IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, AND MULENGA, JJ.S.C.

CRIMINAL APPEAL NO. 25 OF 2002

BETWEEN

1. **WALAKIRA ABAS**
2. **SGT. KIZITO JOSEPH**
3. **MUWAKANIRA JOHN. :: APPELLANTS**

AND

UGANDA:::RESPONDENT

{Appeal from the judgment of the Court of Appeal (Kato, Okello and Engwau JJ.A) at Kampala, dated 22nd May 2002 in Criminal Appeal No.49 of 2001}

JUDGMENT OF THE COURT.

The High Court of Uganda (Mwondha J.), sitting at Mubende on 11th May 2001, convicted the above-named appellants on one count of aggravated robbery under sections 272 and 273 (2) of the Penal Code Act and sentenced them to death. The robbery for which they were indicted and convicted, was committed in the night of 30th June 1999, by three robbers at the home of one Sulaiman Musisi, where they stole diverse goods and in the course of the robbery used deadly weapons. The three appellants appealed to the Court of Appeal, but were unsuccessful, hence this second appeal.

Although Walakira Abas, the 1st appellant, pleaded not guilty upon arraignment, ultimately he did

not dispute his participation in the robbery. Three eyewitnesses, Nabakema Sarah PW2, Livingston Musisi PW3, and Stephen Kalungi PW4, identified him as one of the three robbers. A fourth witness, Moses Byamukama PW5, testified that the 1st appellant had used his bicycle, without his consent, to transport some of the stolen goods. The stolen goods and guns similar to those the robbers had, were recovered in a shrine at the home of the 1st appellant's parents. To crown it all, when the 1stappellant testified, he admitted that he participated in the robbery. His only ground of appeal in this Court is that the Court of Appeal erred in upholding his conviction for aggravated robbery instead of substituting one for simple robbery. We shall dispose of his appeal first.

Ms. Musoke, learned counsel for the 1st appellant submitted that there was no proof that the guns exhibited in court, were the guns, which the robbers carried during the robbery. Secondly, she submitted that none of the eyewitnesses testified that the guns were used during the robbery. Thirdly, she pointed out that when the guns were tested at the trial, only one was functioning. She argued that the prosecution had not proved that the 1st appellant had carried the functioning gun. Learned counsel submitted that on the evidence before the trial court, the 1st appellant ought to have been convicted of simple robbery.

In reply, Mr. Semalemba, Principal State Attorney, conceded that the guns were not fired during the robbery, but contended that there was ample proof that the robbers "used" the guns to threaten the victims. He submitted that although the indictment alleged that the robbers "used a deadly weapon to wit a gun and panga", the conviction on proof of only a threat to use a deadly weapon did not occasion any miscarriage of justice. He also maintained that upon recovery, both guns were tested and found to function and that only later one failed to function due to rust.

The 1st appellant raised the same issue in the Court of Appeal, and in their judgment, the learned Justices of Appeal said -

"On the issue of guns, PW2, PW3 and PW4 testified that the thugs were armed with 2 guns... We accept their evidence that no gunshot was fired during the robbery. We, however, find that the guns were used to threaten the witnesses. PW3 had identified one of them to be having a barrow which was cut short. The following day, PW7 recovered 2 guns from the home of the 1st appellant. Both guns had their muzzles cut to make them shorter. The evidence of PW7, in

our view, tallies with the description given by PW3 in respect of one gun. The evidence of PW7 was ... that soon after the robbery, Corporal Kwoba who was in charge of that search operation test fired the guns in his presence and both guns were capable of discharging bullets. His evidence was not challenged at the trial. Although the guns were not shown to PW3 at the trial for identification, we agree ... that the 2 guns recovered from the home of the 1st appellant were the ones seen with the appellants during the robbery. They were capable of discharging bullets in view of the evidence of PW7. ... we find that they were lethal or deadly weapons within the meaning of section 273 (2) of the Penal Code Act."

We are unable to fault the findings of the learned Justices of Appeal in this respect. Having regard to the evidence as a whole, we find it irresistible to infer, as the courts below did, that the guns exhibited at the trial, are the guns the eyewitnesses saw during the robbery. In addition to the similarity of the exhibited guns to the description given by PW3, the proximity in time between the robbery and the discovery of the guns, and the finding of the guns along with the stolen goods, lead to only that inference. We are also satisfied, as was the Court of Appeal, that PW7's evidence was sufficient proof that the guns, which were tested in his presence, could discharge bullets and were, therefore, deadly weapons. We would add that the 1st appellant's testimony that one of the robbers had directed him how to operate the gun he carried, also tends to corroborate the evidence that the gun could function. Besides, it is immaterial if the 1st appellant carried a defective gun since clearly the robbers had a common intention. Finally, we agree that there was ample proof of threatened use of the deadly weapons. A threat to use a deadly weapon need not be in express or direct terms. In the instant case, throughout the incident the victims were at gunpoint while either lying down or being shoved about. The principal victim of the robbery, PW2, testified that when the robbers took her to the siting room demanding for money, they asked her to chose between money and life. Another witness, PW4, testified that the robbers repeatedly threatened to kill any of the victims who move from where they were ordered to lie. It would be farfetched to deduce that the threats were to kill without use of the guns. The allegation in the indictment was that the robbers used a gun and a panga on the complainant's family. In light of the evidence, the indictment ought to have been amended to reflect that they only threatened to use guns. However, we are satisfied that failure to so amend did not prejudice the appellants or otherwise lead to a miscarriage of justice. In the circumstances, the first appellant's ground of appeal fails. We find no merit in his appeal, which we dismiss.

The 2nd and 3rd appellants filed separate memoranda of appeal, and were separately represented. However, their grounds of appeal are virtually the same. Both complain that the Court of Appeal failed to properly re-evaluate the evidence; and each contends that that court erred in upholding the trial court's finding that he participated in the robbery. The arguments of Mr. Ddamulira Muguluma and Mr. Kafuko, their respective counsel, are also similar and can be summarised together. The main thrust of learned counsel's submissions is that the convictions of both appellants depended solely on identification evidence. Both learned counsel contend that the evidence is unreliable because during the robbery, which occurred at night, the conditions favourable to correct identification were difficult. The frightened victims had no sufficient opportunity to clearly observe the assailants who were strangers and who ordered them at gunpoint to lie down and not look at them. Besides, neither of them was found with any of the stolen goods; and the 1st appellant who confessed to the robbery, testified that they did not participate in it. Finally, both counsel submitted that the arrest of the two appellants was not on strength of identification by the eyewitnesses, but rather on suspicion by LC1 Chairman and other undisclosed people. Counsel put forward a hypothesis that the eyewitnesses may have identified the appellants as the robbers, because of that suspicion and the resultant arrests. Each submitted that it was not proved beyond reasonable doubt that his client participated in the robbery. In the alternative, both adopted the argument by the 1st appellant's counsel that what was proved was simple, not aggravated robbery. The learned Principal State Attorney submitted in reply, in respect of the 2nd and 3 rd appellants, that during the robbery the conditions favoured correct identification. Although the moonlight was not bright it combined with torchlight throughout the incident, which lasted for about two hours, to enable the witnesses to see their assailants clearly. Because of that, at the trial the witnesses were able to consistently detail what each of the appellants had done during the robbery. He conceded that the Court of Appeal erred to say that the 1st appellant implicated the other two appellants, but submitted that no miscarriage of justice was thereby occasioned since the eyewitnesses properly identified them.

The learned Justices of Appeal summarised the case against the three appellants together in the following passage of the court's judgment -

"The following morning after the robbery, the 3 appellants were arrested and some of the properties robbed the previous night... were found in a shrine at the home of the 1st appellant's father. The information leading to the recovery of those items including the 2 guns was

voluntarily given by the 1st appellant who admitted having participated in the robbery together with the 2nd and 3rd appellants.

There is overwhelming evidence on record that during the robbery, PW2, PW3 and PW4 properly identified the 3 appellants, which led to their arrest the following morning. There was moonlight and a torch light at the material time. The whole episode took about 2 hours. The distance between the attackers and the witnesses was at close proximity. In fact PW3 also recognised that one of the guns had its barrow cut short.

On the night in question, PW5 also recognised the 1st appellant who was in company of 2 other people whom the witness did not identify. The evidence of the 1st appellant which he later retracted, put the 2nd and 3rd appellants at the scene of robbery. We are therefore satisfied that conditions were favourable for correct identification. The learned trial judge was justified to hold that the 3 appellants were properly identified...." (emphasis is added).

At the outset, we have to point out, in agreement with the Principal State Attorney, that the learned Justices of Appeal misdirected themselves on a material aspect of the evidence. While it is correct that in his evidence the 1st appellant admitted participating in the robbery, it is an error to say that he admitted doing so ***"together with the 2nd and 3rd appellants";*** and that his evidence ***"put the 2nd and 3rd appellants at the scene of robbery."*** On the contrary, he expressly dissociated the two appellants from the robbery, and testified that he committed the robbery together with two different persons from Kampala whom he mentioned to the police, but the police failed to trace them. He named those others as Mohammed Kabalu and Sevume John. We are unable to trace the origin of this error. Both the recorded evidence and the trial court judgment, show that the 2nd and 3rd appellants are only implicated by identification evidence of PW2, PW3, and PW4.

This Court and its predecessors have in a chain of decisions elaborated on principles applicable to cases where the guilt of an accused person depends on only identification evidence. See **Abdulla Bin Wendo** & **Another vs., R** (1953) 20 EACA 155; **Roria vs. Republic** (1967) E.A.583; **Moses Kasana vs. Uganda** Cr. App. No. 12/81(1992-93) HCB 47; **Abdala Nabulere and Another vs. Uganda** Cr. App. No. 9/78 (1979) HCB 77; **George William Kalyesubula vs. Uganda** Cr.

App. No. 16/97; **Moses Bogere and Another vs. Uganda** Cr. App. No. 1/97 SCD (CRIM) 1997/2000 p.185. The court may rely on identification evidence given by an eyewitness to the commission of an offence, to sustain a conviction. However, it is necessary, especially where the identification be made under difficult conditions, to test such evidence with greatest care, and be sure that it is free from possibility of a mistake. To do so, the court evaluates the evidence, having regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the court ought to warn itself of the need for caution; because a mistaken eyewitness can be convincing; and so can several such eyewitnesses: **Abdullah Nabulere & Another vs. Uganda** (supra). As much as possible therefore, the court must evaluate not only material that supports the accuracy of the identification, but also material which tend to raise doubt on it.

In the instant case, both the trial court and the Court of Appeal evaluated the evidence concerning the circumstances under which the eyewitnesses saw their assailants. Both found that the conditions were favourable to correct identification. While ordinarily we would not be inclined to interfere with that concurrent finding, we note that neither court considered if the evidence was free from the possibility of mistake. The fact that the witnesses, with the aid of moonlight and torchlight, saw the assailants at close range for the duration of about two hours, does not necessarily rule out the possibility that they were mistaken when the following morning they identified the two appellants as two of the robbers. It is noteworthy that the witnesses did not know the appellants before the incident. More significant, however, is the fact that there is evidence on record, albeit from the defence, to the effect that the two companions of the 1 st appellant in the robbery were different from the two appellants. As we have just noted, in his evidence at the trial, the 1st appellant who confessed to the robbery, testified that his companions in the robbery were Mohammed Kabalu and Sevume John. He said that he did not know the two persons who were arrested after him, to wit the co-accused. The learned Justices of Appeal did not evaluate that evidence. On the other hand, the trial judge who adverted to it, rejected it on grounds, which we find unsustainable. In her judgment, the learned trial judge said -

"A1...in his sworn statement (he) admitted that he was on a mission to steal and he did steal with two other people of whom he gave only one name for each. He said that he stole and or robbed with one Senvume and one Kabalu. When he was asked the description of the Senvume and Kabalu the description fitted A2 as Senvume and A3 as Kabalu. Even the

prosecution witnesses had described their assailants as A1 described them when giving their testimony. The issue that remains is whether A2 and A3 were put squarely at the scene of crime." (emphasis is added)

After reviewing the evidence on the conditions favourable to correct identification and the defence evidence, the learned trial judge concluded -

"The accused persons had been squarely put on the scene of crime. Much as A1 had volunteered to be sacrificed because he is the one who kept the loot, may be he was the master planner, the evidence against the other 2 accused persons was so incriminating and pointed to the guilt of all 3 accused persons as indicted..." (emphasis is added)

The assertion that the 1st appellant *gave only one name for each* of his companions in the robbery is incorrect because the record shows that he gave two names for each. In as much as this was a cause for doubting or rejecting the 1st appellant's version that he was with different persons, as it appears to be, it is a misdirection. Secondly, the bold finding that the 1st appellant's description of his companions fitted the two appellants is not borne out by the recorded evidence. What appears in the record of his cross-examination in that regard simply reads thus -

"Senvume was tall and brown. The short one was Sevume who was short and fat."

Even if allowance is made for possibility of a slip in recording the name of one person twice, the descriptions are so commonplace that they can hardly be basis for the finding. Lastly, the learned trial judge's conclusion that the 1st appellant ***volunteered to be sacrificed*** and ***may have been the master planner*** of the robbery, is not deducible from any recorded evidence. It appears to be a theory conceived by the learned trial judge to explain away the clear and direct evidence that otherwise raises serious doubt on the identification of the two appellants as participants in the robbery. This is a serious error in law. It cannot be over emphasised that a trial court must decide issues before it on basis of evidence adduced and not on basis of its own theories or conjecture.

As we have already observed the learned Justices of Appeal did not evaluate the 1st appellant's testimony that cast doubt on the identification of the 2nd and 3rd appellants. They were content to hold that ***proper identification during the robbery, led to the arrest of the appellants.*** A scrutiny of the evidence concerning the arrests of the 2nd and 3rd appellants, however, tends to show equivocation as to what led to the arrests, namely between identification by the eyewitnesses and suspicion by LC1 Chairman and other unnamed persons. In respect of identification by PW2, the

arrest led to the identification rather than the reverse. According to her testimony, the police brought the appellants to her home after arrest, asking if she knew them. Although PW3 and PW4 participated in the search for the robbers and arrest of the appellants, their evidence shows that local suspicion was a major factor leading to the arrests. PW3 testified that he went with an armed policeman for the search, following bicycle tyre marks, which eventually disappeared. At Kalonga, they met the LC1 Chairman Nsozinga to whom they disclosed, ***inter alia,*** that one of the robbers was in army uniform. That Chairman told them -

"that there is a man at his village who fits the explanation of the witnesses. He also said that there is another man whom they associate with. We proceeded to Nsozinga and when I saw A2 I identified him straight away. He was still in army uniform and he was light skinned. I had recognised his face features."

The witness further said that the Chairman took them to Kirumbi, where the **3rd** appellant was arrested. Neither the policeman who went with **PW3** nor the Chairman LC1 who led them to the two appellants gave evidence. **PW4** testified that he went on the search in a group, including OC and two LDU's, and they met some people to whom they mentioned that one robber was in army uniform and the other two were in jackets, and that in apparent response -

"Those people told us that they knew A2 because he steals so much. ... We were shown A2 and he was the actual man. ... He was in an army uniform. It was around 10.00 am but was still sleeping. The face was exactly of the robber who attacked us...A3 was arrested by another group I found when he had been arrested with his overcoat on...."

It is from the evidence of **PW3** and **PW4** that counsel derived the hypothesis that the two appellants were arrested on strength of suspicion by the LC**1** Chairman and the unnamed people, that a soldier in the village and his usual associate ***"fit the explanations of the witnesses",*** and that their arrest influenced the witnesses to identify them as the robbers. The appellants did not canvass that hypothesis at their trial or in their first appeal. As a result, we lack the benefit of its evaluation by the lower courts. Nevertheless, we are constrained to consider it as it goes to the root of evaluation of the identification evidence. Since the case against the two appellants depends solely on identification evidence, it is imperative to consider both the aspects that tend

to strengthen and those that tend to weaken it. (See **Bogere Moses** & A**nother vs. Uganda** (supra).

Moses Byamukama, PW5, was not an eyewitness to the robbery, but he appears to have encountered the robbers soon after the robbery. He was the owner of a bicycle, which the 1st appellant admittedly stole for using to transport some of the stolen goods. He testified that in the night in question he discovered that his bicycle was missing from the person he left it with while he had a drink. The latter informed him that the 1st appellant had earlier wanted to borrow it but he refused. Thereupon PW5 went about looking for the 1st appellant whom he knew, until he came across three people who tried to hide from him. He testified thus -

"I went to the lady (from) whom A1 had bought a drink and I saw people who were peeping at me ... when I wanted to recognise them by going back they took cover. They were three of them. As I was going towards where they were they ran away. I followed them asking why they were running when they were strangers on the village. I told them I was going to raise alarms. They stopped and I found they were together with A1. I didn't recognise them. He apologised and we went to their home we got the bicycle from the shrine and handed it back to me."

PW5 was the only witness from the area where the robbers took their loot. He recognised the 1st appellant but not his two companions. In his testimony, he did not identify the other appellants as the companions. The record does not show if he was asked about them. Although not conclusive, his testimony is more consistent with the claim by the 1st appellant that his companions were strangers from Kampala rather than locals from the area. We are constrained to observe that in a properly conducted investigation, the suspects would have been put on an identification parade to ascertain if this witness and PW2, both of whom did not participate in the arrests, could identify them. That was not done.

In conclusion, considering all the foregoing matters, we are unable to uphold the concurrent decision of the two courts below, that the participation in the robbery by the 2nd and 3rd appellants was proved beyond reasonable doubt. We think the evidence raises reasonable doubt on their identity, which doubt must be resolved in their favour. In the circumstances, we allow their

appeals, quash their convictions and set aside the sentences imposed on them. We order that the 2nd and 3rd appellants be set free unless held for any other lawful cause.

Dated at Mengo this 23rd day of September 2004.

B.J. Odoki
Chief Justice

A.H.O. Oder
Justice of the Supreme Court

J. Tsekooko
Justice of the Supreme Court

A.N. Karokora
Justice of the Supreme Court

J.N. Mulenga
Justice of the Supreme Court.