IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: , ODOKI - CJ, ODER - JSC, TSEKOOKO - JSC, KAROKORA - JSC, KANYEIHAMBA - JSC)

CRIMINAL APPEAL NO. 42 OF 2000

B E T W E E N

SSEGONJA PAUL::::::::: :::::::: :::::::: APPELLANT

A N D

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

(Appeal from a decision of the Court of Appeal in Kampala (Manyindo - DCJ, Kato and Twinomujuni - JJA.) dated 08-09-2000 in Cr. App. No. 92 of 1999, arising out of the judgment of the High Court at Masaka (Akiiki-Kiiza - J) in Criminal Session Case No. 178 of 1998)

REASONS FOR DECISION OF THE COURT

The appellant, Ssegonja Paul, was jointly indicted with another person, Kirigwajjo Charles, for aggravated robbery, contrary to sections 272 and 273 (2) of the Penal Code. The particulars of the charge were that on 11th October, 1992, at Kanywa Village, in Masaka District**,** they robbed John Ssemwogerere of his motor vehicle Registration No. 640 UAF, Toyota Carina, white in colour, or." Omax watch and cash of Shs. 30,000= and at or immediately before or immediately after the said robbery used a deadly weapon, to wit, a gun and a knife on the said John Ssemwogerere. Kirigwajjo was released on bail and could not be traced when the case came for trial in the High Court. The indictment was accordingly amended and only the appellant was tried on it. He was convicted of simple robbery, contrary to sections 272 and 273(1) of the Penal Code Act and sentenced to 12 years imprisonment. He was also ordered to receive 12 strokes of the cane, to pay compensation of Shs. 100,000=, and to undergo Police supervision for three years after serving the sentence of imprisonment.

The prosecution case was that before the incident John Ssemwogerere, who died after the robbery but before the trial of the appellant, was a special hire taxi operator at Nyendo taxi stage in Masaka Municipality. His taxi vehicle was a white Toyota Carina Registration No. 640 UAF. On 11th October, 1995, at 6.00 p.m. he was hired by the appellant and Kirigwajjo to take them and their luggage to Kitwe Village. On the way, at Kanywa, the appellant and his colleague threw a rope around Ssemwogerere's neck and strangled him, leaving him for dead on the road. The two robbers then drove off the motor car to Mutukula at the Ugandan/Tanzanian border, and tried to cross with the motor car to Tanzania. They were prevented from doing so by the Police, because it was already mid-night. They left the motor vehicle at the border post, went and spent the night at a nearby lodge. By next morning, the police had become suspicious, because when they searched the car they discovered a blood stained knife and a blood soaked shirt. When the police contacted Masaka Police Station they were informed that the car had been reported stolen. The appellant and Kirigwajjo were arrested and taken to Masaka Police Station, where the appellant confessed to the crime. At the trial, the appellant retracted the confession. Nevertheless, he was convicted with the consequence we have already referred to. His appeal to the Court of Appeal failed. He appealed to this Court. We also dismissed his appeal, reserving the reasons for doing so, which we now proceed to give.

The Memorandum of appeal, as amended with leave of the court, contained three grounds of appeal as follows:

1. ***The learned Justices of Appeal erred in law and in fact by finding that the appellant's charge and caution statement had been voluntarily made and properly admitted in evidence.***

2. ***The learned Justices of Appeal erred in law and fact in confirming the decision of the trial court in the absence of any sufficient corroboration.***

3. ***The learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence on record and hence reached an erroneous decision***

In the Court of Appeal ground one was similar to ground one in this appeal.

Mr. Henry Kunya, represented the appellant in this appeal. On ground one, the learned Counsel contended that the appellant's confession statement was not freely given, because he had been subjected to torture and threats at Mutukula,

although he was not tortured at Masaka Police Station. At the trial within a trial to consider the admissibility of the confession the appellant testified that he had sustained injuries on his abdomen and shoulder as a result of the torture. In his ruling, the learned trial judge observed that he had seen visible scars on the appellant. The confession had been recorded three days after the alleged torture. Consequently, the learned trial judge considered whether the effect of the torture had been removed in view of the provisions of section 26 of the Evidence Act (Cap. 43) . Secondly, learned Counsel contended that contrary to the learned trial judge's finding the confession statement was not truthful because one Hussein was not referred to in the evidence of A/IP Mutebi Yakubu (PW5). the Police Officer who arrested the appellant, and yet the appellant said in the confession that Hussein, a Tanzanian who was to buy the stolen car, went with a Police Officer to the lodge on the Ugandan side in which the appellant and Kiriggwajjo had slept and were arrested by the Police. Another departure from the confession statement concerns items alleged to have been found in the car in the morning. A/IP Niwamanya Ivan (PW6) testified that when the car was searched a toy Pistol, a sharp knife and a shirt with blood stains were found in it. But in the confession statement, the appellant said that at the Police Station, the Police told him and Kirigwajjo that a toy pistol and a knife had been found in the car. Where there are discrepancies between a confession statement and direct evidence from prosecution witnesses, Mr. Kunya submitted, the confession should not be accepted as true. He relied on - ***RA No. 78064. Cpl. Wasswa and Another* -vs-** ***Vganda, Cr. App. No. 49/99. (SCU)*** (unreported). Relying on the same authority, Mr. Kunya also submitted that there was a delay of six days from the date the appellant was arrested to the day the confession statement was recorded from him. Such a delay was criticized in the ***Cpl. Wasswa Case*** (supra).

Mr. Vincent Okwanga, Senior State Attorney, for the respondent supported the conviction and sentences imposed on the appellant. He submitted that the appellant's confession was made voluntarily, and that it was true. It was corroborated by the appellant's possession of the motor car so soon after it had been stolen. The motor vehicle was stolen early in the evening, and at 12.00 mid-night the robbers arrived driving it at Mutukula. In the circumstances, the doctrine of recent possession of stolen property applies to what the appellant and his fellow robber did. The presumption was that the appellant was the thief not an innocent receiver. The time involved was too short for him to be an innocent receiver Mr. Okwonga contended that the fact of recent possession, which the *defence never* challenged at the trial, corroborated the

appellant's confession. AIP Niwamanya Ivan (PW6) and AIP, Mutebi Yakubu (PW5) saw the appellant and the stolen car at Mutukula. There was not a second car. There was sufficient evidence from the two Police Officers that the appellant and his companion were arrested with the motor car. The time at which the appellant intended to cross to Tanzania was suspicious. PW6 and PW5 testified that after mid-night motor vehicles were not allowed to cross the border. Yet that is what the appellant and his companion wanted to do at the material time.

Regarding the appellant's confession, Mr. Okwanga submitted that it was recorded almost a week after the appellant had been arrested, and the appellant made it voluntarily. It was so found, correctly, by the learned trial judge.

With regard to the appellant's allegation of torture and the scar seen by the learned trial judge, Mr. Okwonga contended that it was impossible for the appellant to have survived if he had been beaten with sticks by seven Police Officers for one hour as he claimed.
In the circumstances, Mr. Okwanga contended, the learned trial judge correctly held that the confession was made voluntarily and he rightly relied on it.

In this case, the record shows that the prosecution relied on the appellant's confession, and his having been found in possession of a recently stolen motor car, the basis on which he was convicted. There was no direct evidence from the person from whom the vehicle had been robbed, since he died before the appellant's trial.

In his retracted confession, the appellant gave a detailed account of what happened. He related how he and Kirigwajjo got a market from one Hussein of Mutukula, who wanted a Carina Car and how they planned to get the car from a taxi driver in Masaka. They then chose John Ssemwogerere's car. On 11-10-95, they pretended to hire him ostensibly to take bread for sale. On the way, they bought a rope which they put around his neck and disabled him from driving. They left him for dead and drove the car to Mutukula the same night. However, they reached the Ugandan - Tanzanian border too late to cross to the Tanzanian side where the car was to be sold to one Hussein. They were not permitted to cross. Next morning they were suspected to have stolen the car, arrested and subsequently escorted to Masaka Police Station, where the appellant made the confession in a charge and caution statement to an Inspector of Police at the time, D/ASP Obuku John Julius. The defence objected to admission of the

confession in evidence on the grounds that it was not made voluntarily, because it was preceded by torture and threats on the appellant. A trial within a trial was held to determine the admissibility of the confession, after which the learned trial judge ruled in favour of admission on the **ground** that it was voluntarily made.

In his ruling after the trial within a trial, the learned trial judge said:

> ***"Section 25 of the Uganda. Evidence Act, excludes all statements induced by threats and inducement from being admitted. However, section 26 of the same Act, renders a statement after the removal of such threat or inducement relevant and admissible. In the instant case the accused states that he was not assaulted or threatened while making the statement at Masaka. That he made the statement three days after his arrest. That he had been beaten and threatened with death while at Mutukula, if he ever admitted the offence. The prosecution witness denied assaulting or threatening the accused. In the case of - Arikonjero Dan -vs- R. (1962) EACA, the East African Court of Appeal held that:***
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> ***". .Principle is that if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."***
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> ***My understanding of the above principle is that if the time between the alleged making of the threat and the making of the statement is long enough so as to remove any threat then such statement is admissible. In the instant case, the accused stated that he made the statement after 3 days from his being- assaulted, and threatened at Mutukula. In my view, the time between the alleged assault and the threats of death was long enough to have such threat or fear dissipated and no longer was operational on him. In any case, after carefully studying the demeanours of the prosecution witnesses on the admissibility, I am impressed by their consistency and steadfastness in denying any threats or assaults to the accused either at Mutukula or Masaka. On the other hand, the accused was hesitant in answering simple questions put to him, relating to the voluntariness of his statement. putting everything into account, I hold that the statement was made voluntarily."***

Regarding the procedure by which the confession statement was recorded, the learned trial judge said this in his ruling:

> ***"During cross-examination, Mr. Ssegirinya, the learned Counsel for the accused followed a line tending to show that there should have been a Luganda version of the accused's statement before it was translated into English; but not only one English version. It appears DC Musitwa was translating from Luganda into English to D/ASP Obuke, who was***

recording the statement. In the case of Namulobi Hasadi -vs- Uganda, Supreme Court Cr. App. No. 16 of 1991, this method of recording a statement was considered by the Supreme Court, among other points.

My understanding of their Lordships' judgment on this point is that, it agreed with both the trial court and the Court of Appeal, that the method of recording the statement (only English statement recorded) was not fatal; especially considering their Lordships' conclusion on this point when they held on page 9 of their judgment that:

" We find no fault in the manners both the trial Court and Justices of the Court of Appeal dealt with the confession of the appellant."

Actually the Supreme Court upheld the convictions and dismissed the appeal. In the circumstances, I find that the recording of only the English version did not prejudice the accused, as Luganda has been used by D.C. Musiitwa with the accused according to D/ASP Obuku, it was read back to the accused.....I therefore, hold it relevant and admissible."

The appellant was in fact, arrested at Mutukula on 12-10- 95, and the confession statement was recorded at Masaka on 18-10-95. That is about six days, not three, between the date of his arrest and the date of the statement including the period taken for his transfer from Mutukula to Masaka Police Station-

In his judgment, the learned trial judge said:

After holding a trial within a trial, I found that the statement was voluntarily made and it was accordingly admitted in evidence as exhibit PE1. In cases like the present one, only where there has been a retracted or a repudiated confession, the court must, before founding a conviction on it, be fully satisfied in all the circumstances of the case that the confession is true. The same standard and of proof is required in all cases and usually a court will only act on such confession if corroborated in some material particulars by independent evidence accepted by court. But corroboration is not necessary in law and the court may act on a confession alone, if it is fully satisfied after considering all the material points and surround circumstances, that the confession is true. TUWAMOI -VS- UGANDA (1974) EA 84."

The learned trial judge considered relevant circumstances earlier referred to in this judgment and held that the statement was true.

In its re-evaluation of the evidence, the Court of Appeal said that in their view, the main issue in the appeal related to the charge and caution statement of the appellant: that is whether it was made voluntarily, whether the proper procedure was followed in recording it, and whether it was admitted correctly in evidence.

It found like the learned trial judge had done, that the appellant had not been assaulted or tortured at Mutukula or at Masaka Police Station. Even if he had been tortured at Mutukula, the effect of such torture had dissipated when he made the statement three days later at Masaka, where he was neither beaten nor tortured in any way. There was a gap of three clear days. None of the Police Officers who had arrested him at Mutukula was present when the appellant made the confession statement. He had all the opportunity to refuse to make the statement. In the circumstances, the Court of Appeal found that the provisions of section 2 6 of the Evidence Act, applied to the case.

On the issue concerning the language in which the confession statement was recorded, the Court of Appeal found that the fact that the appellant made the statement in vernacular and it was recorded by a Police Officer in English through an interpreter, was not fatal to the prosecution case. The Court of Appeal applied the decisions of this court in ***F*esto *An*droa *Asen*ua -vs- *Uganda***(supra) and in ***Namulodi Hassadi -vs- Uganda*** (supra) . It held that as long as the charge and caution statement was read back to the appellant through a translator and he signed it, which was done in the instant case, no miscarriage of justice was occasioned to the appellant.

We agree with the findings of the Court of Appeal that the appellant's confession statement was correctly admitted in evidence as having been voluntarily made and that the procedure followed in recording it did not cause a failure of justice to the appellant.

Before us, the appellant's learned Counsel argued that the learned trial judge should not have accepted the confession statement as true, nor should the learned Justices of Appeal have agreed with that finding. This is because, learned Counsel contended, there were differences in certain particulars between the confession statement and the evidence from prosecution witness. We make two comments in this regard. First, that argument was not made before the Court of Appeal. Consequently, it does not deserve our consideration. Secondly, even if it was made there, the departures in the prosecution evidence from the appellant's confession were too minor to affect the substance of the confession as a true statement. The Courts below accepted the confession as being true, rightly so in our view.

We think that on the question of discrepancies between the appellant's confession and the prosecution evidence, the instant case is distinguishable from

that of ***Wasswa and Another*** **-vs-** ***Uganda*** (supra), in which this Court found that there were two significant discrepancies between the contents of the appellant's confession on the one hand and direct evidence of prosecution witnesses on the other. The first one was that the only eye witnesses who gave evidence at the trial testified that there was only one gun man who stood on the road in front of the advancing bus and shot at its tyres once, forcing it to stop. In his confession statement, however, Wasswa said that the robbers had two guns. The second discrepancy related to the mode of Wasswa's travel to Lyantonde, where he was arrested. The effect of Wasswa's evidence was that he and his accomplices arrived there on foot, but the evidence of the LDU Officer who arrested Wasswa was that the latter arrived at Lyantonde in a car.

In the circumstances of that case, the Court did disagree with the concurrent findings of the trial court and the Court of Appeal that Wasswa's confession was true because it differed with the prosecution evidence in some respects.

Another argument put forward before us by the appellant's Counsel, which was not made in the Court below, is that there was a delay in recording the confession after the appellant had been arrested. This, it is contended,, should have rendered the confession unreliable. With respect, we have no hesitation in saying that this criticism of the Court of Appeal is unjustified. The point was not raised before it. In the trial court the point was not raised either by the defence counsel in his closing address. Consequently, the learned trial judge dealt with only one aspect concerning the length of the appellant's stay in detention after his arrest, before his confession statement was recorded. He found that three days had elapsed and that it was sufficient time for any effect of the alleged torture to have dissipated if, indeed, he had been tortured, which the learned trial judge and the learned Justices of Appeal concurrently found he was not.

In the circumstances, we saw no merit in the first ground of appeal. It therefore, failed.

Mr. Kunya took the second and third grounds of appeal together. He submitted that in the absence of any direct evidence, there ought to have been corroboration of the appellant's retracted confession. He criticized the learned Justices of Appeal for holding that as the appellant had been found trying to cross to Tanzania with the recently stolen car, that evidence alone was not sufficient to convict him for the crime charge against him. The learned

Counsel contended that there was no evidence that the appellant was, in fact, found in possession of the stolen car. According to the evidence of PW5 (AIP Mutebi Yakubu) he was found in a lodge. He was not found in the car driving it. Available evidence gives only a vague description of the people who went with the car to the border post. Mr. Okwanga countered this by submitting that the appellant and his colleague arrived in the stolen car at Mutukula border post at midnight after the car had been stolen earlier in the evening. The appellant was obliged to explain his possession of the car. He did not. Consequently, there was a presumption that he was the thief or a guilty receiver of the motor vehicle. He could not have been a guilty receiver, because the period was so short. With regard to possession, the evidence of PW5 and PW6 (AIP Niwamanya Ivan) proved that the appellant was found in possession of the stolen car. There was not another car at the material time and place. The prosecution evidence that it was the appellant and his companion who took the car to the border post was not challenged by the defence at the appellant's trial. The fact that the appellant was in possession of the car shortly after it had been stolen provided ample corroboration that he was the robber. As the Court of Appeal found, the evidence of recent possession alone was enough to convict the appellant of the robbery of the car.

The prosecution evidence that the appellant was found in possession of the stolen motor car came from two witnesses. AIP, Niwamanya Ivan (PW6) and Special Police Constable Mutebi Yakubu, both stationed at Mutukula border Police Post at the material time. AIP Niwamanya was the 0/c Mutukula Police Post. As far as it is relevant, his evidence was:

> ***"On 11-10-95, at about midnight I was approached by P/C Omodoi that there is a motor vehicle with two occupants who were seeking permission to cross the border to Tanzania. I advised the occupants to wait for the morning hours and that they should hire a lodge. They went to sleep and left the motor vehicle at the crossing. It was 640 UAF Toyota Carina, white in colour. They went to the lodge though they did not tell us.***
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> ***On the following morning/day at around 6.00 a.m. they sent one of them, information to come to negotiate with the people so that the motor vehicle could be released early in the morning. This led me to suspect that this motor vehicle was stolen.***
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> ***Then I detailed Kyaligonza and SPC Ssekondwa and PW4 (sic) to go and check when there people had***
>
> ***Checked to the lodge. They were eventually brought and I drove the motor vehicle to the Police Post to check and we searched it and found one toy pistol, one sharp knife with blood stains and one shirt which was blood stained as well.***

I communicated to Masaka to find out whether there was any missing motor vehicle as I suspected these people. Masaka told me that a motor vehicle was reported stolen and that they were coming to collect it. Then I handed over the two suspects to them. That the motor vehicle had been reported stolen the previous night. The suspects were called Ssengonja Paul and Kirigwajjo. Ssegonya is now in court. (Accused identified) .

I handed over the motor vehicle and exhibits to Masaka Police Officers."

The evidence of AIP Mutebi Yakubu was that:

"I*n 1995, I was at Mutukula border Post on 12-10- 95 at 6.00 a.m. my O/c sent me with two Policemen, to Dembe Lodge (Guest House) at Mutukula and that we arrest two men who had gone to that lodge.*
I went with Kayonza Amooti and Okur who are both Police Officers.* We went *and arrested them and brought them to the Police S*tation. *They were sleeping in the same room, but on different beds.* We *brought them to the Police Post. I later came to know their names as Ssegonja Paul and Kirigwajjo. I remember the people I arrested, but I can see only one (accused) identified in court). I do not see the second one."

In cross examination, SPC Mutebi said.

"In the lodge I do not remember the number of people, when asked the in charge about the people who had come and she took me to them. My 0/c described the suspects we were going to arrest which I also did to the reception lady at the lodge's counter. My O/c had told me to arrest a brown (light skinned) man and a black man who had just arrived and parked the motor vehicle."

On the basis of this evidence, the learned trial judge found that the appellant and his colleague were arrested at Mutukula with the stolen motor vehicle. The learned trial court said this:

"Both *PW6 and PW7 (sic) , the Police Officers stated that the accused and his colleague were arrested at Mutukula with a stolen vehicle. This vehicle had been recently stolen, just a few hours before the accused and his friend arrived in M*utukula with it. *A*s was *held by the S*upreme Court *in the case of - <u>Bogere Moses and Anor vs-U</u>*ganda, <u>Criminal Appeal *No. 1 of 1997 (unreported) that:</u>*

> ***"I*t ought *to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable***

than the eye witness' evidence of identification . . . ."

This is especially so because invariably the former is independently variable, while the latter depends on the credibility of the eye witness."

There was no reasonable or convincing explanation as to how the accused got the motor vehicle which turned out to be the one stolen from Mr. Ssemwogerere John.

In my opinion a motor vehicle is not a commodity which can change horns easily, e.g. within a few hours. To counter all this, the accused in his unsworn evidence, testified to the effect that on the material day, he had met his brother from Mutukula, presumably in Masaka, made an appointment to go and join him in Mutukula but failed to get him, before he was picked up by the Police on this charge. In my opinion his story is too good to be true. In any case, he looked hesitant while testifying and struck me as someone making up a story to deceive the court.

Putting everything into consideration, I dismiss his story in court as mere lies and I prefer the evidence from the prosecution whose witnesses impressed me as truthful and reliable and his own confession as the* truth. *I* warn the assessors as *I warn myself now, to convict on circumstantial evidence, but I am satisfied that in this case, it leaves no room whatsoever as to the accused's participation in stealing of the motor vehicle belonging to the complainant. There is evidence on the record that the accused helped tighten the rope around John Ssemwogerere's neck, but even it was his colleague who did, both had common intention, to commit the crime as they jointly planned it and successfully executed it. All in all I find that the state has proved beyond reasonable doubt the participation of the accused in this crime."

The learned Justices of Appeal, rightly so in our upheld the trial court's finding that the appellant and his companion were found in possession of the complaint's motor vehicle with which they tried to cross into Tanzania so soon after it had been stolen. As the learned Justices of Appeal said, this was a damning evidence against the appellant. They continued:

"On the doctrine of recent possession, the appellant could have been convicted on this evidence alone as he did not give any account of how he came to possess the car."

In our view, that conclusion cannot be faulted.

In the result we agreed with the Court of Appeal that the appellant was properly convicted of simple robbery, contrary to sections 272 and 273(1) of the Penal Code Act.

Accordingly, we dismissed this appeal.

Our attention has been drawn to the decision of the Court of Appeal in ***Criminal Appeal No. 14 of 2000, Sewankambo Francis and two Others*** **-vs-** ***Uganda*** made on 01-06-2001 and to the ruling of the Constitutional Court by a majority of three to two dated 14-12-2001, in Constitutional Reference No. 10 of 2000, ***Kamanwywa Simon*** **-vs-** ***Uganda*****.** The respective judgment and ruling are to the effect that corporal punishment is inconsistent with article 24 of the Constitution. This Court would deal with the issue of corporal punishment if and when it is properly before it.

Dated at Kampala this 11th day of January 2002.

B.J ODOKI
CHIEF JUSTICE

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

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT