IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA JJ.S.C.

CRIMINAL APPEAL NO. 39 OF 2003

BETWEEN

1. **Walugembe Henry]**
2. **SSALI PAUL SANDE]::::::::::::::::::::::::::::::APPELLANTS**
3. **KAMANZI JOSEPH]**

AND

UGANDA ::RESPONDENT

(Appeal from judgment of the Court of Appeal (Okello, Mpagi-Bahigeine & Twinomujuni JJ.A) at Kampala, in Criminal Appeal No.60/01 dated 12.12. 2003).

JUDGMENT OF THE COURT.

Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph, hereinafter referred to as the 1st, 2nd and 3rd appellants respectively, were indicted and convicted by the High Court of Uganda (Wangutusi Ag. J.) sitting at Masaka, on three counts of robbery contrary to sections 272 and 273(2) of the Penal Code Act. They were each sentenced on every count to suffer death, but the sentences on the second and third counts were suspended. Their appeals to the Court of Appeal were dismissed. They have now appealed to this Court.

A summary of the facts on which their convictions were based is as follows. On 10 9. 99, at about 8 p.m., employees of Minnesota International Health Volunteers (M.I.H.V), an NGO engaged in public health education, traveling in a Land Rover reg. no. UAA 937 M fell in an ambush mounted by robbers at Rwensiri village along Matete-Sembabule road. The robbers ordered them out of the vehicle and robbed them of personal property, including money, a watch and shoes as well as the said vehicle. During the robbery the robbers were armed with what appeared to be a gun and a panga, with which one of them repeatedly hit the victims. The robbers drove off in the vehicle, which contained equipment that the victims had been using for public video shows at Nondo Rwebitakuli, and shs.160,000/-, which the driver had hidden under a seat when he sited the robbers. They left the victims at the scene of crime. Subsequently, the vehicle was found abandoned, but both the equipment and the money had been removed from it.

On the following day, the police at Kinoni Police Post received information that the 3rd appellant and others were preparing to collect hidden stolen articles or to go on a "robbery mission". The police monitored the group's movements until evening when they laid ambush in Kyasonko swamp, at a spot suggested by the informer. At about 10.30 p.m., the 2nd and 3rd appellants travelling in a hired vehicle (with a woman called Rose and Sula, the driver), fell into the ambush and were arrested. The 3rd appellant owned up to the police that they had come to collect articles they had hidden in the swamp. Initially he led them to a generator and a TV set, which were then retrieved from the swamp. Later, he and the 2nd appellant disclosed that there were other items left behind. They returned to the swamp with the police and retrieved a video deck, a radio cassette and speakers. All the items bore the initials M.I.H.V. In the course of recovering those items the two appellants disclosed that they had had a panga during the robbery, but a search for it was futile. They also revealed that the 1st appellant had participated in the robbery. The 3rd appellant then led the police to the residence of the 1st appellant in Nyendo. The police

searched the 1st appellant's house and found a toy gun and a watch that the appellant admitted was stolen property. Subsequently, at the police post, the robbery victims identified the recovered generator, TV set, video deck, radio, speakers and watch as articles stolen during the robbery. Also similarly identified, was a pair of shoes the 1st appellant wore upon being arrested.

In addition, while in police custody, the 1st and 2nd appellants made charge and caution statements, which were admitted in evidence at the trial. Each statement amounted to a confession by the maker and incriminated the other appellants.

In defence, each appellant, in an unsworn statement, denied participating in the robbery, and possessing the stolen property, implying that the police planted the property on them. The 1st appellant asserted that he was arrested near Nyendo Police Post while selling second-hand clothes, and not at home as testified by the police witnesses. The 2nd appellant denied being arrested in the police ambush. He said that policemen and LDUs found him sleeping with his girl friend in a lodge at about 1a.m., and arrested him apparently because they suspected that the tax tickets he produced for identity were not genuine. The 3rd appellant agreed that he was arrested at a police roadblock in the night of 11. 9. 99 but claimed that he was travelling with his wife to Bukoto in a hired car. He said that the policemen at the roadblock were standing near stolen property found in the area, about which he knew nothing. He denied leading the police to retrieve them from the swamp. Both the 2nd and 3rd appellants reiterated their repudiation/retraction of the confession statements. The trial court rejected each appellant's defence and accepted the prosecution case.

In this Court, the appellants filed separate Memoranda of Appeal through different counsel. The formulations of the grounds of appeal vary, but there is much similarity in substance. Therefore, rather than reproduce and consider the grounds

of appeal as separately formulated, it is expedient and will suffice to consider the issues arising there from as follows —

- Whether the Justices of Appeal erred in upholding the finding that
- the 1st and 2nd appellants' confessions were admissible; o the robbers used or threatened to use a deadly weapon;
- Whether the Justices of Appeal failed to re-evaluate the evidence;
- Whether the circumstantial evidence against any of the appellants was inconclusive.

Admissibility of confession statements.

In convicting the appellants, the trial court relied heavily on the written confessions that the 1st and 2nd appellants made to the police. He treated the rest of the circumstantial evidence as corroboration of the confessions, which had been retracted/repudiated. The main argument before us on the confessions was that the courts below wrongly accepted and relied on the confession statements notwithstanding the prosecution's failure to disprove the allegations that the confessions were obtained through torture. Secondly, it was submitted that the recording of the statements was irregular because (a) they were recorded in English and not in the languages in which the appellants spoke; and (b) they were both recorded by one police officer, to the prejudice of the 2nd appellant whose statement was recorded later. Thirdly, it was submitted for the 1st appellant that his statement was also irregular because it was recorded in the presence of the O/C Police. In support of their submissions, counsel referred us to ***Sewankambo Francis and Others vs. Uganda*** Cr. App. No.33/01 (SC) and ***Festo Androa Assenua and Others vs. Uganda*** Cr. App. No. 1/98 (SC). Counsel for the respondent submitted that the trial court tested the statements in a trial-within-trial and found that they were both made voluntarily, and that because they were detailed in content and corroborated by the circumstantial evidence, they were true. He conceded that it was irregular for the same police officer to record the two

statements but submitted that the irregularity was not shown to have prejudiced any of the appellants.

In the Court of Appeal, the appellants similarly complained *inter alia* that the trial judge erred in holding that the statements were made voluntarily and properly admitted in evidence. In their judgment, the learned Justices of Appeal rejected that ground of appeal saying -

> ***"These statements were meticulously tested by the court during trials within the trial. A1, Walugembe Henry, denied having made any statement. He then changed the story and said that he had made one because of the beating. The Judge was therefore correct to find him a liar. A2, Ssali Sande claimed to be illiterate saying***
>
> ***that he was guided by the police to write his name, yet when asked to read, he read without hesitation. The Judge found his story of torture to be untrue."***

With the greatest respect to the learned Justices of Appeal, we do not share their view that the trial court "meticulously tested" if the confessions were made voluntarily. In our view the learned trial judge did not direct his mind correctly on the law and principles governing admission of confessions in evidence. In particular he erred in regard to the onus of proof and did not consider the irregular recording of the confessions. The learned Justices of Appeal overlooked or did not appreciate this. We need only elaborate on the error on the onus of proof, since the irregularity was virtually conceded.

Section 24 of the Evidence Act, (Cap.6) provides -

> ***"A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise***

calculated in the opinion of the court to cause an untrue confession to be made."

Where an accused person objects to the admissibility of a confession on the ground that it was not made voluntarily, the court must hold a trial-within-a-trial to determine if the confession was or was not "caused by any violence, force, threat, inducement or promise calculated to cause an untrue confession to be made". In such trial-within-trial, as in any criminal trial, the onus of proof is on the prosecution throughout. It is for the prosecution to prove that the confession was made voluntarily, not for the accused to prove that it was caused by any of the factors set out in s.24 of the Evidence Act.

See ***Rashidi*** v***s. Repu****blic* (1969) EA 138. In the instant case, when the two appellants, through their counsel, severally challenged admissibility of their respective confessions, on ground that they were tortured, the prosecution assumed the burden to prove that no acts of torture were inflicted on either of them. We are not satisfied that the learned trial judge had this principle in mind when he ruled that the confessions were made voluntarily. It appears to us that he came to that conclusion more because of his finding that the appellants lied to him about torture than on the ground that the prosecution proved that the confessions were made voluntarily. This is what he said in the ruling -

"The accused... objected to the tendering of the charge and caution statement. A1, ... in evidence said he never made any statement. That he never signed any and that although he was beaten he made none. <u>The foregoing alone</u> (shows) ***<u>he was not truthful</u> because at the time he instructed counsel to make objection he said he had made a statement because he was being beaten by the police. <u>This is enough to show that the accused told lies about the torture.</u> While he said he was tortured by police in the same breath he said he never saw any policeman, He even denies seeing AIP Otto and the interpreter Sebwato or Amayo. Yet these are the very fellows he first said forced him to make a statement. This statement is***

the one he now denies. TT1, TT2 and TT5 testified that the accused was taken by Amayo to Otto who was with Sebwato and they took down his statement. <u>Their evidence remained unchallenged and because of the straight forwarded I believe they did not torture the accused.</u> A2, ... also objected and said the statement was obtained from him under torture. He did not at that time refer to the torture hanging a

brick on his testicles. He instead said he had been beaten. What however seemed to be most untruthful was where he said the police officer then guided his hand to write his name since he (accused) did not know how to write. I found this difficult to believe because all the signatures were the same Secondly when he was asked where he signed and read, the "supposed illiterate" read the three names without hesitation and in the order in which they were written. I found this rather strange and incompatible with truthful- ness. <u>While the story of the accused was tainted with untruthfulness, the prosecution witnesses in the trial within trial were so consistent and straight forward that they could only but have been telling the truth</u>

" (Emphasis is added).

It is obvious to us from the ruling, that the learned trial judge proceeded on the erroneous premise that the appellants had to prove that they were tortured. This is so because in respect of each statement, the learned judge in effect, held that since he did not believe the appellant's story, the prosecution evidence was unchallenged and therefore true. That is an obvious misdirection. We think that if the learned judge had evaluated the evidence bearing in mind that the onus was on the prosecution, he may well have concluded that the prosecution had not discharged the onus. In that regard, counsel for the appellants argued that notwithstanding that the trial judge disbelieved the appellants, the possibility of torture was not ruled out because no medical evidence was adduced to negative the allegations of

torture. While we do not wish to give the impression that only medical evidence can negative allegations of torture, we think there is some substance in this argument. It is a routine practice to subject an accused person taken into police custody, to medical examination and subsequently to adduce medical evidence of his/her physical and mental condition, particularly in trials of serious crimes. In appropriate cases, this helps to resolve pertinent disputes such as the one at hand or in respect of criminal liability on account of age or mental status. In the instant case where it was alleged *inter alia* that one of the appellants was stabbed and underwent medical treatment, such medical evidence would most likely have helped to either support or belie the allegation. It is noteworthy that medical evidence on PW3's injuries was adduced, but surprisingly, none was adduced in respect of any of the appellants, and the omission was not explained.

In ***Sewankambo and others vs. Uganda*** Cr. App. No. 33/01 (SC), this Court considered similar issues and had this to say -

> ***"...there are other unsatisfactory features which affect the voluntariness of these confessions. First, we think that it is irregular for one police officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the police man to use contents of one statement to record a subsequent statement cannot be ruled out. In the instant case we note that AIP Otim recorded the alleged confession of the second appellant after he had recorded a similar confession from the first appellant. Second, the same police officer apparently did not have a Luganda interpreter to interpret communication between him and appellants. ... Third, all the appellants claimed that they were assaulted by the police before they were made to sign .... the alleged confessions. Indeed the first appellant claimed that he was assaulted and injured***

on the left leg which was treated by Dr. Ssekitoleko. Strangely enough the prosecution did not adduce any evidence of medical examination in respect of all the appellants. No explanation was given. In the circumstances, with all due respect, the Court of Appeal misdirected itself to say, as it did, that the learned trial judge properly admitted the appellants' confession statements in evidence."

We are of a similar view in the instant case. We think that the combination of the trial judge's misdirection on the onus of proof, and the non-adherence to the guidelines on recording of confessions as set out in F***esto Androa Asenua and others vs. Uganda*** (supra), on the part of the police officer who recorded the said confessions, makes it unsafe to uphold the admission of the confession statements in evidence. The Court of Appeal erred in upholding the trial judge's ruling that the confession statements were admissible. We accordingly allow the grounds of appeal on that issue. We hold that the 1st and 2nd appellants' confession statements were inadmissible and should not have been relied upon in convicting the appellants. We now have to consider if, without the confessions that the courts below relied on, the remaining evidence can sustain the convictions of the appellants or any of them.

Evidence against each appellant

The fact of the robbery was proved beyond any doubt. What we have to consider is whether there is conclusive proof that the appellants were the robbers. As against the 1st appellant, the remaining evidence is that upon his arrest at his residence, he was in possession of two articles, a watch and a pair of shoes, which were stolen from the robbery victims. Similarly, as against the 2nd and 3rd appellants, the remaining evidence is that they were arrested while on a mission to retrieve articles stolen during the robbery.

Counsel for the 1st appellant argued that the shoes found on him were not positively proved to be property stolen during the robbery. Counsel, however, made no comment on the watch. On the other hand, the respective counsel for the 2

and 3 appellants argued that there was no conclusive evidence that the appellants led the police to the articles, as the police already knew the location of the articles and arrested the appellants before they retrieved the articles from the swamp. According to that argument, it was not proved beyond reasonable doubt that the articles were in the possession of the two appellants or that when the appellants fell into the police ambush they were going to retrieve the stolen articles.

In our view the evidence that the appellants were found in possession of articles stolen during the robbery is overwhelming. The learned trial judge believed the police witnesses who testified that they found the watch, Exh.P5, on a table in the house of the 1st appellant, and that when they were taking him away under arrest, he first asked and was allowed to put on shoes, Exh.P8. The watch and the shoes were subsequently identified first at the police station and later in court during the trial, as articles stolen, respectively from Ignatius Kabuye, PW3, and Polisio Ssonko, PW4. The appellant offered no explanation of innocent possession of those articles. Similarly, the trial court accepted the evidence of the same police witnesses that when the 2nd and 3rd appellants fell into the police ambush, they owned up and led the police party to the several articles hidden in the swamp, which articles were conclusively proved to be property of M.I.H.V that had been in the vehicle when the robbers drove off after the robbery. Although it appears from the evidence that the 3rd appellant played a leading role in the recovery of the articles, after the recovery of the first items, i.e., the generator,

Exh.P1, and the TV set, Exh.P2, the 2 appellant participated in disclosing that some other items were left behind, which led to the recovery of the deck Exh.P3, the radio Exh.P4, and two speakers Exh.P6. He rejected the defence that the articles were planted on the two appellants. The Court of Appeal upheld the trial judge's decision and we have no reason to fault that. Accordingly, we are satisfied from the evidence that when the police intercepted the 2nd and 3rd appellants, they were both on a mission to collect those articles, which leads to an irresistible inference that

both participated in hiding the articles in the swamp. We therefore hold that the property was in their constructive possession.

Under the doctrine of recent possession, if a person is found in possession of property that was recently stolen, a presumption of fact arises that such person is either the thief or a receiver with knowledge that the property was stolen. The presumption may be rebutted by credible explanation of innocent possession of the property. In ***Kantilal Jivraj and Another vs. R*** (1962) EA 6, at p. 7 the Court of Appeal for Eastern Africa said -

> ***"It is of course well established, ... that a court may presume that a man in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession. ... This is an inference of fact which***
>
> ***'may be drawn as a matter of common sense from other facts...'***
>
> ***It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon***
>
> ***any other reasonable hypothesis than that of guilt. According to the particular circumstances, it is open to a court ... to hold that unexplained possession of recently stolen articles is incompatible with innocence. <u>But guilt in this context may be guilt either of stealing or of receiving the articles in question.</u>"*** (Emphasis is added)

In ***Andrea Obonyo and Another vs. R*** (1962) EA 542, the same court fully considered and reviewed the doctrine of recent possession, and at p. 549 had this to say on the question of determining the offence to be inferred in different scenarios -

> ***"When a person is charged with theft and, in the alternative with receiving, and the only evidence connecting him ... is the recent***

possession of the stolen property, then if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more probable or likely in the circumstances. He is not entitled to be acquitted altogether (merely due to the doubt on which of the two)... ***because the decision is not between guilt or innocence but between whether he is guilty of theft or receiving...But where it is sought to draw an inference that a person has committed another offence from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt. If, in such a case, a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles such a finding would not be justified unless the possibility that he received the articles has been excluded. The inference that he stole the articles must be irresistible."***

We agree with the proposition in ***Andrea Obonyo's case*** (supra) that where on a charge other than 'theft or receiving', the sole evidence relied on as proof that the accused was at the scene of crime, is possession of stolen goods soon after the theft, the possibility that he only received the stolen items must be ruled out beyond reasonable doubt. An accused person cannot be convicted of robbery if the presumption is that he either stole or received the property. The presumption must go beyond that. It must be a presumption that the accused is without any reasonable doubt the thief.

This Court in ***Izongoza William vs. Uganda,*** Criminal Appeal No. 6/98 also reviewed the doctrine of recent possession as applied in other decided cases and invoked it to uphold the conviction of the appellant in that case for aggravated robbery on strength of evidence that twelve hours after the robbery, he was found in possession of a bicycle that was obviously stolen in the robbery and the possibility that he was a mere receiver was excluded largely because he offered no

explanation of his possession of the bicycle. The doctrine was also applied in ***Oryem Richard and Another vs. Uganda,*** Criminal Appeal No. 2/02 (SC).

We now turn to consider if in the instant case the possibility that the appellants were only receivers was excluded, and if the inference that they participated in the robbery is irresistible. The time that lapsed between the robbery and when the appellants were found in possession of the stolen articles was so brief as to make the possibility that the articles changed hands too remote. The robbery occurred in the night of 10. 9. 01 and in the night of the following day the 2nd and 3rd appellants were intercepted on the way to retrieve the articles hidden in the swamp, and thereafter the 3rd appellant led the police to the 1 appellant who was in possession of the watch and the shoes. Secondly, the articles, particularly those marked with the initials MIHV, were the kind that would not have been sold off or otherwise disposed of readily. Thirdly, it is difficult to believe that if they were mere receivers they would not say so when faced with the capital charge of aggravated robbery, even if it involved admitting the offence of receiving. Each simply denied possession and relied on the implicit allegation that the police planted the stolen articles on him, which in our view the learned trial judge rightly rejected. We are satisfied that the possibility that the appellants were mere receivers is without any reasonable doubt excluded. We agree with the concurrent finding of the courts below that all three appellants participated in the robbery.

Deadly weapon

The last issue is whether the offence committed was simple or aggravated robbery. The latter is constituted if a deadly weapon is used or threatened to be used in the course the robbery. The arguments raised for the appellants in this regard were (a) that there was insufficient evidence to prove that the robbers had a deadly weapon which they used or threatened to use, and (b) that the Court of Appeal misdirected itself on evidence where it held that the robbers used a panga to cut

PW3, contrary to the medical evidence that the injuries PW3 sustained were inflicted through use of a stick. Counsel for the respondent submitted that both courts below judiciously considered the issue whether a deadly weapon was used or threatened to be used and concurrently answered the issue in the affirmative. He maintained that no cause was shown to justify reconsidering the issue on a second appeal.

It is evident from their judgment that in considering the issue the learned Justices of Appeal were largely influenced by the contents of the confession statements, which we have held should not have been admitted in evidence. However, they also said -

> ***"We agree with the findings of the learned Judge that the panga was properly identified under the circumstances he outlined. In actual fact PW3 sustained bruises and cuts which would be consistent with use of a panga rather than a piece of wood as alleged. We have no doubt it was a panga that the witnesses saw and thus a deadly weapon."***

In Section 286 (3) *[formerly s.273 (2)]* of the Penal Code Act "a deadly weapon" is defined as including -

"any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death." It is common knowledge that a panga answers that definition. Furthermore, precedents abound in which our courts have held that a panga is a deadly weapon. All the three eyewitnesses who were victims of the robbery testified that one of the robbers was armed with a panga and hit them with it many times, albeit using the flat side of the panga, and that he also threatened to cut the driver with it. The witnesses were able to see the weapon in the light of the motor vehicle before the driver was ordered to switch off the light, and must have felt it as they were hit with it. That evidence, which the court believed, was ample proof of the fact that the robbers had and used a deadly weapon. We reject, as farfetched speculation, the suggestion by counsel for the appellants that what the witnesses saw may have

*b*een an imitation panga. However, we agree that the view expressed *b*y the learned Justices of

Appeal that *"**PW 3** sustained bruises and cuts which would be consistent with use of a panga rather than a piece of wood as alleged"* was inconsistent with the evidence. The learned Justices did not see the injuries and so had no *b*asis for rejecting the medical opinion that they resulted from *b*eating with sticks. Nevertheless, much as their view was erroneous, it was immaterial *b*ecause the injuries and their cause are not ingredients of the offence in issue.

In conclusion, we find that the erroneous admission of the confessions in evidence did not occasion any miscarriage of justice as the other circumstantial evidence led to irresisti*b*le inference of the appellants' guilt. We hold that the trial court rightly convicted all three appellants as indicted and the Court of Appeal rightly upheld their convictions. Accordingly, we dismiss the appeal against conviction.

On sentence, the appellants through Messrs Katende, Ssempe*b*wa & Co. Advocates, with consent of counsel for the respondent applied and were allowed to file grounds of appeal against sentence. Before they did, we heard the Advocates in ***Philip Zahura Vs. Uganda Criminal Appeal No. 16 of 2001,*** on the same ground of appeal they intended to raise in this appeal. We intimated that we would make appropriate order in similar cases. In this cases it is appropriate to follow our decision in ***Philip Zahura Vs. Uganda (supra),*** and exercise our discretion under articl***e*** 22 (1) of th***e*** Constitution, to postpone confirmation of the sentences imposed in this case, until the determination of the pending appeal against the decision of the Constitutional Court in Constitutional Petition No. 6 of 2003.

DATED at Mengo the 1st day of November 2005.

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

J.N. Mulenga

Justice of the Supreme Court

G.W. Kanyeihamba
Justice of the Supreme Court.