IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C.

CRIMINAL APPEAL NO. 19 OF 2005

BETWEEN

OLWOL WILLIAM::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal from judgment of the Court of Appeal (Okello, Byamugisha and Kavuma JJ.A.) at Kampala dated 7th April 2005 in Criminal Appeal No.138/01)

JUDGMENT OF THE COURT.

This appeal is against a decision of the Court of Appeal upholding the judgment of Zehurikize Ag.J., convicting Olwol William, the above named appellant, for simple robbery and sentencing him to 10 years imprisonment.

The robbery in issue was committed on 15th December 1999, in Ntinda, a Kampala City suburb, at Plot 39/41 Martyrs Way, which is the residence of Ravinda Singh

Chauhan, PW1. The appellant, an employee of a private security company named Interid, was deployed at the residence as a security guard. At about 9.30 p.m., while Singh and his wife were in their sitting room watching T.V., two robbers who were strangers entered the room. One of them put Singh at gun point and the other snatched two cellular phones from him and disconnected the landline telephone. The robbers demanded for money. Singh agreed to the demand and went to his bedroom with one robber while the gunman remained in the sitting room keeping Singh's wife at gunpoint. In the bedroom, Singh surrendered to the robber US $ 3,500, £ 2,500 and unascertained amount of Uganda shillings. Thereafter the robbers left.

Shortly after the robbers left, Singh went out to check on the appellant who should have been on guard. He did not find him. He noted that the gate was locked from inside and concluded that the appellant had gone with the key for the main gate. He walked through the side gate to the neighbour's home from where he telephoned the boss of Interid and reported the incident to him. The boss promptly visited the scene with his staff and brought a substitute guard. That night, the Interid staff found the guard's uniform and boots that the appellant had abandoned in his room; and the following morning they found the gun that was issued to him for guard duty also abandoned behind a shrub in the compound at the premises.

The evidence of arrest was not clearly adduced and/or recorded. However, it is common ground that the appellant was traced in Lira, his home area, by Interid investigators together with the police. He was arrested and escorted by the police to Kampala on 20th December 1999. As a result of information disclosed by the appellant, three other suspects were arrested. The four suspects, namely the appellant, a brother of Singh's house girl, the house girl and another man were

charged with the robbery against Singh, and eventually they were jointly indicted and tried for aggravated robbery as A1, A2, A3 and A4 respectively. After the trial, the learned trial judge acquitted all the accused of the offence of aggravated robbery and convicted the appellant alone for simple robbery. He stated that he reduced the offence to simple robbery because the prosecution did not prove beyond reasonable doubt that the gun used to threaten violence during the robbery was loaded and therefore a deadly weapon.

The appellant's conviction was essentially based on Exh.P9, a charge and caution confession statement that he made to PW7, D/AIP Perez Katungi, who recorded it. Before admitting the confession in evidence the learned judge held a trial within a trial, which satisfied him that the appellant made the confession voluntarily. In his judgment, after considering the evidence on both sides, the learned trial judge rejected the defence evidence and held that the confession was true and that although it had been retracted it was sufficiently corroborated. In upholding the conviction, the Court of Appeal found that the admission of the confession in evidence was lawful and that the trial court had correctly relied on it because it was true and was corroborated by the appellant's conduct after the offence, which was inconsistent with innocence. The court also noted that Singh's evidence that the appellant was responsible for opening and locking the gate tended to show that the robbers had gained entry with his assistance.

The appeal to this Court is on four grounds framed thus –

> ***"1. The learned Justices of Court of Appeal erred in law and in fact in admitting in evidence the exhibit gun alleged to have been used in the commission of the offence which was prejudicial to the appellant.***

2. The learned Justices of Court of Appeal erred in law and in fact in admitting in evidence the retracted confession of the appellant hence arriving at wrong decision.

3. The learned Justices of Court of Appeal erred in law when they failed to properly subject the evidence on record to fresh scrutiny and evaluation thereby upholding the Appellant's conviction and sentence.

4. That in the ALTERNATIVE but WITHOUT PREJUDICE to the aforesaid, in the circumstances the sentence of ten years was harsh and excessive."

Counsel on both sides filed written submissions and argued ground 1 separately, grounds 2 and 3 together and ground 4 separately. We have to point out at the outset, however, in agreement with the Assistant D.P.P., counsel for the respondent, that the appeal against sentence for being harsh and excessive, as set out in ground 4, is misconceived. Under s.5 (3) of the Judicature Act, an accused person may only appeal to this Court against sentence ***"on a matter of law, not including the severity of the sentence".*** Clearly that ground fails and we shall say no more about it.

We also find no substance in ground 1. In his written submissions Mr. Alli Gabe Akida, learned counsel for the appellant, argues that the admission of the gun in evidence was prejudicial to the appellant because its admission ***"meant that it was the gun used in the robbery and that biased the mind of the learned trial judge……."*** According to learned counsel, if the gun had not been admitted in evidence the appellant's confession would have been rejected like those of the co-accused and he would have been acquitted. However, counsel did not disclose any ground that would render the gun inadmissible in evidence. In the Court of Appeal

the same argument was raised but the learned Justices of Appeal, quite rightly in our view, rejected it holding that the trial judge did not base the appellant's conviction on the evidence of the gun. They pointed out that the evidence was considered only in the context of determining an essential element of the indictment, namely if a deadly weapon was used during the robbery; and it was concluded that the prosecution had failed to prove that element. For our part, we should add that as a matter of law, the evidence about the gun was relevant and admissible. The gun was found abandoned at the premises where men armed with a gun of similar description had committed a robbery the previous night. The gun so found and produced in evidence was proved from the serial number on it to be the gun issued to the appellant for guard duties at that premises. In our view, since the appellant's version that the gun was forcefully removed from him was found to be false, the learned trial judge could have appropriately considered the evidence on the gun as part of the circumstantial evidence, which proved the appellant's participation in the robbery. That he did not so consider that evidence cannot be construed as prejudicial to the appellant. Consequently, it is immaterial to speculate, as learned counsel does, that the admission of the gun in evidence biased the trial judge.

In his written submissions, counsel for the appellant does not advance any argument in support of ground 2 that complains against the admission in evidence of the retracted confession. We also find no reason to fault its admission and consider the complaint as abandoned. Learned counsel only focuses on the complaint in ground 3 that the Court of Appeal failed to re-evaluate the evidence as a whole and to come to its own conclusion on it. We are reluctantly inclined to accept this criticism. Although it appears that part of the court's discussion of the case is missing from the signed judgment of the court, presumably due to typing

error, we have to agree that it is not shown in the judgment that the learned Justices of Appeal re-evaluated the defence evidence as they were duty bound to do as a first appellate court. In the circumstances we have deemed it incumbent on this Court as a second appellate court to re-evaluate the evidence. (See ***Bogere Moses and Another vs. Uganda*** Cr. App. No.1/97 (1SCD: CRIM 1996/2000 p.185) and ***Kifamunte Henry vs. Uganda*** Cr. App. No.10/97 (1SCD: CRIM 1996/200 p.280)

As we said earlier in this judgment, the main evidence against the appellant is the charge and caution statement he made to the police a week after his arrest, in which he confessed participating in the robbery. At the trial, however, apart from retracting the confession, the appellant gave evidence in his defence. He testified that in the night of the robbery he was on guard duty at Singh's residence, when at about 10 p.m. he heard voices ordering him to put up his hands. Although he confirmed that he had locked the gate he said he did not know how the intruders gained entry into the premises. He saw first two men, one of whom was armed with a gun, and later two others joined them. They disarmed him, tied him up and took him to a car outside the fence where they locked him in the boot of the car. He did not say what they did thereafter, but after about 20 minutes they drove him away, and stopped an hour later. They opened the boot, untied him and ordered him to run away, which he did. He went into hiding for three days and then fled to Lira. According to him, he did not report to his employer or the police out of fear because his supervisor had earlier threatened him that if ever a gun was removed from him "*he would be in for it.*"

In the confession statement, the appellant gave a detailed account of how the day before the robbery A2 and A3 persuaded him to participate in the robbery; of how in the night of the robbery he gave his duty gun to A2 and A4 who then entered the

house to execute the robbery; of how after the robbery he abandoned his duty and the gun and went away with A2 and A4 who gave him a share of the money robbed from Singh and paid for him to stay in a hotel overnight; and finally of how the following day when A2 and A4 did not turn up to pay him more money as promised, he travelled to Lira where he was eventually arrested by an Interid official and handed to the police.

On a number of issues we find the appellant's testimony not credible. The first issue is in regard to the entry of the robbers into the premises. Since it is common ground that the main gate was locked and the side gate was otherwise secured from inside, the robbers could only have gained entry either through some form of force (e.g. by breaking one of the gates or the fence or jumping over) or with the appellant's assistance. Yet there is no scintilla of evidence suggesting entry by the former alternative. It is not credible for the appellant as the only witness to the entry to plead ignorance. Secondly, the appellant's allegation that after disarming him the robbers took time to tie him, to lock him in a car boot and after the robbery to drive him around for an hour, savours of dramatic fiction. Thirdly, it is incredible that an innocent security guard overcome by robbers would, out of fear of his supervisor, choose to go into hiding, at the risk of being suspected of participating in the robbery, rather than report to the employer or the police what befell him.

On the other hand, the confession is coherent and so detailed that it cannot be a fabrication by PW7, the police officer who recorded it, as alleged by the appellant. We are in agreement with the learned trial judge that the confession cannot but be true. We also find that the appellant's conduct after the robbery was inconsistent with innocence and provided sufficient corroboration to the retracted confession.

Our only concern is an apparent prejudicial observation the trial judge made in his judgment, where, after holding that the confession recorded by PW7 was true, he went on to say –

> ***"But in addition A1 had disclosed the story to PW2, when escorting him from Lira. I am alive to the provisions of section 24 (1) of the Evidence Act and as such whatever A1 is alleged to have told PW2 and PW5 is not admissible in evidence. However, I am convinced that it must be true that he talked to these police officers. It is his interviews with these officers that led to the making of charge and caution statement. It is also because of what A1 said that led to the arrest of the other co-accused."***

Section 24 (1) of the Evidence Act that the trial judge referred to here, *(which is s.23 (1) in the 2000 revised edition)* provides that no confession made by any person in the custody of a police officer shall be proved against such person except in the presence of, *inter alia,* a police officer of or above the rank of assistant inspector. A trial court ought not to admit in evidence a confession made in contravention of that provision, whether or not there is defence objection to it. PW2 and PW5 were of the rank of detective constable and consequently the learned trial judge ought to have refused to admit in evidence any alleged confessions made to them by the appellant. In total disregard of that prohibition, however, the trial judge irregularly recorded the confessions in detail and waited to observe in the judgment that after all the confessions were inadmissible. Furthermore, after erroneously admitting the inadmissible confessions, he purported to consider them as additional to the admissible evidence and asserted that he was convinced that they were made.

Notwithstanding the said errors, however, we find that no injustice was occasioned to the appellant. It appears that in referring to the said evidence the learned judge had in mind the provisions of s.29 of the Evidence Act, which permits the

admission of information, including confessions, irrespective of s.23, if the information leads to discovery of a fact deposed to, hence his reference to the appellant's interviews having led to his charge and caution statement and to the arrest of the co-accused. We should stress, however, that s.29 strictly applies only to ***"so much of the information as distinctly relates to the fact thereby discovered."*** It does not provide a blanket cover for admission of any amount of confession. Nevertheless, we are satisfied that even if the learned trial judge had properly excluded the irregularly admitted evidence, he would still have convicted the appellant as the rest of the evidence proved his guilt beyond reasonable doubt. Ground 3 also fails.

There is another matter we are constrained to comment on for guidance before taking leave of the case. It is the apparent incompatibility of two decisions the learned trial judge made in respect of confessions allegedly recorded from A2 and A4. After a trial within trial in respect of each confession the trial judge ruled that the confession was admissible and that he would give his reasons later in the judgment. However, in the judgment, he did not give reasons for either ruling. Instead, as was within his discretion, he decided not to base any conviction on the confessions on the ground that because the confessions were retracted they should be, but were not, corroborated. Later in the judgment, he intimated that he believed the two confessions were based on the confession of the appellant. This is how he put it –

> ***"…his (A1's) confession is so detailed that it cannot have been fabricated by any police officer even with the greatest imagination. In fact I do believe that the retracted confessions of A2 and A4 were based on this confession. That is why I was suspicious of the confessions of A2 and A4. Like A2 and A4, A1 was interrogated by PW5 to whom he explained …what happened and this led to the***

obtaining of the charge and [caution] statement by (sic) PW7"
Emphasis is added

The obvious innuendo is that the contents of the purported confessions of A2 and A4 were not voluntary statements made to PW7, but rather were extracts from A1's confession. Needless to say, the purpose of a trial within trial is to establish if a contentious confession is a voluntary statement made by the accused person. Where, as in the instant case, the trial judge believes, albeit through suspicion, that the contents are not statements of the accused, the court cannot properly hold the confession to be voluntary and admissible. Although this issue was not subject of appeal by either party, we have to point out that the learned trial judge erred in law to admit the retracted confessions of A2 and A4 in evidence when apparently he ***"believed that*** [they] ***were based on*** [A1's] ***confession."*** However, no miscarriage of justice was thereby occasioned as ultimately the court did not base its decision on the confessions.

In the result, we find no merit in the appeal and we hereby dismiss it.

Dated at Mengo this 16th day of October 2007

B.J. ODOKI
CHIE JUSTICE

J.W.N. TSEKOOKO
JUSTICE OF SUPREME COURT

J.N. MULENGA
JUSTICE OF SUPREME COURT

G.W. KANYEIHAMBA
JUSTICE OF SUPREME COURT

B. KATUREEBE
JUSTICE OF SUPREME COURT.