THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI - CJ, ODER - JSC, KAROKORA - JSC, MULENGA - JSC AND KANYEIHAMBA - JSC

CRIMINAL APPEAL NO. 41 OF 2000

B E T W E E N

MULINDWA SAMUEL:

APPELLANT

A N D

UGANDA: ***RESPONDENT***

(Appeal from the decision of the Court of Appeal at Kampala (Manyindo, DCJ, Okello and Kitumba, JJ.CA) dated 07-09-2000, in Criminal Appeal No. 28/95, arising from an appeal against the judgment of the High Court (Kireju, J) dated 05-09-1997) , in H.C.C.Ss. NO. 28/95).

REASONS FOR JUDGMENT OF THE COURT.

This was a second appeal.

The appellant and three other men had been convicted by the High Court at Kampala (Kireju, J.), on 05-09-97, on two counts of criminal charges. The first one was aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code and the second was murder, contrary to section 183 of the Penal Code. They were sentenced to death on both counts, but the sentence for murder was

suspended. The fifth co-accused with whom the appellant and the others had been indicted and tried was acquitted by the High Court. The four convicted accused persons appealed to the Court of Appeal, which allowed the appeal of three of them and dismissed that of the appellant. We also dismissed his appeal to this Court, but we reserved our reasons for doing so, which we now proceed to give.

At their trial, the prosecution case against the appellant - who was the second accused person - and his co-accused was based partly on their confessions, partly on eye witness evidence and partly on circumstantial evidence. Briefly, it was that at about 11.00 a.m. on 23-12-93, the Red Fox Foreign Exchange Bureau, on Plot No. 20 – Kampala Road, was invaded by an armed gang of robbers. They disarmed the Bureau's Police guards and robbed the Bureau of travelers' cheques, some US Dollars and British Pound Sterling. **A** gun wielding man ordered the **workers** and customers at the Bureau to lie down while **his** colleagues removed money and travelers' Cheques from the counters and pushed them in a polythene bag. In the process one of the robbers shot dead a Policeman guarding a nearby bank as the Policeman apparently tried to block the robber's escape. The appellant was seen running away from the scene, carrying a black polythene bag. He was chased and arrested by a Policeman who was on duty at the Bank of Uganda, apparently not far away from the scene of the robbery.

He was escorted to the Kampala Central Police Station where the black polythene bag he was carrying was found to contain part of the money and travelers' cheques stolen from the Forex Bureau. The other robbers wore arrested the same day in a vehicle within the central area of Kampala.

At the trial, the appellant and his co-accused set up defences of alibi, which the trial judge did not believe. The appellant was convicted on the evidence of identification by the Managing Director of the Forex Bureau Alemayehu Degefa (PWl) and Peter Bahemuka (PW2) who was inside the Forex Bureau waiting to see PWl at the material time. Another evidence on the basis of which the

appellant was convicted was his possession of the black polythene bag containing traveler's cheques and money recently stolen.

The Court of Appeal upheld the High Court's conviction of the appellant. The appellant was the second appellant in that Court.

Five grounds of appeal to this Court were set out in the memorandum of appeal as follows:

1. *The learned Justices of Appeal erred in law and in fact in their assessment of evidence on record and interpretation of the law regarding identification when they concluded that the appellant was properly identified.*

2. *The learned Justices of Appeal erred in law and in fact when they misapplied and misinterpreted the doctrine of recent possession.*

3. *The learned Justices of Appeal erred in law and fact when they relied solely on the evidence of the prosecution and totally ignored the evidence adduced by the appellants thereby denying the appellant the benefit of doubt.*

4. *The learned Justices of Appeal erred in law when they failed to give a reasoned judgment which resulted in a miscarriage of justice.*

5. *The learned Justices of Appeal erred in law and in fact when they failed to properly re-evaluate the evidence as a whole thereby arriving at a wrong conclusion which was a miscarriage of justice.*

Mr. Yusufu Nsibambi, the appellant's learned Counsel, argued the appeal. In the course of his submissions he abandoned the fourth ground of appeal.

Under the first ground of appeal, the learned Counsel criticized the Court of Appeal's finding that the appellant was properly identified as one of the robbers, because, Counsel contended, the circumstances at the scene of crime must have

been difficult for Alemayelu Zegefa (PWl) and Peter Bahemuka (PW2) to identify the appellant. According to Counsel, that is what the learned Justices of Appeal should have found. The difficult conditions were that the robbers were armed and the appellant allegedly pointed a gun at every person who was in the Forex Bureau at the time, demanding money. There was commotion in the premises during the incident. Consequently PWl and PW2 must have been struck by fear and therefore, unable to identify the appellant. Secondly, the duration of the incident was only about two to four minutes, which was too short a time for the prosecution witnesses to identify the appellant. Thirdly the position in which the witnesses were in, made it difficult for them to see the appellant and the other robbers properly. For instance, PWl testified that they were made to lie down, although he himself was still able to see the appellant. PW2 also testified that after the robbers entered the Forex Bureau, he was forced to enter another room with PWl by the robber who forced people to lie down.

Learned Counsel further contended that the fourth difficult condition unfavourable for identification of the appellant was that PWl and PW2 were seeing the appellant for the first time during the incident. The appellant was a stranger to them. In view of the unfavourable conditions aforementioned, Mr. Nsibambi contended, the Court of Appeal should have found that PWl (Alemayehu) and PW2 (Peter) were unable to, and did not, identify the appellant.

The learned Counsel also criticized the failure by the investigating Police Officers to conduct an identification parade for purposes of identification of the appellant by PWl and PW2. He contended that the failure to do so was fatal to the appellant's conviction. The learned Counsel said that he had no authority for that argument.

Mr. Wamasebu, Principal State Attorney, supported the Court of Appeal's decision upholding the appellant's conviction. In his reply, he submitted that there was sufficient evidence which put the appellant at the scene of the crime. He was identified by PWl (Alenayehu) and PW2 (Peter) . His possession of the recently stolen travellers' cheques and foreign money was additional evidence

which put the appellant's guilt beyond doubt. It was the respondent's case that the trial Court and the Court of Appeal respectively evaluated and re-evaluated all the evidence of the circumstances of identification. For instance the appellant had a French hair-cut, which was a peculiar feature by which the prosecution witnesses identified him. Regarding duration of the incident, the learned Principal State Attorney contended that the time of two to four minutes was long enough for the prosecution witnesses to see and identify the appellant. The robbery was committed in broad day light. He also contended that as his evidence shows PWl had no fear although he was shocked during the incident, but the shock did not detract him from his identification of the appellant. Nor was he unable to identify the appellant because he (PWl) was lying down for, though he was lying down, he was able to move his neck to see around. From his position, he was able to see the appellant. Moreover, PWl and PW2 were never facing down. One of them said that he was lying down on his hands. The learned Principal State Attorney also contended that although the prosecution witnesses were seeing the appellant for the first time, they had sufficient time to see him, enabling them to describe his appearance. Ordinarily first time encounter is not a favourable condition for identification. The instant case was different, because PWl and PW2 did not merely have a fleeting glance at the appellant. They had sufficient time to see, and be able to identify him. Regarding the evidence of the circumstances in which the appellant was identified, the learned Principal State Attorney concluded that these were matters of fact, on which the Court of Appeal and the trial Court made a concurrent finding. There were no good reasons for this court to disagree with the Court of Appeal's finding, which the learned Principal State Attorney urged us to uphold. Regarding the failure to hold an identification parade, Mr. Wamasebu submitted that such failure was not fatal to the appellant's conviction, although it should ordinarily have been held. In the instant case, the investigating Police Officers appear to have been satisfied with the appellant's possession of the recently stolen money as sufficient to connect him with the robbery. In any case an identification parade would have been valueless, because the police found it necessary to show the appellant to the prosecution witnesses.

In our view, the respective arguments by the appellant's learned Counsel and learned Principal State Attorney were more suitable to a first appeal, which this one was not. Notwithstanding our advice to them to that effect they insisted on their ways and carried on. We did not stop them.

The first ground of this appeal is similar to the first ground of the appellant's appeal in the Court of Appeal. So, too, are the respective arguments in this court by both Counsel. The Court of Appeal considered the relevant evidence and arguments of Counsel and made its finding on the issue of identification, agreeing with the finding of the learned trial judge. The Court of Appeal said:

> ***"We agree with Mrs. Lwanga that the conditions favoured correct identification. The incident took place in broad day time and the duration of two to four minutes which the robbery took in that lighting condition was long enough for correct identification as the witnesses came quite close to appellant No. 2. He did not only push PW2 into the computer room but also entered that room at least twice while the witnesses lay there. The gunshots which were fired from outside the Forex Bureau could not have affected the identification of appellant No. 2 by PWl and PW2 because the shooting happened when the robbers were escaping after the robbery. The clear description of the second appellant's physical appearance at the scene by these witnesses is evidence that they had accurately identified him. This evidence alone sufficiently puts the second appellant at the scene of the crime."***

Regarding identification parade we, with respect, are unable to agree that the failure to hold one was fatal to the appellant's conviction. The object of an identification parade is to test the ability of a witness to pick out from a group the person, if present, who the witness has said that he has seen previously on a specific occasion. Where identification of an accused person is an issue at his trial, an identification parade should usually be held to confirm that the witness saw the accused at the scene of crime. However, where other evidence

sufficiently connects the accused with the crime, as was the case in the present appeal, failure to hold an identification parade is not fatal to the conviction of the accused person.

In the circumstances, we saw no reason to disagree with the finding of the Court of Appeal concerning identification of the appellant by prosecution witnesses. There is no doubt that the appellant was properly identified at the scene of crime by PWl and PW2. His possession of recently stolen money also connected him with the robbery. The first ground of appeal therefore fails.

The appellant's learned Counsel argued the second and third grounds together.

In his submission under these grounds the appellant's learned Counsel complained that the Court of Appeal ignored the appellant's evidence regarding the polythene bag which was found in his possession. In its judgment, the Court of Appeal referred only to the evidence of P/C Onzima Tom **(PW6**) but not to that of the appellant. In his defence, the appellant said that some people who were running threw down a black polythene bag under the verandah of the Greenland Bank Building. He picked up the bag and started running. He ran towards the Imperial Hotel. He did not know the contents of the bag. He picked it up because he thought it might be something valuable. Secondly the learned Counsel also contended that the Court of Appeal misapplied the doctrine of possession of recently stolen property in this case, because the appellant did not know what the polythene bag contained.

In Counsel's view, the doctrine applies only where the person found with the stolen property knows that it is stolen property. For that preposition Counsel relied on the case of ***Jethva and Another -vs- Republic (1969)E.A.459.***

In the instant case, learned Counsel contended, the prosecution failed to prove that the polythene bag which was allegedly found with the appellant was the one which was later found to contain money and travellers' cheques. The prosecution

also failed to prove that the appellant knew that the money in the bag was stolen or was feloniously obtained, which was a necessary condition for the doctrine to apply in the instant case.

Mr. Wamasebu's reply under the second and third grounds was that the money contained in the polythene bag was shown by P.W.6 (IP. Onzima) to the appellant at the Central Police Station soon after he was escorted there with the bag. The evidence of PW6 and of the O.C. CID George Garihendere D/SP (PW10) to whose office the appellant was taken by **(PW6)** , shows that there was no break in the chain of evidence from the time of the appellant's arrest while in possession of the polythene bag and his being taken to the Central Police Station where, in the office of PW10, the appellant said that the polythene bag was his , and that it contained money with which he was going to buy electrical appliances. The appellant thereby, admitted that the polythene bag was his. PW10 then took the appellant and the bag to the office of the O.C. Regional CID (Mr. Opio). In Opio's office PW10 opened the bag in the presence of the appellant, and removed the contents and put them on the table. The contents consisted of Uganda and Foreign Currencies (U.S. Dollars and Pound Sterling) and travellers' Cheques in Dollars.

With regard to the criticism of misapplication of the doctrine of recent possession of stolen property, the learned Principal State Attorney submitted that it was unjustified, and should be rejected by this Court.

After finding that the appellant had been properly identified at the scene of crime, the Court of Appeal said this:

> ***"Corroboration of that evidence was found in the fact that the second appellant was found in possession of the black polythene bag containing money and travelers' cheques that had just been stolen during the robbery from the Forex Bureau.***

Onzama Tom (PW6) testified that he saw the man with a black polythene bag running away from the scene of crime towards the High Court. He chased the man and eventually arrested him. He is the 2nd appellant. He was taken to the Central Police Station, where his polythene bag was found to contain travellers' cheques that were identified to have been part of those stolen from the Forex Bureau. In our view, there is sufficient evidence to support the conviction of the second appellant."

We noted that the black polythene bag in question was not exhibited at the trial, but the effect of the Court of Appeal's finding in the passage of its judgment we have just reproduced was that the polythene bag and its contents to which the prosecution witnesses referred in their evidence was the same one which was in the appellant's possession when he was arrested. There was only one bag. The bag, with its contents, which was in the appellant's possession when he was arrested was not substituted with another one. There was no break in the chain of evidence of how the bag was handled from the time of the arrest of the appellant up to when the bag and the appellant were taken to PW10. We were satisfied that the Court of Appeal was correct in so holding. A clear inference can also be drawn that the Court of Appeal considered and rejected the appellant's defence that he did not know the contents of the bag because evidence of PWl and PW2, who identified him at the scene clearly showed that he was the person who, with the other robbers, grabbed money and stuffed it in the polythene bag before the appellant fled with it out of the Forex Bureau. Further, appellant's evidence in his defence that he did not know the contents of the bag was contradicted by what he told D/SP. Garihandere PW10 and others in Opio's Office that the bag contained money with which he was going to buy electrical appliances contrary to his claim, his running away with the bag was incompatible with his alleged ignorance of what it contained. An inference was irresistible that the appellant ran away from the scene of crime with the polythene bag because he knew that it contained stolen money. An innocent person would not have tried to escape with the bag without knowing what it contained.

In our view, the Court of Appeal rightly rejected the appellant's defence that he did not know the contents of the bag.

The well known case of ***Andrea Obonyo and Others V.R. (1962)542*** is an authority in this Country on the application of the doctrine of recent possession of stolen property in criminal cases. The facts in that case, briefly were that the appellants were convicted of murder of a man found in the street soon after a raid by a gang of eight to ten men. The appellants were alleged to have been in the gang. At the trial evidence was given that the gang, armed with pangas and clubs, terrorized the residents of the street and broke into and stole from two buildings there. The appellants were not directly identified and their convictions were based on evidence of their possession at the time of their arrest, some six days later, of some of the stolen property which were stolen during the raid. The appellants denied taking part in the raid or of being in possession of the stolen property which they said had been planted on them by the Police. On appeal to the Court of Appeal for Eastern Africa, it was submitted, inter alia, that in order to establish that the appellants were the gang, it was necessary to eliminate beyond reasonable doubt the possibility that they were mere receivers and not thieves. The Court of Appeal held inter alia, that where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has certain stolen articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles, has been excluded. All criminal charges must be proved beyond reasonable doubt. The presumption which arises from the possession of property recently stolen is merely an application of the ordinary rule relating to circumstantial evidence. Where the evidence is circumstantial, in order to justify an inference of guilt, the inculcatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

That is still the law in our Country. The case of ***Jethwa and Another*** **-vs-** ***Republic*** (supra) is merely an echo of ***Andrea Obonyo*** (supra).

In the second passage of its judgment to which we have hereinbefore referred the Court of Appeal made a concurrent finding with the trial court to the effect that the appellant's possession of the polythene bag containing travellers' cheques, and foreign money, so soon after the travellers' cheques and money had been robbed from the Forex Bureau, was incompatible with the appellant's innocence. That conclusion, in our view cannot be faulted. In the circumstances, the complaint that the Court of Appeal misapplied the doctrine of recent possession of stolen property was, with respect, completely unjustified.

The second and third grounds of the appeal, therefore, failed.

Under ground 5, the appellant's learned Counsel submitted that the Court of Appeal as the first appellate court, had a duty to re-evaluate all the evidence in the case before reaching its own conclusion. It was contended that the court failed to fulfill that duty. For instance, it ought to have taken into account the manner in which the appellant was interrogated and his charge caution statement recorded but it did not. In his reply in opposition, Mr. Wamasebu said that there was no standard format of re-evaluation by a first appellate court. In the instant case the Court of Appeal did re-evaluate the evidence as it was enjoined to do by statute. The appellant's complaint that it did not re-evaluate the evidence had no merit.

We agreed with the submission of the learned Principal State Attorney that the Court of Appeal re-evaluated the evidence in the case as a whole and reached its conclusion, as reflected in the two passages of the Court of Appeal's judgment, which we reproduced hereinbefore.

The complaint that the Court of Appeal did not take into account the manner in which the appellant was interrogated and how his charge and caution statement

was recorded was, in our view, irrelevant, because the appellant's conviction was not founded on his alleged confession statement. The fifth ground of appeal, therefore, failed. In the circumstances, we were satisfied that the appellant's conviction was supported by ample evidence. He was properly convicted. In the result we saw no merit in the appeal and we dismissed it.

Dated at Mengo this 16th day of July 2002.

B.J. ODOKI CHIEF JUSTICE

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

A.N. KAROKORA JUSTICE OF THE SUPREME COURT

J. N. MULENGA JUSTICE OF THE SUPREME COURT

G. W. ***KANYEIHAMBA JUSTICE OF THE SUPREME COURT***