THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J. ODER, KAROKORA, KANYEIHAMBA, KATO, J.J.S.C.)

CRIMINAL APPEAL NO. 53 OF 2001

B E T W E E N

MATETE SAM ::::::::::::::::::::::::::::::::::::APPELLANT

A N D

UGANDA ::RESPONDENT

(Appeal from the judgment and decision of the Court of Appeal (Mukasa-Kikonyogo,DCJ, Twinomujuni, Kitumba, JJA, dated 18th December, 2001 at Kampala in Criminal Appeal No. 29 of 2000)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decision of the Court of Appeal dated 18th December 2001, in which the appellant's conviction and sentence by the High Court at Fort Portal in C.S.C. No. 0013 of 1998 and dated 5th June, 2000, were upheld and confirmed.

The facts of the case maybe summarised as follows:

On the 29th April, 1997 in the Police barracks at Kasese police station, both the appellant and the deceased, one SPC Raphael Rugemwa, were on duty. The deceased was on duty at the Guard Room while the appellant was also on duty in the adjoining room known as the Radio Control Room. At about 5 a.m. that morning, the barracks was awakened by a lot of

gunfire noise coming from the area of the Guard Room and the Radio Control Room. Several policemen including the O/C of the barracks took cover initially. However, soon afterwards, they cautiously moved to the area where the gunfire noise had been heard to come from. These police officers met the appellant moving away from the Guard Room. He was armed with a gun, AK.47, and smoking a cigarette. He was seen behaving as if nothing at all had happened. On being asked what was going on, all the appellant could say was that there was no problem. The police colleagues who had met and asked him about the shooting became suspicious of him and decided to disarm him, which they did. When they inspected the Guard Room, they found the body of Raphael Rugemwa riddled with bullet wounds. It was lying in a pool of blood. Examination of the gun, which was taken away from the appellant, revealed that its muzzle was still very hot and smelt of gunpowder. The gun was identified as the one which had been issued to the deceased to carry with him while on duty. The appellant had not been issued with any gun but as already observed, when disarmed, the gun he had was found to be the same gun that had been issued to the deceased. The appellant was arrested and charged with murder contrary to sections 183 and 184 of the Penal Code. He was subsequently indicted for that offence. At his trial, his unsworn statement of denial and plea of alibi were rejected. The court believed the prosecution's evidence and convicted him. He was sentenced to death. His appeal to the Court of Appeal was dismissed, hence this appeal.

The Memorandum of Appeal before this court contains four grounds of appeal framed as follows: -

1- *THAT the learned Justices of Appeal erred in law and fact for having upheld the decision that the charge and caution statement was true and voluntary and that the confession was correctly admitted in evidence.*

2- *THAT the learned Justices of Appeal erred in law and in fact to uphold the finding that there was enough circumstantial evidence to justify a conviction for murder.*

3- *THAT the learned Justices of Appeal erred in law and in fact for having failed to evaluate evidence as a whole.*

4- *THAT the learned Justices of Appeal erred in law and in fact for having failed to return or find a verdict of manslaughter.*

In this Court, the appellant was represented by Mr. Edward Muguluma and the State by Mr. Okwanga, Principal State Attorney. Mr. Muguluma, argued grounds 1 and 2 separately but combined grounds 3, & 4. In reply, Mr. Okwanga also argued grounds 1 and 2 separately but combined grounds 3 and 4.

In arguing ground 1 of the appeal, Mr. Muguluma contended that the charge and caution statement upon which the appellant's conviction was based had been improperly obtained and wrongly admitted by the learned trial judge. Consequently, counsel contended further that when the learned Justices of Appeal confirmed the findings of the trial court on the matter and upheld the conviction, they erred both in law and fact. Mr. Muguluma submitted that the evidence in the case shows that the recording of the charge and caution statement was recorded by one D/AIP Okot, a police officer who had been heavily involved in the investigation of the case. Not only was this practice contrary to the Evidence Act, Cap.25, but it offended against police regulations and practice which stipulate that an investigating police officer in a case should not be the same officer to record any charge and caution statements of accused persons in the same case. It was Counsel's contention that police officer Okot did both which should have rendered the statement inadmissible. Counsel cited the case of Mateo Ocheng v. Uganda, Cr. App. No. 25/2000 (S.C), (unreported) in support of his submissions.

On ground 1, Mr. Okwanga for the respondent, contended that the charge and caution statement in this case was properly tendered and received by the courts below. Counsel pointed out that, following the appellant's retraction of his confession, there had been a trial within a trial. The trial within a trial showed that the confession had been legally and properly obtained. It was for this reason that the learned trial judge admitted it and the Court of Appeal, having properly reevaluated the evidence, confirmed the findings. Mr. Okwanga contended that under the circumstances therefore there could be no reason for this court to interfere with the decisions of the courts below.

In the Court of Appeal, ground 1 before this court was ground 3. The learned Justices of Appeal went to great lengths in dealing with this ground. They examined the manner in

which the charge and caution statement had been extracted from the appellant and considered whether or not the procedure in doing so had offended the provisions of section 25 of the Evidence Act. They reviewed the allegation that the appellant had been restrained with handcuffs during the extraction of the statement and that in any event the statement had not been read back to him and therefore could not have been voluntary or truthful. They considered the complaint that D/AIP Okot who recorded the statement was also an investigating officer in the same case. They noted that following the retraction of the charge and caution statement by the appellant, there had been a trial within a trial. The learned Justices of Appeal then concluded.

"Learned counsel for the appellant did not point out, nor do we see where the learned trial fudge went wrong. He had the opportunity of seeing witnesses give evidence before him and his wisdom held that the prosecution case was credible. He was entitled to make such a holding. We think that the trial court acted correctly to admit the statement, which in fact was a confession".

Thereafter, the learned Justices of Appeal considered the implication of authorities such as Kasule v. Uganda, (1992-1993) HCB 38 and Mateo Ocheng v. Uganda, (supra) and concluded that that ground should be dismissed. We entirely agree with their Lordships, the Justices of Appeal, that there is no merit in this ground. Therefore ground 1 of this appeal is dismissed.

On ground 2, Mr. Muguluma contended generally that the circumstantial evidence upon which the appellant was convicted was insufficient to justify the indictment of murder and corroborate the charge and caution statement. Counsel pointed out contradictions in the evidence. One of these contradictions related to the date and month when the sketch showing the murder scene was drawn. Part of the evidence indicated that it was in April, 1997 while another part said it was in May, 1997. Counsel contended further that the fact that there were rebels operating in the area of the incident which was advanced by the defence, was ignored by both the trial court and the Court of Appeal.

Counsel for the appellant also contended that, considering that no finger prints on the murder weapon had been lifted or ascertained and that a number of bullets from the murder

gun had not been accounted for, tended to weaken the prosecution's case and create reasonable doubt which ought to have been resolved in favour of the appellant, but was not.

On ground 2, Mr. Okwanga responded by contending that there was overwhelming circumstantial evidence to show that only the appellant could have committed the murder. It was only the appellant who had opportunity to enter the Duty Room. It is only he who was found at the scene of the crime holding the murder weapon for which he had no plausible explanation. There had been a lot of shooting around the area where witnesses found the appellant fully awake and smoking a cigarette. When asked by witnesses as to what had happened, the appellant behaved and acted as if all was well. He ought to have been scared. The conduct of the appellant was therefore incompatible with his innocence. In our view, the evidence against the appellant as the person who shot the deceased was overwhelming. We agree with the findings of the Court of Appeal that the discovery by eye witnesses of the appellant at the scene of the murder with the murder weapon, together with the bullet-riddled body of his colleague in the Guard Room lying in a pool of blood left no doubt that it was the appellant who had shot and killed the deceased. The finding is reinforced by the manner in which the appellant behaved when discovered at the scene of the murder. When asked for an explanation, all he could say about the shooting was that there was no problem. Yet, in his own statement of defence, he admitted being at the scene of the crime. Even if he had been in the toilet as he claims, he could not have failed to react to the murder of his colleague. The police witnesses who were further away in distance at the time of shooting had to be the ones to discover the body of the deceased. The appellant did not state that he had seen any other person coming to or running away from the Radio Room or Guard Room. We find no merit in this ground. It is therefore dismissed.

On grounds 3 and 4, Mr. Muguluma contended that the explanation offered by the appellant was totally ignored by both the trial judge and the Justices of Appeal. The Justices of Appeal seemed to be interested only in why, in light of what had happened, the appellant remained calm and did not react to the murder. Counsel contended that the onus is not on the appellant to explain how and why he behaved in a certain way during the commission of a crime of which he is innocent, but on the prosecution. Counsel contended that the demeanour of the appellant at the scene of the murder can be explained away by saying that he was too frightened to do or say anything which any other rational person would. Different people behave differently in all sorts of encounters and situations. For instance, on the night in

question, it was dark and cold and that is the reason why the appellant was smoking. The police did not carry out any thorough investigations after making up their minds that it was the appellant who committed the murder. The appellant ought to have been given the benefit of the doubt. Counsel concluded by praying for the quashing of the appellant's conviction and the setting aside of his sentence.

For the respondent, Mr. Okwanga submitted that there was no merit in either ground 3 or 4 of the appeal. Counsel contended that on ground 3, the Court of Appeal evaluated the entire evidence on record, scrutinised it and came to the only finding possible. In their judgment, the learned Justices of Appeal considered and resolved all the relevant evidence on record. They took into account the explanation given by the appellant when found at the scene of the crime. Mr. Okwanga submitted that ground 4 of the appeal was devoid of merit since there had been overwhelming evidence to support the conviction of murder. The manslaughter theory advanced for the appellant in ground 4 is not justified and, in any case, it was not advanced by the defence at the trial in the High Court.

We agree with learned Counsel for the respondent that there is no merit in grounds 3 and 4 of the appeal. They must accordingly fail.

Since all the four grounds of appeal have failed, the appeal is dismissed.

Before leaving this appeal, we are constrained to comment on one aspect of it upon which we found the observations of both the learned trial Judge and the learned Justices of Appeal not to be in conformity with the principles we have established in cases such as Bogere Moses v Uganda, Criminal Appeal No.1 of 1997 (S.C), (unreported) and Kifamunte Henry V. Uganda, Criminal Appeal No. 10 of 1998 (S.C), (unreported). In their judgment, the learned Justices of Appeal observed,

"The learned trial Judge correctly directed himself to the law applicable when the prosecution relies on circumstantial evidence. This is how he handled the matter. 'The law dealing with circumstantial evidence was clearly stated in Simon Musoke V R. (1958). E.A. 715. That principle of the law simply says that where the prosecution case is founded on circumstantial evidence, that circumstantial evidence must show that the accused is guilty and there are no coexisting factors that tend to weaken or destroy the inference of guilt. In the circumstances which I

have explained above, I would not hesitate to hold that there were no other co-existing circumstances which would weaken or destroy the inference of accused's guilt.

Accordingly, I have found that the prosecution has successfully destroyed the accused's alibi by adducing evidence which put the accused at the scene of the crime. The law is that once the prosecution has proved that the accused was at the scene of the crime, the defence of alibi must be rejected. I accordingly reject it. The circumstantial evidence available conclusively leads to the inference that the accused person was responsible for Rugemwa's death. I so find'. We agree with this finding."

In so far as the learned Justices of Appeal are agreeing with the learned trial Judge's statement on the law of circumstantial evidence, we also agree, but in so far as the statement deals with the issue of alibi, with greatest of respect, we disagree. We have held in a number of cases, that where an accused person pleads an alibi as a defence, the prosecution must do more than merely place him or her on the scene of the crime. They must disapprove or otherwise discredit the defence of alibi. The mere putting the accused on the scene of the crime is not enough. We can only reiterate what we said in the Bogere Moses case (supra).

"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, hut also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."

Dated at Mengo this 17th day of December 2003.

B.J. ODOKI

CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

C.M. KATO

JUSTICE OF THE SUPREME COURT