IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO.28 OF 1992

BETWEEN

ANDREW WALUSIMBI (Al)
TWAHA BUGEZA (A2)========== APPELLANTS
JOSEPH KANDOLE BYARUHANGA (A3)
DAVID BOGERE SAKEBEMBE (A4)

AND

UGANDA==========RESPONDENT

(Appeal against conviction and sentence of the High court decision holden at Kampala (Hon. Justice C.K. Byamugisha J.) dated 7th day of September 1992)

IN

HIGH COURT CRIMINAL S.S CASE NO. 102/92

JUDGMENT OF THE COURT

The four appellants before the Court were convicted of aggravated robbery contrary to Sections 272 & 273(2) of the Penal Code on the first count, and murder contrary to Section 183 on the second count. They were sentenced to death on the first count and a similar sentence was suspended on the second count.

Learned Counsel, Mr. Matovu appeared for the Fourth appellant Sekabembe alias Eddy Lubowa. Learned Counsel, Mr. Zaabwe appeared for the Appellants Walusimbi (the First Appellant); the Second Appellant Twaha Bugeza and the third Appellant Kandole.

The death of Abbot Sebuliba occurred in this way. A payment by cheque had been made to him of shs. 2,692,816/- and he had deposited it at Grindlay's Bank Corporate Branch for clearance. He then visited Mr. Sam Kakonge (PW1) a friend and business acquaintance, and asked for a box to carry the money. Mr. Kakonge gave the Deceased a card board box and NEWSPAPERS TO COVER IT. They returned to the Bank, where the cashier paid over the sum. The Deceased handed the notes to Mr. Kakonge to check and a porter placed the money in the box. When that was finished the porter took the money to the deceased's pick-up, and placed it in the front. The deceased drove away. They knew it was risky and whilst they kept a look out, they were suddenly overtaken by a car. Although they tried to escape, guns were pointed at them. Kakonge heard gun shots and the deceased complained that he had been hit. Kakonge jumped out and fell into some water. But he saw three people jump out of the overtaking car who collected the bag and the box, while one man remained shooting in the air. The robbers then drove off and Kakonge came back to look for the deceased. He was outside his car. Kakonge got help from a passing car and so the deceased was taken to Mulago Hospital. It was found that a bullet had hit and entered his back, ruptured the intestine and pancreas and damaged a part of the liver. He died the following day.

There was ample evidence upon which the learned Judge could find that there had been an armed robbery with the aid of a deadly weapon, and that the deceased Sebuliba met his death in the robbery by being shot in the back. The question is who were the robbers? The proof of the identity of the participants in this crime was by no means easy to obtain, apart from the confessions of the Appellants who implicated their co-accused.

We will summarise the case against each appellant. We will then set out the general principles applicable to these appeals, and finally we will apply these principles to the facts and grounds of appeal. In the case of the appellant Kandole his appeal will be dealt with apart from the other appeals.

1. The Facts

The First appellant Walusimbi was arrested by army officers on the night of 9th November, 1989, some 18 days after the offences were committed on 24th October 1989. He was kept in custody by the army until handed over to the police on 17th & 18th January 1990. On 17th January 1990, when the Inspector of Police , John Opio (PW12) interviewed Walusimbi at

Basima House, the Directorate of Military Intelligence, Walusimbi volunteered to show Mr. Opio an S.M.G. gun which he had hidden at Bunamwaya Hill. He also said that "they had an S.MG. gun and a pistol". The latter had been recovered at his house. On 18th January 1990 he made an extra-judicial statement to a Magistrate Grade 1, Miss Wolayo (PW2). He clearly implicated himself and the Appellant Twaha Bugeza (No.2) and David Sekabembe (No.4), but not the Appellant Kandole (No.3). This appellant explained his part in the robbery in his extra-judicial statement.

Mr. Kakonge's evidence is the basis for the prosecution evidence as to what took place. The overtaking car had blocked the route chosen by the deceased who tried to avoid being trapped. But bullets were fired one of which hit the deceased as he complained, while other hit the tyres which forced the deceased's car to stop. The deceased and Kakonge left the car. The thieves entered the deceased's car and took away the money. One mad continued to fire his gun at random. Eventually the thieved drove away. Mr. Kakonge emerged and arranged for the deceased to get to hospital. Unfortunately Kakonge could not identity any one of the robbers who were 3 or 4 in number.

In the meantime, a report had been made, and Inspector Opio (PW 12) visited the scene. There he found spent cartridges of which he took possession. The gun pointed out by the appellant Walusimbi was test.-fired by the Firearms Expert and proved to be the gun, which had fired the spent cartridges found at the scene. Although he bullet which killed the deceased was not recovered, the circumstantial evidence was such that this group of men, with common intent, had fired the gun at the deceased's car to stop the deceased driving it, and *in* so doing had killed him. The gun was pointed out by the appellant Walusimbi on the 17th January 1990 with the result that he was found to have been in possession of the fatal instrument. Walusimbi did not explain how he came into possession of the gun. He denied the evidence against him. The defence having been rejected, he was found guilty of robbery,

The appellant Walusimbi's confession which was retraced implicated the Appellants Twaha and Sekabembe, in that he alleged that he, Twaha and Sekabembe had stolen the white corolla car. They had all taken part in the robbery. They escaped in it. It was found abandoned soon after at Kamwokya, Kampala. Unfortunately it was not dusted for fingerprints. It was in this

car that Walusimbi, Twaha and Sekabembe went to Grindlays Bank. One Jimmy was waiting for them. They saw a man putting money in a box into his pick-up. They then followed the pick-up.

They had the S.M.G.gun in the car, Jimmy stopped the pick-up by shooting at the tyres and at the car for he hit the deceased. They then stole the money, escaped, and abandoned the car at Kamwokya and left the scene. They hid the gun which was in box in the bush and returned to Kampala. Jimmy gave them their shares of money.

As the learned Judge pointed out, the surrounding circumstances were borne out, viz the stolen car in which they carried out the robbery; the method of stopping the car; the theft of the money and then escaped; and the hiding of the gun. The Appellant shared in the loot. The question is whether, without the confession of the Appellant's guilt at least to the robbery, his conviction would have been sustained by his unexplained production of the gun used at the robbery?

The background to the confession caused the learned Judge to warn the military authorities that to keep a person in custody without being brought before a court for a long period was illegal. Here this Appellant had been arrested and kept in military custody from 9th November 1989 to 17th January 1990 and then handed to the police. The Appellant complained of daily assaults and torture. Whether or not the police doctor noticed the result of these abuses, the fact is that the Appellant had been kept in custody for so long a period that his confession would seem to have been rendered objectionable. However, the learned Judge acted on it.

The Appellant Twaha's case was as follows:

He made an extra-judicial statement, which amounted to a confession. He claimed that he did not take part in stealing the while corolla.
He had, however, discussed the possibility of stealing money from Mitchell Cotts, drawn

from Grindlays Bank Ltd to be paid out as wages. On the day in question he went to Sekabembe's place at Makindye and there he found the stolen Corolla. Walusimbi, David Sekabembe, Jimmy Mugerwa and himself carrying their gun drove to the Bank. On the way they picked up Kandole. At 11.00 a.m Kandole ran from the bank and suggested that they follow another man who had packed three boxes of money and that later they should wait for the Mitchell cotts vehicle. Kandole was sent back to observe well. They saw a small pick-up go behind the Bank and it was loaded with money. Twaha took over the driving. They followed the pick-up, and blocked its way with Jimmy firing. The occupants of the pick-up ran away, but could not take the money. The robbers took the money and escaped. Twaha's share was shs 550,000/=

The Appellant Twaha had been arrested on 16th January, 1990. There was a retraction because he alleged that he was threatened that he would be killed. The learned Judge admitted the statement as having been voluntarily made and held that it was true. It was, she said, corroborated by the testimony of Kakonge, Kalyango and Opio, that is to say, by the surrounding circumstances.

The confession of Twaha was given in Luganda, and recorded by the interpreter in the magistrate's presence. An accused is entitled to give his statement in the language which he prefers, and the statement recorded in that language becomes the original statement. It must be read over to the accused for him to correct or accept, and he must sign for it. The magistrate and interpreter must date and countersign it. The interpreter must make the translation which, should be read over to the accused and he, the magistrate and interpreter must date and sign it. This procedure is preferable to the old procedure of the magistrate recording the statement himself direct from translation, since inaccuracies in interpretation have sometimes obscured the meaning of the accused. The strange feature in this case is that the original statement in Luganda was not signed by the Appellant Twaha nor the magistrate. The translation was signed by Twaha, the magistrate and the interpreter, and really treated as the original statement. Both the original and translation were produced; but the original being unsigned by the Appellant renders its production doubtful. It seems that a pro-forma for recording statement should once again be revived.

The learned judge also had before her the bank statement of a person called Edirisa Sempija, or Sempija Dilisa. It was produced by Mr. Kalyango (P.W.9) an officer in the Continental Building Society. The statement of account showed that the customer banked shs 500,000/= on 24th October 1989. The statement also had a photograph. The witness said:-

> ***"Looking at the photograph, the photo was taken when the person was wearing a hat (Moslem hat). He is not one of the accused. There is a similarity between the photograph and the second gentleman on my right (A 2)"***

'A2' referred to Twaha. But it is not certain identification of him. The statement of account was entirely at variance with the way the Appellant stated that he had operated his account in his confession.

In his defence the Appellant made the cryptic remark:-

> ***"Opio said that I had banked Shs.450,000/= on my account on 24'/1O/89. That account is mine. I am a businessman. I could bank money at any time.,"***

In the case of the Appellant Kandole he did not take party in the actual robbery having been left at the bank. His connection is the allegation of Mr. Kakonge that he recognized the Appellant behaving suspiciously at the Bank. It is unfortunate that Mr. Kakonge did not clearly explain when and where he noticed this Appellant. There were several possibilities. Was the appellant seen talking to the cashier next to the deceased when the latter was drawing the money? Was he some 10 paces away? Was he sitting outside the bank on the curb? If he was seen inside and outside the Bank one would have expected some explanation that having first seen him in the Bank he saw him again outside. For some reason Mr. Kakonge said he never saw him again that day. It may perhaps be that he referred to the later robbery, or for some other reason. But the evidence is disjointed.

There was an identification parade quite fairy carried out 23rd January 1990. The witness identified the Appellant Kandole whom he had known before by sight around Kampala. The question was what was the Appellant doing at the Bank? After the identification parade Mr. Kakonge said that he had seen this Appellant at the Bank when they were loading the money in the pick-up. If that is so, it seems doubtful whether Mr. Kakonge saw this Appellant near the Bank cashier. Indeed it is doubtful whether any connection can be made with the robbery, unless the Appellant was seen near the cashier, and again near the pick-up.

The learned judge emphasized that the confession of the Appellant Twaha implicated Kandole. She directed herself correctly that to be admissible for this purpose Twaha must have exposed himself to the same or even a greater risk than the person implicated.

She also acknowledged that it was evidence of the weakest kind. What unfortunately she did not do, was to advise herself on the authorities, that the practical approach to such weak evidence, is to consider whether there is a substantial case for the prosecution already in existence, so that this weak evidence simply adds the final assurance of the Accused's guilt. (See ***Gopa s/o Gidamebanya .v. R.*** (1953) 20 E.A.C.A. 255). This approach was very necessary in this case. The evidence of Mr. Kakonge was weak. By itself it would never have sustained a conviction. That therefore, was not a substantial case only wanting some further assurance. It was not properly produced. It was not agreed by Appellants Walusimbi or Sekabembe that Kandole was involved. It seems to us with great respect that the approach was the wrong way. The confession was in truth the main evidence, Mr. Kakonge adding some weight to it.

In these circumstances the weakest kind of evidence given by Twaha could not add certainly to the uncertain evidence of Mr. Kakonge as to where Kandole was seen by him, inside or outside the Bank, and what he was doing there. It is not certain that he was a spy, apart from Twaha's confession. We are not surprised that the Assessors advised the learned Judge to acquit this Appellant. We think that his appeal should be allowed on this point.

Then lastly the case for the appellant David Sekabembe. This appellant made a cautioned statement to Inspector Opio after his re-arrest. It was retracted and repudiated because he never made it and he was threatened and shot at with a gun. He has in fact a foreign body lodged in his leg, whether from this incidence or an earlier one, the evident is not clear.

His statement was to the effect that himself, Walusimbi and Twaha had taken part in stealing the Corolla. They had then met at the Bank and had set off for the robbery chasing the pick-up. What happened at that time was narrated in similar terms to the other confessions; the holding up of the pick-up by firing at it, and the theft of the money after which came the escape and abandonment of the Corolla.

This appellant had been arrested on the 10th November, 1989 and had remained in unlawful military confinement until he was handed over to the police on 18th January 1990. He had steadfastly refused to make any confession. The police kept him in custody in a different place to the appellants' Walusimbi and Twaha. Then on 23rd May he left the station; as the police recall incident, the appellant escaped from custody, and as the appellant asserts, he was released because he had been in custody for a very long time. The police officer responsible was apparently disciplined. The appellant was then re-arrested on 7th May 1990 carrying documents in the name of Eddy Lubowa. They would be calculated to hide his other name, by which the police knew his.

The learned Judge accepted the cautioned statement. The Judge recognised that it would have been prudent for the statement to have been taken by another person, other than the investigating officer; but she said it was not unlawful. The statement contained a confession to an officer of the rank required by Section 24 of the ***Evidence Act.*** Moreover it was corroborated by Kakonge's description of what happened, and the extra-judicial statement of Walusimbi and evidence of Opio. It was further corroborated by his escape and change of name. The statement was in fact true.

On the facts, there are three areas where the evidence ought to have been clarified by further evidence. The first is that Inspector Opio may or may not have taken this Appellant to Miss

Wolayo as well as Walusimbi. Inspector Opio started off in early evidence in a trial within a trial saying that he had taken the Appellants to Miss Wolayo for a statement to be recorded. One was tendered in cross-examination but not properly produced. As inspector Opio's evidence was heavily challenged, this difficulty should have been cleared up. The prosecution recalled Miss Wolayo, who denied recording it. But it was shown to her by the defence. So the defence ought to have produced it from wherever they obtained it. Having not done so, we cannot take any further notice of this alleged statement. But it makes little difference as far as this Appellant's general denial goes at this stage. The main value of it was to show that Inspector Opio was not reliable. That chance was lost in non-production.

Secondly, there is the controversy whether the Appellant was released or escaped. As the police officer responsible was disciplined, something went wrong at the police station. Here is again an example of the Court being asked to accept a witness's conclusion as to what happened.. The police officer himself should have been called to explain what he did. He was not so called and therefore, the Court must give the benefit of the doubt to the Appellant. The later was present at the incident. Mr. Opio was not. What Mr. Opio says happened, is what he heard from the officers who had to explain their actions.

Thirdly, it is most undesirable for the officer conducting the investigations to take a cautioned statement at a late stage of the investigations. Mr. Opio had by this time had the confessions of Walusimbi and Twaha, the finding of the gun and the ballistic expert's report on it. The Appellant was cornered. If he did not confess, he would imagine that the least that would happen might be what happened in military custody from 10th November, 1990 to l8" January 1991. It is not surprising that Mr. Opio thought that the Appellant spoke voluntarily. The test would have been whether he would tell this story to a Magistrate, or to someone who knew nothing about the case, and could not have written part of the statement himself.

Now, having said that, we must explain the setting in which such a statement is objectionable. What we have said does not apply to a cautioned statement at the time of arrest before the police officer knows anything about the case. Even so a probable confession can be referred to a Magistrate. We are aware of the provisions of the Evidence **Act** permitting a confession to a police officer. As far as possible that statement should he made to a police officer who knows nothing about the case.

2. The General Principles.

We must now deal with the underlying problem running through this *case* which stems from sec.25 of the Evidence Act. The learned Judge dealt with it squarely in one of her decisions at the conclusion of a trial within a trial. The provisions of the Section are as follows:

> ***"A confession made by an accused person is irrelevant if the making of the confession appears to the Court, having regard to the state of mind of the Accused person and to all the circumstances, having been caused by any violence, force, threat, inducement or promise calculated in the opinion of the Court to cause an untrue confession to be made."***

Two interpretations, at least are possible. The one the learned Judge chose is that the test is whether the confession is in fact true, whatever the inducements. Apparently, if the Accused has been induced to tell the truth, that is the best evidence after all.

The other interpretation is to consider the nature of the inducement alone. Was it such as likely to lead to an untrue confessions? If it was, then it is objectionable and should be excluded. It is sometimes the duty of the Judge to decide whether evidence obtained by unlawful or improper means should be excluded e.g. in the case of **an agent provocateur** committing a crime himself.

The problem raises a matter of the first importance. There is the operation of Section 29 of the **Evidence Act.** The finding of a fact whether induced or not is accepted. The philosophy is that the Accused has undertaken to produce the fact discovered himself a matter within his own knowledge. It proceeds nevertheless, upon a possibly tainted background. But so cogent is the fact discovered, compared with a confessional statement, because usually it is unequivocally true, that proof may safely proceed upon it. It can still be imagined, however, that the discovery of a fact - such as possession of some object engineered by an agent provocateur - could still be excluded. On the other hand, there is the ingrained disgust of torture as a method of investigation. In some countries such confessions have been excluded as too dangerous After the recent Irish case in England, very special safeguards will be

necessary, if such confessions are acceptable at all. Some prisoners have died in custody, under interrogation and yet some have given false confessions to shield other persons. Nevertheless, there are occasions when, regrettable though the handling of the Accused may have been, he may voluntarily decide that he will not be influenced and give a statement which is genuinely not affected by inducement. If it is true, it will be sanctioned by Section 25 of the **Evidence Act**

Bearing all these considerations in mind, we take the view that the Legislature aimed at setting forth a pragmatic view of this topic, and chose appropriate words, leaving it to the Judge's judicial discretion whether the statement was to be excluded or admitted in evidence. The essence of the Section is not simply ether the statement is apparently true. Attention should be paid to the manner in which the statement was made; whether the circumstances made it likely that an untrue confession would be made, or whether the statement was voluntarily made and gave some grounds for believing it to be true. But even if admissible the usual safeguards should still be observed. The rules concerning corroboration and confessions of a co-accused are still to be acted upon. There is moreover, the general rule that a Judge may reject evidence if it has been unfairly obtained; ***KENYARITHI s/o MWANGI v. R. (1956)*** 23 E.A.C.A. 422).

The approach to Section 25, as far as the prosecution is concerned, should be that the confession is merely an aid to investigation. As far as possible, as the learned Judge correctly held, the facts of the case should be investigated independently, and if identification is the main issue, that fact must be specifically investigated. In this case, as the learned Judge pointed out very properly, the "get-away" car ought to have been dusted for finger-prints.

The whereabouts or activities of an accused should also be followed up; and we acknowledge that some such efforts were made in the case. Corroboration should always be sought implicating the accused person in some material particular and which tends to show that what is said in the confession is true. ***(R v. OKITUI s/o ODEKE*** (1941) of E.A.C.A 294. It is not usually sufficient to find the surrounding facts ***per se*** borne out by other evidence, unless the accused himself has been implicated by them. It is as well to recall that motive and opportunity are important matters when weighing the prosecution case, hut they are not in themselves regarded as corroboration; ***(R v. KEISHEIMEIZA s/o TINDIKAWA*** (1940)

E.A.C.A 67).

Finally it should be remembered that it is inadvisable for a cautioned statement to be recorded by the investigation officer; ***(Israel Kamukolse v. R*** (1956) 23 E.A.C.A 521). The following passage seems to be as relevant in 1994 as it was in 1956:-

> ***"We have already mentioned that most of the impugned statement were recorded by the Investigating Officer. This Court has more than once said that this practice is inadvisable, f not improper: see NJUGUNA & OTHERS (etc). By ignoring this opinion the Investigating Officer in the present case has exposed himself to grave allegations of misconduct made both the Appellants and by their Advocate. We trust that the Law Officers will take steps to bring these remarks to the notice*** *of* ***police officers in Uganda generally and Inspector Sandhu in particular."***

Turning to the question of confessions by a co-accused, it must be recalled that it is accomplice evidence of the weakest kind. Counsel usefully relied on ***Simon v. Rep.-(1971)*** E.A. 74. In ***Anyanga v. R..****(1968)* E.A. 239 at p. 240. Sir Clement de Lestang V.P. described the situation in this way:-

> ***"If it is a confession and implicates a co-accused it may, in a joint trial, be "taken into consideration" against that co-accused. It is, however, not only accomplice evidence but evidence of the "weakest kind," and can only be used as lending assurance to other evidence against the co-accused,."***

Such evidence, of course, implicates the co-accused directly. But it is of the "weakest kind." The Courts are looking for admissible evidence **aliunde** to show that the confession itself is trustworthy, especially as regards a co-accused. Confessed criminals are not in general persons whose word can easily be trusted. But other evidence and the surrounding circumstances may show that this confession is trustworthy against the maker. It is less trustworthy against a co-accused even when the confession has not been retracted, because as the **Evidence Act_** states, it can only be "taken into account." But when the confession has been retracted or repudiated, it then requires more corroboration before it can be relied on

against the maker. How much less so, is that the case against a co-accused. ***(Israeli Kamukolse v.*** R. (1956) 23 E.A.C.A *521).*

We should also note that confessions by co-accused cannot be prayed in aid as corroboration ***R. V. Aryato s/o Ochulura (1936)*** 3 E.A.C.A 120. We are aware of the development in the law of corroboration in sexual cases. We are not prepared to extend that development to the corroboration looked for in cases of retracted confessions, by allegations of co-accused in their confessions themselves requiring corroboration. There is a world of difference between evidence upon which proof can be founded and evidence of the weakest kind which may be taken into account. We would not be able to use the confessions of Walusimbi or Sekabembe for the purpose of adding corroboration of Twaha's confession, even if such confessions were admissible.

3. **The application**

We turn to the precise issues in this case.

The Appellant Walusimbi appealed on the grounds that his confession ought not to have been accepted. We agree because he had been in unlawful military custody for a very long time. But he volunteered to produce the gun. He did so to the police authorities. He may have returned to the military authorities for one night. But there seems nothing in the evidence which one would describe as evidence unfairly obtained. The learned Judge was entitled to admit this evidence.

For all these reasons we leave aside the Appellant Walusimbi's statement. But this Appellant produced the gun which had been used at the time of the robbery, since it had been used to fire bullets from the spent cartridges at the scene of the crime. Without any explanation of the Appellant's possession of the gun, it was a proper inference that this Appellant had taken part in the robbery. The Appellant stated in defence that the police produced the gun. It seems it was planted on him in some way. The learned Judge was entitled to rely on the prosecution evidence that it was the Appellant who produced the gun, and his untruthfulness about this matter confirms the finding that the Appellant was at the scene of this crime, acting together with others in the commission of this robbery described by the witness Kakonge.

We confirm this Appellant's conviction for robbery and the sentence imposed thereon for a man of this Appellant's age of 27 years. His appeals on the robbery charge are dismissed.

We pass on to the case against the Appellant Twaha. There is now no case of the Appellant Walusimbi's alleged confession being in any way against Twaha. There is simply the alleged confession of Twaha and the bank statement.

Twaha was arrested on 16th January, 1990 by the Military. He was handed over to Inspector Opio on 17th January and made this confession on 18th January. He was examined by the doctor on 19th January. The alleged allegations of torture did not result in any wounds seen by the doctor; nor did this Appellant complain of any physical abuse to the Magistrate before whom he gave his extra-judicial statement. The reason he gave for the confession was that:-

> ***"At the commencement of the acts, he did not expect Sebuliba to die, that he had been assured by his colleagues that nobody was going to die; that he was very sorry for what had happened and that was why he was willing to make the statement."***

The learned Judge was entitled to disregard the allegations of torture. This Appellant had been in custody for such a short period that any real wounding would have been noticed by the doctor and possibly the Magistrate, although the latter did not inspect the body of the Appellant. A possible future safeguard might be to ask the accused to sign for any wounds he may have received.

Accordingly, the learned Judge had before her a retracted confession and she looked for corroboration of its truth. The surrounding facts were true enough in the light of Mr. Kakonge's evidence, but too much emphasis was placed on the confessions of co-accused implicating Twaha. As a matter of fact, both the Appellants Walusimbi and Sekabembe implicated Twaha in the theft of the corolla which the robbers used; yet Twaha denied any part in that theft.

That indicates very clearly the limited usefulness of such evidence. Both Walusimbi and Sekabembe had been held unlawfully in custody by the military authorities for a long time,

and their confessions were retracted, and in Sekabembe's case repudiated as well. It would have been better to have left their confessions aside.

We also note that the extra judicial statement was not properly produced in its originally form. Twaha signed every page of the translation as correct. Comparing the translation with the original it is correct according to the Interpreter of the Supreme Court. The doubt as to the admissibility of the of the original is curable since even if the original had been properly produced and exhibited, it would not have been translated any differently.

Looking at the matter from the point of view of Twaha's own confession and the reason why he gave it, it is necessary to examine whether there is corroboration. It stands as being an apparently serious confession. It will be found however, that his defence has conflicted with his confessional account of what he did with his share of the money stolen.

In his confession, he said that he had banked Shs.300,000/- the following day after the robbery and that he kept shs.250,00/=. By October he had abut Shs.800,000/= on his account. He then purchased an ominibus by installments of Shs.430,000/= and Shs.270,000/= He was left with a balance of Shs. 150,000/=.

The statement of account produced by Mr. Kalyango (P.W.9) did not reflect any one of those dealings. While the Appellant Twaha admitted having a share of the money stolen, the bank statement did not bear out how he stated that he had used the money. That statement showed that the had very little money in his account, the major and apparently unusual payment into the account was Shs.500,000 on 24th October, 1984. That was much more in conformity with the beginning of the confession, that due to the detention of his goods at Malaba, he was without capital in his business and he was looking for a loan. We infer that he decided to take pat in this robbery as a result, because he could not raise a loan.

The evidence of Kalyango did not identify the Appellant Twaha as the holder of the account in the name of Sempija Dilisa. But the Appellant gave unswom statement in which lie said:-

Opio said that I had banked Shs.450,000/= on my account on 24th October, 1989. That account is mine. I am a businessman. I could bank money any time."

The learned Judge held:

"He admitted that he had an account with Continental Building Society where he banked money on 24/10/1989."

In our judgment that was a reasonable understanding for the defence. It leads to several conclusions. The first is that the statement of account was that of the Appellant despite the vagueness of the identification by Mr. Kalyango. If that was the Appellant's account it showed that part of his confession was untrue, namely the romance of banking a part of the money stolen and using the other part to buy an omnibus, with an account of about Shs.800,000/=. What he had done in truth was that he had banked Shs.500,000/= on 24th October, 1989, as must be inferred from the defence. Where had a down-and-out businessman suddenly acquired Shs.500,000/=? It must be as he said in his confession that it was from the robbery.

The second conclusion must be, that while the statement of account by itself did net corroborate the details of banking explained by the Appellant, it led to a reconsideration by the Appellant had happened, in the Appellant's defence. That allowed the trial Court to separate that part of the confession that dealt with his case of his share of the money stolen, and rely upon the defence. The deposit of Shs.500,000/= is opposed to Shs.450,000/= as the Appellant understood Mr. Opio to say; but that was a misunderstanding. We would not call this corroboration, but it is substantial factor in assessing the situation as whole.

Thirdly, the learned Judge repeatedly used Mr. Kalyango's evidence as corroboration of the confession. That was a misdirection. Mr. Kalyango's evidence together with the defence disproved part of the confession, with the result that as we have observed in general terms a confession should only be accepted with caution. Kakonge's and Opio's evidence did not offer corroboration as the Judge thought.

The difficulty which now faces the Court is this, whether Twaha's confession can be relied upon without corroboration. Perhaps a useful statement of principle may be gleaned from ***R. V. Pangahesa s/o Mgimba*** (1948) 15 E.A.C.A. 79 and ***Muligwa s/o Mwinje V. R.*** *(1953)* 20 E.A.C.A. 255, that there is no rule of law making corroboration essential before a retracted confession can be relied upon, but as a matter of practice the Court looks for corroboration, because it is dangerous to act upon a retracted confession alone. Yet after warning itself of the danger and after a full consideration of the circumstances, including the way in which the confession was given and, the nature of the retraction, the Court is satisfied that the confession cannot but be true, the Court may, with great caution, act upon it.

With great respect we do not find that the greatest care was taken over this confession. We have set out the misdirection on the facts. There was yet the misdirection relating to the charge of murder. Twaha was no confession to murder. The gang had not intended to kill anyone, as matter of common intent, as Twaha explained to the Magistrate. There is no statement in the confession showing that there was any intention to kill. The intention was to shoot at the tyres. Consequently it was not right to convict the Appellant Twaha of murder on the basis of the confession.

Had the learned Judge analysed the situation accurately the question is whether she would have relied on the statement alone. We have to look at all the circumstances for ourselves. Here was a man who commenced by apologizing for the death of Mr. Sebuliba. He was hard-up for capital to carry on his business. He fell to the temptation of taking part in this robbery. He described the circumstances o the robbery in similar terms to Mr. Kakonge, although he Appellant knew the planning that had taken place before hand. The S.M.G. gun had been fired. The gang stole the money and his share was shs.550,000/=. Shs.500,00/= had been banked by him in his account on 24th October, 1989, a possible fact as the robbery took place at or a little before midday. Taking all these facts together we are convinced that the trial Court would have come to the same conclusion that it did.

In our view, judging this confession for what it is worth, in the circumstances of this case, we think that the trial Court and the Assessors were right to rely upon part of it. Accordingly we uphold the conviction of this Appellant for robbery and the sentence imposed.

There remains the appeal of the Appellant Sekabembe. The learned Judge correctly addressed her mind to the principles set out in ***Tuwamoi v. R (1967)*** E.A. 84, that in the case of both retracted and repudiated confessions, corroboration is looked for as a matter of practice. The learned Judge held:-

> *"**The statement is amply corroborated by the testimony of Opio, Kakonge and the extra-judicial statements made by A1 andA2" i.e. Walusimbi and Twaha.).***

It was further corroborated by the Appellant's escape from custody and the changing of his name on his identity card.

The appeal presented challenged the admission of the confession, and then the reliance on it without corroboration. We agree that the appeal must be allowed. First, we are of the opinion that the Appellant was for a long time in unlawful detention by the military authorities. He left custody but he was re-arrested. It was for the prosecution to show that the long period of arrest was not operating on his mind. We can find no evidence to that effect as this aspect was not inquired into. There was also Byaruhanga's evidence (D.W.7) that he was bleeding whilst in custody after making his statement.

Secondly, we are not satisfied that Inspector Opio's presence was proper in itself, or would allow the Appellant to forget the past and make a fresh start. Certainly it is clear that the Appellant steadfastly refused to "co-operate" with Inspector Opio at the beginning. What caused him to change his mind was not inquired into. We are therefore, not satisfied that after his re-arrest the Appellant then decided to confess without the memory of the past acting upon him.

The corroboration relied upon of his alleged escape was unsatisfactory. In the circumstances, as we have shown no great probative value lay in the change of his name. Moreover the confessions of he co-accused could not act as corroboration.

It would clearly be unsafe to rely only upon this repudiated and retracted confession.
The convictions of all the Appellants on the charges of murder must be quashed. There was no evidence of an intention to kill the deceased. The use of the gun was to stop the car.

In consequence of the foregoing reasoning, the appeals of the Appellants, Kandole ad Sekabembe are allowed, their convictions of robbery and murder quashed, their sentences are set aside, and they are ordered to be set at liberty forthwith unless held for any other lawful cause. The convictions of Walusimbi and Twaha on the count of robbery are confirmed as well as the sentence. The convictions of Walusimbi and Twaha for murder as quashed and the sentence set aside.

Delivered at Mengo this 18th day of March, 1994.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE.

A.H.O ODER

JUSTICE OF THE SUPREME COURT

H.G. PLATT

JUSTICE OF THE SUPREME COURT