THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ, S.C.)

CRIMINAL APPEAL NO. 33 OF 2001

B E T W E E N

1. ***SEWANKAMBO FRANCIS***
2. ***KIWANUKA PAUL***
3. ***MUTAYA MUZAIRU*** ***: : : :*** ***: : : :*** ***APPELLANTS***

A N D

UGANDA: ***: : : : : :*** ***: : : : :*** ***RESPONDENT***

(Appeal from the decision of the Court of Appeal in Kampala (G. M. Okello, A. E. Mpagi-Bahigeine, and J. P. Berko, JJ.A.), dated . . in Criminal Appeal No. 14 of 2000).

JUDGMENT OF THE COURT

The three appellants were convicted by the High Court at Masaka of simple robbery, contrary to sections 272 and 273(1) of the Penal Code Act and were each sentenced to ten years imprisonment. They were also ordered to suffer corporal punishment of ten strokes of the cane, to pay to the complainant compensation of Shs. 50,000= each and to undergo Police supervision for three years after completing their terms of imprisonment.

The facts of the case as accepted by the trial court and the Court of Appeal were briefly as follows:

The complainant, Semakula Hussein (PWl), and another person not named, were on 19-08-97 at 5.45 a.m. travelling in a Toyota Corolla DX car No. 128 UAN from Lamunu Fishing Village when, at Wakasanke, they found the road blocked by trees placed across it. When they stopped, some people flashed a torch at them and ordered them to get out of the vehicle and lie down, which they did. Their attackers, who had two guns, demanded money from them and Semakula handed to them Shs. 110,000=. The attackers tied Semakula's hand those of his companion behind their backs, and disappeared.

Thereafter, Semakula and his companion managed to untie their hands but could not find their motor vehicle. In it were bottles containing traditional medicine which they had been selling. They walked to Nyendo Police Post and reported the incident.

In the meantime, the first and the second appellants were arrested by LDU's in the morning of the same day. They had in their possession a toy gun. On interrogation by the Police, the two appellants named the third appellant as a person who had also participated in the robbery. The Police proceeded to his home, but did not find him. They found his wife and searched the home. They recovered an SMG gun, a magazine containing 17 rounds of ammunition and some bottles containing traditional medicine. Subsequently, the third appellant was also arrested. All three appellants each made a charge and caution statement in which he confessed participation in the robbery. Each gave a detailed account of the part he played. They were all eventually indicted jointly on five counts of aggravated robbery contrary to sections 272 and 273(1) of the Penal Code Act.

At the trial the appellants' confessions, which were recorded by Police Officers, were each admitted without any objection. All the appellants were represented by a Lawyer on state briefs. In their respective sworn evidence in defence, the

appellants repudiated their confessions and set up a defence of alibi which the learned trial judge rejected. He convicted all the appellants of simple robbery charged in the second count only. In that court, the appellants were charged with robbery only of Shs. 112,500=. He acquitted them of aggravated robbery in all the five counts of the indictment. Following the conviction, the learned trial judge made the consequential orders to which we have already referred. Aggrieved by the decision and orders of the trial court the appellants appealed to the Court of Appeal against conviction and sentence.

Their appeals against conviction and against the sentence of ten years imprisonment, compensation to the complainant and police supervision after completion of the sentence of imprisonment were dismissed. The Court of Appeal allowed the appeal against corporal punishment and set it aside. Hence this appeal.

The memorandum of appeal originally contained four grounds of appeal, but when the hearing of the appeal commenced the appellants' learned counsel, Mr. Moses Kuguminkiriza abandoned the fourth ground of appeal, which was against sentence. Thereafter, the learned counsel argued the remaining grounds in the order in which they were set out in the memorandum of appeal. Towards the end of his submission, the appellant's learned counsel also abandoned the third ground of appeal saying that it had been covered by his arguments regarding the first and second grounds of appeal.

The two remaining grounds of appeal are set out in the memorandum of appeal as follows:

1. The learned Justices of the Court of Appeal erred in law and fact when they held that simple robbery was proved against the appellants beyond reasonable doubt.

2. The learned Justices of the Court of Appeal erred in law and fact when they held that the confessions by the appellants (Exbts. P.5, P.6 and P.7) were properly admitted and relied upon by the presiding judge.

We shall consider ground 2 of the Appeal first. In his submission under this ground, the appellants' learned counsel, Mr. Moses Kuguminkiriza, first referred to the evidence of D/IP Otim (PW4) concerning how he recorded the charge and caution statements from the first and second appellants in which they confessed to have participated in the robbery. D/IP Otim tendered the confession statements which were admitted in evidence without any objection as prosecution exhibits P.5 and P.6 respectively. The learned counsel also referred to the evidence of D/AIP Rwenduru (PW5), who narrated how he recorded a charge and caution statement from the third appellant in which he confessed to have participated in the robbery. PW5 also tendered in evidence the third appellant's confession statement as prosecution exhibit P.7, without objection by the defence. The learned counsel submitted that although the appellants were represented by counsel at the trial the record does not show whether the learned trial judge asked the defence counsel whether there was any objection to the admission of the confession statements. He contended that the absence of record showing whether or not such a question was put to the defence counsel showed a failure of justice, because the confessions were relied on by the learned trial judge to convict the appellants although they had each repudiated or retracted the confessions. For instance, the third appellant said in his evidence in defence that a policeman took his watch. Learned counsel contended that had the learned Justices of Appeal considered the circumstances in which the appellants said the confession statements were recorded, they would not have acted on the confessions.

The learned Principal State Attorney, Mr. Vincent Okwanga, opposed this ground of appeal. In his submission, he contended that the learned trial judge and the learned Justices of Appeal properly acted on the appellants' confessions. The learned trial judge followed proper procedure in admitting the confessions. The Police Officers who recorded the confessions gave evidence about how they recorded the statements, which indicated that they followed the proper procedure in doing so. The defence raised no objection before the confessions were admitted in evidence. The learned Principal State Attorney

contended that a trial judge should not go prompting defence counsel on what he or she should or should not do during a trial. He is an impartial umpire in the trial. The learned counsel submitted that in the instant case, the learned trial judge had no duty to invite objections to admission of the confessions from the appellants or their counsel. Moreover, failure by the defence to object to the confessions at the material time means that, they were admitted.

With respect, we do not agree with the submission of the learned Principal State Attorney. We shall say more about this later in this judgment.

Secondly, the learned Principal State Attorney submitted that the courts below rightly believed the appellants' confessions as true because the statements contained minute details of how the appellants committed the robbery. The confessions also agreed with the prosecution evidence in certain respects. For instance, the first appellant's confession statement concerning arrest was corroborated by the evidence of PW1 and PW2; and PW2's evidence tallied with the first appellant's confession. The learned Principal State Attorney submitted that the prosecution evidence that the second appellant ran away when being arrested is confirmed by the 2nd appellant's own evidence that when he was asked what the bag he was carrying contained, he ran away. All these showed that the defence evidence was all lies, which justified the learned trial judge's rejection of the defence evidence. The learned Justices of the Court of Appeal re-evaluated the prosecution evidence including the appellant's confessions and found that the charges against the appellants had been proved to the required standard.

The learned Justices of Appeal dealt with the complaint in the second ground of appeal this way:

> ***"On ground. 2 , Mr. Kibonda argued that the trial Judge ought to have asked the appellants if they objected to the admissibility of their charge and caution statements before admitting and relying on them On the other hand, Mr.***

Wagona, Senior State Attorney, who appeared for the state, contended that the trial judge was justified in admitting and relying on those confessions since counsel who represented the appellants at the trial did not object to their admissibility. We agree. The appellants were represented by a Lawyer. Since he did not object to the admissibility of the confessions in evidence, the trial judge was justified in so admitting them He did not have to inquire of the appellants if they had any objection to their admissibility. We cannot fault the trial judge in admitting these confessions in evidence. As regards his relying on them, it is clear from their evidence that the appellants repudiated/retracted these confessions. The trial judge, therefore, had to treat them as such with the attendant requirement of a warning that such evidence must be received with a caution. Once that warning is made, the trial Judge does not even need to look for corroboration and can legally convict on the uncorroborated repudiated/retracted confessions provided that he is satisfied that in all the circumstances, the confession is true. This was the point stated in *Tuwamoi -vs- Uganda (1967)EA, 84, at 91* ***which is still good law."***

We have carefully examined the record of the trial court in this regard. In his evidence, D/IP Otim (PW4) testified at length regarding how he first recorded the confession statement from the first appellant. He also read out to the court the contents of the confession. His evidence in part reads:

"After recording it from A.1., I read it back to him and he said that they were true. I signed and he also signed by writing (put in marked P.E.5)"

D/IP Otim also testified at length how he recorded the second appellant's confession statement and read it out to the court the contents of the document. He ended his examination-in-chief by saying:

"He stated further that he led PW2 and another Police Officer together with A.I to the home of A.3 where they recovered an SMG gun with some ammunitions and then led them to Masaka Police where he made the statement before me. I then signed it, so did A.2 by themselves, printing on each of the sheets after reading them to him and he found them correct (put in and marked as P.E.)."

DA.I.P Rwenderu (PW5) recorded the confession statement from the third appellant. He also read out the document to the court. The relevant part of his testimony reads:

"He again said that during the arrest one of the Police Officers took his Seiko watch; I read it back to him, then he signed and I counter-signed, (put in marked RE.[1])."

As the record shows, it appears that the learned trial judge did not give either the defence counsel or the appellants any opportunity to say anything about the confession statements before the documents were admitted in evidence as prosecution exhibits. It would seem therefore, that there was no way the appellants or their defence counsel could have raised any objection to the admissibility of the confession statements in case they wanted to do so. Not surprisingly, therefore, no objection was raised.

The issue of whether a confession the admissibility in evidence of which has not been objected to by the defence can be admitted in evidence, without a trial within a trial to determine its admissibility can be used to convict an accused person has been considered by this Court in recent cases. The clearest and the most relevant decision of this Court was in the case of ***Omaria Chandia -vs- Uganda, Criminal Appeal No. 23 of 2001 (SCU)*** (unreported). In that case the appellant was convicted by the High Court of the murder of his wife in Owino Market in Kampala, where the deceased was a trader in a stall. Several eye witnesses saw the appellant stab the deceased to death with a knife.

A confession statement allegedly made by the appellant was admitted in evidence without objection from counsel for the appellant. His appeal to the Court of Appeal failed because, apart from his alleged confession, there was ample evidence from eye witnesses to support the conviction.

In his appeal to this Court, one of the grounds of appeal was that the learned Justices of Appeal erred in fact and in law when they admitted the charge and caution statement, extracted from the appellant.

Regarding that ground of appeal this Court said:

> ***"Firstly, we would reiterate what we have stated in our recent decisions that because of the doctrine of the presumption of innocence enshrined in Article 28(3)(a) of the Constitution where, in a criminal trial, an accused person has pleaded not guilty, the trial court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial.***
>
> ***We say this because an unchallenged admission of such a statement is bound to be prejudicial to the accused and to put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or has conceded to its admissibility. Unless the trial Court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the court ought to hold trial within a trial to determine its admissibility. See*** **Kawoya Joseph -vs-** ***Uganda, Criminal Appeal No. 50 of 1999, (SCU) (unreported) Edward Kawoya -vs- Uganda, Criminal Appeal No. 4 of 1999 (SCU) (unreported) and Kwoba -vs- Uganda, Criminal Appeal No. 2 of 2000 (SCU) (unreported).***

Therefore, and with respect, we think that it was improper for the learned trial judge to admit in evidence the confession statement (exhb. P.3) of the accused on the basis that his counsel did not object."

Applying the Court's decision in ***Omaria Chandia's*** case (supra) to the instant case, our view is that it was improper for the learned trial judge to admit in evidence the confession statements of the three appellants (Exbt. P**.5,** P**.6** and P**.7)** on the basis, that neither the appellants nor the defence counsel challenged the admissibility of their confession statements, and without holding a trial within a trial to determine the admissibility of the confessions.

A part from the failure by the trial judge to ascertain from the appellants whether the confessions could be admitted, there are other unsatisfactory features in the case which affect the voluntariness of these confessions. First, we think that it is irregular for one Police Officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out. In the instant case, we note that A.I.P. Otim (PV.) recorded the alleged confession of the second appellant after he had recorded a similar confession from the first appellant. Second, the same Police Officer apparently did not have a Luganda interpreter to interpret communication between him and the first and second appellants. According to Otim himself, he mixed Luganda and English when speaking to the appellants and recording the alleged confessions from the first and second appellants. Third, all the appellants claimed that they were assaulted by the police before they were made to sign or thumb-print the alleged confessions. Indeed, the first applicant claimed that he was assaulted and injured on the left leg which was treated *by* Dr. Ssekitoleko. Strangely enough, the prosecution did not adduce any evidence of medical examination in respect of all the appellants. No explanation was given.

In the circumstances, with all due respect, the Court of Appeal misdirected itself to say, as it did, that the learned trial judge properly admitted the appellants' confession statements in evidence.

The appellants' confession statements in question was the only evidence implicating them with the offence charged in the second count, in which they were jointly charged with robbery of Shs. 112,500= from the complainant. The money was not found in possession of the appellants. Nor was it recovered. The appellants were strangers to the complainant and his companion, who were victims o f the robbery. They did not recognize the appellants, nor identified them as the robbers. There was no other evidence which supported the appellants' conviction other than the confession statements. In the circumstances, their conviction of simple robbery cannot be left to stand

In the circumstances the second ground of appeal must succeed. The success of that ground disposes of the appeal. It is not necessary, therefore, to consider the remaining ground of appeal.

In the result, this appeal succeeds. It is accordingly, allowed and its ordered that the appellant's conviction for simple robbery C/SS.272 and 273(1) of the Penal Code be and is hereby quashed. The Court of Appeal's decision up-holding their conviction for simple robbery and the order upholding the trial courts sentences of the appellants be and is hereby set aside. Each and all of the three appellants are also set free forthwith, unless held on some other lawful grounds. If they have already paid any compensation to the complainant, the same should be refunded to them by the complainant.

Dated at Mengo this 20th day of February, 2003.

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