

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CASE NO: HCT – 00 – CR – SC – 0080 – 2002
UGANDA:.....PROSECUTOR
VERSUS
PC OYAT MARTIN:.....ACCUSED
BEFORE: HONOURABLE MR. JUSTICE MOSES MUKIIBI.

JUDGEMENT.

The accused, No. 33054 PC OYAT MARTIN, was indicted for murder contrary to sections 183 and 184 of the Penal Code Act. The particulars of the offence alleged that on or about the 28th day of July, 2001, along Ben Kiwanuka Street, No. 33054 PC Oyat Martin murdered one BABIGUMIRA GEORGE. On arraignment the accused denied the indictment where upon the prosecution called ten witnesses to prove its case. In his defence the accused made an Unsworn Statement but called no witnesses.

The Prosecution case is as follows:-

The accused was a police officer on night patrol duty along Ben Kiwanuka Street in Kampala City on 26/7/2001. The deceased was a student at Makerere University. At around 11.00 pm the deceased, who was in the company of a friend called Can Mark Lain (PW2), walked to Bata Mini Price Stage, along Ben Kiwanuka Street, to get a taxi back to Makerere University. While at the stage the accused, who was armed with a gun, chased the deceased towards Shell Ben Kiwanuka Street, and eventually shot the deceased, who was lying down, through the chest. The deceased was rushed to Mulago Hospital where he died on 28/7/2001.

In the same night of 26/7/2001 AIP Matte Godfrey (PW3), who was the Commander of Police vehicle No. UP 0180 where PC Oyat Martin (the accused) was supposed to be, started looking for the accused. He found the accused at Central Police Station (CPS) Kampala, at the counter, recording a statement. AIP Matte Godfrey (PW3) ordered the accused to surrender his gun No.

56-31006393, an AK 47 SMG which had a magazine containing 28 rounds of ammunition. The gun and its magazine were admitted in evidence as Exhibit P.5.

At 6.45 am on 27/7/2001 No. 25634 CPL. Amandi Manson (PW7) went to the scene of crime at Shell Ben Kiwanuka Street and he recovered a spent Cartridge. The said Cartridge, having Number 911 on top and Number 86 below, was admitted in evidence as Exhibit P.3.

The accused was arrested and detained at CPS, Kampala.

Dr. Nalwoga Haawa (PW1) a specialist Pathologist, on 28/7/2001, at the City Mortuary, carried out a Postmortem examination of the deceased's body. She prepared and signed a postmortem report No. 872/2001 on Police Form 48B dated 28/7/2001, in respect of the deceased, which was admitted in evidence as Exhibit P.1.

Gakyaro Francis (PW5) a Detective Superintendent of police (D/SP) and a Firearms and Ballistics Expert test fired an AK 47 gun No. 56-31006393 (Exhibit P.5). A used Cartridge with Serial Numbers 16 on top and 17 below marked F. 104/01 TC was admitted in evidence as Exhibit P.4.

Gakyaro Francis (PW5) carried out an examination of the gun (Exhibit P.5), twenty-eight rounds of ammunition in a Magazine, and a fired Cartridge case (Exhibit P.3). He made a report of Laboratory reference No. F.104/2001 dated 18/9/2001, which was admitted in evidence as Exhibit P.2.

CPL. Cheboriot John (PW9) who, on 26/7/2001, in the evening, issued to the accused the gun (Exhibit P.5) with 30 rounds of ammunition, tendered an entry No. 32 in the Armoury book made on the same day, relating to the accused which was admitted in evidence as Exhibit P.6.

On 13/8/2001 No. 20576 D/CPL. Opio Christopher (PW8) filled in Police Form 17A which he used to submit exhibits to the Firearms and Ballistics expert. Robbina Kirinya (PW10) a Government Analyst in Ballistics tendered the original PF. 17A marked Laboratory No.

F.104/2001 which was admitted in evidence as Exhibit P.7. Robbina Kirinya (PW10) received the Exhibits for examination from D/CPL. Opio Christopher (PW8) and she entered them in the Firearms Register on 14/8/2001. Her entry in the Firearms Register relating to Laboratory No. F. 104/2001 was admitted in evidence as Exhibit P.8.

On 27/7/2001 the accused was charged with Attempted murder contrary to section 197 (1) of the Penal Code Act and taken to court. He was remanded in Prison. Following the deceased's death the charge was amended to become Murder contrary to sections 183 and 184 of the Penal Code Act. On 19/9/2001 the amended charge was read to the accused and he was further remanded in custody.

The accused, in his Unsworn statement, denied committing the offence for which he was indicted. He admitted that on 26/7/2001 at around 11.50 pm he was armed with an AK 47 SMG and he proceeded to MiniPrice Bata while escorting a Taxi driver suspect from CPS, Kampala. He stated that at the time a gunshot was heard from the direction of Shell Ben Kiwanuka Street they (him and the Taxi driver suspect) were at the junction between William Street and Ben Kiwanuka Street. He stated that he rushed down to the scene where, at the entrance to Shell Petrol Station, he found an adult male wearing Civilian clothes lying down in a pool of blood. He stated that from that time he put all his efforts to saving the life of the victim. He put up a defence of an alibi. He stated that he only came to the scene as a good Samaritan and a police Officer mindful of his duty.

The prosecution had to prove beyond reasonable doubt the following essential ingredients for the offence of murder, namely:

- (i) That a human being by the name of Babigumira George is dead;
- (ii) That he died as a result of an Unlawful act;
- (iii) That the Unlawful act was accompanied by malice a forethought;
- (iv) That the Unlawful act was committed or participated in by the accused person.

The burden of Proof rests upon the prosecution to prove the guilt of the accused person beyond reasonable doubt.

See: WOOLMINGTON V.D.P.P.(1935) A.C.462 at P.481 Per Viscount. Sankey, L.C. SEKITOLEKO V. UGANDA (1967) E.A.531. OKETH OKALE and ANOR. V.R (1965) EA 553.

It was conceded by Mr. KUNYA HENRY, learned counsel for the defence on state brief, that:

- (1) Babigumira George is dead; and
- (2) That his death was Unlawfully caused.

Dr. Nalwoga Haawa (PW1) testified that she is a Medical Doctor and a specialist Pathologist working at Mulago and City Council Mortuaries. On 28/7/2001 she carried out a postmortem examination on a body which was identified to her by a mortuary tag as that of Babigumira George. She prepared a Postmortem Report (Exhibit P.1). The deceased was a male aged 20 years and his body was well nourished. As external injuries she observed:

Gunshot wound with an entry at the left chest wall in the axilla (the area under the arm pit on the left). The exit wound was on the right chest wall, just below the scapula bone (below the shoulder blade).

As internal injuries she found:

A ruptured diaphragm (a muscle which is at the lower end of the chest cavity which assists in breathing), a lacerated lung with blood in the chest cavity, and a lacerated transverse colon (the large intestine) which had been repaired.

She concluded that the cause of death was acute hemorrhagic shock secondary to injuries sustained from a gunshot wound.

She testified that she could tell the proximity between the offensive weapon and the body affected. She told court that in this case the offensive weapon was in close range.

In the circumstances I find myself in agreement with the views of the assessors that the prosecution has proved beyond reasonable doubt that the deceased is dead, and that his death was unlawfully caused.

Only the third and fourth ingredients were contested.

On the third element:-

That the unlawful act was accompanied by malice a forethought,

The prosecution relied on the evidence of Dr. Nalwoga Haawa (PW1), Can Mark Lain (PW2), No. 25121 PC Mafabi Godfrey (PW4) and No. 25634 CPL. Amandi Manson (PW7).

Can Mark Lain (PW2) testified that he saw six men pushing the deceased back wards across Ben Kiwanuka Street. The deceased was saying to them: "Leave me, what have I done to you?" The witness was shouting for help. He had seen a man who was wearing a long coat and holding a gun. The deceased was down on the ground at the exit of Shell Petrol Station and the men were kicking him. The witness heard gunshots and saw sparks. After the gunshots the men retreated and left.

The witness crossed the road and went to the deceased. He was lying on the ground at the exit of the Petrol Station. Blood was coming out of his side. There was a hole on the left side of the chest. The deceased said: " I can't believe this man has shot me. Yet I have done nothing to him".

No. 25121 PC Mafabi Godfrey (PW4) testified as follows:

Driver SPC Masette drove Patrol vehicle No. UP 0180 from the direction of Mini Price Bata. He informed the witness that some one had been shot at Shell Petrol Station, Ben Kiwanuka Street. AIP Matte (PW3) instructed them to board the vehicle and go to the scene. They found CPL. Amandi(PW7) at the scene. Members of the public were trying to put the victim in a Taxi.

The witness saw the victim when he was being transferred from the Taxi to their Police vehicle. The victim was a male. The witness saw blood on him around the chest. He and SPC Kaggwa Abudu rushed the victim on the Police vehicle to Mulago Hospital.

No. 25634 CPL. Amandi Manson (PW7) testified as follows:-

He moved down along Ben Kiwanuka Street to Shell which was the scene. He found someone lying in a pool of blood. It was a male adult. He observed the victim and saw a fresh wound on the left hand side of the chest. Some one who identified himself as Can Mark (PW2) said that he was a colleague of the victim. Can Mark (PW2) identified the victim as George Babigumira a fellow student of Makerere University. The victim was rushed to Mulago Hospital.

Intent to kill is an essential mental element in the crime of murder.

See: S. 186 (a) of the Penal Code Act.

Alternatively, it must be shown that the accused, at the time of committing the act charged knew that, in all probability, it would be likely to cause death of some person.

See: S. 186 (b) of the Penal Code Act.

Malice or the lack of it can be determined by examining the nature of the weapon used, the manner in which it is used, the parts of the body affected and the conduct of the assailant before and after the act.

See: Uganda V. Aramanzani Mubiru (1996) HCB 35 (Musoke- Kibuuka, J).

R.V. Tubere s/o Ochen (1945) 12 EACA 64.

Where the weapon used is a deadly or lethal weapon, or where a lethal weapon is used Savagely, or where the vulnerable parts of the body of the deceased were affected by the injuries, malice a forethought would be more readily inferred by the court.

See: Moses Kayondo V. Uganda,

S.C. Criminal Appeal No. 11/92 (Un reported).

Otim Gabriel Ogola V. Uganda S.C.

Criminal Appeal No. 16/93. (Un reported).

A gun cannot be considered to be a deadly weapon unless it is proved that at the particular time it was loaded and capable of discharging a bullet.

See: Uganda V. Kamusini s/o Seku and Anor. (1976)H.C.B.159.

The weapon must be shown to be deadly in the sense of being capable of causing death. If a gun is fired the court has no difficulty in holding that it is a deadly weapon.

In the instant case Can Mark Lain (PW2) testified that he heard gunshots and saw sparks. He saw a hole on the left side of the victim's chest. Dr. Nalwoga Haawa (PW1) observed, as external injuries, a gunshot wound with an entry at the left chest wall under the armpit of the victim.

So, I find as a fact that a gun was used by the assailant and that it was a deadly weapon. I also find that the left chest of the victim, which was affected by the gunshot, was a vulnerable part of the body.

Can Mark Lain (PW2) testified that the deceased was down on the ground and the men were kicking him. Then he (the witness) heard gunshots and saw sparks. This corroborated the finding made by Dr. Nalwoga Haawa (PW1) that in this case the offensive weapon was in close range. In the circumstances I find that the assailant used the gun, a lethal weapon, savagely on a person who was lying on the ground.

Can Mark Lain (PW2) testified that he saw six men pushing the deceased backwards across the road. The deceased was protesting and requesting the men to leave him alone. When the deceased fell down to the ground the men kicked him. Among the men was one wearing a long coat and carrying a gun. Then the gun was fired. From this evidence I make a reasonable inference that the group of men, including the one holding a gun, were carrying out wanton torture of the victim before the gunshot was fired.

Learned Counsel for the defence submitted that the intention of the assailant was not known and, therefore, it was difficult to determine the issue of malice a forethought.

The learned State Attorney, Mr. Bakora Arinaitwe Brian, submitted that whoever caused the death of the deceased had malice a forethought. He referred to the evidence of Dr. Nalwoga Haawa (PW1) and Can Mark Lain (PW2). He submitted that the killer of the deceased was armed with a gun, a deadly weapon. He referred to the evidence of Can Mark Lain (PW2) that the deceased was lying down, helpless and being beaten, when an armed man shot him. Counsel referred to the evidence of Dr. Haawa Nalwoga (PW1) that the deceased was shot through the left chest wall, under the armpit. Counsel submitted that this is a very dangerous area. He invited court to infer malice a forethought.

The learned State counsel submitted that if the intention of the assailant had been to arrest the deceased he could have:

- (i) Held the deceased by hands, since he was already on the ground; or
- (ii) Shot in the air to scare him; or
- (iii) Shot the deceased at the legs to disable him; or
- (iv) Sounded a verbal warning to the deceased.

Counsel submitted that the use of a gun, loaded with live ammunition, and firing it at a person on the ground, on a vulnerable part of the body, at such a close range was proof of malice a forethought. Counsel invited court to find that the prosecution had proved the 3rd ingredient beyond reasonable doubt.

The first assessor Ms. Stella Nyanzi Zziwa referred to the evidence of Dr. Nalwoga Haawa (PW1) and said that considering the weapon which was used and the part of the body affected the deceased had no chance of survival. However, she went on to state that the accused did not run away from the scene, and so his conduct was not that expected of a person having a guilty mind. So according to her malice a forethought had not been proved.

The second assessor Mr. Kiggundu Peter considered the evidence of Can Mark Lain (PW2), PC Mafabi Godfrey (PW4), CPL. Amandi Manson (PW7) and Dr. Nalwoga Haawa (PW1) who testified about an injury on the deceased's chest. He, particularly, considered the evidence of the Pathologist on the nature of injuries inflicted on the deceased, the delicate and vulnerable part of the body targeted, the weapon used, and the close range from which the assailant shot the deceased. However, he also considered the evidence that the accused was found at the scene of crime. The assessor had this to say:

“ He must have tried to give a helping hand. This is an indication that he had shot at the deceased mistakenly. In other words he came to realize that he had shot at a wrong person. He must have regretted his ruthless action”. The assessor concluded that the prosecution had not proved the third ingredient beyond reasonable doubt.

It is clear that both assessors looked at the accused as the assailant. In both cases the assessors came to this conclusion before considering the evidence which was adduced concerning the participation of the accused in the crime. Both assessors examined the conduct of the accused after the deceased had been shot at. At this stage neither of the two assessors considered the accused's evidence as to how he came to be at the scene. Nor did they analyse the prosecution evidence concerning the presence of the accused at the scene. With due respect to the assessors, I am of the view that they made inferences relating to the accused's conduct before establishing the primary facts concerning the accused's presence at the scene. Consequently, in my view, the assessors drew inferences which were not supported by any evidence.

This difficult exercise of drawing inferences from non-existent primary facts over shadowed the assessor's appreciation of the prosecution evidence of facts from which malice a forethought could be inferred.

I am not bound to follow the opinions of the assessors. Where the assessors' opinions are based upon a clear misconception of the law or facts, and this is reflected in their opinions after proper and careful direction by the trial judge he is perfectly entitled to differ giving his reasons for so doing.

See: Charles Komiwsa V. Uganda (1979) H.C.B. 86 (CA).

In the instant case, for the reasons I have given here in above, I differ from the opinions of the two assessors. I am satisfied that the prosecution has proved beyond reasonable doubt that when the assailant opened gunfire on the deceased he knew that in all probability it would be likely to cause his death. It is my view that the prosecution has established beyond reasonable doubt that the unlawful act was accompanied by malice aforethought.

The fourth ingredient to be considered is the question whether or not the unlawful act was committed or participated in by the accused person.

The prosecution relied on circumstantial evidence. Where the evidence is circumstantial it must be such that it produces moral certainty beyond reasonable doubt that it is the accused person who committed the crime. In order to support a conviction circumstantial evidence must point irresistibly to the accused person as the one who committed the offence for which he is indicted. Circumstantial evidence must be inconsistent with the innocence of the accused person. Circumstantial evidence should be incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person.

See: Charles Kayemba V. Uganda (1985) HCB 9 (CA).

Uganda V. Stephen Mawa alias Matua (1992-93) HCB 65.

The onus remains on the prosecution throughout and never shifts to the defence.

See: A.Z. Rubashoka V. Uganda (1971) I.U.L.R. 17.

It is the duty of court and the assessors, in dealing with circumstantial evidence, to consider every possible set of circumstances, in the process of determining whether the evidence, is incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person. The court and the assessors must examine every other reasonable possibility, and test it against the evidence.

See: Sharmal Singh V. R (1960) E.A. 762 (CA) at P. 776.

The court and the assessors are supposed to ensure that whatever inferences are made, there is no reasonable explanation to them other than the guilt of the accused person.

See: SIMON MUSOKE V.R (1958) E.A. 715.

The facts proved by the prosecution must be such that there are no other Co- existing circumstances which would destroy the inference of guilt.

See: TEPER V.R (2) (1952) A.C.480 at P 489; or (1952) 2 ALL.E.R.447 (P.C) at P.451.

AIP Matte (PW3) testified as follows:-

He had PC Oyat on Motor vehicle UP 0180.

At around 10.00 pm they arrested Taxi drivers and Conductors from Mini Price Bata. They took them to CPS, Kampala. They carried suspects twice. The witness instructed the accused to pick a driving permit from Mini Price Bata. When the witness took suspects to CPS, Kampala on the first trip he had all the members of his Patrol group who were five in number. After dropping suspects at CPS, Kampala on the second trip he realised that the accused was not with him.

He had been sent by the in charge traffic, through the witness, to go and pick a driving permit.

PC Mafabi Godfrey (PW4) testified as follows:

On 26.7.2001 at 18.00 hours he was deployed on UP 0180 for night Patrol. At 20.50 hours AIP Matte (PW3) took over the vehicle as commander. PC Oyat joined the group on the vehicle. They were all armed with AK 47 rifles.

They arrested some stubborn Taxi drivers and took them to CPS, Kampala. PC Oyat sat in one of the Taxis. AIP Matte together with PC Oyat and the Taxi drivers entered the station at CPS, Kampala. AIP Matte (PW3) instructed the group that they were proceeding to Arua and Nebbi Parks to arrest suspected opium smokers. At the time they set off from CPS, Kampala PC Oyat was not on the vehicle. They went to Arua Park and parked the vehicle opposite Total Petrol

Station. PC Oyat came on foot and by passed them. They were still on the vehicle. PC Oyat was armed and he moved towards Mini Price Bata.

Can Mark Lain (PW2) testified as follows:-

He and George were walking from Mini Price Bata towards the taxis along Ben Kiwanuka Street. A man who was wearing a shirt which had flowers across the chest grabbed the collar of George's shirt and pulled a bag George was carrying over the shoulder. A group of about six men came from behind. They joined the first man. They started kicking and slapping George. The man wearing a flowered shirt disappeared. The six men pushed George. He was made to cross the road backwards. They reached the exit of Shell Petrol station. George was down. The men were kicking him. The witness heard gunshots and saw sparks. He saw a man wearing a long coat with a gun among the six men. At the time of the shooting the man wearing a long coat and carrying a gun had his back to the witness. The witness shouted to him for help. He saw only one person holding a gun. After the gunshots the six men started leaving. The witness could not describe what the six men were putting on. Soon after the witness saw a policeman in uniform talking on a mobile phone. Much later a Police Patrol vehicle came to the scene.

No. 25634 CPL. Amandi Manson (PW7) testified as follows:-

On 26/7/2001 between 10.00 and 11.00 pm he was on foot patrol along William Street. He heard a gunshot which came from the direction of Shell Ben Kiwanuka Street. He rushed to Shell which was the scene. He found SPC Turyaheebwa, armed with a baton, standing with PC Oyat Martin, about five metres from the victim. The victim was lying down. PC Oyat was armed with an SMG rifle. The witness asked SPC Turyaheebwa who shot the victim. He had no answer. He asked PC Oyat but he too did not say anything. He then asked Ogoola and Nzeyimana, who were securiko guards at shell, who were armed with SLR rifles. He got no answer about the gunshot. He came back to SPC Turyaheebwa. PC Oyat had left. The witness arrested SPC Turyaheebwa and took him to Kikuubo Police Post.

No. 32463 PC Driver Masette Micheal (PW6) testified as follows:-

On 26.7.2001 he was on night duty. He was driving Motor Vehicle UP 0180. At around 10.00 p.m he had parked the vehicle opposite mini price Bata. He saw people chasing somebody towards shell petrol station. He was about to enter the vehicle. As the group approached the exit

of shell he heard a gun shot. After the gunshot these people started taking off. He entered the vehicle, made a U-turn, and drove upwards along Ben Kiwanuka Street. He saw a man lying down at the exit of shell petrol station. He was alone. Later he drove back with AIP Matte (PW3). He met at the scene CPL. Amandi (PW7). His commander instructed him to rush the victim to Mulago Hospital. From Mulago Hospital he drove back to the scene. He saw his commander talking to a security guard at the scene. His commander moved around. He came back and told the witness that he was looking for Oyat. Later he drove his commander back to CPS, Kampala. He went to the counter at the station. He heard his commander say: "Oyat is here. He is making a statement". The witness saw the person called Oyat. It was the accused standing in the dock. (The witness identified the accused in the dock).

PC Mafabi Godfrey (PW4) testified as follows:-

When the group on Motor Vehicle UP 0180 went to the scene at shell petrol station Ben Kiwanuka Street, they found CPL. Amandi (PW7) there. When the witness returned with the vehicle from Mulago Hospital to the scene PC Oyat was not there. The witness had not seen PC Oyat. When they went back to CPS, Kampala he found PC Oyat making a statement at the counter.

In response to cross examination the witness explained that at the time the Patrol vehicle UP 0180 reached the scene CPL. Amandi (PW7) was trying to organize people to put the victim in a Taxi. He testified that from the time PC Oyat by passed them at Total Petrol Station the witness only met him at CPS, Kampala. He told court that he saw PC Oyat with foolscap paper writing a statement at the counter.

AIP Matte Godfrey (PW3) testified that while at Shell Petrol Station he checked the guns of: CPL Amandi (PW7), a Securiko guard at Shell, SPC Kaggwa, PC Onungu and some two SPCs who were on foot patrol at Mini price Bata. He checked the firing pins of the guns. He was checking for smoke/soot near the chamber, inside the cocking handle, and in the muzzle. The witness gathered his men to find out who was missing. PC Mafabi (PW4) and PC Oyat Martin were missing. The witness and his team started looking for PC Oyat. They went back to CPS, Kampala. PC Oyat had also gone back. He was at CPS, Kampala.

CPL. Amandi Manson (PW7) testified that he moved in patrol vehicle UP 0180 with AIP Matte (PW3) to CPS, Kampala. They found PC Oyat Martin in Room 4 seated, recording a statement.

The accused made an unsworn statement. He stated as follows:-

He is a policeman attached to CPS, Kampala.

On 26/7/2001 at around 23.50 hours (i.e. 11.50 pm) he was instructed by AIP Matte (PW3) and a traffic Officer to escort one Traffic suspect, a driver of a Taxi, to Mini Price Bata. He moved on foot with the suspect and passed via Arua Park. They joined Ben Kiwanuka Street, going down towards Mini Price Bata. At exactly the junction between William street and Ben Kiwanuka Street, he heard a gun shot. He and the traffic suspect rushed to the scene where the gunshot was heard. They arrived at shell petrol station where they found a gathering of people at the entrance to shell petrol station. He saw one male adult putting on Civilian Clothes lying in a pool of blood. He asked the gathering what exactly had happened. A person who claimed to be a friend of the victim talked to him. He said:

“Police officer some one who had a gun and putting on a black coat shot a bullet on my friend. Yet we are students”.

He (the accused) saw one security person who was not armed. It was SPC Turyaheebwa. The victim was still alive. He (the accused) had to save life. He instructed the suspect Taxi driver to bring his Taxi vehicle. He did so. He (the accused) and the victim’s friend started putting the victim in the Taxi. He (the accused) called 999. Soon after he saw CPL. Amandi coming. When CPL. Amandi arrived he asked what had happened. He (the accused) briefed CPL.Amandi about what he had learnt from the friend of the victim. CPL. Amandi used a mobile phone to ring the controller. A 999 Patrol vehicle arrived under the command of Inspector Ebong. The accused briefed him. The 999 vehicle turned and drove towards Namirembe road, a direction which the assailant had allegedly taken. Shortly after police vehicle No. UP 0180 arrived at the scene under the command of AIP Matte. CPL. Amandi (PW7) briefed AIP matte. AIP Matte ordered them (including the accused) to remove the victim from the Taxi and put him on the police vehicle. The accused and others put the victim on the police vehicle. AIP Matte was in the vehicle; and on it were SPC Kaggwa, the driver, PC Mafabi and a friend of the victim.

The accused remained at the scene together with CPL. Amandi, PC Onyutha, SPC Turyaheebwa, PC Okello CD (who came from Kikuubo Police Post) and the suspect taxi driver. From the scene they crossed to Kikuubo Police Post. He (the accused) was around when CPL. Amandi made an entry about the incident in the Station Diary. The accused then decided to go back to CPS, Kampala with the taxi driver suspect. He went to Room 4 at CPS, Kampala. There was the main Station Diary. He decided to write a statement about what he had heard and seen at the scene. When he was concluding the statement AIP Matte (PW3) and two SPCs arrived.

I have carefully considered the accused's story in light of the prosecution evidence.

In light of what AIP Matte (PW3) told court it is not true that the accused was instructed to escort a traffic suspect, a Taxi driver, to Mini price Bata. AIP Matte (PW3) told court that the accused had been sent by the In charge traffic, through him, to go and pick a driving permit.

In light of the testimony of PC Mafabi Godfrey (PW4) it is not true that the accused moved with a suspect taxi driver on foot via Arua Park. PC Mafabi (PW4) told court that they went to Arua Park and parked the vehicle opposite Total Petrol Station. He testified that while they were still on the vehicle PC Oyat came on foot and by passed them. This witness did not say that the accused was in the company of any one else.

In light of the testimony of Can Mark Lain (PW2) it is not true that the accused talked to him. Nor is it true that Can Mark Lain (PW2) identified the accused and addressed him as a Police Officer. Can Mark Lain (PW2) told court that he saw a man wearing a long coat with a gun among the six men. He shouted to him for help. He testified that at the time of the shooting the man wearing a long coat and carrying a gun had his back to him. He said that he could not describe what the six men were putting on. He testified that soon after he saw a policeman in uniform talking on a mobile phone. It is clear from the evidence that the person whom Can Mark Lain (PW2) identified as a policeman was CPL. Amandi Manson (PW7) but not the accused person. Even the accused testified that he saw CPL.Amandi using a mobile phone to ring the controller.

In light of the evidence of Can Mark Lain (PW2) it is not true that the accused instructed the suspect Taxi driver to bring his Taxi vehicle. Nor is it true that the accused and Can Mark Lain (PW2) lifted the victim to put him in the Taxi. It is not true that at this time CPL.Amandi (PW7) had not yet arrived at the scene. Can Mark Lain (PW2) testified that a lady came to him and urged him to stop any vehicle; that she would pay the charges. He testified that he and the lady started stopping cars until eventually a Taxi stopped. The Taxi man offered to take George to hospital. He told court that he and the lady lifted George and put him in the Taxi. When they were about to leave a police patrol pickup arrived and stopped them. Can Mark Lain (PW2) told court that the policeman in uniform who was reading out a number in a mobile phone was already at the scene before the Taxi came and stopped.

CPL.Amandi Manson (PW7) testified that when he arrived at the scene he saw someone lying in a pool of blood. He used his mobile phone to call an emergency Number. The controller informed him that he had sent to the scene patrol vehicle No. UP 180.

In light of the testimony of CPL.Amandi (PW7) it is not true that the accused briefed CPL.Amandi about what he had learnt from the friend of the victim. CPL. Amandi (PW7) told court that SPC Turyahabwe (Turyaheebwa) was armed with a baton at the time. He testified that he arrested SPC Turyaheebwa and took him to Kikuubo Police Post. In my view if the accused had explained the circumstances to CPL. Amandi (PW7) there would be no reason for arresting SPC Turyahabwe (Turyaheebwa). It cannot be true that the accused remained at the scene with CPL.Amandi (PW7). In my view if that had been the case CPL.Amandi (PW7) would have arrested the accused as a suspect, because he was armed with a gun.

I think that it is not true that a 999 Patrol vehicle arrived under the command of Inspector Ebong. I cannot imagine how CPL.Amandi (PW7), who was trying to get transport to assist the victim, could have let it go away to trace the alleged assailant before taking the victim to hospital. Also, Can Mark Lain (PW2) did not say that any Police Patrol vehicle came to the scene and went away before police vehicle No. UP O180 arrived at the scene.

PC Mafabi Godfrey (PW4) testified that it was him and SPC Kaggwa Abudu who rushed the victim on the Police vehicle to Mulago Hospital. He told court that they left AIP Matte (PW3) together with PC Onungu at the scene. So it is not true that AIP Matte was in the vehicle at the time the victim was rushed to hospital. The accused stated that he remained at the scene with CPL.Amandi, PC Onyutha, SPC Turyaheebwa and PC.Okello CD. In my view this cannot be true. PC Mafabi Godfrey (PW4) testified that from the time PC Oyat by passed them at Total Petrol Station the witness only met him at CPS, Kampala.

AIP Matte (PW2) testified that he gathered his men at the scene to find out who was missing and it was PC Mafabi (PW4) and PC Oyat Martin. He told court that he and his team started looking for PC Oyat. No. 32463 PC driver Masette Michael (PW6) testified that after he had returned to the scene from Mulago Hospital he saw his commander (AIP Matte) moving around. His commander told him that he was looking for Oyat. In my view this evidence corroborates the evidence of CPL. Amandi (PW7) that PC Oyat had already left the scene. In light of this evidence I think that it is not true that the accused participated in lifting and putting the victim on the police vehicle. Nor can it be true, in my view, that the accused moved from the scene with CPL. Amandi (PW7) and that they crossed to Kikuubo Police Post.

CPL. Cheboriot John (PW9) testified that on 26/7/2001 he made entries, in his own handwriting, in the armoury book. Entry No. 32 had these Particulars:

Date: 26/7/2001; Time: 18.00 hrs; Force No: 33054; Rank: PC; Names: Oyat; Rifle No: 56-31006393; Rounds: 30, Place of work: On UP 0180; and Oyat's Signature. He testified that he issued a gun with 30 rounds of ammunition to PC Oyat on 26/7/2001. He told court that Oyat did not bring back the gun. (Entry No. 32 in the Armoury book was admitted as exhibit P.6).

No. 25634 CPL. Amandi Manson (PW7) testified as follows:

They (him and AIP Matte) found PC Oyat Martin in Room 4 recording a statement. AIP Matte (PW3) disarmed PC Oyat Martin. AIP Matte (PW3) handed the gun to the witness. He instructed the witness to count the ammunition in the magazine. The witness did so in the presence of AIP Matte (PW3), PC Oyat and SPC Turyahabwe (Turyaheebwa). He found in the magazine 28 live ammunitions. He asked PC Oyat what had happened to the two bullets. PC Oyat Martin told him that he had been given 28 rounds by the armoury man.

AIP Matte Godfrey (PW3) testified as follows:-

When they went back to CPS, Kampala they found PC Oyat at the station.

The witness ordered PC Oyat to surrender his gun to him. Present were: CPL. Amandi (PW7), an Inspector, who was the duty officer, and one Senior officer on Standby. The witness checked the gun of PC Oyat. He found that it had soot on its working parts.

He saw soot in the muzzle. Then he counted the bullets in the magazine. He found 28 rounds of ammunition. Oyat's gun was an SMG – AK 47.

During Cross examination the witness explained that when you open a gun which has been fired you see smoke on top of a part which comes out when the cocking handle is opened. He testified that he checked the accused's gun at the counter. He denied having gone to Room 6 or having counted the rounds of ammunition in the accused's absence. He confirmed that he had counted 28 rounds and that the accused's gun had two bullets missing.

In response to cross-examination CPL. Amandi Manson (PW7) testified that he counted the ammunition in the accused's magazine in the corridor of Rooms 4 and 6 in the presence of AIP Matte, PC Oyat and SPC Turyaheebwa. He also told court that the securiko guards at Shell had SLR guns while the police had SMG rifles. He testified that other private security organizations do not handle SMG rifles.

No. 25121 PC Mafabi Godfrey (PW4) told court that AIP Matte (PW3) caused the ammunitions in the magazines of the people on duty to be counted. The witness' magazine was checked and found to have 30 rounds. During cross-examination the witness testified that the counting of ammunition in the magazines of personnel who had been on duty in the field was done in room 6. He told court that his magazine was counted and after that he walked out.

In his unsworn statement the accused stated as follows:-

When he was concluding his statement at CPS, Kampala AIP Matte (PW3) and two SPCs arrived. AIP Matte had a Pistol. The two SPCs had AK 47 rifles. AIP Matte (PW3) put him at Pistol point. He ordered him to surrender his gun to him. AIP Matte (PW3) took his gun. The accused was at the counter. AIP Matte (PW3) took the gun to Room 6. After some minutes he came out of Room 6 and returned to Room 4. CPL. Amandi (PW7) had arrived. AIP Matte (PW3) asked him (the accused) about two bullets missing from his magazine. The accused was not aware when his bullets were being counted. He was shocked to hear AIP Matte (PW3) mention a shortage of bullets from 30 to 28. AIP Matte (PW3) took him to the office of the duty officer, Inspector Zziwa. IP Zziwa asked the accused what had happened. He read through the accused's statement. IP Zziwa instructed AIP Matte to put the accused in cells until the next day, and it was done. On 27/7/2001 at 2.00pm D/CPL. Opio (PW8) escorted him to Buganda Road court. A charge was read to him and he was remanded in Luzira Prison.

The prosecution evidence is that AIP Matte (PW3) had been looking for the accused and he found him at the counter at CPS, Kampala. AIP Matte (PW3) immediately disarmed the accused. In the circumstances I do not think that AIP Matte (PW3) could have waited to gather all Personnel who had been on night duty in the field in room 6 before causing the accused's gun to be checked. AIP Matte (PW3) told court that he checked the gun and, thereafter, counted the bullets in the magazine. I believe this witness when he says that this was done immediately.

CPL Amandi Manson (PW7) testified that after checking the accused's magazine and after asking the accused about the two missing bullets IP Zziwa instructed him to March PC Oyat Martin and SPC Turyahabwe (Turyaheebwa) to information room. He testified that he took the two to IP Zziwa who interrogated them briefly. He told court that IP Zziwa instructed him to have PC Oyat and SPC Turyahabwe detained in connection with the offence of Attempted Murder by shooting. He told court that the two were accordingly detained. He testified that later he was called to information Room by IP Zziwa who instructed him to go back to his area of operation to get all the armed personnel, the police officers, SPCs and private security guards who were armed. He testified that he got PC Onyutha, SPC Kagwa Abdu, SPC Nsubuga, and two Uganda securiko guards called Ogoola and Nzeyimana. He told court that he brought them to the information Room. IP Zziwa directed him to count the rounds of ammunition each armed

person was having. The witness said that he checked the magazines from the rifles. Thereafter, the Personnel went back for their duties.

In my view this counting of the rounds of ammunition in the magazines of these armed personnel could have taken place in Room 6 as PC Mafabi (PW4) said. However, I find that this was a different exercise, carried out long after the accused had been detained. I find something significant with this exercise and this is the fact that the magazines were checked in the presence of their owners. PC Mafabi (PW4) testified that his magazine was counted and, thereafter, he walked out. It is my view that the counting of rounds of ammunition in magazines was not a one-man affair. It was not done by AIP Matte (PW3) alone. After it was done the accused was taken before another officer, IP Zziwa who interrogated him. I do not believe the allegation implicit in the accused's statement that AIP Matte could have taken away two bullets from the accused's magazine to implicate him. AIP matte (PW3) was not cross examined about any grudge between him and the accused. So, in the circumstances, I prefer the prosecution evidence on the counting of the rounds of ammunition in the accused's magazine to the accused's story. I do believe the prosecution witnesses and find as a fact that the magazine attached to the accused's gun had two bullets missing at the time it was checked at CPS, Kampala.

CPL. Amandi Manson (PW7) testified as follows:-

At 6.45 am on 27/7/2001 he went back to the scene of crime. He recovered a spent cartridge of a rifle. He found it about two metres from where the victim was lying. He brought the cartridge to CPS, Kampala and exhibited it.

No.20576 D/CPL. Opio Christopher (PW8) testified as follows:-

On 13/8/2001 he filled in PF.17A.

He wrapped an SMG rifle serial No. 56-31006393 with its magazine containing 28 rounds and labelled it "A". He put a used cartridge of an SMG ammunition in a small envelope which he labelled "B". On 14/8/2001 he took the exhibits to CID Headquarters, to the office of the ballistic expert. Some one signed and stamped on PF.174 to acknowledge receipt of the exhibits. The original PF 17A remained in the office of the ballistic expert. The witness took back a copy of it. In September, 2001 the witness collected from the office of the ballistic expert a report of

the expert and the exhibits. He took them to CPS, Kampala. The recovered used cartridge was admitted as Exhibit P.3.

A second test fired used cartridge marked F.104/01 TC was admitted as Exhibit P.4. An SMG serial No. 56-31006393 with a magazine containing 27 rounds of ammunition was admitted as Exhibit P.5.

Robbina Kirinya (PW 10) testified that she is a government analyst in ballistics and that on 14/8/2001 she received a rifle no. 56-31006393 with 28 rounds of ammunition and one spent cartridge. She entered the exhibits in their register (Exhibit P.8). She tendered the original PF 17A dated 13/8/2001 (Exhibit P.7).

Gakyaro Francis (PW5) testified as follows:-

He was a D/SP and worked as a fire arms and ballistic expert. He received a rifle No.56-31006393; twenty eight (28) rounds of ammunition in a magazine; and one fired cartridge case. He carried out an examination and made a report on his findings. The report was admitted as Exhibit P.2.

The rifle was No.56 – 31006393, an AK 47 of caliber 7.62 mm. He test fired it using one of the ammunitions in the magazine. He found that the gun was capable of discharging the ammunition. He concluded that the ammunitions were live and capable of being used in the rifle. He found that the cartridge case was of an ammunition similar to those in the magazine. The cartridge case was found capable of having been used in the said rifle. The magazine should have 27 rounds left.

The accused in his unsworn statement said that at exactly the junction between William Street and Ben Kiwanuka Street, he heard a gun shot. He and the Taxi driver suspect then rushed to the scene at shell petrol station. This amounted to an alibi.

When an accused person puts up a defence of alibi he does not assume the responsibility of proving it. It is the duty of the prosecution to adduce evidence which will destroy the alibi by

placing the accused at the scene of crime. The assessors and the court have to evaluate the evidence as a whole: the prosecution version and the accused person's version.

See: Kaguda Fred V. Uganda Crim. Appeal No. 14 of 1998 (SCU) (un reported).

IN BOGERE MOSES and ANOR V. Uganda SC, Crim. Appeal No. 1 of 1997 (un reported) the supreme court considered this question:

What amounts to putting an accused person at the scene of crime?

The court said: “ we think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time”.

In the instant case I have considered the question whether the prosecution has adduced evidence to prove beyond reasonable doubt that the accused was at the scene of crime, that is at the exit of shell petrol station, Ben Kiwanuka Street, at the time of shooting.

I have carefully evaluated the evidence adduced by the accused by way of his unsworn statement. I have found that his statement was untrue in many respects. For example I have found the accused's story that he was escorting a Taxi driver suspect untrue. I have also found that his claim that he assisted in getting a vehicle to take the victim to hospital was untrue. I have also found that his claim that he remained at the scene with CPL.Amandi (PW7) is untrue.

I believe the evidence of CPL.Amandi (PW7) that he met the accused and SPC Turyahabwe (Turyaheebwa) at the scene soon after the shooting. I also believe this witness when he says that the accused moved away after some initial questioning. I have found that when the magazine attached to the accused's gun was checked two bullets were found missing. I also believe AIP Matte (PW3) when he says that he examined the accused's gun and found that it had soot on its working parts and in the muzzle. He concluded that the accused's gun had been fired. I believe the evidence of CPL.Amandi (PW7) who testified that he recovered a spent cartridge of a rifle about two metres from where the victim was lying. Gakyaro Francis (PW5) found that the said cartridge case was of an ammunition similar to those in the accused's magazine. The cartridge case was found capable of having been used in the accused's gun. He found that the gun was capable of discharging the ammunition. In my view the presence of soot in the muzzle of the

gun, the shortage of two bullets in the accused's magazine, and the recovery of a cartridge case from the scene which was similar to those of the ammunition in the accused's magazine are factors which have placed the accused at the scene of crime at the time of the shooting. He was the only one present at the scene who was armed with a gun capable of firing the cartridge which was recovered from the scene. I must say that the accused's demeanour when he made his unsworn statement gave me a poor impression of him. It is not surprising that he made so many untrue statements. For all the reasons I have given I do hereby reject his version of the story. Both assessors gave similar opinions that the prosecution had proved the fourth ingredient of the offence beyond reasonable doubt. In full agreement with the assessors I find that the prosecution has proved beyond reasonable doubt that the unlawful act of shooting the deceased was committed by the accused person.

In the result I hold that PC Oyat Martin committed murder and, I accordingly, convict him of murder contrary to section 183 of the Penal Code Act.

MOSES MUKIIBI

JUDGE

17/9/2003.

SENTENCE:

There is only one sentence authorised by the law for murder, and that is death. I, therefore, hereby sentence PC Oyat Martin to suffer death in the manner authorised by the law.

MOSES MUKIIBI

JUDGE

17/9/2003.

Right of appeal to the court of Appeal of Uganda within 14 days from today has been explained to PC Oyat Martin, the convict.

MOSES MUKIIBI

JUDGE

17/9/2003.

17/9/2003 at 4.30 PM.

Mr. Bakora Brian – State Attorney for State.

Mr. Kunya on SB for the accused is absent.

Accused is in Court.

Ngobi: Court Clerk/ Interpreter.

Court: Judgment is delivered in open court.

MOSES MUKIIBI

JUDGE

17/9/2003

