THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER. TSEKOOKO, KAROKORA KANYEIHAMBA AND KATO, JJ,S.C.)

CRIMINAL APPEAL NO. 12 OF 2001

B E T W E E N

CHEMONGES FRED: :: :: :: :: :: :: :: :: APPELLANT

A N D

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

(Appeal from the judgment of the Court of Appeal in Kampala (Mpagi-Bahigeine, Engwau, and Kitumba, JJ.A) dated 27-02-2001 in Criminal Appeal No. 12 of 2001).

REASONS FOR JUDGMENT OF THE COURT

This is a second appeal. The appellant was indicted and tried by the High Court at Mbale on one count of murder, c/ss.183 and 184 of the Penal Code Act, and two counts of attempted murder, c/s 197(1) of the Penal Code Act. He was convicted of murder on the first count and of attempted murder on the second count. He was acquitted of attempted murder on the third count. He was sentenced to death for the conviction of murder, but the record does not show that he was sentenced for the conviction of attempted murder, although the record of the trial court reads:

"Count 2: ***The sentence on second count is hereby suspended."***

The Court of Appeal also apparently repeated the omission when in its judgment it simply said: ***"He was convicted and sentenced to death on the first count while the sentence on the second was suspended."***

This apparent omission to pass the sentence on appellant for attempted murder was not referred to by both sides at the hearing of this appeal, to enable us deal with the matter under section 8 of the Judicature Statute, 1996.

The prosecution case against the appellant at the trial was that on 01-02-96, at Cheming Market in Kapchorwa District at about 7.00 p.m. the appellant threw a hand grenade into the shop of one Stanley Kuka (PW6), the victim of the crime charged in the second count. The grenade exploded, killing the deceased Michael Chemisto and seriously injuring Nelson Bariteka and Stanley Kuka. The appellant was identified at the scene of crime by Sokuton Geoffrey (PW2) and Sukuku Sadiq (PW5). He was arrested in Jinja where he had run to and was subsequently indicted for the offences in question.

At his trial, the appellant put up an alibi that he was in Jinja at the material time, where he had arrived on 29-01-96, to see his siblings. The learned trial judge accepted the prosecution evidence and rejected the appellant's defence, convicting him, with the consequences we have already referred to. His appeal to the Court of Appeal was unsuccessful. Hence this appeal.

We heard and dismissed the appeal on 10-12-2002, but reserved our reasons for doing so, which we now proceed to give.

Three grounds of appeal were set out in the memorandum of appeal. The appellant's learned counsel, Ms. Harriet Diana Musoke, argued the first two grounds together. They are that:

1. The Honourable Justices of Appeal erred in law and fact in their evaluation of the identification evidence whereas the conditions of identification were unfavourable.

2. The Honourable Justices of Appeal erred in law and fact when they concluded that PW1, Chebet Hadija, and PW2, Sokuton Geoffrey, were credible eye witnesses whereas their evidence was inconsistent with their statement that they recorded at the Police Station.

The appellant's learned counsel submitted on these grounds that the evidence of Chebet Hadija (PWl) could not be credible because she did not know the appellant before. She first saw him when the incident happened on 01-02-96. She next saw him on the day she testified at the appellant's trial namely on 23-10-98 and claimed to identify him in the dock. This was a dock identification of a person she had seen only once for the first time two years and ten months previously. Learned counsel contended that in the circumstances, Hadija's dock identification of the appellant was not possible.

When Mr. Charles Elemu Ogwal, Assistant Director of Public Prosecutions, appearing for the respondent, pointed out that the learned trial judge did not accept Hadija's evidence, the appellant's learned counsel abandoned the point.

In her criticism of Sokuton's evidence, the learned counsel submitted that although Sokutou said that he knew the appellant before, he was not able to recognize him as the person who hurled the grenade, because it was 7.00 p.m. at sun-set and because the appellant denied that he knew anything about the grenade explosion or that he knew any of the persons injured in the incident.

In his reply opposing these grounds of appeal, the learned Assistant Director of Public Prosecution contended that the appellant was properly identified at the scene of the crime. The incident happened at 7.00 p.m. when there was still sunlight. He was well known to Sokuton (PW2) before and PW2 was close to him at the scene. He had seen the appellant earlier during the day when the latter asked the former for Shs. 500=, which he wanted to pay for condolences at a funeral. In addition, Sukuku Sadiq (PW5) had seen the appellant twice the same day.

In view of the evidence of the prosecution witnesses, the learned Assistant DPP submitted that the Court rightly found that the appellant was properly identified at the scene of crime.

The appellant's complaints in the first and second grounds of appeal are similar to those which were made in the first and second grounds of the appellant's appeal in the Court of Appeal. That Court made the following finding regarding evidence of identification of the appellant by the prosecution witnesses:

> ***"From the evidence on record. We find that the appellant was known to PW2 as a clansman. They used to exchange visits. PW2 had seen the appellant thrice during the course of that fateful day, 01-02-96, most importantly, the incident occurred at around 7.00 p.m. when there was still light. When the appellant was fleeing from the scene of crime, he came into close proximity of PW5 Sikuku Sadiq, who was going in the opposite direction towards the scene to find out what had happened. When PW5 saw him running away from the scene he inquired from him what had happened as indeed he expected him to know what he was escaping from The appellant kept mum and instead sped off, thus arousing suspicion of PW5 who then raised an alarm and turned to chase him We agree that inevitably there must have been some commotion after the blast, but it occurred inside the shop and not outside in the market place. We think that it is proper to assume that people's attention must have been focused on the shop. The likelihood of a stampede with people scampering in all directions would have been minimal. While we also agree with Mr. Kunya that people react differently to different situations. It was nevertheless a little strange for the appellant to be running away from the scene of crime refusing to say why he was running away; but instead increased his speed. PW2 and PW5 did not give contradictory evidence as claimed by Mr. Kunya. Their testimonies complemented each other. PW2 saw him at the scene and running away before PW5 saw him running towards him When PW5 turned to chase the appellant he was ahead of PW2. They need not have viewed things from the same angle. We find that the learned trial Judge correctly found the appellant's conduct of running away corroborative of his guilt, relying on the case of*** **Tenikabi -vs-**

Uganda (1975) EA 60. ***The Judge correctly applied the guidelines set down in*** **Abdullah Bin Wendo -vs- R (1953) 20 EACA. 166, Roria -vs- R (1967) EA 583** ***and*** **Nabulere and Others -vs- Uganda (1979) HCB 77**."

We are satisfied that the Court of Appeal was justified in holding that the appellant was properly identified at the scene of crime. It also found, correctly in our view, that there were no contradictions in the prosecution evidence in that regard. The prosecution evidence on the appellant's identification was therefore, credible.

In the circumstances, the first ground of appeal failed.

Next we move to the second ground of appeal. The learned counsel for the appellant did not complain against the evidence of Sokuton (PW2) being contradictory to his statement to the Police although that was one of the complaints in the second ground of appeal. However, the point was argued before the Court of Appeal by the appellant's learned counsel. Mr. Henry Kunya, arguing the appellant's appeal in the Court of Appeal, had contended that there were inconsistencies between the statement of Sokuton (PW2) made to the police and his evidence in court given on oath two years and ten months later. At the trial Sokuton disassociated himself from the statement he had made earlier. This is similar to the argument the appellant's learned counsel attempted to put forward before us, to the effect that testimonies of prosecution witnesses were inconsistent with their previous statements to the police.

It appears from the record that Sekoton (PW2) made his statement to the police in Kupsabiny, and it was recorded by a Police Officer, D/C Mbabazi who only had a working knowledge of Kupsabiny. It appears that the Police Officer did not properly follow what PW2 told him. The Police Officer was not called to prove the statement against PW2, whose testimony about the statement at the trial was as follows:

"I made a statement to the police in Kupsabiny to a Police Officer who spoke Kupsabiny, but it was not perfect Kupsabiny. The statement was not read back to me but I simply signed it. I am the one who reported the case and made a statement. J never told the police (sic) at trading center at 3.00 p.m. what J said was that I arrived at 9.00 a.m., I did not say while I was there one Chemonges Fred alias Brown asked me for cigarettes. I did not tell the Officer that J refused telling him I had no money. The contents of the statements are not mine."

D/CP1. Bumeto David (DW1) testified at the trial that D/C Mbabazi, who recorded PW2's statement, was speaking in Kupsabiny, a language he had learned.

Regarding the submission that PW2's evidence at the trial was contradictory to his previous statement to the police, the Court of Appeal said this:

"PW2 denied most of the contents of the statement which was never proved against him

It is well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his testimony, the court will always prefer the witness' evidence which is tested by cross-examination. The learned trial Judge was, therefore, entitled to prefer PW2's court testimony as against his police statement."

Since PW2's police statement was never proved against him, the issue that his testimony was contradictory to his police statement, therefore, did not arise, in our view. We agree with the learned Justices of Appeal that the learned trial judge was entitled to prefer PW2's testimony as against his police statement. In the circumstances the second ground of appeal failed.

The third ground of appeal is that: *The Honourable Justices of Appeal erred in law and fact when they rejected the appellant's defence of alibi which ought to have raised a reasonable doubt.*

Under this ground, the appellant's learned counsel referred to his unsworn statement made in his defence that he went to Jinja on 29-01-96 to see his father's children. The father had died and the appellant had to assist them. He stayed there until 10-02-96, when he was arrested by a policeman. This means that the appellant was away at the material time from the area where the offence in question was committed. The learned counsel for the appellant contended that the Justices of Appeal did not consider the appellant's alibi.

In reply, the learned Assistant DPP. submitted that the prosecution evidence clearly disproved the appellant's alibi. The appellant was seen at his home and in the area earlier in the day. He was also identified at the scene of crime.

With respect, we think that the appellant's learned counsel was unjustified to criticize the learned Justices of Appeal that they did not consider the appellant's alibi. They in fact, did so, as the following passage of their judgment shows:

> ***"Lastly, Mr. Kunya contended that the learned trial judge erred in rejecting the appellant's alibi in view of the questionable evidence of PW2 and PW5 regarding identification. Mr. Wagona submitted that the learned trial judge having accepted the evidence of identification had to reject the alibi because it had been destroyed by identification. The learned trial judge after analyzing the evidence of PW2 and PW5, the identifying witnesses, together with that of PW3, D/CPI. Cheptai, the arresting Officer who arrested the appellant in Budondo on 10-02-96 concluded:***
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> *"Having believed the evidence of PW2 Sokuton Geoffrey and PW5 Sekuku Sadiq, I found that the prosecution has successfully displaced the alibi of the accused and*

placed him squarely at the scene of crime as the person who hurled the grenade that fatally injured Chemsto Michael. His alibi accordingly rejected."

We agree with the learned judge's finding. It is trite law that the appellant did not have to prove his alibi, but once the prosecution had succeeded in placing him at the scene of crime, this entitled the learned judge to reject his alibi. See Siraji Sajjabi -vs- Uganda, Criminal Appeal No. 31/89."

In our opinion, the learned Justices of Appeal correctly found that the appellant's alibi was disproved by the prosecution. The alibi did not raise any reasonable doubt about the appellant's guilt.

For these reasons, we dismissed the appeal. We were satisfied that the appellant had been properly convicted. There was ample evidence to support the conviction.

Dated at Mengo this 20th day of February, 2003.

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

C. M. KATO

JUSTICE OF THE SUPREME COURT