IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO,D.C.J., ODOKI,J.S.C., & ODER,J.S.C.)

CRIMINAL APPEAL NO. 3 OF 1992

B E T W E E N

1 PC BEN MULWANI
2 FRANCIS WAKIDA ..... APPELLANTS

A N D

UGANDA ..... RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Byamugisha J) dated 27 November 1991

in

Criminal Session Case No 106 of 1991)

JUDGMENT OF THE COURT

The appellants were convicted by the High Court at Kampala of aggravated robbery contrary to sections 272 and 273(2) of the Penal Code and were each sentenced to death. They now appeal to this Court against the conviction and sentence.

Briefly the facts of the case were that on 3.10.90 at about 1 p.m., Dr. T.J. Clarke (PWI) was driving his motor vehicle Registration Number UPJ 203 Toyota Land Cruiser white in colour, with Edmund Kalyesubula (PW2) and Lydia Sanyu (PWII) as passengers, from Nsambya Hospital to La Verna House, along the Old Port Bell Road, when they were attacked by two robbers. One of the robbers who was the first appellant went to Dr. Clarke's side

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and the other, the second appellant, to the left front passenger side. They were both armed with pistols. They ordered the three people to get out of the vehicle, threatening to shoot at them. They pulled Dr Clarke out of the vehicle and drove it away. Dr Clarke went to La Verna House and telephoned the Central Police Station. The Police sent a message to all patrol vehicles in the city. The stolen vehicle was sighted being driven towards Kitante Road. The police in patrol cars laid an ambush around the Mulago/Wandegeya roundabout. When the vehicle came, the police fired at it to stop it. The vehicle swerved and knocked another car. The two appellants who were in the stolen vehicle got out and ran away while the first appellant fired in the air. They were chased by the Police and arrested around Wandegeya Trading Centre. The first appellant was arrested with a pistol. An identification parade was held by the Police ten days later at which Dr Clarke and Lydia Sanyu identified both appellants as the robbers.

The appellants denied the offence and each set up an alibi. The first appellant said he was at Naguru Mobile Unit where he was working, up to 2.30 p.m. when he left for Wandegeya to investigate a case of shop breaking. The second appellant claimed he was at his home which was at the offices of the Christian Childrens' Fund where he was working. He claimed that he left his home at 2 p.m.

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and then went to Nabugabo Road and later to Wandegeya at 3.30 p.m. to meet his friend Issa, a special hire taxi driver. Both claimed that they were arrested at Wandegeya while running away following a commotion caused by the chasing of robbers by the Police.

The learned trial judge found that the robbery of Dr. Clarke's vehicle had taken place and that a deadly weapon had been used. She found that the appellants had been properly identified by the two eyewitnesses both at the scene of crime and at the identification parade. She accepted the evidence of the police that the appellants had been arrested at Wandegeya trying to flee from the stolen vehicle which they were driving. She rejected the appellants' alibi as untrue. She convicted them as charged.

The appellants have appealed on nine grounds some of which are closely inter-related. The grounds attack the sufficiency of evidence and the trial judge's evaluation of evidence. They attack her findings relating to the deadly weapon and also attack the admission of the first appellants extra judicial statement. Finally, they complain about the rejection of the appellant's alibi.

Mr. Mbabazi, learned Counsel for the two appellants argued grounds 5 and 9 together. Ground 5 complains that the trial judge erred in law and fact when she held that the inconsistencies discrepancies and contradictions in the prosecution evidence were minor. Ground 9 states that the trial judge erred in law and fact when she failed

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to properly evaluate the evidence and resolve the doubts in favour of the appellants.

The only inconsistence pointed out by Counsel for appellants was as regards the time of the robbery. According to Dr. Clarke, his vehicle was robbed at around 2 p.m. But the Police Officer who received the report of the robbery in the Information Room at the Central Police Station testified that he received the report at around 1 p.m. The police officers in the patrol vehicles who laid an ambush for the robbers also stated that they received the message and arrested the appellants at around 1 p.m. Kalyesubula (PW2) who was travelling with Dr. Clarke also testified that they were robbed at around 1 p.m. Mr. Mbabazi submitted that this discrepancy between the evidence of Dr. Clarke and other witnesses rendered his evidence unreliable.

In her judgment the trial judge said,

> "I have no hesitation in saying that on the evidence available the prosecution has proved conclusively that on 3/10/90 during lunch time at Old Gaba Road, the complainants vehicle was stolen. Any discrepancies appearing therein are immaterial and do not affect the broad aspect of the case."

We are of the view that the above finding by the trial judge was justified on the evidence on record. We do not accept Mr. Mbabazi's argument that time was of essence in this case and that a difference of one hour between the evidence of the complainant and other of other witnesses

was a major discrepancy which rendered the complainants evidence unreliable. In circumstances of this nature it is difficult for a complainant or witnesses to be exact in estimating time. Therefore the finding by the trial judge that the robbery took place during lunch time was correct. No instances of failure to evaluate evidence by the trial judge were pointed out by learned counsel for the appellants. We are satisfied that the trial judge adequately evaluated the evidence and arrived at correct conclusions. Accordingly, grounds 5 and 9 must fail.

In ground 3, the appellant complains that the trial judge erred in law and fact in holding that the exhibited pistol (Exhibit P.3) had been recovered from the first appellant/had therefore been used in the robbery. The /and evidence of arrest of the first appellant was given by PC Francis Ekadu(PW5.) He was on patrol duty around Mulago, in vehicle UP 753. They were six police officers under the charge of the late AIP Masiko. There was also another patrol vehicle UP 0743. As they laid in ambush of the stolen vehicle, it came towards the roundabout with two people in it, and the second appellant was driving. He then explained how the arrest was carried out,

> "As they came near we had to open fire by shooting at them three bullets got the car. They drove on going towards Wandegeya and we followed them. They crossed from left to right and knocked a vehicle CD 66 1244. After knocking the vehicle they got out and started running. My colleague in UP 753 followed A2 and I and the late Masiko followed A1 and

> "and some civilians also joined in the chase. He decided to shoot one bullet in the air. He was armed with a pistol. He was running towards Mulago and when he heard the shot he came and also released a shot. When the accused saw that we were close to him, he decided to enter somebody's house in Katanga. We found the accused inside and he handed the pistol to AIP Masiko. We brought him to the vehicle and as we reached Cooperative Bank Wandegeya, I found my colleagues with A2. They were brought to Central Police Station and handed over to the counter. I looked at the pistol. He gave it to me at the house where we arrested accused. It was a USA make No. 212873 M 51911. It had two ammunitions and one cartridge."

The evidence of PC Ekadu was supported by that of Cpl Ojwiya (PW4) who testified that the late Masiko recovered a pistol from the first appellant.

The first appellant denied having been arrested under those circumstances. He claimed he was arrested while running away from a commotion caused by the chasing of robbers by the police. He denied in his extra judicial statement having been arrested with a pistol.

The learned trial judge accepted the prosecution evidence and disbelieved that of the appellant. She then made the following findings,

> "A1 was at the scene of crime and he participated in the robbery and the pistol which was recovered from him was the one used at the time the robbery was committed. The evidence given by the arresting officer was cogent and I have no reason to disbelieve it."

We think that there was sufficient evidence to justify the above findings. Therefore the third ground must fail.

Counsel for the appellant next argued Ground 6. It states that the trial judge erred in law and fact in relying on the evidence of identification when it was unsafe to do so, and there existed doubts in the propriety of the identification and a gap in the chain of identification. The two appellants were identified at the time of the robbery and subsequently at an identification parade by the two eyewitnesses Dr. Clarke PWI) and Lydia (PWII). They were arrested fleeing from the stolen vehicle by a team of police officers who had laid an ambush in patrol cars. All this happened in broad day light and within a short space of time of only one hour. The conditions favourable to correct identification were present. We think that the possibility of mistaken identity was excluded by the presence of this overwhelming evidence. We hold therefore that the trial Judge was justified in relying on the evidence of identification and in holding that it conclusively proved that the two appellants participated in the robbery. We find no merit in this ground of appeal.

The fourth ground of appeal attacks the admission of the first appellant's statement to police.

It states that the trial judge erred in law and fact when she found that the respondent had proved beyond reasonable doubt the charge and caution or confession by the first appellant had been made voluntarily and therefore admissible. Counsel for the appellants argued that since the trial judge had held that the statement was a confession, she erred in holding that it was obtained voluntarily when there was evidence from the first appellant that he was beaten by the police. He submitted that had the statement not been admitted the first appellant would not have been convicted.

On 10.10.90, the first appellant made a statement to Sgt. Buyinza at the Central Police Station. When the prosecution sought to introduce it at the trial, he objected to its admission on the ground that he was forced to sign it after being severely beaten by the Police. A trial within trial was therefore held. The leafned Judge considered the issue of whether the statement was made by force on the basis of the credibility of witnesses. She gave serious consideration to the failure to medically examine the appellant before or after the statement and concluded,

> "Although this was a necessity I find that failure to do so is not fatal to the prosecution case, since the evidence of Buyinza and Katahweire to the effect that the accused had no injuries on him when he made the statement is sufficient. They were witnesses of substantial truth and I have no reason to disbelieve that evidence. I have also evidence from Ekadu (PW2) to the effect that A1 was beaten by the mob at Wandegeya before he was rescued by the Police and this

> "explains why A2 saw A1's face s
> swollen and distorted."

She found that the proper procedure had been observed during the recording of the statement from the first appellant. She then observed,

> "I am also satisfied that the accused being a Police Officer gave his statement to his fellow Police Officer voluntarily and I reject his claim that he was forced to sign a statement already prepared. The accused was not a witness of truth and his Counsel conceded during the submission that his client lied."

The trial judge ~~therefore~~ held that the statement was made voluntarily and was therefore admissible. She had the opportunity to see the witnesses and assess their demeanour. She was therefore in a better position than us to assess the credibility of witnesses on this issue. On the evidence which was adduced, we are not satisfied that she was wrong in believing the prosecution evidence and in holding that they had established that the statement was made voluntarily.

It was argued that the first appellant would not have been convicted had this statement not been admitted in evidence. We do not agree. The statement was not a confession because it did not admit the offence with which the appellant was charged. In Anyangu v. Republic (1968) E.A. 239 the Court of Appeal said,

> "A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried."

In the present case the first appellant denied participating in the robbery in his statement but admitted having been arrested at Wandegeya. The trial judge used part of the statement against the appellant when she said,

> "The relevancy of the statement is that it puts the accused in the vehicle at the time it was intercepted at Wandegeya"

At most this was an incriminating statement but it was not a confession. There was sufficient other evidence from the Police Officers to support the finding that the first appellant was arrested fleeing from the stolen vehicle. Therefore even without the admission of the extra judicial statement, the trial judges decision would have been upheld. Ground four must accordingly fail.

In the second ground it was argued that the trial judge erred in law and fact when she admitted and improperly relied on the evidence of Joran Kakuru (PW10) as a ballistic expert without first establishing and satisfying herself on the competence of that expert witness.

The learned trial judge based her finding that the gun was a deadly weapon on the evidence of police officers who saw the first appellant firing in the air at Wandegeya and the evidence of Kakuru ~~(PW8)~~ PW10. This is clear from her

evaluation of the evidence as follows:

> "The prosecution adduced evidence during the trial of this case to the effect that after the theft of the vehicle it was intercepted at Mulago roundabout going towards Wandegeya. It had two occupants. The vehicle knocked another vehicle and they fled. One of them (A1) ran and was chased by a group of policemen who included E. Ekadu (PW5) and late AIP Masiko. He had a pistol in his hand and he fired one shot in the air. He entered somebody's house and he handed over the pistol to AIP Masiko. It was loaded with two bullets. Later the pistol was exhibited at Central Police Station by Katarikawe (PW9) and kept in exhibit store by Salama (PW8). The pistol was later taken to the Ballistic Expert Kakuru (PW10) whose findings are contained in the report he made (exhibit P.5). His findings that the pistol was capable of discharging a bullet and that the ammunitions found therein were live was not contested. My finding here is that the pistol was deadly in that it was likely to cause death within the meaning of section 273(2)."

It is well established that once a gun is fired during the course of the robbery, it is deemed to be a deadly weapon. (Wasajja v. Uganda (1975) EA 181. Birumba v. Uganda, Cr. App. No. 32 of 1989 (unreported). In such a case there is no requirement that the gun should be examined by an expert or test-fired. In the present case, there was evidence which was believed that the pistol was fired by the first appellant, and that in our view was sufficient evidence to prove that it was a deadly weapon.

However, the pistol was also examined by a ballistic expert. The complaint here is that his competence was not established before he gave evidence. In his evidence, Kakuru did not indicate his rank or official position. He merely said,

> "I work at the Police Headquarters in the Scientific Aids Laboratory. I received exhibits from Police with Police Form 17.A details (sic) the type e.g. exhibits and the examination required."

He then testified as to how he examined the pistol and cartridges by loading the pistol, corking it and firing it. He stated that the examination showed that the pistol was capable of discharging a bullet and therefore it was a fire ammunition. He also found that the cartridge was live. He concluded,

> "I concluded that the crime catridge was fired by the pistol. I wrote my conclusion and made a report."

Thereafter the exhibits were tendered in evidence without objection. Counsel for the appellants did not object to the expert giving evidence nor cross examine him. It would appear that Kakuru was accepted as a ballistic expert by the parties and the court.

It is a rule of practice that the competence of an expert to give evidence should be established before he ~~or she~~ testifies. In Gatheru s/o Nyagwara V.R.(1954) 21 EACA, the Court of Appeal for Eastern Africa held that the

competence of an expert witness should in all cases be shown before his evidence is admitted. But as it was later pointed out by the same Court in Mohamed Ahmed V.R. (1957) EA 523, the omission to observe this rule will not always render the evidence inadmissible particularly when the witness imports a prima facie qualification and his capacity to give expert opinion is not challenged.

We think that Kakuru's qualifications and competence as a ballistic expert should have been established before he gave evidence. But failure to do so did not occasion any miscarriage of justice since it seems that from the nature of his work, he was accepted by the defence and the court as a ballistic expert. Moreover, there was other evidence that the pistol was a deadly weapon. We find no merit in the second ground of appeal.

The last ground of appeal argued was ground seven which complained that the trial judge erred in law and fact when she rejected the appellant's alibi. Counsel for the appellants submitted that their alibi was not investigated and disproved as false, and therefore the trial judge erred in rejecting it. His contention was that the Police should have investigated the claim by the first appellant that he had gone to Wandegeya to arrest a suspect in a case of theft and the second appellant's claim that he was at his place of work, the Christian Childrens Fund, at the time of the robbery.

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The learned trial judge reviewed all the evidence from both the prosecution and the defence. She believed the evidence of the identifying witnesses, the identification parade, and the police officers who arrested the appellants, and she rejected that of the appellants. She came to the conclusion that the appellants participated in the robbery and therefore their alibi was false and would be rejected.

We are unable to accept Mr. Mbabazi contention that because the alibi was not investigated by the Police, it should not have been rejected. It was not established that the alibi was disclosed at the earliest opportunity to enable the police to check it. In those circumstances the Police cannot be blamed for failing to investigate it. Secondly failure to check an alibi does not render it true if there is sufficient evidence to prove it false. In the present case the evidence accepted by the learned trial judge justified her rejection of the alibi both appellants as of false. This ground of appeal must also fail.

In the result this appeal is dismissed.

DATED at Mengo this 31st day of December 1993

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

A.H.O. ODER
JUSTICE OF THE SUPREME COURT