (a), imprisonment for ten years on conviction by a Magistrates Court and in paragraph (b), life imprisonment on conviction by the High Court. Again there is no reference to any weapon.

The reference to a weapon is under section 273 (2) and is in relation to the penalty the High Court must impose in given circumstances. The subsection opens with the following words,

> ***"Notwithstanding the provisions of paragraph (b) of subsection (1)……."***

In my view subsection (2) means that notwithstanding that the High Court can impose a penalty of life imprisonment it shall pass the sentence of death in the specified circumstances. Use or threatened use of a deadly weapon being some of such circumstances.

The subsection does not define what is a dangerous weapon nor is the expression used. The subsection defines what is a deadly weapon as follows:-

> ***"deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purpose is likely to***

cause death."

Learned Counsel for the Respondent submitted, quite rightly in my view, that the definition is inclusive and not exclusive. It does not say, a deadly weapon "means" any instrument made or adapted for shooting etc but says "includes"

A gun is a deadly weapon according to this definition because it is made or adapted for shooting. According to section 31 of the Firearms Act an imitation firearm shall be deemed to be a dangerous weapon for the purpose of section 273 of the Penal Code, even though it is not made or adapted for and is not capable of discharging anything. The effect is to include an imitation firearm as a dangerous weapon amongst deadly weapons. I see no other way of giving effect to the intention of the Legislature in enacting section 31 of the Firearms Act.

It was stated in Wasaja case that,

> ***"If a gun is fired in the course of robbery, a Court will have no difficulty in holding that it is a deadly weapon; if it is not fired, but merely its use is threatening, as in this case, a finding based on evidence that the gun was deadly weapon is essential before its threatened use can constitute aggravated robbery under section 273(2)."***

It has been held in a number of cases that such a finding may be based on evidence that the gun was test fired and proved to be capable of discharging a bullet. Apparently **Wasaja case** and others do not require proof that the gun was loaded at the time of the robbery. To that extent, I see no difference between an unloaded gun and an imitation firearm. Their effect is the fear induced in the victim to part with his or her property. Very few victims will wait to see whether the weapon facing them is a loaded gun or a mere imitation firearm. This must have been the intention of the Legislature in enacting subsections (4) and (5) of section 31 of the Firearms Act 1970. It is to be noted also that the Fire Arms Act 1970 is later in time than the provisions of section 273 of the Penal Code which were enacted in 1968. The later provisions of an Act of Parliament cannot be rendered ineffective by earlier provisions which Parliament must have been aware of in enacting the new provisions. My views would have

been different if the provisions of section 273 of the Penal Code were later than the provisions section 31 of the Firearms Act. It would have been possible to argue that the Legislature knew about deeming imitation firearms to be dangerous weapons in section 31 of the Firearms Act but provided for deadly weapons in section 273 of the Penal Code. In those circumstance Wasaja's case would have been correctly decided. In the instant case the position is the reverse.

For the foregoing reasons I hold that **Wasaja case** was decided per incuriam. I would accordingly have overruled it and dismissed this appeal.

Dated at Mengo this 20th day of June, 1991.

S.W.W. WAMBUZI
CHIEF JUSTICE

I CERTIFY THAT THIS IS A
TRUE OF THE ORIGINAL,

W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT.