THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI, C.J., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C. AND KANYEIHAMBA, J.S.C.)

CRIMINAL APPEAL NO. 3/19 97

OGWANG J. ALFRED ... ... APPELLANT

AND

UGANDA ... ... RESPONDENT

(Appeal from the judgment of the Court of Appeal at Kampala (Manyindo, D.C.J., Mukasa-Kikonyogo,
J. and E.S. Lugayizi, J.) dated 17th January 1997 in Court of Appeal Criminal Appeal No. 41 of 1996)

JUDGMENT OF THE COURT:

This appeal is from the decision of the Court of Appeal which on 17th January 1997 dismissed the appeal of the appellant to that court against convictions by the High Court for ten murders. The Court of Appeal allowed the appeal in respect of three other convictions for murder on grounds that there was no proof of death in respect of those three convictions.

The case for the prosecution was that in 1994 the appellant, a policeman, was based at Kamwenge Police Post. At the time material to this appeal he was under the command of Inspector Kisembo Samuel (P.W.10). Each Policeman including the appellant had a gun which he kept in his residence because there was no armoury. Policemen were on strict standby for duty. The appellant was on duty during day time on Christmas day (25/12/1994) until 6.00 p.m. Birungi Joseph (P.W.3) organized a disco in Kamwenge Social Hall. It was well attended because by about 11.00 p.m. well over 100 people were in the disco drinking

and dancing. The appellant went to the disco at about 8.30 p.m. There was a canteen in a room adjoining the social hall which was connected to the hall by a door. A lady called Night sold beers in the canteen. The second deceased (Ruhanga Geofrey) and the fifth deceased (Rutaro John) together with Asaba were among the young people drinking beers in the canteen. The door leading from the canteen to the dancing hall was closed. Asaba leaned against that door of the canteen. The canteen and the social hall were lit with electricity from a generator. At about 11.00 p.m. the appellant attempted to enter the canteen by pushing the canteen door onto which Asaba leaned. Birungi (P.W.3) opened the door. The appellant paid Shs. 1400/= for a bottle of beer. Birungi Joseph (P.W.3) opened the bottle and gave it to appellant. The appellant refused to take the beer and stated that he was annoyed with the young men in the canteen because they had delayed to open the door for him when he pushed the door. The appellant could not accept apologies by Birungi Joseph (P.W.3), the second deceased and others. He refused to drink the beer he had purchased and another one offered by Mwebembezi (P.W.5) . The appellant got out with Mwebembezi (P.W.5) while saying he (the appellant) was going home. Noah Kassim P.W.4 who had allowed the appellant into the dancing hall without charging entrance fees offered to see the appellant off. As he was going away, the appellant asked Mwebembezi (P.W.5) to warn the second deceased to be careful. Then the appellant went to his residence which was about 2 km away and collected his gun with two magazines. He returned to the scene. There he stood by the canteen window and first shot down the 2nd deceased then the fifth and other persons who were in the canteen. He thereafter moved, stood in the door way of the Social hall and turned his gun on to the crowd in the dancing hall where he emptied the first magazine of his gun by shooting at everybody, killing and wounding many people including those who form the subject of the thirteen counts upon which the appellant was prosecuted. As the appellant was in the process of replacing the empty magazine with a full one so as to continue his carnage, Birungi Joseph (P.W.3) gathered courage, run out of the dancing hall and

switched off the generator. Because of this brave act, the appellant could not see targets, so he returned to his uniport.

Inspector Kisembo Samuel (P.W.10) came out of his residence to find out where gunfire came from. He found the appellant armed with his gun standing by his uniport. Thrice Inspector Kisembo (P.W.10) asked if the appellant had heard the gun shots, but the apfcpellant did not reply. Upon being asked the third time, the appellant turned his gun towards Inspector Kisembo (P.W.10), Who got hold of the barrel of the gun, struggled with the appellant for the **gun and eventually** disarmed the appellant. The appellant disappeared from there. Inspector Kisembo (P.W.10) sensed that the barrel of the gun was very hot. He formed the view that it had been used in shooting many times. He removed the magazine which had three bullets. He also removed a bullet from the chamber of the gun. Later on a crowd of people from the scene of the carnage reported to Inspector Kisembo (P.W.10) what had occurred. The Inspector (P.W.10) promised to attend to the matter in the morning. The crowd went away. The appellant was arrested a day later from Dura, 18 miles away where he had fled.

In his defence the appellant made an unsworn statement. He claimed that before going to the dance he had drunk two bottles of enguli and marwa with Inspector Kisembo (P.W.10). That thereafter on instructions of Inspector Kisembo (P.W.10) he went on duty at the Social Hall. He admitted he was armed with his submachine gun. At the Social Hall he handed his gun to an L.D.U. to keep for him as he drank and danced. That he danced, got tired and dozed off or slept. He came to his senses long after midnight when he was in his uniport. He then heard people speaking outside claiming that he had killed people at the Social Hall. He fled the uniport. In effect he denied the offences.

At the conclusion of the trial the assessors advised the trial judge to convict the appellant on all the thirteen counts. The learned judge believed the prosecution evidence.
He disbelieved the appellant, considered the possible defences of intoxication and provocation and found that they were not available to the appellant and so he convicted the appellant on all the thirteen counts, sentenced him to death on only the first count and purported to suspend sentences on the other counts even though he had not actually sentenced the appellant on those counts.

The appellant appealed against the convictions and sentence to the Court of Appeal. The Court of Appeal allowed the appeal on counts 7, 10 and 11 because of lack of evidence that the persons named in the three counts had died. The Court dismissed the appeal on the rest of the counts. The Court of Appeal correctly noted that the learned trial judge

erred in not passing sentence of death on all the counts before he suspended most of them.

The appellant has appealed against the decision of the Court of Appeal in respect of the convictions on the ten counts. Mr. Ogwal-Olwa for the respondent took objection to the original ground of appeal because it was not precise, concise but argumentative and narrative. With leave of the Court, Mr. Lubwa, Counsel for the appellant, amended the only ground. Consequently the following three grounds were^argued -

1. The learned Justices of the first appellate Court erred in law and fact when they upheld the decision of the trial court that malice aforethought had been established beyond reasonable doubt.
2. The learned appellate Justices erred in law and fact by denying the appellant the defence of intoxication in view of the evidence on record.
3. The learned appellate Justices erred in law by failing to subject the evidence on record to vigorous fresh scrutiny and evaluation thereby occasioning miscarriage of justice to the appellant.

The complaints raised by the appeal can be summarised thus:

1. Malice aforethought was not proved beyond reasonable doubt.
2. On the evidence the defence of intoxication was available to the appellant.
3. The Court of Appeal did not as a first appellate court subject the evidence to fresh and exhaustive scrutiny and consequently occasioned a miscarriage of justice.

Mr. Lubwa, learned Counsel for the appellant, argued the three complaints together. He contended that prosecution witnesses! Birungi Joseph (P.W.3), Noah Kassim (P.W.4), Mwebembezi (P.W.5), Ogwang Tomasi (P.W.7) and (P.W.10) Inspector Kisembo stated that the appellant was a good person **and** could not behave so abnormally without cause. On intoxication Counsel relied on the unsworn statement of the appellant that he drank enguli, malwa and beer which must have affected him. Learned Counsel also relied on a remark by Mwebembezi (P.W.5) that the appellant drinks malwa to support the argument that the appellant must have been drunk at the material time as this time was Christmas period when everybody drinks.

Learned Counsel contended that the learned justices of the Court of Appeal failed to appreciate the motive for the killing. This submission ignored the evidence of Birungi Joseph (P.W.3), Noarah Kassim (P.W.4) and Mwebembezi (P.W.5)
to the effect that the appellant had been annoyed because he had not been allowed

easy access to the canteen to purchase beer and the fact that as he left the appellant asked P.W.5 to warn the 2nd deceased to be careful.

Mr. Lubwa conceded that the trial Court and the Court of Appeal did not misdirect themselves in law on the defence of intoxication in application of Section 13(4) of the Penal Code. In effect that means no point of law arises for consideration.

Mr. Ogwal-Olwa,Principal State Attorney, supported the decisions of the trial court and of the Court of Appeal. He adopted the submissions made by the Director of Public Prosecutions in the Court of Appeal. The learned Principal State Attorney submitted that there was no evidence to support the defence of intoxication; that the conduct of the appellant before, during and after the commission of the crimes shows he was alert and that his escape from the barracks shows that he was aware of his wrong doing.

We do not quite appreciate why the third complaint was made. In the Court of Appeal there was one main complaint of identification. This complaint has not been pursued before us. In the Court of Appeal the alternative ground was only the defence of intoxication.

We agree with the learned Principal State Attorney that this appeal has no merit. Both the learned trial judge and Justices of the Court of Appeal considered the evidence before them and both came to correct decisions. Nor has he persuaded us that the prosecution failed to prove malice aforethought.

In the Court of Appeal, Mr. Emoru, Counsel who argued the appeal there, contended that, since the prosecution omitted to adduce during trial the evidence of a ballistics expert or his report, the trial court should not have believed Inspector Kisembo's (P.W.lO's) testimony that he disarmed the appellant. In dismissing that contention, the Court of Appeal stated at page 6 of its typed judgment that:-

> "The omission by the prosecution to call the ballistic expert to give evidence or to produce his report was not fatal to the prosecution case. In any case that evidence would have been rather superfluous as the appellant had been clearly seen shooting the deceased persons with the very gun that P.W.10 removed from him."

It may well be that the omission was not fatal to the prosecution case as there was other evidence of eye witnesses, but we think that proof of spent cartridges collected from the

scene and of bullets recovered from the victims having been fired from the gun recovered from the appellant soon after the shooting was certainly the best evidence linking the appellant to the crime and, with respect, could not have been superfluous.

After considering and disposing of the issues of identification the Court of Appeal considered the defence of intoxication at pages 6 to 8 of its judgment in the following words:-

> "Regarding the alternative defence of intoxication, Sec. 13(4) of the Penal Code Act reads that:-
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> "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence".

The learned trial Judge went to a great extent to consider whether the defence of intoxication was available to the appellant. He found that his conduct before, during and after the incident clearly showed that the appellant had formed the specific intent to kill. His judgment was not impaired by intoxication.

It is conceded as submitted by Mr. Emoru, there is evidence that the appellant had taken some malwa as P.W.5, Mwebembezi testified. We, however, reject Mr. Emoru's submission that P.W.10, Inspector Kisembo, had twice sent the appellant to buy enguli which both of them consumed. There is no evidence to support that claim. All that P.W.10, Inspector Samuel Kisembe, told court that he knew the appellant used to drink malwa.He however, did not know whether the appellant had taken any on that day. As far as he was concerned he (P.W.10) had not taken any drink that day. It was false, therefore, to say that they drank enguli together before the incident. To that extend the appellant told a lie.

The prosecution witnesses who knew the appellant very well before the incident were definite that he was not drunk but sober when he committed the offences. Their testimony was supported by the conduct of the appellant before, at the time and after committing the offences. After the misunderstanding between the boys in the canteen and the appellant P.W.5, Mwebembezi, had talked to the appellant and cooled him down, he agreed to
leave the matter and return home.

He was not armed. He, however, went back to the barracks which was about 2 kilo metres away and brought his gun. On his return he went straight to the canteen and shot dead Geoffrey Ruhaga first whom he had told P.W.5 to warn to be careful. He also killed Patrick Rugonza who again was in the canteen when the appellant was denied entry. When the magazine was finished the appellant removed it, threw it outside and replaced it with another one. He stopped shooting at the dancing crowd when the generator was switched off. After the shooting he again walked back to his home 2 kilo metres from the scene. When P.W.10, Kisembe, disarmed him the appellant escaped to his brother's home at Dura which was 18 miles from Kamwenge. We accept Mr. Buteera's submission that that **sort** of **conduct** showed that the appellant knew the

wrong he had done and the sort of punishment that would be meted out to him by the people if caught. His running away to Dura was not innocent conduct.

The cases cited by Mr. Emoru are distinguishable from the present one in that in those cases the appellants were found to be drunk. For example in the case of: **Joel Amar vs. Uganda** (supra) there was evidence that the appellant was drunk when he shot the deceased. He had been drinking for many hours. The group he was drinking with had consumed three bottles of enguli considered to be a strong drink. Further he was armed with the gun at the material time unlike in the present case where the appellant walked 2 kilometres to bring the gun to kill.

Again in the case of **Ssesawo vs Uganda 1979 H.C.B 122** the appellant had been drinking for a long time before he committed the offence. The Court of Appeal, hence, held that "It is possible that the appellant and the deceased got drunk quarreled and fought and it would therefore be unsafe to support the finding of the learned trial Judge that malice aforethought was proved beyond reasonable doubt".

None of the two cases is on all fours with the present case as submitted by Mr. Emoru.

We are mindful of the fact that P.W.10 , Inspector Kisembo, described the appellant as a good person and obedient. It was also strange behaviour for the appellant to have kept quiet and instead point a gun at his superior officer when questioned by him. But then the appellant was in a killing mood.

It may well be that the strange conduct of the appellant in this case was prompted by the fear of

> arrest and, as the appellant himself told his superiors on arrest, the usual mob justice that would follow such atrocities as he had committed.
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> Having regard to all the circumstances of this case, we are satisfied that the learned trial Judge rightly- rejected the defence of intoxication and convicted the appellant of murder on counts 1-6, 8-9, 12 and 13".

Clearly the court did scrutinise and re—evaluate the evidence adequately before it concurred with the learned trial judge in the finding that the **defence of** intoxication was not available to the appellant. We find no fault in law in these concurring findings of fact and therefore we cannot intervene. Mr. Lubwa has not raised a point of law for our decision. Neither has he demonstrated how the decision of the Court of Appeal occasioned a miscarriage of Justice.

We think that all matters raised in the three grounds were adequately dealt with and the grounds must fail.

Consequently we uphold the convictions on all the ten counts & The trial judge should have but did not impose sentence of death except in respect of count one. The Court of Appeal ought to have passed sentences on the rest of counts where the trial judge had failed to do so, i.e., counts 2, 3, 4, 5, 6, 8, 9,12 and 13. However as we are upholding the conviction on count one on which the appellant was sentenced to death, the omission by the Court of Appeal to sentence the appellant on the remaining counts causes no practical problems. The appeal is dismissed.

Delivered at Mengo this 15th May 1998

S.W.W WAMBUZI

CHIEF JUSTICE

JWN TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N KAROKORA

JUSTICE OF THE SUPREME

JA MULENGA

JUSTICE OF THE SUPREME

G.W KANYEIHAMBA

JUSTICE OF THE SUPREME COURT