THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

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

CRIMINAL APPEAL NO.10 OF 2001

B E T W E E N

OMIAT JOSEPH »»»»»»»»»»»»»»»»»»»APPELLANT

A N D

UGANDA »»»»»»»»»»»»»»»»»»»»>RESPONDENT

(Appeal from the judgment of the Court of Appeal, (Kato, Engwau and Kitumba, JJA), dated 27th February, 2001, in Criminal Appeal No. 141 of 1999)

REASONS FOR THE DECISION OF THE COURT

On the 8th July, 2002, we heard and allowed this appeal and intimated that we would give our reasons on a date to be notified to the parties. We now do so.

The appellant, Omiat Joseph, was jointly indicted with another in the High Court at Soroti, on three counts of murder contrary to sections 183 and 184 of the Panel Code Act. At the close of the prosecution case, the co-accused was acquitted for lack of sufficient evidence. The appellant was convicted on all the three counts and sentenced to death on each count. He unsuccessfully appealed to the Court of Appeal. Hence this appeal.

The brief facts of this case are that on the 29 , November 1995, at about 8.00 p.m. at Kaswii village in Soroti District, the house of one Levi Epou, was

attacked, Levi Epou who died before the trial, made an alarm. His son, Opolot Simon Peter, PWl, answered the alarm. He found his father's house on fire. He saw two bodies lying in the compound. One was of his mother Litu whom he presumed to be dead and the other was of Enenau, his brother. At this point, Opolot got frightened by what he saw. He left the scene and hid in the bushes nearby. In the morning, Opolot returned to the scene of the crimes and in addition to the bodies which he had seen the previous night he also found the body of Epou Simon, his own son who had been shot with a gun. Opolot reported the matter to the police who visited the scene and later gave permission for the bodies to be buried. The appellant was alleged to have confessed to the police to have committed the murders. At the trial, he repudiated the confession but after a trial within a trial, the learned trial judge held that the confession had been made voluntarily and was admissible. The learned trial judge convicted the appellant on the basis of the confession and was upheld by the learned Justices of Appeal.

The Memorandum of Appeal before this court contained 5 grounds framed as follows:

1- **That the learned Justices of Appeal erred in fact and in law for having upheld a retracted and repudiated charge and caution statement and also for having relied upon the same to confirm the conviction.**

2- **That the learned Justices of Appeal erred in fact and in law for having speculatively found that the missing record of the trial within a trial ruling in the High Court was in favour of the prosecution and that such omission did not prejudice the defence case.**

3- **That the learned Justices of Appeal erred in fact and in law for having upheld the trial judge's finding that the charge and caution statement was corroborated by the evidence of PWl at the trial.**

4- **That the learned Justices of Appeal did not adequately evaluate side by side the Prosecution and Defence Evidence and thus came to a wrong conclusion.**

Mr. Ddamulira, counsel for the appellant abandoned ground 2. On ground 1 of appeal, he contended that the appellant was unable to write or read and that it was only the police who made up and recorded his alleged charge and caution statement which was never read back to him so that he could verify its accuracy Consequently, the statement should not have been admitted as his own or as having been made voluntarily. Counsel further contended that the appellant who gave evidence on oath denied that he put his own thumb print on the charge and caution statement. The appellants claim that the statement had not been read back to him, was corroborated by D/P, Opus, PW2, the police officer who recorded the statement. Mr. Ddamulira submitted that failure to prove that the charge and caution statement was that of the appellant combined with the failure to read back his alleged statement to him were fatal to the prosecution's case. Learned counsel cited the case of ***Festo Androa Asenua and Kakooza Joseph Devor*** v. ***Uganda,*** Cr. Appeal No. 1 of 1998), (S.C.) (unreported), in support of his submissions.

On ground 3, Mr. Ddamulira contended that the Justices of Appeal erred in law and fact to have held that the ruling of the trial judge in the trial within a trial was in favour of the prosecution when in fact both the ruling, its reasons and the proceedings from which it came were missing from the record of proceedings. Counsel contended that the holding of the learned Justices of Appeal was based on mere speculation and such a holding was prejudicial to the interests of the appellant.

On ground 4, Mr. Ddamulira submitted that the evidence of PWl needed corroboration which had not been shown by the prosecution's witnesses or evidence and therefore the courts below were wrong to accept PW's evidence itself as corroborative of the appellant's alleged charge and caution statement. Counsel further submitted that the courts below ignored the appellant's defence of alibi.

For the respondent, Ms. Khisa, Principal State Attorney, supported the conviction. She contended that the conviction was amply justified because of the admission by the appellant in his charge and caution statement that he committed the murders. The omission to include in the record the ruling on the trial within a trial was not fatal to the prosecution's case because it was clear from the judgment of the Court of Appeal that the Justices of that court accepted the fact that the learned trial judge had found for the prosecution as evidenced by his reliance in his judgment on the retracted confession.

Ms. Khisa next dealt with the contention for the appellant that the alleged charge and caution statement was not corroborated. She contended that in this respect the trial judge warned himself of the need for corroboration. In any event, the Court of Appeal found some corroboration in the evidence of PWl relating to gunshots and his vivid description of what had happened at the scene of the crime. With regard to the defence of alibi, it was the contention of counsel for the respondent, that that defence had not been raised by the appellant in the courts below. Counsel argued further that even if that defence had been raised, it would not have made any difference to the conviction of the appellant since it related to periods of time other than that in which the murders were committed.

Having perused the records of proceedings in the courts below and heard counsel for both sides, we were convinced that this case was not as straight forward or simple as the prosecution made it out to be. In our view, the failure by the police officer who recorded the charge and caution statement of the appellant to read it back to him was a serious omission. It deprived the appellant of the right to know exactly what he is alleged to have said and to correct it, if need arose. Had the learned Justices of Appeal reevaluated this evidence, it is possible that they would have come to the conclusion that probably the appellant was telling the truth. In any event, the revaluation by the learned Justices of Appeal would have affected the weight of the prosecution's evidence

and created a reasonable doubt in favour of the appellant. Counsel for the appellants in the Court of Appeal submitted that the trial judge was wrong to find that the omission by PW2 to indicate on the statements, exhibits P1 and P2, that they had been read over to the appellants was a mere irregularity. The Court of Appeal in their judgment held that,

> ***"The learned trial judge found that the appellant's confession though retracted, was voluntary and True, as PWl who was not an investigating officer could not, therefore, make up a statement of the facts relating to the commission of the offence. He observed that the Ateso statement, exhibit P1, bears no thumb print of the appellant. He concluded that failure to indicate on the statement that it had been read back to the appellant was a mere irregularity. We agree with the learned trial judge's statement of the law and his findings on the facts."***

With the greatest respect, we think that the learned Justices of Appeal erred in agreeing with the findings of the trial judge on this matter. It is a cardinal principle of our criminal law, that an accused person who confesses to a crime must do so voluntarily and the confession must be read back to him or her in a language he or she understands. The admission by the police that the charge and caution statement was not read back to the appellant after it had been recorded and his unshaken story of the events that preceded his arrest created such reasonable doubt in the prosecution's case as to render the appellant's conviction unsafe to uphold. Once the appellants" alleged charge and caution statement was faulted as it was, there was nothing else against him for which he could properly be convicted of the murders which occurred.

We were also concerned that the Court of Appeal did not consider the omission of the record of the trial within a trial to be material or important for their findings and decision. In fact, the learned Justices of Appeal dealt with that omission as an afterthought and obiter dictum. In our view, the matter of the retracted confession and the trial within a trial in the High Court were crucial in the determination of the appeal and ought to have constituted an essential issue for determination by the Court of Appeal. An appellant is entitled to have at his

or her disposal, the entire record of proceedings under which his or her conviction is founded. Only on this basis is the appellant availed all the opportunities to challenge every step and aspect leading to his or her conviction and sentence. Moreover, in the absence of such an important ruling, appellate courts would be unable to satisfy themselves that the trial court was correct in reaching its decision about the trial within a trial.

It is for these reasons that we allowed the appeal, quashed the conviction and ordered the appellant to be released unless held on some other lawful ground.

Dated at Mengo this 12th Day of December 2002.

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

J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT

A.N. Karokora
JUSTICE OF THE SUPREME COURT

G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT