IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J., Lubogo, P.J. & Ssekandi, J.A.)

CRIMINAL APPEAL NO.12 OF 1978

BETWEEN

1. WILSON NDEGE) …….APPELLANTS
2. LEO KAAHWA)

AND

UGANDA ……...……RESPONDENT

(Appeal from a conviction and sentence
of the High Court of Uganda at Masindi
(Khan, J.) dated 21st June, 1978
in
Criminal Session Case No.153 of 1976)

JUDGMENT OF THE COURT

6th December, l978. The following considered judgment of the Court was read by SAIED, C.J.:

The two appellants were tried on a bill of indictment containing two counts of capital robbery contrary to sections 272 and 273(2), the third count being theft of a motor boat contrary to sections 255A and 252 respectively of the Penal Code. They were acquitted on the theft charge but convicted on both counts of robbery and sentenced to the mandatory death penalty.

We allowed the appeals of both appellants on 27th November, 1978 and now give our reasons.

The robberies for which the appellants were indicted were allegedly committed on 12th December, 1975 at the homes of Mary Ngutu (Count 1) and Vicent Oyera (Count 2) at Kitebere fishing village in the South Bunyoro district. Both appellants also fishermen living in the nearby

village of Ntoroko, and most of the material witnesses for the prosecution claimed to have known them very well for varying periods of time before this incident which occurred at around 8 p.m.

It was alleged by the prosecution that the first appellant was in army uniform and armed with a rifle which was, according to the evidence, fired at least once during the incident; and the second appellant was dressed in what was described as a "game uniform". They were only two of a gang of about six, some allegedly carrying knives and pangas, identified by the main prosecution witnesses in circumstances involving severe assault, particularly on Mary Ngutu, and disclosing some contradictory evidence concerning the quality of light then available. This witness was taken to Ntoroko dispensary almost immediately and was thereafter interned at Buhinga Hospital, Fort Portal, for some days.

Amongst the nine witnesses whose evidence was admitted at the preliminary hearing was Station Sergeant Dratciri who was then stationed at Ntoroko Police Post. He visited the scene on 15th December, 1978 apparently in the company of the local muluka chief who is alleged to have handed him a spent cartridge. We should like to point out at this juncture that the muluka chief was not called during the trial and no explanation seems to have been given for his absence. After setting out in great detail the evidence given by each witness, including that which was admitted at the preliminary hearing, the learned, trial judge posed two questions upon which the case turned as follows: —

> "The first question to be decided is whether the robbery as alleged under counts I & II and theft as alleged count III has been proved or not. If the answer is in the affirmative then the next question is whether the two accused were among the robbers who committed these crimes. The assessors were also directed on these crimes."

For the appellants Mr. Ayigihugu submitted, and we agree, that the learned judge quite properly addressed his assessors and himself on these two issues. There then followed a detailed discussion of the evidence from which the learned judge concluded, rightly in our opinion, that the two robberies were in fact committed. This finding led him to the vital issue of identification, upon which he said,

> "In this case no stolen property is said to have been recovered from any of the accused persons. It is the evidence of the three witnesses which alleged participation of the accused in the robbery. The assessors were directed as I direct myself now that the evidence of identification of the accused must be weighed with caution when the robbery is said to have been committed during night (as in this case) and to see whether the circumstances were such in which the identification was possible. Keeping these principles in mind I examine the evidence of the three eye-witnesses."

Learned counsel for the appellants made a lengthy submission in which he endeavoured to high light some discrepancies and contradictions in the evidence of the main witnesses for the prosecution in an attempt to show that not only the circumstances for making a correct identification were difficult but were such as not to rule out the possibility of error, reference to the latter important factor being absent from the extract of the judgment just cited. For the purpose of our judgment we need not review the entire evidence to assess the ultimate effect of those conflicts in evidence. Learned Senior State Attorney, Mr. Kabatsi, was unable to support the convictions of the appellants for a completely different reason for which we allowed the appeal and as the point is of fundamental importance for the administration of justice we shall now consider that submission in some detail, not that it is a novel argument or has arisen for the first time, but only to emphasise the vital importance it entails.

As we have said Station Sergeant Dratciri visited the scene three days after the alleged robberies in the company of the muluka chief. His evidence, like that of the complainant Oyera (count 2) and some other witnesses who were present at the time of the event, was admitted at the preliminary hearing. We have had occasion previously in Fabiano Olukuudo v. Uganda, U.C.A., Criminal Appeal No.24 of 1977 to point out that s.64 of the Trial On Indictments Decree should only be used as a means for putting on record formal evidence. These provisions are an advance in the due administration of justice and provide for a more expeditious and efficient criminal trial by providing for the admission of facts not in dispute, see John Kanyankole v Uganda (1972) E.A. 308. We agree but should nevertheless take this opportunity of expressing our view unequivocally that experience has indicated that occasionally expeditiousness seems to be the main consideration in guiding counsel to employ these provisions somewhat indiscriminately in admitting facts which ought to be proved by calling relevant witnesses, seldom if ever the court•

to such a practice. We are firmly of the opinion that if efficiency at the trial is to be maintained, as indeed it ought, then what has been said in the past about this law should be adhered to strictly so that such expeditiousness based apparently on reducing the time taken by a much fuller trial, in contradistinction to ‘hat that law was really aimed at achieving that is, expediting the preparation of summary of evidence leading to an equally speedy committal proceedings, is not permitted to gain ascendancy over the cardinal principle of ensuring that an accused on trial for his life, or on some other indictable offence not carrying the death penalty, gets a fair and proper trial.

This is one such instance where the statements of some eye witnesses to the robberies, and the only investigating officer, whose evidence cannot be described as of a formal nature, were admitted. They were all important witnesses to the trial as a whole, more so to the vital issue of identification. Considering that the two appellants were local residents and there being no evidence of their having absconded from the village for almost two months during which some other people were arrested and released and both reported to the police of their volition on hearing allegations being made against then the learned trial judge should have, is our opinion, involved his general powers under the provisions of s.37 as well as s.64 (3) of the above mentioned Decree of recalling those main witnesses whose evidence had been admitted for further examination to ascertain the correct position. He might also have usefully invoked his discretionary powers in 5mmoning the chiefs who participate in the initial stages of investigation With respect to the learned judge, we feel that in the peculiar circumstances of this case where obviously so much was left uncovered by the prosecuti0fl such intervention, particularly on the central issue of identification, was manifestly necessary and quite essential to reach a just decision.

Mary Ngutu was cross-examined to some extent upon her statement to the police. The learned judge commented on that evidence as follows:-

> “It was also contended about Mary that the police officer who recorded her statement does not say in his admitted statement that Mary named the two accused robbers so her statement about the identity of the accused be not accepted. I have said earlier that unless Mary was confronted with her police statement to show that the names of the two

> accused do not find mention in her police statement; the silence of police officer either way in his admitted statement, cannot be a ground to disbelieve Mary when circumstances discussed earlier point to her credibility Likewise the absence of the names of any robbers from the admitted statements of Jane Orebi, Michael Peter abler and Jane Nsala does not mean that Mary also could not identify them."

This passage raises some interesting points. Let it be said at once that the only police officer whose statement was admitted was the one we have already mentioned. It was on the basis of what he had said in his own statement that the learned Senior State Attorney was unable to support these convictions. It is true that Mary was in hospital by the time the police officer visited the scene in the company of the muluka chief, but more importantly in the presence of all the other prosecution witnesses as we were informed by Mr. Kabatsi. Mr. Kabatsi read out the following passage from his statement which was made on the same day he visited the scene:

> "They told us that the people who attacked us were army men but they did not identify the suspects at all."

During our present session we stressed the importance of first information reports in Clement Namulambo And Another v. Uganda, U.C.A. Criminal Appeal No. 1 of 1978. What the sergeant was told at the scene was obviously in the nature of such a report. This portion of the sergeant's statement was left out of the summary of evidence as well as the memorandum of admitted facts. The first point we should like to mention concerns the preparation of a summary of evidence under the provisions of s.173 (2) of the Magistrates Court Act by the office of the Department of Public Prosecutions.

There is a lot to be said in favour of the former procedure of committal proceedings on the basis of a preliminary inquiry. The foremost advantage was to have the depositions of witnesses which were of immense importance at the trial. The present system does not fill the gap left by depositions and the only basic material left before the courts upon which the summary is based is the statement made by a witness. It is a notorious fact that such statements are not recorded properly; policemen who do not seem to know much about investigations generally and the ingredients of the offence in particular produce results which more often than not are disgrace

full the other difficulty being the language problem which exacerbates their other problems. On such statements is the summary based which now forms the foundation of the trial. These basic and fundamental deficiencies naturally increase the onerous burden on the Law Officers many fold but, as they are the officers responsible for the preparation of summaries, they ought to ensure that the material before them is adequate and, since they bear the ultimate responsibility for preparing the summary, they cannot avoid blame for any criticism which may arise from the manner in which they execute their duty in this respect. We have noticed through our own experience that the standard leaves much to be desired. We are also saddened to note that on many occasions portions of statement concerning vitally important issues, like the one under review, are omitted altogether from the summary. Preparation of this summary is not a classroom exercise where a student is asked to condense a comprehensive passage into a précis form; we take it as of fundamental importance to the trial as a whole, more particularly to the accused who has to prepare his defence and instruct counsel, where this is necessary, on the basis of what is disclosed in the summary. We think that a summary should be prepared by experienced Law Officers so that maximum material, barring of course inadmissible evidence, is included in it to afford an accused ample opportunity to defend himself adequately at his trial. Haphazard and wholesale editing of statements and the use of pregnant or ambiguous phrases ought to be avoided to ensure not only that the accused is better enabled in his defence but also that the trial judge gets an opportunity of obtaining a fair idea about the case as a whole. On the latter observation we should cite the case of Obare s/c Abare v R., (1960) E.A.464, where the Court of Appeal quoted with approval a passage from Seif s/o Selemani v R (1953) 20 E.A.C.A. 235 which dealt with the practice of trial judges reading depositions taken from witnesses under the former procedure of preliminary investigations, saying,

> “Except to a limited extent in Kenya the system of trial by jury does not obtain, and the trial judge, although aided by assessors, has by law the responsibility placed on him of being a judge of fact as well as of law. We are aware that man judges observe the practice of reading the depositions before the trial, and the practice is in every sense a proper one. Indeed if this was not generally done the chances that accused persons would suffer is by no means remote. Except in capital cases, it is the exception rather than the rule that the accused is represented by counsel, and even in capital cases, the counsel assigned will

> often he young and inexperienced persons. It would often therefore be very much in the interests of the person charged that the judge should have knowledge of the nature of the case alleged against him, and should be able to test the credibility of the witness by his acquaintance with what they have said on a previous occasion. It is this knowledge that enables a judge to keep proper control of the trial, and to ensure that no point which may tell in the accused's favour is overlooked."

We see no reason to differ from this view which, although was with regard to committal proceedings based on preliminary inquiries as of old, would apply in principle with such greater emphasis and vigour to the present procedure if the summary is prepared properly and adequately by the Law Officers not omitting anything which tells in favour of the accused thus enabling both the defence and the judge to discharge their way will the criminal courts hopefully reach the oft declared goal of seeking to achieve fairness in the general circumstances of the administration of justice.

Having said this, we turn now to the duty of the prosecutor. In the High Court all prosecutions are conducted by State Attorneys. We should quote the following passage from ARCHBOLD Criminal Pleading Evidence And Practice, 39th edn. at p.217:

> "It has been said that prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than advocates of a cause, see Comption J. in R v Puddick (1865) 4 F & F. 497 at p.499, approved in R v Banks (1916) 2 K.B. 621; 12 Cr. App. R.74 (Avory J. –'Counsel for the prosecution throughout a case ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice', p.76)"

We respectfully agree and would add that this lends further weight to what we have so far endeavoured to say with regard to the preparation of summary of evidence. We do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do we desire to discourage the utmost candour and fairness on the part of those charged with this duty and those conducting prosecutions.

Turning now to the allied matter of statements made to the police, we should refer to Amisi And Others v. Uganda (1970) E.A. 662 where the Court of Appeal made certain observations about prior statements made by witnesses in criminal trials and he duty of the prosecution. Dealing with the question under two heads, the court (at p.663) under the heading (a) extended the principle in R v Bryant and Dickson, (1964), 31 Cr. App. R.l46 of the prosecution duty to make available as a witness to the person from whom a statement has been taken and can give material evidence but is not celled by the prosecution to also making available his statement to the defence Under heading (b) the court, dealing with police statements of a witness giving evidence, said that there was the prosecution not only to inform the defence of any material discrepancy between the witness's evidence and any statement made by the witness in their possession, but to make a statement available to the defence which they are entitled to see and to cross-examine the witness on any discrepancies The court, however, appreciated that defence counsel may not make sufficient use of this procedure and said:

> "If the accused is represented then normally it is sufficient to inform the discrepancy but the judge feels that there might be cases where the defence advocate does not make sufficient use of the contradictions in the statement; we think that it would be good practice when the prosecutor does inform the defence of the contradiction in the open court so that the trial judge would be aware of the matter.

Reference may also be made to the majority judgment in the case of Dallison v. Caffery, (1965) 1 Q.B. 348, a case of false imprisonment and malicious prosecution. There Lord DENNING, with whom DANCKWERTS, L.J. agreed, said at p.369:

"The duty of a prosecuting counsel or solicitor…is this if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent; he must either call that witness himself or make a statement available to the defence. It is highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows who he does not accept as credible, he should tell the defence about him so that they call him if they wish." (Emphasis supplied).

DIPLCCK, L.J., after saying that a prosecutor is under no duty to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person, went on to say:

> "His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, the prosecutor should make such witness available to the defence. It is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial."

With respect, we agree with the view of the majority, and we think that the observations made in Amisi are in an -attempt to apply the same principles to local conditions and circumstances. In a young, generally inexperienced and still developing Bar as we have at present, we are of the considered opinion that every care should be taken that an accused is not made to suffer due to the inefficiency of advocate, particularly on the matter now under discussion. It is in this regard that we think that a judge should feel free to intervene on the lines indicated above, and certainly ought to where his suspicion concerning the credibility of a witness is aroused in enquiring from the prosecutor about the contents of his statement to the police. We should not be taken to mean that he should descend into the arena but the extent to which law and previous authorities clearly permit such intervention, he should do so in the interest of justice. We strongly endorse what was said in Amisi (supra) and would adopt those observations as a rule of practice to be followed whenever such a situation arises.

Had the sergeant's statement been produced or the learned judge's attention drawn to it at the trial the outcome may well have been different. We were informed that the sergeant was able to see all the main witnesses when he visited the scene. It was known that by then Mary Ngutu was in hospital. Without any further explanation of any sorts which should have been forthcoming but was not, concerning the names of the witnesses the sergeant saw and who denied having identified any of the robbers, we find it difficult to say that besides the witnesses mentioned by name by the learned judge in the passage quoted from his judgment the other two, that is, William Opok (P.W.1) and Margaret Anyango (P.W.3) to whom he looked for corroboration were not amongst the lot of witnesses the sergeant spoke about in his statement. It must therefore

follow that in the circumstances the sergeant's statement in the form of a general and unqualified assertion concerning the denial by all witnesses then assembled would create considerable doubt about the credibility of P.W.1 and P.W.3 as well on the basis of Namulambo (supra). The net result in the end is that the only other witness left concerning identification of the appellants is Mary Ngutu.. We agree, as the learned judge said, that no such adverse inference in so far as her statement is concerned could possibly be drawn merely on the basis of the omission of such a reference from the sergeant's statement unless the names were shown to be missing from her statement altogether, but the judge's comment that the circumstances which he had discussed earlier pointed to her credibility calls for comment. Under cross-examination she said,

> "My husband told me that none of the property had been recovered and that they have known one who was believed to be the army man and they were trying to locate him. My husband did tell me his name."

When she was examined by Court she said,

> "When my husband had told me that they have known believed to be the army man but did not tell me his name. I told him that he was Ndege and his companion's men Leo and Tibasema's. I had not by then made a statement to the police." (sic).

It is obvious that she contradicted herself on this crucial aspect of the case. Later on, she said,

> "At the time of the robbery my husband had indentified some of the robbers. He told me that he had identified Ndege and Leo."

This was yet a further glaring self-contradiction. Her husband is Olieve Onega, whose evidence was admitted. Nowhere in it has he claimed to have identified any of the robbers. It is unfortunate that the learned judge does not refer to these vital contradictions in Mary's evidence. Had he directed his mind to them, we doubt if he would still have described her as a credible witness on the issue of identification. We further doubt if any conviction could be based upon the evidence of such a witness who out of her own mouth had cast serious doubts about her own integrity. But for the sake of argument and proceeding on the basis of the learned judge's assessment of her credibility, she would have been the sole identifying witness after

discarding both P.W.1 and P.W.3 as doubtful for the reasons we have already given. In that event the learned judge would have been bound by Roria v. R. (1967) E.A. 583. With respect, it was not enough for the judge to "see whether the circumstances were such in which the identification was possible." We hasten to add however that in his summing up he directed the assessors meticulously to weigh the evidence with caution "eliminating the possibility of mistaken identity. In omitting this material part of the direction, perhaps inadvertently when writing his judgment, he seems to have ignored certain other aspects of the case which rather than negativing the possibility of error, considerably enhanced the danger of mistaken identity. We have already dealt with the obvious contradictions in the evidence of Mary Ngutu. There is not a shred of such other evidence as is usually looked for in such cases to support her identification and remove the possibility of error. Furthermore, the doubts already existing about the crucial issue of identification were confounded by two other matters, neither of which was satisfactorily explained. Both appellants claimed to have stayed on in the village after the robbery for about two months which remained controverted and there was no evidence whatsoever about any efforts which might have been made to arrest them. It stands to reason that had any witness, and this includes Mary Ngutu who according to the admitted evidence of Dr. Ayeni of Buhinga Hospital was discharged on 22nd December, 1975, mentioned those names there would have been no difficulty in arresting them at least that is what we think. There was evidence that an army soldier was arrested by a mutongole chief but was released allegedly for having all his documents. This chief was not called and the reason for and the circumstances in which that soldier man arrested and subsequently released not disclosed. Finally both appellants maintained in their unsworn statements that they reported to the sergeant on 14th January, 1976 upon hearing rumours about their implication in this robbery but were sent away as he had heard nothing about them when he visited the scene. It was not till 2nd February that they were arrested by the Sa3a chief and taken to the police. Again this chief was not called. Evidence of arrest and the circumstances in which it was made should always be given - see Fabiano Olukuudo (supra). The fact that the appellants themselves reported to the sergeant upon hearing allegations being made against them was a potent factor pointing towards their innocence. Their statement about what they were told by the sergeant lends further credence be what he himself stated in his statement to which our attention was drawn that none of the witnesses present when he visited the scene had mentioned any names.

Before we take leave of this case we should like to express our appreciation for Mr. Kabatsi for bringing to our attention the statement of the sergeant. What has puzzled us is that this statement has been on the police file which was forwarded to the office of the Director of Public Prosecutions all the time. Not only was the Law Officer who prepared the summary of evidence grossly irresponsible and professionally inefficient in overlooking it completely, but the one who conducted the prosecution was equally inefficient and unmindful of his duty to court in bringing it to the attention of the trial judge. Had this been done much time and effort would have been spared and the prisoners would not have had to wait for their release till the hearing of this appeal. Primarily this involved a decision whether to proceed to committal proceedings in the first place upon the evidence which was on the police file. We think that in the circumstances as disclosed no such decision could have been taken without first calling for further investigations concerning matters which we have mentioned and which would have been apparent to any experienced State Attorney. Although we are to make any comments upon this matter of decision taking of whether to prosecute or not this case has disclosed that the entire procedure in this regard needs careful consideration to ensure that such situations do not recur.

Lastly there is just one other procedural matter concerning sentence which need be mentioned. The appellants were sentenced to death on both counts of capital robbery. The accepted practice is that when a person is sentenced to death on one count, no sentence should be passed on the other counts in the same indictment on which he is also convicted. It is sufficient to record a conviction on such counts.

It was for these reasons that we allowed the appeals of both appellants, set aside their convictions and quashed their sentences of death.

DATED AT KAMPALA this 6th day of December, l978

(M. Saied)
Chief Justice

(D. L. K. Lubogo)
Principal Judge

(F. N. Ssekandi)
Justice of Appeal

Mr. P.S. Ayigihugu of Ayigihugu & Co., Advocates for the appellants.
Mr. Kabatsi, Senior State Attorney for the Director of Public Prosecutions.

I certify that this is a true
copy of the original.

(M. Ssendegeya)
CHIEF REGISTRAR.