IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J., Nyamuchoncho, J.A., Ssekandi, J.A.)

CRIMINAL APPEAL NO. 14 OF 1977

BETWEEN

JAMES SSEMWOGERERE

EMMANUEL NGAMIZE ……APPELLANTS

AND

UGANDA ……RESPONDENT

(Appeal from a conviction and sentence

f the High Court of Uganda at Masaka

(Kantinti, J.) dated 9th August, 1977

in

Criminal Session Case No. 69 of 1977

Between

UGANDA …… PROSECUTOR

and

JAMES SSEMWOGERERE)

EMMANUEL NGAMIZE) ……ACCUSED

JUDGMENT OF THE COURT

NYAMUCHONCHO, J.A.

The appellants, James Ssemwogerere (to whom I shall refer as 1st appellant) and Emmanuel Ngamize (to whom I shall refer as 2nd appellant) were convicted by the High Court sitting at Masaka of the murder of Zelomina Nankabirwa (to whom I shall refer as the deceased) and were sentenced to death. They have now appealed against both conviction and sentence.

The deceased lived at Bbale village. She lived with a little girl, 7 years 1d, called Nantongo. The 1st appellant lived on the same village as the deceased. He lived in his parents' home about 200 yards from the deceased's house. The 2nd appellant lived at Kimanyi village. Tue deceased was killed on the night of 2nd February, 1977. She was strangled with a red nylon ribbon. On the night the deceased's property was stolen. According to Nantongo, whose statement was admitted, during the night of 2nd February, 1977, when she and the deceased were about to take supper, three men, whom she did not know, entered their house and ordered her to enter into one of the rooms. She was locked in one of the rooms. Shortly afterwards she heard the three men attacking the deceased. She did not recognise any of the attackers.

The deceased was found dead early in the morning of 3rd February, 1977, by a little girl called Najjuma whose statement was admitted. She had gone there to collect her school—mate, Nantongo, with whom she used to go to school. The body was lying at the back of her house. It seems quite obvious that she was killed by the thieves who stole her property. Her body was removed from the scene by D/Cpl. Amuria (P.W.8) to Masaka mortuary. There, Dr. Lule examined it and certified that the cause of death was due to suffocation.

The two appellants were arrested by D/C Ekou (P.w.11) and D/C Gamba (he was not called as a witness) at 4 p.m. on 3rd February, 1977, in Masaka Municipality. At the time of their arrest, the 1st appellant was carrying a Sanyu radio, and the 2nd appellant was carrying a bundle in which he had three gomesis. The radio (Exh.p.1) and three gomesis (Exh.p.3) were properly identified by Walakila (P.w.6) and Nakagwa (P.W.7) respectively, as the property of the deceased. On 8th February, 1977, each appellant made an extra— judicial statement before a magistrate. In his statement, the 1st appellant stated that on 2nd February, 1977, Mulefu (2nd appellant) and Kayongo suggested to him that they should go and rob the deceased, but he declined. The next day on rd February, he met them again at 2 p.m. and they reported to him that they had a successful trip and got the property. The 2nd appellant stated that on 1st February, 1977, he agreed with Ssemwogerere and Kayongo to go and steal the property of the deceased. They went there and hid in a forest the whole day. On 2nd February, 1977, at 7 p.m. they went to the deceased's house. They found her going to the kitchen, Kayongo held her, Ssemwogerere entered the house and took out a radio and a suitcase, Kayongo left the woman and entered the house to

look for property. He himself did not enter the house. He remained hiding at the corner of the house. He did not know that the woman had been killed,

At the trial, the admissibility of these statements was challenged on the grounds that they were not voluntary, but the learned trial judge ruled that they were admissible.

There was no eye witness in this case, the case against the appellants depended on circumstantial evidence. The learned trial judge, in agreement with the assessors, found that the two appellants must have been the thieves who stole the deceased's property. He invoked the doctrine of recent possession and convicted him as charged.

Mr. Rwankole, counsel for the appellants, argued two main grounds of appeal on behalf of the appellants. In his first ground of appeal he made three submissions. His first submission was that the learned trial Judge erred in law to act on the extra-judicial statements of the appellants when the totality of the evidence and in particular the unexplained injuries on the appellants negatived their voluntariness. In this connection, he referred to the medical evidence to support his submission that the appellants were beaten by the police in order to extract the statements from them. His second submission was that the learned trial judge erred to hold that the said statements were confessions when in fact they do not admit the offence charged. His third submission was that the so-called confessions were retracted. He submitted that the trial judge should not have acted on retracted confessions without corroboration. Mr. Kabatsi, Counsel for the State, conceded that not much weight should have been attached to these statements. He submitted that both appellants sustained injuries when in custody of the police and complained consistently that they were threatened in making the statements. In his view it cannot be said that at the time they made the statements the threat had been removed. However, Mr. Kabatsi argued that the learned trial judge did not base the conviction on the extra-judicial statements of the two appellants.

At the trial the admissibility of the extra-judicial statements was challenged. A trial within a trial was held. The prosecution called the grade 2 magistrates, Messrs Nsubuga and Tagayika who had recorded the statements from the appellants. The defence called the two appellants and another witness, James Serwada, a medical assistant attached to Masaka Prison. In his evidence, at the

trial within a trial, the 1st appellant alleged that, while he was at the police station, he was beaten at the back and in his face with piece of wire while he was in a barrel. He alleged that D/Cpl. Amuria was one of those who assaulted him. He told him what to say and threatened him that if he changed the story he would be beaten again. The 2nd appellant alleged that, at the police station, he was put in a barrel with barbed—wire, he was told to sit but he could not sit because of the barbed—wire. Many policemen threw bricks at him. He raised an alarm but he was told they would kill him. He was taken out of the barrel and whipped with wire. He a11eed that D/Cpl. Amuria called him to his office, got a panga and cut him in the ribs. He too alleged that a police detective told him what to say about the offence.

James Serwada testified on behalf of the 2nd appellant that on 11th February he treated the 2nd appellant. He had septic wounds in his back. They were many wounds. D/Cpl. Amuria testified for the prosecution that the appellants were not assaulted at any time by him or any other person at the police station. He said that he examined the two appellants on the 23rd February, 1977, and saw no scars on them.

The appellants' allegations of torture are corroborated by the evidence of James Serwada and Dr. Lule. Dr. Lule examined the two appellants on 23rd February, 1977, on the same day on which D/Cpl. Amuria claimed he had examined them and found no scars. Dr. Lule found that the 1st appellant had two lung scars on the right and on the left side of the back which were both recent. He had another scar on the left side of the chest and a recent scar on the right elbow. His examination of the dad appellant revealed that he had multiple healing wounds all over the back. The doctor's findings show that D/Cpl. Amuria did not tell the court the truth at all. The prosecution did not call the arresting officer D/C Ekou (P.W.l1). May be it was not necessary to call him since the appellants did not allege that they were assaulted at the time of, or shortly after, their arrest. Both made it clear that they were assaulted when they were in detention at the police station.

Despite the doctor's findings which are corroborated by Mr. Serwada, the learned trial judge ruled that the statements were admissible. That they were made voluntarily by the appellants, In view of the medical evidence supporting the appellant's allegations of torture, we are left in some doubt whether the statements were actually voluntary.

Mr. Rwankole's last two submissions that the statements were not confessions and even if they were they were retracted and should not have been acted on without corroboration can be disposed of briefly. The statement of 1st appellant is exculpatory. It does not admit the offence charged. It is not a confession. The statement of the 2nd appellant is exculpatory too. As the learned trial judge put it, each accused tried to put the blame on the other and to show that he did not take any active part in the theft. It does not admit the offence charged. It was not a confession either. The appellants repudiated the statements at the trial. No weight should have been placed on these statements.

However, the learned trial judge did not base the conviction on the statements. First he made a finding that the appellants were the thieves who stole the property. Then he proceeded to discuss whether the two appellants had a common intention to kill the deceased. In his discussion of common intention, be made use of these statements and said that he was convinced they were in essence true and they reveal that the two appellants were present at the home of the deceased on the relevant evening. He also looked for corroboration. This appears to suggest that he relied on them. We have carefully perused the judgment and we are satisfied that the conviction is based on the doctrine of recent possession. His discussion of these statements after he had made the finding that the two appellants were the thieves in no way influenced his decision. In any case, we think it was not necessary to resort to the statements in order to support a finding of common intention. Once it is proved that the murder was committed in the course of a robbery, then, all those who participated in the robbery are equally responsible. In such a case two essential elements which have to be determined are (1) whether the murder of the deceased was committed in the prosecution of a common unlawful purpose of the gang and was a probable consequence of the prosecution of that purpose, and (2) whether the individual appellants have been shown to have been members of that gang showing the common purpose. In those circumstances each member of the gang is guilty of murder. See Andrea Obonyo vs R. (1962) E.A. 542 and Ezera Kyabana-maizi and others v R (1962) E.A. 309. This ground fails.

In his 2nd ground of appeal, Mr. Rwankole submitted that the learned trial judge erred in law to convict the appellants on the basis of the doctrine of recent possession is the absence of any evidence that the items exhibited could have come into appellants possession from an intermediary source consequently when the possibility of their being mere receivers has not been

excluded. He argued that there was no evidence against the 1st appellant that he was in possession of the stolen goods at the time of his arrest. As for the 2nd appellant, he argued that the articles found in his possession were easily marketable; there was ample time between the theft and the time of his arrest for the property to pass from the thief into his possession. He submitted further that the failure by the learned trial judge to find the appellants mere receivers was a miscarriage of justice.

It is well established that a court may presume that a man in possession of stolen goods soon after The theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession See Kantilal Jivraj & Another vs R. (1961), E.A. 6 at p. 7. See also R vrs Jassani s/o Mohammed (1948), 15 E.A.C.A. 121. This is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and Incapable of an explanation upon any other reasonable hypothesis. See Director of Public Prosecutions vs Neisar (1958), 3 757 at p.766. Where it is sought to draw an inference that a person has committed another offence from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt, If, in such a case, a finding that he stole the articles de1nds n the presumption arising from his recent possession of stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded. The inference that he stole the articles must be irresistible. See Andrea Obonyo vrs R. (1962), E.A. 42 p. 549 para 1. Again it was said in R vs Bakari s/o Abdulla (1949) 16 E.A.C.A. 84 that cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held to support a presumption of murder if all the circumstances of a case point to no other reasonable conclusion. The learned trial judge carefully considered these principles and correctly applied them to the facts of this case. He did not, however, state in clear terms that the possibility that they were receivers had been excluded, but his finding makes it abundantly clear that he considered such a possibility and excluded it.

With these principles in mind we will consider the evidence to see whether the possibility that the appellants were mere receivers could be excluded. The theft was proved beyond reasonable doubt. The dispute is whether the appellants were the thieves or part of the gang which raided the deceased’s house. The theft occurred on 2nd February, 1977 at about 7.30 p.m. According to

Nantongo the gang consisted of three persons. They ordered her to enter one room and they locked her in. Soon afterwards she heard them attacking the deceased. The next day the deceased was found dead. His property was also stolen. On this evidence there is no doubt that she was murdered by the thieves.

The appellants were arrested by n/c Ekou on 3rd February, 1977, at about 4 p.m. this was exactly 20.30 hours after the theft. At the time of his arrest, the 1st appellant was carrying a radio which was properly identified to be the property of the deceased. When D/C Ekou asked him where he got it from, the 2nd appellant replied that it belonged to the 1st appellant. The 1st appellant gave no explanation of his possession of the radio. On this evidence, we disagree with Mr. Rwankole's submission that the 1st appellant was not found in possession of some of the recently stolen goods, At the trial, the 1st appellant gave no explanation of how he came to possess the Sanyu radio Exh. P.1. He was content with giving an account of his arrest and of his ill-treatment during this detention in the police station. If he was a mere receiver, it is difficult to believe that he would have failed to put forward some explanation to account for his possession in order to demonstrate his innocence. The 2nd appellant was, at the time of his arrest, carrying a bundle which contained 3 gomesis Exh. P3, the property of the deceased. When he was questioned by D/C Ekou about it, he told him that the property was his. He did not give him an explanation as to how he came to possess them. At the trial, the 2nd appellant too did not give any explanation to account for his possession. He did not even say anything about them. He, too, was happy to narrate the events of his arrest and give an account of what happened to him when he was in detention at the police station. If he was a mere receiver, it is difficult to believe that he would have failed to explain how he came to possess those articles. The two appellants were required by law to furnish such explanation but they failed to do so. It was contended, on their behalf, that there was ample time for the property to come into their possession from an intermediary and they should have been held to be mere receivers. These appellants were found in possession of property recently stolen 20.30 hours after the theft. This was not too long a period following the theft within which these articles could have passed from hand to hand. We considered this argument carefully and we agree with the learned trial judge that the two appellants were part of the gang which stole the deceased's property.

We are fortified in this conclusion by the failure of the appellants to give an explanation to account for their possession. We think such inference that the appellants stole the property is inescapable and that the possibility that they were mere receivers can safely be excluded. For this reason this ground also fails. The appeal of each appellant is dismissed.

DATED at Kampala this 25th day of September 1978.

Sgd: (MOHAMMED SAIED)
CHIEF JUSTICE.

Sgd: (P. NYMUCHONCHO)
JUSTICE OF APPEAL

Sgd: (F. M. Ssekandi)
JUSTICE OF APPEAL.

Mr. Rwankole of Rwankole 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