IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, & KATO, *J J* .S.C.

CRIMINAL APPEAL NO. 2 **OF 2002**

BETWEEN

1. **ORYEM RICHARD &**
2. **NAYEBALE PETER::::::::::::::::::::::::::::::::::APPELLANTS**

AND

UGANDA::RESPONDENT

(Appeal from the decision of the Court of Appeal (Mukasa- Kikonyogo DCJ, Okello, &Mpagi-Bahigeine JJ.A.) at Kampala, dated 20th December 2001 in Criminal Appeal No. 79 of 2000).

<u>*J* UDGMENT OF THE COURT</u>

This is a second appeal by Oryem Richard and Nayebale Peter, who were convicted by the High Court at Masaka, on 3rd October 2000, for simple robbery, and were each sentenced to imprisonment for 10 years, corporal punishment of 10 strokes, and to other statutory orders. Their appeal to the Court of Appeal was dismissed on 20th December 2001.

The robbery for which the two appellants were convicted, occurred on 22nd August 1998, at night. The assailants forcefully broke into the house of Mutebi Ahmed, and while threatening to use violence, stole a motorcycle, a radio cassette, a jerry can of petrol and shs.100,000/-. The only eyewitnesses to the robbery, Mutebi, PWl, and Nambirige, PW3,

were not able to recognise the robbers. The convictions of the appellants were based on different circumstantial evidence against each. The evidence against Oryem was in three parts. First, on 24.8.98, two days after the robbery, police officers, acting on a tip-off, found him attempting to sell the stolen motorcycle at a garage in Nyendo, in Masaka Municipality. He was arrested and taken into police custody. Secondly, at Nyendo police station Oryem admitted that he had taken part in the robbery, and then he led the police to his home where they recovered the stolen radio cassette. Thirdly, on 25.8.98, in a charge and caution statement made to, and recorded by D/AIP Samuel Kato, PW2, Oryem confessed that he had carried out the robbery with Nayebale Peter. As against Nayebale, there were two pieces of evidence. First, a neighbour, Namakula Josephine, PW5, testified that early on 23.8.98, the morning after the robbery, she saw Nayebale and another person, riding a motorcycle without number plates, which looked like the stolen motorcycle. She also testified that Nayebale had the motorcycle for two days, and that she had never seen him with a motorcycle before. The second piece of evidence, was that Oryem stated in his confession, that Nayebale participated in the robbery.

In the courts below, the appellants were jointly represented, but in this Court, two counsel were instructed, and ultimately two sets of grounds of appeal against conviction were pursued. We shall first consider the grounds pertaining to conviction; and end with consideration of the only ground relating to sentence. Oryem's appeal against conviction was on three grounds, but at the hearing of the appeal, Mr Ddamulira-Muguluma, his learned counsel, abandoned the third ground. The remaining two are that:

"The learned Justices of Appeal erred -

1. when they upheld the learned trial judge's decision to admit the first appellant's charge and caution statement.

2. when they upheld the decision of the High Court that the appellants jointly participated in the robbery.

On the first ground learned counsel submitted three reasons, why the charge and caution statement ought not to have been admitted in evidence, namely that -

- the statement was obtained through torture;

- it was recorded in English without asking the appellant the language he preferred to use; and
- the police officer who recorded it had first participated in the investigation of the case;

He contended that the courts below had not properly evaluated the evidence regarding the torture of the appellant. He invited this Court to hold that the statement was not voluntary. In the alternative, counsel submitted that the offence described in the statement was not robbery but burglary. On the second ground, counsel submitted that apart from the inadmissible confession, there was no reliable evidence to link the appellant with the robbery.

Mr. Elubu, Principal State Attorney, submitted that the courts below had properly considered the issues regarding the charge and caution statement and had rightly concluded that it was admissible and credible. There was no evidence that Oryem had been tortured. He made the statement voluntarily, and agreed with PW2 to use the English language, which both could speak. Mr. Elubu submitted that Oryem and his mother, DW2, had lied when they alleged that the police officer who recorded the statement participated in the investigation of the case. He pointed to contradictions in their evidence to show that they had lied. On ground 2, the learned Principal State Attorney submitted that, the evidence that Oryem was in possession of property stolen during the robbery, less than two days after the robbery, was sufficient proof that he participated in the robbery. His confession confirmed his guilt.

In the Court of Appeal, counsel for the appellants concentrated his criticism of the charge and caution statement, mainly on the inconsistencies between its contents and the testimony of PW3. He attacked the admission of the statement in evidence, only on the ground that Oryem had been tortured. On that issue, the Court of Appeal said in its judgment -
"The claim of injuries allegedly sustained by the first appellant is patently false as the signs and scars could not have disappeared within a matter of two days. He was arrested on 24.8.1998, the statement was made on 25.8.1998 and he was medically examined on 27.8.1998. However, admissibility of a statement is a matter for the court. The allegation of torture by the first appellant put the Judge upon inquiry. After weighing all the denials, allegations of torture and probabilities, the learned Judge found it to have been made voluntarily. We agree with him."

We should add that, notwithstanding lack of clarity in Oryem's evidence on the issue, the learned trial judge treated the admissibility of the statement with commendable care. He carefully considered and ruled out what appeared to be, two alternative pleas in Oryem's evidence. He held that if Oryem had been tortured on arrest, then any threat caused by such torture, must have been removed by the lapse of three days before he made the statement, coupled with the fact, confirmed by Oryem himself, that D/AIP Kato who recorded the statement, did not torture or threaten him, and was a close family friend. Secondly, he considered Oryem's claim that the statement was not his, but had been simply given to him to sign. After evaluating the evidence and the manner it was given, he concluded that Oryem had made the statement and D/AIP Kato had recorded it as it was made. We are satisfied that, in upholding the decision of the learned trial judge to admit the charge and caution statement in evidence, the Court of Appeal did not err. Oryem's first ground of appeal therefore fails.

With regard to the second ground, we find that the evidence against him is overwhelming. In the charge and caution statement, Oryem made a full confession to the robbery. Although at the trial he retracted it in one breath, and repudiated it in another, a court upon finding corroboration, or upon appropriately cautioning itself against the danger of relying on a retracted and/or repudiated confession, could convict on it. Furthermore, Oryem was in possession of the stolen motorcycle and radio cassette, less than 48 hours after the robbery. He was attempting to sell the motorcycle without its registration book or number plates. This was a classic case for the application of the doctrine of "possession of recently stolen goods". Any doubt as to whether he was the thief or a receiver, was resolved by his confession that he participated in the robbery. As for the submission by learned counsel for Oryem, that the evidence adduced disclosed the offence of burglary rather than robbery, the short answer is that there was sufficient evidence of threatened violence. Accordingly, Oryem's second ground of appeal also fails.

Nayebale Peter's appeal was on the grounds that the learned Justices of Appeal -

1. ***made an error of law and an error of law mixed with fact to have used the charge and caution statement as evidence against him;***

2. ***erred in law and fact in confirming the conviction of the appellant without a thorough re-evaluation of the evidence on record."***

Mr. Kunya, learned counsel for Nayebale, submitted that the conviction was wrongly based on Oryem's confession. He pointed out that Nayebale had been arrested for the offence of defilement, and came to be charged with robbery only because he was subsequently implicated in Oryem's confession. Learned counsel submitted further that the Court of Appeal erred in holding that the evidence of Namakula Josephine, PW5, was the basis of the conviction. He argued forcefully, that the evidence of that witness contained inconsistencies and uncertainties, which rendered it unreliable. Her allegation that Nayebale had the motorcycle for two days, was not consistent with her other evidence, that she saw him on the motorcycle only once, in the morning of the day on which he was arrested. According to him, the witness was even not certain if the motorcycle she saw him riding, was the stolen motorcycle produced and identified in court. He contended that in the circumstances, the doctrine of possession of recently stolen goods was not applicable.

In reply, the learned Principal State Attorney submitted that the evidence of PW5 proved that Nayebale was in possession of the stolen motorcycle in the morning after the robbery. Any doubt in the evidence of that witness was dispelled by Oryem's confession. He relied on Gopa and others v R (1953) 20 EACA 318.

We are constrained to observe, with concern, that the handling of the case against Nayebale on appeal was not entirely without fault. In evaluating the evidence in its judgment, the Court of Appeal started with a misdirection, and then considered the cases against both appellants concurrently, without indicating that each case was independently proved beyond reasonable doubt. The misdirection was in respect of the law applicable to Oryem's confession, in relation to the case against Nayebale. After upholding the trial court's decision that Oryem made the confession voluntarily, the learned Justices of Appeal reviewed the contents of the statement, Exh.P2, and upon concluding that it was true, held that "the situation" was covered by section 29A of the Evidence Act. With due respect, this conclusion was a misdirection. Section 29A provides -***"Notwithstanding the provisions of sections 24 and 25 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*** **(emphasis is added)**

In the instant case, there was no fact deposed to as *"discovered in consequence of information received"* from Oryem's confession in Exh.P2. That confession was recorded on

27.8.98, three days after the motorcycle and radio cassette had been recovered. The only statement which falls within the ambit of section 29A of the Evidence Act, being information from an accused person, in consequence of which the stolen radio cassette, was discovered, is what Oryem said to Cpl. Mfitundinda, PW7, at Nyendo Police Post, after the arrest. The pertinent information he gave then, was simply the admission that he participated in the robbery. It is that which led the police to visit his home, and which distinctly relates to the recovery of the radio cassette. Although Exh.P2 was not within the ambit of section 29A, however, since it was a confession by an accused person, it was lawful under section 28 of the Evidence Act, to consider it against Nayebale, a co-accused. For that reason, we are satisfied that the misdirection did not unduly prejudice Nayebale.

Mr. Kunya's main criticism that the conviction of Nayebale was wrongly based on Oryem's confession seems to arise from the following passages in the judgments of the lower courts. The learned trial judge said of the evidence he reviewed -

"After putting all the above into account I find that the confessional statement made by A1 was truthful and that A2 participated in the robbery in question and was seen with PW1's motorcycle on the 23rd day of August 1998 by PW5.1 therefore hold that the prosecution has succeeded in putting him at the scene of crime and has proved beyond reasonable doubt that he participated in the crime."

In its judgment, the Court of Appeal said -

"We, therefore, find that the confession having been proved to be true against the first appellant it can safely be used to lend buoyancy to the evidence of Josephine Namakula, PW5 to base on a conviction against the second appellant. Josephine Namakula testified having seen the second appellant with a numberless red motorcycle very early in the morning of 23.8.98. The first appellant stated that they drove the motorcycle to the home of the second appellant first before he returned to his home. It was there that they plucked off its number plate. <u>There is therefore overwhelming evidence in the confession against both appellants.</u>

However even without it, the mere recovery of the recently stolen property in possession of the first appellant, only two days after the robbery was enough to base on a conviction.

Gidoga Alex No. 19105 PC, PW4, arrested the first appellant on 24.8.98 with the motorcycle He identified it in court."

If the two passages are read in isolation, it is plausible to infer that Oryem's confession was the basis of Nayebale's conviction, and that Namakula's evidence was only taken as supplementary to the confession. It is trite law, that in a case where two or more accused persons are jointly tried for the same offence, a confession by one implicating another, cannot be used as a basis for the conviction of that other. Under section 28 of the Evidence Act, it may only be used to supplement substantial evidence against the co-accused. Such confession is even not to be equated to accomplice evidence, as implied by the Court of Appeal in the instant case. See Gopa and others vs. R (supra), and Ezra Kyabanamaizi and others v R (1962) EA 309. Accomplice evidence, which is adequately corroborated, can be a lawful basis for a conviction. A confession, such as Exh.P2 in the instant case, cannot be. Indeed, it is a weak form of evidence, because it is made in absence of the implicated co-accused, and its veracity is not tested through cross-examination.

We have carefully examined both judgments. We think that neither court based the conviction of Nayebale on Oryem's confession. The learned trial judge did not address himself, or the assessors, on the import of section 28 of the Evidence Act. However, he placed much reliance on the evidence of Namakula, (PW5), regarding Nayebale's possession of the motorcycle in the morning of 23.8.98, highlighting where it tallied with the confession. He had this to say about the witness herself -

"PW5 is not said to have any grudges with A 2 and she gave her evidence in a straight forward manner and withstood rigorous cross-examination. She impressed me as truthful..."

The Court of Appeal on the other hand, addressed itself properly on the extent to which Oryem's confession could be used against Nayebale, citing not only section 28 of the Evidence Act, but also Ezra Kyabanamaizi's case (supra) and Gopa's case (supra). We think that if the learned Justices of Appeal had adverted to the point, they would have expressly applied the doctrine of recent possession to Namakula's evidence, as they did to that of PW4. In upholding Nayebale's conviction, they must have had in mind, both Namakula's evidence and that doctrine. In the circumstances, we find that the Court of Appeal did not err either in upholding the decision to admit Oryem's confession as evidence against Nayebale, or in the

way it used it against him. Nayebale's first ground of appeal accordingly fails. We also find no substance in his second ground, as the learned Justices of Appeal thoroughly re-evaluated the evidence against him before upholding his conviction. It also fails.

The final ground of appeal is that -

"The learned Justices of Appeal erred in law in upholding the illegal sentence of corporal punishment, passed by the trial judge."

Learned counsel for Oryem, submitted that the sentence of corporal punishment is illegal because it contravenes Article 24 of the Constitution. Though the submission was made on behalf of only Oryem, it obviously affects both appellants, since the sentence was imposed on both. The learned Principal State Attorney did not oppose this ground. He conceded that corporal punishment is unconstitutional.

The sentence of corporal punishment was imposed pursuant to the Penal Code Act, which provides in mandatory terms under section 274 A, that a person sentenced to imprisonment for robbery shall in addition be sentenced to corporal punishment. On the other hand, the Constitution provides in Article 24 that - ***"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment."*** In an earlier appeal, Kyamanywa Simon v Uganda, Criminal Appeal No.16 of **1999,** (SC)(unreported), the same ground of appeal was raised. On 7th April 2000, this Court, by majority, held that a question as to the interpretation of the Constitution had arisen, and decided to refer the question to the Constitutional Court. The question, so far as is material, was framed thus:

"On 16th March 1999, the Court of Appeal... convicted the appellant of robbery ...and sentenced him to imprisonment for six years and to six strokes of the cane... The sentence of six strokes of the cane was imposed under section 274 A of the Penal Code Act. Is the sentence of six strokes of the cane inconsistent with or does it contravene the provisions of article 24 of the Constitution?"

In a ruling dated 14 December 2001, in Constitutional Reference No.10 of 2000, the Constitutional Court, by majority of three to two, held in answer to the question, that *"the sentence of six strokes of the cane is inconsistent with article 24 of the Constitution."* Kyamanywa's appeal, which should have been disposed of in accordance with that decision,

was overtaken by events. Kyamanywa was granted pardon by the President, before the process of the reference was concluded. However, the decision on the reference is of general application. In the course of making the reference, this Court observed -

"In case the decision of the Constitutional Court on the question referred to it is not appealed, then such a decision would stand as the law until it is overturned or upheld on appeal by the appellate Constitutional Court in another case in the future."

The decision of the Constitutional Court on reference, has not been appealed, What the court said about the six strokes in Kyamanywa's case, applies to the 10 strokes in the instant case. This ground of appeal therefore succeeds. In the result we dismiss the appellants' appeal against their convictions. We allow the appeal against the sentence of corporal punishment, which we hereby set aside. The rest of the sentence imposed on each of the appellants is confirmed.

Before taking leave of this case, we are constrained to express our agreement with the observation of the Court of Appeal that the learned trial judge did not give due regard to the evidence on the use of the gun. Where a witness testifies, as PWl did, that during a robbery, he saw the assailant pull out a gun, point it at him and fire a bullet which missed him but hit the wall, there is sufficient proof of use of the gun, unless that evidence is otherwise discredited. To demand that if the gun is not produced, the witness should describe it *"as carefully and as exactly as possible"* is to set the standard of proof too high, and unattainable in the average cases of robbery. The same applies to the suggestion implied by the learned trial judge that it should have been proved that the gunshot heard by the witness was from the gun he saw with the assailant.

Dated at Mengo this 17th day of September 2003.

J.W.N. TSEKOOKO
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

C.M. KATO

JUSTICE OF THE SUPREME COURT