IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO - DCJ, ODOKI - JSC, PLATT - JSC)

CRIMINAL APPEAL NO. 1/93

BETWEEN

A-1- HOFNI TOPACHO ONGIRETHO

A-2- NOAH ABBAS ==========APPELLANTS

A-3- PHILIP ABOTH KARUNEN

AND

UGANDA==========NDENT

(Appeal against Conviction & Sentence of the H/C decision holden at Kampala by (Mr. Justice J.P. Berko) dated 15-1-93, in H.C. Cr. Ss, No, 7/92)

JUDGMENT OF THE COURT:

The appellant and three other men, who were acquitted, were tried and convicted on an indictment for treason, contrary to Section 25(1) (c) of the Penal Code. Nine overt act were alleged in the statement of offence. The first overt acts alleged that the appellants and other on 5-8-90, held a meeting at the International Television Sales premises in Kampala at which plans to overturn the Government by force of arms were discussed.

In the second overt act it was alleged that on 12-8-90, at the same place the appellants and others held a similar meeting held on 17-8-90, at the same place by the appellant and others.

In overt act 4 it was alleged that the appellants and two others met at Spring Garden Village, Kyambogo, near Kampala, and discussed further the plans overturn the Government. Overt act 5 alleged that the first and third appellants and two other accused who were acquitted held another meeting at the International Television Sales on 25-8-90, arid discussed the plot.

Overt act 6 alleged that the appellants alone met at the same place on 27-8-90, and discussed the plot.

Overt act 7 alleged that the first and third appellants met alone at same place on 28-8-90, and discussed the plans to overturn the Government. Overt act 8 related only to the first appellant and other persons who were not before the Court. The allegation was that they had met at "the Date Processing offices in Kampala" on 29-8-90 and discussed the plans to overturn the Government. And in overt act 9 it was alleged that the first and third appellants and others, (but not the second appellant) had met at the open park opposite Kampala Railway Station on 29-8-90 and discussed plans to overturn the Government.

After hearing the evidence of both sides and submissions of Counsel in the case, the trial Judge summed up the case to the Assessors and, without waiting to hear the opinion of the Assessor, he decided that the case against the fifth accused, one Ocan, had not been proved. He promptly acquitted him and orders his immediate release from custody.

Later the assessors gave their joint opinion. It was delivered by one of them, Kayongo. They advised the Judge to acquit all the appellants on all the overt acts, as the allegations against them had not been proved by the prosecution. At the outset of his judgment the Judge ruled that the case against the first and third appellants in overt act 7 and against the first appellant in overt act 8 had not been established. He acquitted them. He stated that in fact he thought that they had no case to answer on the two overt acts but that all the same he had decided to put those two appellants of their defence.

On overt act I he found the appellants not guilty and acquitted them. On overt act 2 he convicted the second and third appellants as charged but found the first appellant guilty only of aiding and abetting treason. He convicted him accordingly. On overt act 3 all the appellants were acquitted. On overt act 4 the second and third appellants were convicted as charged while the first appellant was convicted of aiding and abetting treason only. On overt act 5 the first and third appellants were acquitted. As already point out, the second appellant was not implicated in that act.

On overt act 6 the first appellant was convicted of aiding and abetting treason; the second and third appellants were convicted of treason. Surprisingly, the trial Judge made no specific finding on overt act 9, although he had found the first and third appellant, two co-accused (A3 and A4) and other not before Court had met and discussed the overthrow of the Government as alleged in that overt act. May be the Judge was in a dilemma here. Having acquitted the A3 and A4 how could he convict the first and third appellants? Yet in view of finding he should have gone on the convict them. He was not entitled to leave the matter open. A decision had to be made one way or the other.

The trial judge simply wrapped the matter up loosely as follows:

> ***"I am satisfied however from the evidence before me that the prosecution have proved the case against Al, A2 and A6 (the first, second and third appellants respectively). Though Al did not attend and participate in the meetings, which formed the overt acts, from the evidence in*** *Court* ***he aided and abetted the crime. By virtue of the provisions of S 21(1) (c) and 35 of Penal Code Act Al is a principal offender. I have found A1, A2 andA6 guilty of the offence."***

The appellants were sentenced to death. Hence this appeal based on seven grounds, namely: -

> ***"1. The learned trial Judge erred in law when at the conclusion of the prosecution case he did not make a finding and ruling as to whether or not a prima facie case had been made out against the appellants.***
>
> ***2. The learned trial Judge erred in law when he did not inform the appellants nor recorded their replied as to their rights before they gave their defences.***

3. ***The learned trial Judge erred in law when he convicted the 1st appellant of the offence of Aiding when he had not been charged with it.***

4. ***The learned trial Judge erred in law when he failed to require and record the opinion of the 2nd assessor.***

5. ***The learned trial Judge erred when he failed to resolve the discrepancies and contradictions in the prosecution evidence in favour of the appellants.***

6. ***The learned trial Judge erred when he relied on his own theories unsupported by evidence to reject the appellant's cases.***

7. ***The learned trial Judge erred when he shifted the burden of proof from the prosecution to the appellants."***

The Memorandum of appeal was drawn and filed by Mr. Paul Byaruhanga on 18-10-90, when he was representing all the three appellants, on a state brief. But by the time the appeal was called for hearing the first appellant had retained Mr. Owori as his new Counsel, on a private brief. At the hearing Mr. Owori adopted Mr. Byaruhanga's memorandum but abandoned Grounds 1,2,4 and 6. He argued grounds 3,5 and 7 which concerned his client. Mr. Byaruhanga abandoned grounds 1,2,3 and 4 and argued 5 and 6 only. Grounds 1,2 and 4 were abandoned on the ground that they were ***"of no consequence"***

We agree that there was no merit in Ground 4. But we would say this on ground 1 and 2. Section 71 of the Trial on Indictments Decree clearly required a trial Judge to decide, at the close of the prosecution case, whether the accused has a case to answer or not. If a prima facie case had not been out against him then he must be acquitted at that stage and not latter. If he has a case to answer then the options available to him under section 71(2) must be explained to him before he makes his defence.

In this case Counsel for the appellants informed the trial Judge that they did not wish to make submissions of no case to answer. May be that influenced the Judge's decision on the matter but it is the duty of the Court and no one else to decide whether the accused has a case to answer or not.

The court must decide the matter one way or the other whether there is a submission by Counsel or not. Be that as it may, we are satisfied that the irregularity did not occasion a miscarriage of justice in view of the conclusion the trial judge reached on those two overt acts.

The convictions of the appellants were grounded on the evidence of Army Sergeants Morgah Armdam (Pwl) and Stephen Musana (PW2). They were Military Intelligence officers who participated in the alleged meetings as spies. They prepared reports of these meetings. The reports were put in evidence as corroboration of their oral testimony. As against the first appellant his retracted confession was relied on.

Their testimony was, briefly, that sometime in May 1990, the Military intelligence received information from Private Buntuki (PW6) a member of the Military Intelligence Directorate, to the effect that a group of people were plotting to overthrow the Government violently. The group was trying to recruit government soldiers into its ranks. Accordingly, the Directorate of Military Intelligence detailed PW1 and PW2 to infiltrate the group of plotters which they did. Among the plotters were the appellants. At the time the first appellant was employed by International Television Sales Ltd. as Assistant Sales Manager, the second appellant is a former Major in the defunct Idi Amin Military Regime and the third appellant was self-employed. Thereafter they attended a series of meetings as detailed in the overt acts.

According to PW1 and PW2 the meetings at the International Television Sales were facilitated by the first appellant who allowed the plotters to meet in his office. The first appellant also arranged for the meeting at Spring Garden Village, Kyambogo, to he held in his cousin's house. He even provided their transport to and fro Kyambogo. He did not attend the meeting in his office expect once (on 28-8-90) but even then he said nothing during that

meeting.

The appellants denied the charges. The first appellant denied that he permitted his office to be used by the appellants and the witnesses. He denied having even facilitated the meeting at Kyambogo. The second and third appellants denied having attended any of the alleged meetings.

We will deal with the case against the second and third appellants first. The trial Judge found that PW1 and PW2 had given contradictory evidence on overt acts Nos. 1,3,4 and 7. With regard to overt act 1 he found that there was a major discrepancy in their evidence which: -

> ***"Went to root of the prosecution 's case which depended on the credibility of the two key prosecution witnesses."***

As a result he acquitted all the appellants. On overt act 3 he did not believe the evidence of PW2 in view of a serious conflict in his evidence and one of the reports (exh. P3) which was compiled by PW1 and PW2. He said: -

> ***"The contents of the said report and the evidence of PW2 about what were discussed at the meeting are so conflicting that the two cannot be reconciled and a sense made out of them. The inconsistencies and contradictions between PW2 's evidence in covert and the report Exh. P3 cannot be said to be minor."***

He held that overt act 3 had not been proved. In fact PW2 was a self confessed liar. He admitted that he and PW 1 had lied to the court about their reports - that they had written them at Lubiri Barracks immediately after the meetings with the appellants when the truth was that they had written them three months later and then backdated them. This is how PW2 put it:-

"The reports were written three months after the arrest of the accused persons so that I have told the Court that we recorded our report after every meetings are all lies."

Even some of the reports were shown to be false. For example, in our report (Exh.P8) it was alleged that A5 (Ocan) had attended the meeting of 27-8-90, at Kyambogo. Yet in Court PW1 and PW2 said nothing about that. The trial Judge found as a fact that A5 did not attend the alleged meeting and accordingly acquitted him of overt act 4.
PW1 and PW2 did not only contradict each other in material respects but did not support each other on other points. For example, in respect of overt act 2 the trial Judge found that: -

"PW1's talk about he and PW2 promising to recruit soldiers from Lubiri Barracks and that they had 23 guns and 20 trusted soldiers at Lubiri Barracks is not supported by PW2."

The assessors in the case did advise the trial Judge that as PW1 and PW2 had already been found not to be credible witnesses on all the overt acts. With respect, we think the assessors were right. As the two key witnesses had been very badly discredited, they should not have relied upon to convict any of the appellants on any of the overt acts which formed a series of same transaction.

In the result, we allow the appeal of the second and third appellants.

The first appellant had raised an interesting point of law in ground 3 of appeal. He complaint is that since he was charged with treason, it was not open to the trial Judge to convict him of aiding and abetting treason which is not a minor and cognate offence. The offence of treason is set out in section 25 of the Penal code, the relevant parts of which state as follows:

"25. (1) Any person who

(a) *- - -*

(b) *- - -*

(c) Contrives any plot, act or matter and expresses or declares such plot, act or matter by any utterance or by any overt act in order, by force of arms, to overturn the Government as by law established;

(d) Aids or abets another person in the commission of the foregoing acts, or becomes an accessory before or after the fact to any of the foregoing acts, or conceals any of the foregoing acts.
Commits an offence and shall suffer death."

Overt act is defined in section *35* of the Penal Code as follows: -

"35. For the purpose of any offence defined in this Chapter (Chapter VII covering treason and offences against the State) when the manifestation by an overt act of an intention to affect any purpose is an element of the Offence, every act in furtherance of the commission of the offence defined or every act of conspiring with any person to effect that purpose and every act done in furtherance of the purpose by any of the persons conspiring, shall be deemed to be an overt act manifesting the intention."

As already pointed out, the trial Judge held that aiders and abettor are principal offenders by virtue of the provisions of section 21(1) (c) and 35 of the Penal Code. Section 21(1') (c) states:

"21. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the

offence, and may be charged with actually committing it, that is to say -

(a) - - - -

(b) - - - -

(c) Every person who aids or abets another person is committing the offence."

Clearly section 21(1) (c) is a general provision, making aiders and abettors principal offenders. There is a special offence of aiding and abetting in section 25(1) (d). The prosecution chose not to proceed under this section by amending the charge after it had transpired, from the evidence, that the first appellant had not participated in the actual plot but that he might have facilitated the plotter somehow. As the trial judge rightly found, the prosecution did not prove that the first appellant participated in any of the overt acts.

The question then is, in view of the specific offence in section 25(1) (d) was the trial Judge right to invoke the general provision in section 21(1) (c)? We think not. The first appellant could have been charged with aiding and abetting under section 25(1) (d) but was not. The evidence led by the prosecution clearly focused on the overt act as stated in the particulars of the offence and naturally the first appellant applied the defence to those overt acts only.

We are satisfied that he was wrongly convicted under section 25(1)(d). His appeal succeeds on that account. We do not find it necessary to go into the question whether there was sufficient evidence to warrant the conviction.

In the result the appeal is allowed. The appellants' conviction is quashed and sentence set aside. The appellants are to be released from custody forthwith unless otherwise lawfully held.

Dated At Mengo this 4th day of March 1994.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE OF THE SUPREME COURT.