IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO D.C.J., ODER J.S.C. AND PLATT J.S.C.)

CRIMINAL APPEAL NO. 5 OF 1987

BETWEEN

ARAMANANI KAMPAYANI :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

(appeal from the Judgement and conviction
of the High Court of Uganda at Kabale (Hon.
Mrs L.E.M. Kikonyogo) dated 3rd March 1987).

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CRIMINAL SESSION CASE NO. 70 OF 1986

REASONS FOR JUDGEMENT

The appellant was convicted of murder by the High Court and sentenced to death. On November 15th 1989, we heard and allowed his appeal, quashed the conviction, set aside the sentence and released him. We now give our reasons.

The prosecution case was that between August and October one Bitwire, a businessman in Kabale, hired assassins to kill the deceased, Henry Rusatsi, another businessman in the same town. The appellant was a normal employee of Bitwire a driver.

In August, the appellant sent by Bitwire, called Sowedi Singundu (PW3) from Kampala to hire would—be assassins to kill the deceased. The appellant did not, however, know the purpose of his first mission or that of the subsequent trip with Sowedi to Kampala. Sowedi eventually fetched from Kampala three men to whom Bitwire paid money for the job they were to do for him. Sowedi and the three men returned to Kampala and diesappeared before performing their part of the bargain. After he had learned about it, the appellant inquired why he wanted to kill the deceased. Bitwire did not tell him the reason but warned him not to reveal the plan to anyone or also he would be killed too. The first team of would-be assassins recruit having let him down, Bitwire approached a local man Ahamadi to recruit for him other gunmen for the same purpose. He (Bitwire) also informed the appellant that this time he would not pay Ahamadi until the job had been done. Ahamadi found four men to whom Bitwire gave two Pistols. On Bitwire's instructions, the appellant drove the four to Mutagamba forest on Kabale-Mbarara Road to test—fire the guns, which

they did. The appellant heard the guns fired and drove the men back to Bitwire. The men gave Bitwire a positive report of the gun's working condition. They also informed him that they would go to the house of the deceased the same night. They apparently did because reported to Bitwire the following day that the mission had aborted when the deceased refused to open the door and the guns failed to function. The deceased, who apparently was a good friend of Bitwire (the two had married from the same family) went to and informed Bitwire of the attempt on his life. He was unaware who was after his life. Bitwire remarked to the appellant about this, saying that if there was God why would the deceased report the incident to the very person who was planning to kill him.

After the abortive attempt, Ahamadi advised Bitwire that the next attempt should be put off for a week. Indeed it was. Then, in accordance with a prior arrangement, but unknown to the appellant, Bitwire on 1st November 1981 at 5.00 p.m. told the former that he was going to visit the deceased. The appellant drove Bitwire to the home of the deceased, where they found him in the company of another visitor Christopher Mulenga (pw4). Bitwire was welcomed and he and his host sat drinking whisky, taken there by the former; the appellant was also asked into the house and drank tea. On permission from his employer, the appellant drove out at about 6.00 p.m to buy cigarettes, returning shortly afterwards. Bitwire, the deceased and Christopher were still conversing.

Christopher departed first at about 7.00 p.m, because he was unwell and did not partake of the whisky.

At about 8.30 p.m the wife of the deceased served food after eating which Bitwire insisted on taking more drinks.

Eventually, however, Bitwire and the appellant rose to depart, the deceased seeing them off. The two entered the motor vehicle and drove off the deceased's compound. As they did so they saw three men near the gate and Bitwire remarked to the appellant that men had arrived.

Immediately thereafter the deceased was shot at his house by unknown gunmen. He was rushed to Kabale Hospital where attempts to save his life by surgical operation unfortunately failed. He died at 5.00 a.m the following morning.

In his sworn testimony and extra judicial statement which was admitted under s.64 of the Trial on Indictment Decree, 1971, the appellant's defence was to the effect that he did not assist those who killed the deceased. He was merely an employee of Bitwire. He innocently went for Sowedi and subsequently knew of three attempts by Bitwire to kill the deceased. He neither gave nor contributed money which Bitwire paid to the gunmen; nor was he present

when the men were paid. Nor did he report to the authorities about Bitwire's plan to kill the deceased; nor left his employment after having learnt of the plan because he feared that Bitwire would kill him. In any case, Police in Kabale were in Bitwire's pocket. So it would not have served any useful purpose to report the plan to them. He was forced by Bitwire as his master to take the four men to test the guns. He did not know that the deceased would be killed the night he was shot. On that day, Bitwire merely told him that they were going to visit the deceased at his home. In the event the learned trial Judge rejected the appellant's defence and held that the appellant having fully known of Bitwire's wicked plan to murder the deceased voluntarily rendered his services to Bitwire to facilitate the plan. As an aider and abettor he was guilty of murder as charged.

The appellant's testimony, his extrajudicial statement and the judgement convicting him revealed that Bitwire had been charged with, and convicted of the murder of the deceased. On subsequent appeal however, he was acquitted by this Court in Criminal Appeal No.23 of 1985, on 11/7/1986, six months before the present appellant was tried. We shall have more to say later about that appeal in relation to the present appellant's case.

Ten grounds were listed in the Memorandum of Appeal, ground one and four of which Mr. Emesu, learned counsel for the appel1ant argued together.

These were that:—

1. The learned trial Judge erred in law in allowing the admission of the evidence of PWI, PW2, PW3, PW8, PW9; and PW11 whereas such evidence was highly prejudicial to the

appellant and therefore required closest tests examination and scrutiny before being admitted or received, and relied upon in support of the prosecution case.

4. The erroneous and irregular admissions of the prejudicial evidence of PW1, pw2, PW3, PW9, and PW11 as set out above must or might have embrassed the appellant in his defence and/or unduly caused or influenced or misled him into how he should conduct his defence.

According to the record of trial of the appellant in the court below, evidence from all thirteen prosecution witnesses as indicated in the summary of evidence and the appellant's extra judicial statement recorded by the Chief Magistrate (PW9) was agreed and admitted under section 64 of the Trial on Indictment Decree, 1971. None of the prosecution witnesses was called to testify Mir Emesu complained that such a course as was thus adopted by the learned trial judge could not have constituted a fair trial in the circumstances. In his opinion some limitation or control ought to be placed on the use of section 64 which he thinks only

allows admission of facts which are not in issue. Only formal evidence which does not prejudice an accused or is not potentially incriminating to him where he had denied the charge should be allowed under the section. Where a defence counsel appears to be acting in a manner prejudicial to the interest of the accused the learned trial judge has a duty to intervene. In the instant case, therefore, according to Mr. Emesu, the trial judge ought to have rejected the defence counsel conceding the evidence prejudicial to the appellant. The provisions of section 64 relevant to this point are as follows:-

64 (1) "Notwithstanding the provisions of section 63 of this Decree, if an accused person who is legally represented pleads not guilty, the Court shall as soon convenient hold a preliminary hearing in open Court in the presence of the accused and his advocate and of the advocate for the prosecution to consider such matters as will promote a fair and expeditious trial0.

(2) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agree and the Memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and by his advocate and by the advocate for the prosecution, and them filed.

(3) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved.

Provided that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a Memorandum filed under this section be formally proved.

The purpose of this section was to promote fair and expeditious trials of accused persons in Criminal cases. The section was introduced at a time when, as now, inordinate delay in trials of Criminal cases was common, usually due, inter alia, to difficulty of tracing prosecution witnesses. The intention of the section appears to be similar to that behind the provisions of section 30 of the much older evidence act. As it is indicated by the proviso to subsection (3) the application of section 64, as that of section 30 in our opinion, must be subject to the basic rule in criminal trials which is that the accused should be able to test the evidence which is adduced against him so that justice can be seen to be done, as judgement proceeds upon evidence which has been seen to be given in Court.

We are however, unable to accept the strict limitation of its general application as suggested by Mr. Emesu. We consider that the proviso to subsection (3) places adequate limitation on its application, which is that if during the course of the trial the court is of the

opinion that the interests of Justice so demand, it should direct that any fact or document admitted or agreed in the memorandum prepared at the preliminary hearing should be proved by the relevant witness giving evidence verbally. No hard and fast rule can be laid to limit the latitude of a defence counsel in his duty to do the best for his client, nor to the discretion of a trial Judge in the discharge of his function in this regard. Whether an admitted or agreed evidence under section 64 should also be proved depends on the nature of the evidence or document and the case in question. Normally the section should be applied only to formal or non-contentious evidence or documents. See Fabiano Olukuudo V Uganda, CAU Cr. App. No. 24 of 1977 (repeated in CAU 1978, Judgements, part I, page 86). But where witnesses are considered controversial or vital, they should give evidence to enable their evidence to be tested in cross—examination and the trial judge to observe their demeanour. In the instant case, we accept Mr. Emesu's criticism that not all the prosecution evidence should have been admitted under section 64 as was done by the learned trial judge. Such evidence which was irregularly so admitted in our view included that of Dr. Ndibirwe (pw1) and Dr Masika pW2). According to the record Dr Ndibirwe was the one who carried out a post mortem examination of the body of the deceased. On 2nd November, 1981 the day after the deceased had been killed, and wrote out a postmortem report (exhibit p1). He was apparently out of the country on a post—graduate course at the time of the trial. The post mortem report was admitted under section 64; so was the evidence of Dr. Masika, which was to the effect that having previously worked with Dr. Ndibirwe in Kabale Hospital he was familiar with his signature on the post mortem report which he therefore identified as having been signed by Dr.Ndibirwe. The purpose of Dr. Masika's evidence was apparently to facilitate the admission of the postmortem report under section 30(b) of the evidence act as a statement made by a person whose attendance could not be procured without delay or expense which in the circumstances of the case appeared to the court unreasonable. In our view, the postmortem report should not have been admitted in the manner it was done for two reasons. Firstly, the procedure required under section 30 (b) was not complied with in that there was no evidence to show that Dr. Ndibirwe could not be found or that his attendance could not be procured without an a amount of delay or expenses considered to be unreasonable in the circumstances of the case. In the case of Associated Architects V CHRISTINE NAZZIWAM UC Civil Appeal No.5 of 1981 (unreported) this court had this to say:

"In Muzmiri Kisiongo and another V San Birabwa Civil Appeal No. 1/1980, this court had an occasion to consider the conditions which made section 30(b) of the Act applicable. The court said, 'It is the duty of the party seeking to tender the witness' statement to satisfy

the court by evidence the witness cannot found or his attendance cannot be procured without an amount of delay or expense which in the circumstance of the case appear to the court to be unreasonable, In this case no such evidence was led. The court had no material upon which it could exercise its discretion to receive the report. Without such evidence the medical report was wrongly admitted. It should be excluded. Section 30(b) of the Act should be used very sparingly and only in the circumstances falling within the purview of that section".

The same criticism of the Court regarding the admission of the medical report in the Muzamiri (supra) case equally applies to the admission or Dr. Ndibirwe's postmortem report in the instant case. No evidence was led regarding where Dr. Ndibirwe had gone for his Course; when he went and when he was expected back in Uganda or whether he was still outside Uganda. It was not proved that his attendance could be procured without an amount of delay or expense which in the circumstances of the case appeared to the court unreasonable. The trial court was not asked to nor did it rule whether the post mortem report be tendered under section 30(b).

The second reason was the inadequacy of the post mortem report as an explanation of the cause of death. There was evidence from Christopher (pw4) that after the deceased had been shot at his house he was taken to Kabale Hospital where he was operated upon in a vain attempt to save his life. At one stage when the deceased was in the theatre, electricity went off. Later a generator was brought and the doctors continued with the operation. After the operation, the deceased was taken to one of the wards where he died at 5.00 a.m. The subsequent post mortem report read as follows:

(1) Externally he found a paramedium fresh ruptured surgical wound in the Epigastrum.

(2) Internally he found a ruptured stomach, ruptured paraventebrave in artery. The cause of the death was haemorrhage.

Further according to the post mortem report, Dr. Ndibirwe was assisted by Dr. Masika and Dr. Muhunde in carrying out the post mortem examination of the deceased. In the circumstances, we consider that Dr. Masika or any other doctor who participated both in the surgical operation before death and/or in the post mortem examination should have been called to testify with regard to the operation and to explain whether the haemorrhage which led to death was caused by gun shot or surgical operation or both. As it is the cause of the death was not clarified beyond reasonable doubt, the definition of cause of death contained in section 189 of the Penal Code notwithstanding. The irregularities regarding the admission of

the post mortem report referred to above in our opinion occasioned a miscarriage of justice to the appellant.

Sowedi (pW3), according to the learned trial Judge, was a very important witness who played a part in the early stage of Bitwire's alleged scheme to kill the deceased. The learned trial Judge described him and the Chief Magistrate (PW9) as the main prosecution witnesses. His evidence that the appellant carried out Bitwire's instructions in prosecution of the alleged assassination plan was accepted by the learned trial judge. We agree with Mr. Emesu that Sowedi was therefore witness whose evidence should have been tested in cross—examination and his demenour observed in the witness box. In the event the learned trial Judge missed that opportunity, because, he too, was not called. Indeed both Sowedi and the Chief Magistrate who recorded the extra judicial statement should have been called to testify. In principle where an incriminating statement has been recorded, the person who recorded it should be called to give evidence. Indeed both Sowedi and the Chief Magistrate who recorded the extra judicial statement would have been called to testify.

The prosecution case also depended on the appellant's alleged confession in his extra judicial statement which was accepted by the learned trial judge. The statement narrated the saga and the appellant's alleged role in the assassination plan from the beginning to the end. The learned trial judge relied on it to convict the appellant. It was recorded from the appellant by the Chief Magistrate whose evidence was that after sending out the police officer who had escorted the appellant into his chambers, he recorded the extra judicial statement with the aid of a Rukiga/English interpreter called Atuhaire (pW11). He explained to the appellant the purpose of sending out the police officer, which was to ensure that the appellant would speak freely without influence. He then warned the appellant, who elected to make a statement which the Chief Magistrate wrote down in English. The Chief Magistrate's evidence as admitted under section 64 does not say whether the appellant elected to make a statement voluntarily. It is also apparent from the record that the learned trial judge did not satisfy herself before admitting it that the extra judicial statement had been voluntarily made. The failure to do so in our view contravened one of the cardinal conditions regarding admissibility of alleged confessions under sections 24 and 25 of the Evidence Act. This is that the court must satisfy itself that the confession is a voluntary one. See: Beronda V Uganda 1974 EA. 46, and Yowana Serwadda V Uganda (1978) C.A.U Judgement 128. Where, as in the instant case, a trial within a trial is not held to decide the admissibility of the alleged confession we think that the trial judge should equally satisfy him/herself whether the alleged confession was voluntary just as he/she would where a trial within a trial is held. Since it

appears in the instant case that the conviction of the appellant depended so much on his alleged confession, we consider that the learned trial judge's failure in this regard would have occasioned a failure of justice if it had not been valueless.

Grounds 2, 3, 5, and 7, which Mr. Emesu took together were framed as follows:—

2. That the learned Trial Judge erred in law in admitting the extra judicial statement of the appellant without first holding a trial within a trial to determine its voluntariness and admissibility under the Evidence Act.

3. The learned trial judge erred in law in admitting the evidence of the extra judicial statement of the appellant as translated by PWII to PW9 in English, in the absence of the original Rukiga version which was the language actually used by the appellant to speak to PW9 who was recording the appellant's statement through pw11 as the Rukiga/English interpreter who knew how to write and ought to have recorded the statement of the appellant in Rukiga and produced it in court for the purpose of fair and just comparison by the court to guarantee the accuracy of the English interpretation.

5. That the learned trial judge erred in law in relying on the appellants confessions without first considering the reasonable possibility that the said confessions might have been wholly or partly and substantially false, and might have been wholly or partly and substantially false, and if they were partly so false without ascertaining how far truthful were the said confessions to be held in the light of the other conflicting evidence adduced by the prosecution.

7. That the appellants confessions were not wholly truthful and had the learned trial judge considered this he might have rejected them. All these grounds raised objections concerning the admissibility of the appellant's extra judicial statement or the undue weight which the appellant claimed was given to it by the learned trial judge.

We have already accepted Mr. Emesu's criticism of the manner in which the extra judicial statement was received in evidence when dealing with grounds one and four above. So nothing more need be said on that score here. With regard to the point that the learned trial judge erroneously relied on the extra judicial statement in convicting the appellant Mr. Emesu, rightly so in our views abandoned grounds 5 and 7 after realising that the appellant did not confess to the killing of the deceased. The alleged confession was not in fact a confession. All that the extra judicial statement amounts to is that the appellant knew what Bitwire was doing and that he went on various errands on his employer's instructions in the normal course of his duty. In those circumstances the appellant did not confess to being an aider and abettor under section 21 (1) (b) of the penal Code0 AS Mr. Mugambe Kizza,

Learned Counsel for the State conceded the learned trial judge reached the wrong conclusion when she held that the alleged confession and other prosecution evidence proved that he was an aider and abettor to the murderers of the deceased. Had she properly directed herself as to the proper evidential value to be given to the alleged confession she would inevitably have acquitted the appellant.

On these grounds we considered that it was unsafe to allow the conviction to stand.

Ground 6 was that the learned trial judge erred in law in not treating the evidence of PW3 as an accomplice and in not warning the assessors and herself of the danger of relying on such evidence to base a conviction, if it was not corroborated. In the course of his argument Mr. Emesu again, rightly, so in our view, abandoned this ground on realising that Sowedi (pw3) was not in fact an accomplice of the appellant though he may have been to Bitwire. PW3 did not say anything which connected the appellant with the crime.

Ground 8 was that the prosecution evidence as it stood was weak and unreliable and required corroboration and that the learned trial judge erred in law in relying on such evidence to convict without having made any consideration of the issue of corroboration, which was lacking in the circumstances. We found merit in this ground which in the end Mr. Mugambe Kizza, learned State Attorney for the respondent, also conceded with the conclusion that this appeal should be allowed to succeed.

As already stated elsewhere in this judgement the learned trial judge relied on the appellant's extra judicial statement and the evidence of Sowedi (Pw3), neither of which in fact, proved that the appellant knew or had anything to do with the gunman or gunmen who killed the deceased. According to the statement, he drove Bitwire on the fatal evening to the home of the deceased, ostensibly only to visit him as far as the appellant knew. When they were departing from the deceased the appellant with the aid of the head lights, saw three men. There is no evidence that he knew them; still less the purpose of their presence until Bitwire told him that his (Bitwire's) men had arrived. Sowedi's evidence also does not connect the appellant to the actual killers. The first team of three men, whose alleged assignment the appellant learned from Sowedi, apparently disappeared after receiving money from Bitwire before completing the task for which they were allegedly hired. Moreover, according to Sowedi, those men were just swindlers who had no intention of carrying out what they were hired to do. There is no evidence that those men were the ones whom the appellant saw at the gate of the deceased or killed him. In the circumstances it was not proved beyond reasonable doubt, or at all that the appellant aided or abetted the murderers of the deceased or Bitwire to whom he was merely a paid employee. It might appear that after Bitwire the principal

offender in this saga was acquitted on appeal, the appellant was indicted as an afterthought after the principal offender was set free.

In the circumstances, we find that the evidence adduced by the prosecution was so weak that it fell far short of proving the indictment against the appellant to the required standard. He should therefore never have been convicted.

Ground 9 was that the learned trial judge erred in rejecting the appellant's defences of his apprehension or compulsion and ignorance and/or innocence in relation to the various plans made to kill the deceased. Having held as we have done above that the prosecution evidence was too weak to support a conviction of the appellant on the present indictment we consider it unnecessary to say anything about this ground and similar ground which was only a summary to the effect that the errors, irregularities, omissions and decisions complained of in all the other grounds constituted and occasioned a miscarriage of justice to the appellant. For these reasons, the appeal was allowed conviction quashed and sentence set aside.

DATED at Mengo this 8th day of January 1990

SIGNED:
S. T. MANYINDO
DEPUTY CHIEF JUSTICE

A. H. O. ODER
JUSTICE OF THE SUPREME COURT

H. G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL.
REGISTRAR SUPREME COURT