THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 33/2005

CORAM:

HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE C.K. BYAMUGISHA, JA

SYSON MUGANGA :::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::: RESPONDENT

(Arising from HCT-05-CR-CN-0022-2003)

JUDGEMENT OF THE COURT

This is a second appeal. On 4-04-2005, the High Court at Mbarara (P. Magamba J.) confirmed and upheld the conviction of the appellant for the offence of attempted murder contrary to ***sections 204*** and ***388*** of the ***Penal Code Act*** and the sentence of life imprisonment imposed on her by the Chief Magistrate, on 6th April 2003.

Hence this appeal.

The facts were that on the night of 28th July 2001, the victim, Prudence Kobujinya was at her house at Muntuyera High School, when at about 9:00 p.m., a night watchman at the school Byekwaso Wilson (P.W6) saw the appellant being dropped at the school gate by a boda boda (motor cycle rider), Twebaze (P.W5). The appellant was carrying a polythene bag. Soon thereafter the victim who was inside her house heard a knock at her door when she went to open she did not see anybody. Shortly thereafter, however, as she was closing the door, the appellant emerged from the corner of the house with a jug and a bottle. She immediately splashed out a corrosive substance and ran away.

The complainant made an alarm while running to a neighbour who saw the burns on her body and rushed her to a nearby clinic. She was thereafter taken to Mbarara Hospital.

The appellant set up an alibi, by way of defence, which was rejected by the trial court.

Mr. Dusman Kabega learned counsel appeared for the appellant while Ms. Joan Kagezi, Senior Principal State Attorney (SP/SA) was for the respondent.

The memorandum of appeal, dated 28th April 2008, comprises only three grounds namely that:

"1. The learned Judge erred in law when he merely confirmed the sentence of life imprisonment against the appellant without making a fresh evaluation of the evidence and mitigating factors as a first appellate court is required to do.

2. ***The learned judge erred in law when he failed to find that the substance used 'on the appellant' was not what was examined by the expert and exhibited in court thereby leading to a wrong finding.***

3. ***The trial had a major procedural irregularity which rendered it a nullity or a mistrial."***

Mr. Kabega only argued ground 1 and had sought to argue ground 3 with the leave of court, which was declined. It had not been raised in the lower court. This being a matter of mixed law and fact needed to be substantiated by evidence in the lower courts. This court could, thus, not entertain it.

Regarding ground 1 Mr. Kabega submitted that as a 1st appellate court, the learned judge failed to carry out his duty of subjecting the evidence on record to a fresh scrutiny, otherwise he would have concluded differently. He would have passed a lesser sentence than the maximum he imposed. Citing the ***State V Makwanyane 1995 CCT/3/94 CC*** of ***South Africa – page 46***, he pointed out that the learned judge failed to consider factors that were relevant to the sentencing process, otherwise this case did not warrant a maximum sentence.

He prayed court to substitute the life sentence imposed with a lesser term. Learned counsel submitted that the five years the appellant had already served in prison was a sufficient deterrent to have reformed her. She would therefore be entitled to an immediate release.

Ms. Kagezi, the learned SP/SA supported both the conviction and sentence. She pointed out that the learned judge properly evaluated the evidence and the conclusion reached was justified. The judge took into consideration the mitigating factors as stipulated under ***rule 32(2)*** of the rules of this court. She prayed court to consider the reasons given by the trial magistrate (pp 99 of judgement line 20). The aggravating circumstances of the case rendered the appellant not fit for any other sentence. Ms. Kagezi thus asked the court to take into consideration the injuries sustained by the complainant and uphold the sentence.

In rejoinder, Mr. Kabega objecting to Ms. Kagezi's prayer asserted that the trial magistrate only went by the complainant's sight and not the medical evidence. She did not consider the mitigating circumstances. He reiterated his prayer to reduce the life sentence to five years which in his view was a sufficient deterrent.

Rule 32(2) of court provides:

"32(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the

inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."

With the above in mind Mr Kabega's complaint was that the appellate judge did not evaluate the evidence of the lower court as he was mandated to do.

This criticism is not born out by the facts on record. The judgement of the learned judge indicates an exhaustive examination of each witness's evidence on all issues, involved.

On identification of the appellant, the learned judge went through the evidence of Deus Twebaze, (PW5), a boda boda cyclist, who dropped the appellant at the school grounds on the night in question. This witness identified the appellant due to his prior acquaintance with her, and specifically described her clothing as black pants and a black top. This was repeated by, Wilson Byekwaso (PW6), the school watchman, who had seen the appellant being dropped off by a motor cyclist (boda boda), between 9 pm and 9:30 pm, outside the school gate where the complainant resided. He identified her with the help of an electric light which illuminated the appellant's face. He also described her attire as a black pair of trousers and a black jacket.

The complainant Kobujinya (PW4) testified that she stepped out of her house upon suspicion that someone had been tampering with the door. She saw a person approaching from the corner of her house. She identified that person as the appellant. This was with the aid of moonlight and the electric light from her living room. All this illuminated entrance to her living room, giving her a clear view of the appellant.

Both the trial magistrate and the appellate judge closely examined the identification evidence and duly cautioned themselves as to the risks of an identification when circumstances are difficult, relying on ***Nabudere & another v Uganda (1979) HCB 77*** for guidance

Additionally, the complainant testified that the appellant was no more than four metres away from her at the time of the attack, making it easier to identify the appellant as Syson Muganga. She had known her before, as a contemporary at Bweranyangi Girls Senior Secondary School. While the appellant was in senior 3 the complainant was in senior 1. The two had met again in

Mbarara in early 2001. In fact the appellant and her husband had once given her a lift back to Kitunga High School.

This proximity was supported by Cpl Warren Mande's statement. Cpl Mande (PW13) visited the scene of crime (which had been preserved) and found some liquid splashed on the door and the cement floor at the front of the house, some of the liquid was inside the room and on verandah. This evidence lends credence to the victim's testimony that the attacker moved fairly close to the door before she splashed the liquid on Kobujinya.

The appellant sought to challenge Kobujinya's evidence regarding the lighting in the house by presenting John Kwakahando's testimony (PW9) which was that the electric bulb in the sitting room was on the ceiling, and that the sitting room was not directly opposite the entrance as alleged by the victim. However, Cpl Mande's testimony deserves more weight since he was the only police officer to visit the scene. He narrated inter alia: ***"There was a simple ceiling and bulbs were up on the ceiling. The bulb was in the middle of the sitting room. The entrance into the room when you open the shutter goes to the left and the shutter lies across the partitioning wall. The opening is in the middle …."***

The evidence submitted regarding the appellant's facial injuries as a result of the corrosive substance lends further proof to the appellant's guilt. Her explanation for her facial scars cannot be supported by medical testimony. According to the exhibit Ex D1 (P.F.3), the scars could not be the result of injuries from a beating with sticks by her husband. She explained ***"The injuries healed but some scars and small holes are still there.***

…….. The scars expanded due to itching and up to now the scars are protruding on my body.

……. It isn't true that I got the protruding scars as a result of acid that was poured on me as Prudence said……."

The exhibit shows the injuries sustained in June 2000 were bruises on different areas of her body, and provide no explanation for the scars on her face. The Court can therefore safely infer that the liquid she threw at the victim must have splashed back into her face, for clearly the scars could not have been as a result of beating.

In her defence the appellant set up an alibi to the effect that on the night of the 28th July 2001, she was at her parents' home. It is well established that the state has the burden of disproving the appellant's alibi and placing her at the scene of crime for purpose of committing the offence. ***Uganda v Kayemba (1983) HCB 23; Uganda v Katushabe (1988) 90 HCB 59***. The learned trial Chief Magistrate was satisfied that there was sufficient evidence to place her at the scene of crime. After this incident the appellant disappeared for a whole year though she claimed to have gone to Nairobi as a tourist. AIP Okello Bura (PW8) was assigned to track her. After running an advertisement of her photograph in the Monitor Newspaper, the appellant reentered Uganda around 6-1-2002. This means she had evaded arrest since 28-07-2001 when the offence is alleged to have been committed. It is trite that a suspect's disappearance soon after the commission of the offence is corroborative of his guilt.

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No other inference can safely be made from such conduct than that of guilt and that she was trying to evade justice.

Evidence was given by the victim regarding the question of motive. She testified that the appellant had confronted her nursing a suspicion that she had been involved in a relationship with the appellant's husband. The victim's recollection of small details of the conservation with the appellant while in Mbarara makes it difficult to doubt this confrontation. She stated:

> " ***Last year 2001 I met accused in Mbarara. She was seated on the verandah of a building opposite Horizon bus park. I talked to her.***
> ***I asked her where her husband was and she told me he had gone to post office to draw some money.*** She said:

> " ***I hear these days every man is running after you. I hear these days you teach in Kitunga. I understand every man in Kitunga was panting after you …….. As I moved away from where I found the accused seated, I met Joseph; accused's husband …… He said if I was not in a hurry I would wait and they would give me a lift to the school. …….. I met them at around 2.00 pm ……***

At around 3.00 pm, they gave me a lift to school. Joseph was with the accused in the car."

I do consider that the sarcasm and hatred implicit in the appellant's words would in absence of anything else be sufficient to establish motive. It is however important to note that while motive is not dispositive in a criminal action, it can nonetheless provide useful evidence which might establish a clearer misunderstanding of the circumstances surrounding the event. See ***Tinkamanyire v U (1988 – 1990) HCB 5 …*** The existence of a motive makes it more likely that the suspect did in fact commit the offence charged.

Finally it was contended for the appellant that ***"the act of pouring and on another person is not proof of a positive intention to unlawfully cause the death of that person."*** Be that as it may, to establish the offence of murder, the prosecution must establish an intent to cause death. Under ***section 369*** of the ***Penal Code Act***, a person who begins to overtly act in execution of an intent to commit an offence, but does not fulfill his/her intention due to some exterior influence, is deemed to have attempted to commit the offence. The genesis of ***Section 369*** is the general principle that ***"a person is deemed to have intended the results of his actions."***
An intent to cause death must be inferred from surrounding facts such as the weapon used, how it was used, and the part of the body aimed at.
See ***R v Tubere (1945) 12 EACA 63***.

In the instant case, there is sufficient evidence that the accused acquired the corrosive substance and attacked the victim at night in her home, as Dr Robert Balikuddembe (PW10) testified: ***"I know Komujinya Prudence, a patient. I saw her in Mulago hospital in our ward as a patient of chemical burns. She is a patient I have known for the last 1 year plus 1 month. She was admitted as a patient of severe chemical burns and was getting treatment there by the time I was taken there. She is a patient who sustained injury as a result of a corrosive substance as evidenced by the type of injury she had at the time. The damages to the body were most likely caused by a corrosive chemical. Corrosive substances are those if poured on a body a skin will cause death of the body cells or on a metal, they can eat the material of that metal……..***

Hot water will burn the skin and the skin will be soft. But a corrosive substance will dry the skin – cause Eschor (i.e dead skin due to corrosive chemicals)……

This patient developed, as a result of the injury, a number of complications ……. Part the body involved eyelids, nose, mouth, cheeks, right earlob, neck, chest, including breasts, chins, plus armpits especially armside and back.

Size of injuries was extensive, most of the parts mentioned were quite extensive – were fully involved."

The corrosive liquid was thus clearly thrown into very vulnerable parts of the victim's body. The danger with which such a lethal substance was handled and used by the appellant points to the intent to recklessly cause the most heinous grievous bodily harm or death. I thus agree with the learned Chief Magistrate in her exhaustive analysis of the evidence and her decision that an intent to commit murder was established.

The medical report which Mr. Kabega sought to have rejected was made by Mr. Ben Khingi who was at the time unavailable to tender it in court as he was in the theatre carrying out an operation. However, PW10 who was familiar with his handwriting was able to identify his report, did explain contents thereof and tendered it in evidence under ***section 45 Evidence Act***.

S. 45 is not about absence from the country but being unable or unavailable to be in court to testify due to unavoidable circumstances of whatever nature.

In scrutinizing the record and the judgement of the High Court, there is not the slightest doubt that the prosecution established its case beyond a reasonable doubt. There is sufficient evidence and no miscarriage of justice has been detected. The evidence as to the identification of the appellant is overwhelming the motive behind commission of the offence duly established.

Regarding the sentence imposed, the learned judge observed:

> ***" A person convicted of attempted murder is liable to life imprisonment. That sentence is not mandatory. The learned Chief Magistrate gave her reasons for imposing that sentence, one of which was her vivid memory of the injuries that were inflicted on the victim.***

Iam persuaded by neither the circumstances of this case nor the arguments of counsel to disturb the sentence. The act was ghastly and revolting and no remorse whatsoever was shown by the appellant.

This appeal fails.

Conviction and sentence of the trial court upheld."

This court agrees with the learned appellate judge and the court below that this was an outrageously despicable and sadistic act. There are no circumstances which make it expedient that we should disturb this sentence.

We thus disallow this appeal and uphold the life sentence.

Dated at Kampala this 22nd day of September 2008.

HON. L.E.M. MUKASA-KIKONYOGO

THE DEPUTY CHIEF JUSTICE

HON. A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

HON. C.K. BYAMUGISHA

JUSTICE OF APPEAL