THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: **HON. MR. JUSTICE C.M. KATO, JA**
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO.89 OF 1999.

MWERU ALI
ABBAS KALEMA
SENKUMBA SULAIMAN::APPELLANTS

VERSUS

UGANDA::RESPONDENT

(An Appeal from the Judgment of the High Court (Okumu-Wengi J.) dated 22nd July, 1999 in Criminal Session Case No. 65 of 1990 at Kampala)

JUDGEMENT OF THE COURT

Mweru Ali, Abbas Kalema, Senkumba Sulaiman in this judgment referred to as the first appellant, the second appellant, the third appellant respectively and together as the appellants were jointly indicted with two others for aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code Act. The appellants were convicted as charged and were sentenced to death. The two others with whom they were tried were acquitted and set free.

The facts as accepted by the learned trial Judge were as follows. Mugisha Abbas Au, PW1, was an accountant/cashier of the Yugoslav Energo Project. The offices of Energo Project were at Plot 11 George Street, Kampala. On the 30th day of November, 1995, Mugisha Abbas Ali (PW1) went with his immediate boss, Zainan Matorich, to Barclays Bank Kampala Road to withdraw money for workers' salaries. They went to the bank in a saloon car which was driven by Hamis Luganda. Mugisha Abbas Ali (PW1) withdrew a sum of Ug. Shs. 25,000,000/= and put it in the briefcase. They returned to the Energo Project Offices together in the same ear. Mugisha Abbas

Ali (PW 1) sat in the back seat and had the brief case. Zainian Matorich sat in the front passenger seat. When they came up to the gate of their offices the driver hooted. Before the gate man opened the gate for them, they were confronted by attackers who emerged from a car which was parked about 50 metres away. One of the attackers had a gun which he pointed at Matorich. The attackers ordered them to surrender the briefcase and Mugisha Abbas Ali (PW1) complied. The attackers went to their car with the brief case containing all the money and immediately drove off. The incident lasted about five minutes. During the attack PW1 was able to recognise the first and the second appellants. Mugisha Abbas Ali (PW1) reported the robbery to Kampala Central Police Station. Soon after the robbery, the robbers shared their loot at Nsambya and returned the gun they had used for safe custody at the home of one Sula at Katwe. On the same day in the evening Mayanja who was one of the accused persons at the trial, was arrested because he was driving the car the robbers had used in the robbery.

On information received from the first appellant, Detective Corporal Charles Ogwal, PW4, and Detective Constable Wasswa, PW6, in the company of the first appellant proceeded to Katwe to the home of one Sula. The first appellant directed them to that home. A gun number 6710, a magazine and ten rounds of ammunitions were recovered. The first appellant told the investigating officers that he had obtained the gun from PC Kisale of Kiboga Police Station and that it was the gun that was used during the robbery. The gun, magazine and ten rounds of ammunitions were exhibited at the trial as exhibits P3, P3M and P4 respectively. The exhibits were examined by Francis Gacharo, PW5, a ballistic expert. He made a report that the gun was a dangerous weapon, and it was capable of discharging ammunition. The ammunitions were live. The owner of the house where the gun and ammunitions were found relocated his residence from Katwe to Namasuba where PW6 trailed him. As the investigating officers of the case failed to arrest him at his new home in Namasuba, they requested Namasuba Police Post to arrest him. Eventually on the 10th April 1996, the Local Defence Unit personnel (LDU) arrested the third appellant from his home at Namasuba and handed him to Namasuba Police Post. He was re-arrested by Det/Sgt. Charles Ogwal (PW4) who took him to Kampala Central Police Station. The second appellant was arrested by the police at Masaka who had information that he was wanted in the case of robbery. PW4 re-arrested him from Masaka and took him to Kampala

Central Police Station. The second appellant had recently bought a saloon car registration number UBK 683.

On the 21st December 1995 at Kampala Central Police Station an identification parade was conducted by D/AIP Raymond Otim, PW2. During the identification parade, PW1 identified the first appellant and one John Mayanja, who was acquitted by the High Court, as the people who were among the robbers who attacked him. During the trial a charge and caution statement which was made by the first appellant was admitted in evidence without challenge and was marked exhibit P7. A charge and caution statement of the second appellant was admitted in evidence after conducting a trial within a trial. It was exhibit P2. The charge and caution statements of both the first and second appellants gave detailed accounts of the preparation and the execution of the robbery. In both statements the makers implicated themselves as well as each other.

In their defence the appellants gave evidence on oath. The first appellant totally denied participating in the offence and leading the police to the home of the third appellant. He also denied telling the Police anything about the gun. He stated that he made the charge and caution statement because of torture by the police.

The second appellant also denied the offence. He testified that he was arrested at Masaka because he had bought a new car. He stated that he is a Munyarwanda and that Patrick Rwenduru, PW3, who recorded the charge and caution statement from him was speaking Luganda, which language the second appellant did not understand. The statement was recorded in English. He had made other statements to the Police which were torn and he was forced to sign the one presented in court.

The third appellant's defence was that he was not Sula referred to by the two appellants in their charge and caution statement. His name was Senkumba Sulaiman and not Sula. He set up also a defence of alibi, that 30/11/1995 he was away in Kagando hospital attending to his sick wife, Fatuma Nakamya, who passed away when he was in prison.

The learned trial Judge accepted the prosecution case, rejected their defences and convicted the three appellants with the result already stated.

Mr. Edward Ddamulira Muguluma, learned counsel for the first appellant, originally filed a memorandum of appeal containing three grounds. At the hearing of the appeal he abandoned the second ground and the two grounds which remained were:-

"(1) That the Learned Trial Judge erred in law and in fact in accepting and relying on IDENTIFICATION parade evidence and thus came to a wrong conclusion.
(2) ……..
(3) That the Learned Trial Judge erred when he failed to evaluate evidence and thus arrived at a wrong decision."

Mr. Muguluma's complaint in ground 1 was that the identification parade was improperly held. Counsel contended that almost all the rules which govern the procedure of holding identification parades as laid down in Ssentale V Uganda (1968) E.A 365 at 369 were not observed. He also complained that the parade was conducted in the basement at the police station. Mr. Vicent Okwanga, learned Senior State Attorney, submitted to the contrary. He urged this Court to take judicial notice of the geography of Kampala Central Police Station. He submitted that when one enters the police station from the front the back yard is at the basement. That is where the identification parade was held and not at the basement or in the cells, he argued. The volunteers who participated were only eight.

From record of the proceedings we observe that the witnesses who testified about the identification parade were PWI and PW2. Their evidence contradicts each other. PW2 testified that he organised an identification parade of 8 volunteers who almost had physical features resembling each other and took them to the police yard. The first appellant took the position in the line of his choice. He was picked by PWI. PW1's testimony is to the effect that he identified the first appellant from many suspects about 25. He testified as follows.

"At the basement there were so many suspects and they asked me to identify the men who attacked us"

This is clear evidence of contravention of rule ii in Ssentale's case (supra) which provides:-

“In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don’t say, “pick up somebody” or influence hint in any way what so ever”

In his judgment the learned trial Judge held that the identification parade was properly conducted and at P. 25 of his judgment stated as follows:

“I also do not believe that the identification parade in which Mweru and Mayanja had been picked out were misconducted as alleged by him and Mayanja. The officers who carried it out had no reason to crucify a fellow police man for no fault, or to stage him when the accused persons incited into a parade from which they were identified”

With due respect to the trial Judge, that the police acted in good faith and did not have any reason to implicate their fellow policeman is no reason to dispense with the rules of procedure for holding an identification parade or to presume that rules were followed. We are of the view that the identification parade was improperly conducted. Ground 1 therefore succeeds.

The thrust of Mr. Muguluma’s argument in ground 3 was that had the learned trial Judge evaluated the evidence properly he would have acquitted the first appellant. Learned counsel complained about the arrest of the first appellant, his dock identification by PW1, the giving of information to police which led to the arrest of other suspects, the discovery of the gun and the inconsistencies in the prosecution case.

On arrest counsel contended that the first appellant was in police custody where he had been taken by the military intelligence personnel on a charge of murder. Those who arrested him did not give evidence at the trial. With due respect to counsel, we are unable to appreciate this argument. Even if the first appellant was in custody as a suspect on a murder charge there is nothing in law to prevent the state to charge him with another crime different from the one he was originally arrested for. The learned trial Judge’s duty was only to evaluate the evidence on the charge of robbery for which the first appellant was being tried. We are also unable to appreciate counsel’s argument that the dock identification of the first appellant by PW1, was of little or no value. In our view, PW1 who was robbed had to identify the first appellant in court as

the person or as one of the people who robbed him. In that way the appellant would be connected to the offence he was indicted for.

Regarding the arrest of other suspects and the discovery of the gun, exhibit P3, Mr. Muguluma contended that it was not as a result of information which the first appellant gave to the police. In reply Mr. Okwanga, Senior State Attorney, contended that it was the first appellant who gave all the information to the police and led them to Katwe which conduct was incompatible with his innocence. The learned trial Judge found as a fact that the first appellant gave information to the police and led the police to Katwe at the house of one Sula. In consequence of his revelation other suspects were arrested. The first appellant also told the police that the gun, exhibit P3, was obtained from PC Kisale of Kiboga police station and it was the very gun that was used during the robbery. The trial Judge relied on section 29A of the Evidence Act and admitted in evidence the first appellant's statement to the investigating officers which he treated as an admission leading to the discovery of a fact.

We agree with the trial Judge's finding on the facts and application of the law to those facts. We also note that during the trial, PW4 and PW6 testified how the first appellant gave them information and led them to Katwe to the house of one Sula where a gun was recovered. Their evidence on those points was not challenged in cross-examination.

The inconsistencies complained of by counsel were the colour of the car which was described by PW1 as Toyota starlet black and by other witnesses as Toyota starlet white and the registration of the car which was given as UPO 329 and UPO 509. In counsel's view these inconsistencies especially about the colour of the car meant that the only eye witness (PW1) was not able to recognise the first appellant. The learned trial judge found that the inconsistencies were not major and did not affect the evidence. We agree. The law on inconsistencies is that minor inconstancies which do not go to the root of the matter and can be explained away may be ignored if they do not point to a deliberate intention on the part of the witness to tell lies to court. **See Uganda V Dusman Sabani (1981) HCB1.** The inconstancies in this case were of such a nature. PW1 could have been mistaken about the colour of the car, but was sure of its number which led to the arrest of Mayanja who was driving it in the evening of the day of the robbery. Ground 3 must fail.

The learned trial judge when convicting the first appellant relied heavily on his extra judicial statement which amounted to a confession as it implicated himself in the commission of the crime and also implicated others. The confession was admitted in evidence without challenge. In that confession the first appellant gave a detailed account of the preparation and the execution of the robbery. He stated that he attended the preparatory meeting with several other people at Owino market. He obtained the gun which was used in robbery from P.C. Kisale of Kiboga Police station. After the robbery he received his share of the proceeds. As the first appellant had in his defence denied making the confession, the learned trial Judge treated it as a retracted confession and rightly so, in our view, and looked for corroboration. The confession was true. See **Tuwamoi V Uganda (1967) EA 84.** He found corroboration of the confession in the discovery of the gun, exhibit P3, the conduct of the appellant which led to the arrest of the other suspects and the fact that he had been identified by PW1 at the time of the robbery. The trial Judge also relied on the confession of the second appellant. We cannot fault the learned trial Judge on these findings.

We now turn to the appeal of the second and third appellants. The joint memorandum of appeal contained six grounds, namely:-

"1. That the trial judge erred when he decided that conditions were Favourable for correct identification when there was actually a Case of mistaken identity among the Accused Persons.

2. That the trial judge erred when he decided that Sulaiman Senkumba was the same as Sula.

3. That the trial judge erred when he decided that Sulaiman Senkumba was properly linked to the crime by virtue of his arrest at Namasuba.

4. That the trial judge erred by rejecting Sulaiman Senkumba's defence of alibi when no evidence was adduced placing him at the scene of crime.

5. That the trial judge erred in law by not following the chain of evidence from arrest to prosecution.

6. That the trial judge erred in law by admitting the appellant's confessions made involuntarily."

Ground 6 concerned the second appellant alone and it is the only ground which counsel argued in respect of his appeal. We shall deal with the appeal of the second appellant first. Mr. Matovu argued that the learned trial Judge was wrong in admitting in evidence the confession of the second appellant. Counsel submitted that the confession was made involuntarily by the appellant and was recorded by Rwenduru, PW3, in Luganda which language he did not understand. In reply Mr. Okwanga submitted that the confession by the second appellant was made voluntarily and was admitted in evidence after holding a trial within a trial.

The learned trial judge based the conviction of the second appellant on his confession and the confession of the first appellant which implicated him. In his confession the second appellant gave a detailed account of the preparation for the robbery and the part he was assigned to carry out. The second appellant contributed seed money to start off the robbery. He waited at the gate of Energo Project offices and grabbed the brief case. After the robbery he bought a car registration number UBK 683. The judge found that his confession was true and was amply corroborated by the fact that PW1 saw the third appellant wielding a gun and ordered them to surrender the briefcase. In addition to that, the second appellant bought motor vehicle UBK 683 in December 1995 which was soon after the robbery.

We agree with the trial judge's finding. The second appellant's extra judicial statement was indeed a confession as he implicated himself and narrated all the preparations and the execution of the robbery. The first appellant's statement also was a confession and the second appellant was implicated therein. It was rightly taken in evidence against him. See **Festo Androa Asenua & Another V Uganda, Supreme Court Criminal Appeal No. 1 of 1998 (unreported) and Section 28 of the Evidence Act.** It is desirable that a charge and caution statement be recorded in the language used by the suspect and later translated into English. However failure to do so does not render the confession inadmissible or worthless. Ground 6 must fail.

We now consider the appeal of the third appellant. In his address to us on ground 1, Mr. Matovu submitted that the circumstances were not favourable for correct identification Counsel argued that the inconsistencies between the testimony of PWI who said that the car was black in colour and the evidence of other witnesses, who said that the car was white indicated that there was a

possibility of mistaken identity. Mr. Vincent Okwanga submitted to the contrary. As we have already stated in the case of the first appellant, the learned trial Judge was right to find that the circumstances were favourable for correct identification of the third appellant. The offence was committed in broad day light and it took about five minutes. Ground 1 therefore must fail.

The complaint in grounds two and three is the identity of the third appellant Sulaiman Senkumba and we shall handle them together.
Learned counsel submitted that the third appellant was Sulaiman Senkumba and not Sula. The evidence that when the house of Sula at Katwe was searched and that the said Sula relocated from Katwe to Najjananku1j fell far short of proving that the third appellant was that person. Counsel argued that the prosecution should have called the landlady/landlord or some other responsible person to prove that the third appellant was the person who rented the house at Katwe where the gun, exhibit P3, was found. Counsel argued further that the confessions of the first and the second appellants refer to Sula and not Sulaiman Senkumba He also submitted that the evidence of the police officers is to the effect that one Sula Bulega was arrested, and not the third appellant. Learned Senior State Attorney supported the trial Judge's finding that Sula was the third appellant referred to in the confessions of the first and the second appellants. His relocation from Katwe to Najjanankumbi or to Namasumba was caused by his learning of the news that the first appellant had been arrested and the police were looking for him.

We agree with the learned trial Judge that the third appellant is the same man who was identified by PW1 at the scene of crime and in court as being one of the robbers. He is also the same man referred to by the first and second appellants in their confessional statements as Sula. The mere fact that the prosecution did not call the local council officials who arrested him, in our view does weaken the prosecution case. Whether the third appellant was arrested at Namasumba or at Najjanankumbi in our view, is immaterial. Accordingly grounds 2 and 3 also fail.

The argument of Mr. Matovu in ground 4 was that the learned trial judge did not at all consider the defence of alibi which was put forward by the third appellant. Had he done so, he would have found that the alibi was not disproved by the prosecution evidence. Mr. Okwanga for the respondent supported the trial judge's finding that the alibi had been destroyed by the

prosecution evidence which showed that he actually participated in the crime. We agree with Mr. Okwanga on this point. The evidence of PWI and the confessional statements of the first and second appellants put the third appellant at the scene of crime. His defence of alibi cannot therefore be true. Ground 4 also fails.

Submitting on ground five, Mr. Matovu contended that the trial Judge did not take into account the circumstances of the arrest of the third appellant. Counsel submitted that the third appellant was arrested either at Najjanankumbi or Namasuba but no evidence was called as to who had arrested him. In his view there was a lacuna in the prosecution evidence in that respect. In our view this criticism of the trial Judge is not well founded, because of what we have stated above in grounds 2 and 3. Ground 5 too fails.

We find that there was enough evidence to convict all the appellants as charged. Accordingly we find no merit in their appeals and we dismiss them.

Dated at Kampala this 8th Day September 2000

C.M. Kato
JUSTICE OF APPEAL

S.G. Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL