THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 0058 OF 2018

1. OKWII MOSES
2. ATIANG CHRISTINE BETTY
3. OKODI JAMES
4. EKELLU DAVID
5. AJOTU JAMES
6. ENYUTU EMMANUEL::APPELLANTS

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti before Batema, J. dated 13th April, 2018 (conviction) and 30th April, 2018 (sentencing) in Criminal Session Case No. 0032 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

Background

On 13th April, 2018, the High Court (Batema, J.) convicted each of the appellants of the offence of Murder contrary to **Sections 188 and 189 of the Penal Code Act, Cap. 120**. On 30th April, 2018, the High Court sentenced the appellants as follows; the 1st appellant to 10 years and 8 months imprisonment; the 2nd appellant to 10 years and 7 months imprisonment; the 3rd appellant to 10 years and 8 months imprisonment; the 4th appellant to 10 years imprisonment; the 5th and 6th appellants, each, to 14 years imprisonment.

The decision followed a joint trial of 8 persons, including the 6 appellants, on an indictment which alleged that those persons had, on 12th January, 2014 at Kyere Police Post in Serere District, unlawfully and with malice aforethought caused the death of Opolot Paul (the deceased).

The facts of the case as presented in evidence and accepted by the learned trial Judge are as follows. On 12th February, 2014, the deceased, a resident of Oburu Village in Kyere Sub County, Serere District, died in a cell at Kyere Police Station. His body was found hanging from a rope in a cell at that Police Station. The deceased had been taken to Kyere Police Station, upon being arrested on suspicion that he had had unlawful sexual intercourse with a minor girl, the daughter of the 1st and 2nd appellants.

After his arrest, the deceased's mother PW2 Achanit Stella went to the police station to bring food to her son, but had been prevented from seeing him. PW2 met with a group of people, including the 1st appellant, who was following up on the case against the deceased. The 1st appellant asked PW2 to pay Ug. Shs. 3,000,000/= to settle the defilement issue, but she did not have the money. PW2 had also seen the 2nd, 3rd and 4th appellants at the police station, and had also seen the 5th and 6th appellants who were police officers at the said station. Because she had been prevented from seeing her son, PW2 got tired of waiting and left the police station, only to be told later that day that her son had hanged himself in custody using a rope in an apparent act of suicide.

Subsequent police investigations concluded that the deceased had been deliberately killed, and an attempt made to conceal the killing as an act of suicide. This was confirmed by medical evidence of a report from the post mortem examination conducted on the deceased's body.

All the appellants were found to have played a role in the killing of the deceased. They were found to have held a meeting at which they planned the killing of the deceased. The deceased's killing was physically carried out by the 5th and 6th appellants, who were all police officers at Kyere Police

Station, at the instigation of the 1st and 2nd appellants. The 3rd and 4th appellants were also found to have participated in the killing of the deceased.

When called upon to give their defence, the 5th and 6th appellants exercised their right to remain silent and did not give evidence. The 1st, 2nd, 3rd and 4th appellants, each, gave unsworn evidence denying the offence. The learned trial Judge was, however, satisfied with the prosecution evidence and convicted the appellants as charged, and sentenced them as stated earlier. Being dissatisfied with the decision of the learned trial Judge, the appellants now appeal to this Court on the following grounds:

"1. **The learned trial Judge erred in law and fact by failing to properly evaluate evidence on record as a whole thus coming to a wrong conclusion when he convicted the appellants.**

2. **The learned trial Judge erred in law and fact by failing to construe application of the doctrine of common intention thereby coming to an erroneous decision to the prejudice of the appellants.**

3. **The learned trial Judge erred in law and fact when he relied on his own opinion in holding that the appellants participated in the murder of the deceased, thus arriving at a wrong conclusion prejudicial to the appellants.**

4. **The learned trial Judge erred in law and fact by shifting the burden of proof of alibi to the appellants, thus coming to a wrong conclusion."**

The respondent opposed the appeal.

Representation

At the hearing, the appellants were jointly represented by Mr. Kyozira David Samuel, learned counsel on State Brief. Ms. Fatina Nakafeero, learned Chief State Attorney represented the respondent.

Due to existing Prison Regulations to prevent exposure of inmates to COVID-19, the appellants followed the hearing remotely via Zoom Video link, while they remained at Jinja Government Prison.

Written submissions filed prior to the hearing, were, with leave of Court, adopted in support of the parties' respective cases.

Appellants' submissions

Counsel for the appellants argued grounds 1 and 3 jointly, and each of grounds 2 and 4 separately.

Grounds 1 and 3

Counsel for the appellants criticized the learned trial Judge for having based his decision to convict the appellants, not on the prosecution evidence, but on his personal opinion. He singled out several instances to back up his claims. First, the learned trial Judge had found that the reason the 5th and 6th appellants had refused PW2 to see her son because they intended to go to the cells and murder him. Secondly, the learned trial Judge had found that PW2 met her son praying while in the cell at Kyere Police Station, yet there was no evidence to support that finding. Counsel criticized the learned trial Judge for overlooking the prosecution evidence and instead acting overzealously to convict the appellants.

Ground 4

Counsel submitted that the learned trial Judge erroneously placed the burden on the 1st and 4th appellants to prove their alibi defences. The 1st and 4th appellants had stated that they had gone to attend a marriage ceremony at the material time, but the learned trial Judge had disbelieved their alibi on the basis that they did not bring any witnesses to prove their alibi evidence. He referred to the authority of **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (supra)** for the principle that an accused person does not bear the burden to prove an alibi that he/she sets up, which burden lies on the prosecution to adduce evidence to place the accused at the scene of crime. Counsel urged this Court to find that the 1st and 4th appellants' alibis were not disproved by the prosecution evidence.

Ground 2

Counsel faulted the learned trial Judge for applying the doctrine of common intention yet it had no relevance to the case against the appellants. He submitted that the doctrine of common intention is provided for under **Section 20** of the **Penal Code Act, Cap. 120** which provides:

> **"20. Joint offenders in prosecution of common purpose.**
>
> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."**

According to counsel, the doctrine of common intention comes into play, if an accused person is present at the scene of crime, and he/she carries out an act that manifests an intention in common with the actual perpetrator of the offence. Counsel contended that there was no evidence to support a finding of common intention of the appellants to kill the deceased, which explains why the learned trial Judge relied on speculation to convict the appellants. The learned trial Judge had merely speculated that because each of the appellants was present at the Police Station when medical examination of the deceased was being carried out, they must have had common intention to kill the deceased which was erroneous as the prosecution led no evidence to prove that the appellants agreed to cause the death of the deceased. Moreover, to counsel, the actual perpetrator of the killing of the deceased remained unknown and therefore it was impossible to impute a common intention on any of the appellants in the circumstances.

Counsel further faulted the learned trial Judge for convicting the 3rd appellant merely because he was a friend of the 1st appellant and had arrested the deceased and transported him to Kyere Police Station, submitting that none of those factors were relevant to proving any of the ingredients of murder against the 3rd appellant. All in all, counsel urged this Court to find that the

learned trial Judge erred in his application of the doctrine of common intention to the present case. He prayed the Court to quash each appellant's conviction for the offence of Murder and to order for their immediate release.

Respondent's submissions

Counsel for the respondent argued all the grounds of appeal concurrently. She submitted that the decision of the learned trial Judge was based on the prosecution evidence and not his personal opinion. The prosecution adduced medical evidence which proved that the deceased had been deliberately killed and had not committed suicide. The medical evidence showed that the deceased had died from injuries inflicted on his spinal cord resulting in cardiac respiratory arrest. The injuries were consistent with deliberate acts of murder and suicide as the deceased's eyes were not protruding and neither was his tongue hanging out of his body as would have been the case if he had committed suicide by hanging. Thus, because the medical evidence ruled out death by hanging, the appellants' defence that the deceased had hanged himself was ruled out and the only conclusion to be reached was that the deceased had been deliberately killed.

It was further submitted that the inference that the deceased had been deliberately killed was supported by further prosecution evidence. The deceased had died while in custody at Kyere Police Station, and considering that it was the practice of the Uganda Police Force to remove personal items from suspects before taking them into custody, it was unlikely that the deceased had been allowed to carry a rope to the cells and use it to hang himself as alleged by the appellants. Accordingly, the 5th and 6th appellants who were the police officers on duty on the day that the deceased was killed were answerable for his death.

Further, it was submitted that the prosecution evidence supported an inference that the appellants had planned the murder of the deceased. PW2 stated in evidence that the 1st, 4th, 5th and 6th appellants were at Kyere Police Station immediately after the deceased was taken there. PW2 further stated

that she had met with the 1st appellant who had demanded for money to settle the defilement allegations against her son and when she could not pay that money, the 1st appellant stated that in three days he would "clap his hands'. In addition, it was submitted that the prosecution evidence indicated that while PW2, the deceased's mother was refused from seeing her son, some of the appellants had been allowed access to the deceased's cell. In counsel's view, the evidence highlighted above showed that the appellants acted with common intention to murder the deceased and proved the case against them.

Counsel submitted that in view of the satisfactory prosecution evidence, the relevant alibi defences raised by the 1st and 4th appellants could not stand. Moreover, the question of demeanour of the witnesses was vital in considering whether to reject or uphold those alibis. In this regard, the learned trial Judge's impression was that demeanour of the prosecution witnesses was that of truthful witnesses as opposed to the appellants whose demeanour was that of unreliable witnesses. Further, it was submitted that the prosecution witnesses who identified the appellants at the scene of crime had made their observations of the appellants under favourable circumstances, and thus mistaken identification of the appellants was ruled out.

On the alleged misapplication of the doctrine of common intention, counsel cited **Section 20** of the **Penal Code Act, Cap. 120** which provides for that doctrine and submitted that the prosecution evidence showed that each of the appellants was complicit in the killing of the deceased. She contended that the prosecution evidence highlighted the role played by each appellant in the murder of the deceased. Therefore, the submission that the learned trial Judge misapplied the doctrine of common intention must fail.

Counsel concluded by praying this Court to dismiss this appeal and uphold the trial Court's decision to convict each of the appellants.

Resolution of Appeal

We have carefully studied the Court Record, considered the submissions of counsel for either side, and the law and authorities cited in support thereof. Other relevant law and authorities not cited have also been considered.

This is a first appeal from a decision of the trial High Court, and the duty of this Court in such appeals is settled. This Court has a duty to reappraise the evidence and other materials placed before the trial Court and reach its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported).** We shall remain alive to this duty, throughout, as we resolve the grounds of appeal.

We shall begin by resolving grounds 1, 2 and 4 jointly, and thereafter resolve ground 3 separately.

Grounds 1, 2 and 4

We find it necessary to consider grounds 1, 2 and 4 jointly as counsel for the appellants made several related points in his submissions on the three grounds. In support of ground 1, counsel contended that the learned trial Judge failed to properly evaluate the evidence on record. In regard to ground 2, counsel for the appellants submitted that the doctrine of common intention that the learned trial Judge relied on to convict the appellants was inapplicable in the present case. If the doctrine of common intention was applicable, it was submitted there was no evidence to justify the finding that the appellants had acted with common intention to kill the deceased person. This latter point will be considered along with ground 4 that alleges that the learned trial Judge erred to disregard the respective alibi defences of the 1st and 4th appellants.

On her part, counsel for the respondent supported the decision of the learned trial Judge on each of the contested points.

We shall begin by considering the point argued for the appellants that the learned trial Judge erred to apply the doctrine of common intention in convicting the appellants. The doctrine of common intention is a product of English common law, although at common law different although analogous terms such as "joint enterprise" or "common purpose" were used to refer to the said doctrine. The common law developed principles establishing that apart from the primary offender who physically commits an offence, in certain circumstances a secondary offender who did not physically commit an offence, could, just like the primary offender, nonetheless be found guilty of committing the relevant offence.

The common law developed the doctrine of common intention in contradistinction to cases where a person other than the primary offender may become a party to the crime through activities such as aiding, abetting, counselling, inciting or procuring a crime. **(See: Chan Wing-siu and others v R [1984] 3 All ER 877)**. For common intention, it had to be established that there was an agreement between the primary and secondary offenders to commit the relevant crime. The relevant principles were succinctly stated in the Australian authority of **Tangye vs. R (1997) 92 A Crim R 545** cited with approval by the **Australian High Court in Osland v R [1998] HCA 75**, as follows:

> **"A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.**

A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed."

The doctrine of common intention is incorporated under **Section 20** of the **Uganda Penal Code Act, Cap. 120** which provides:

"20. Joint offenders in prosecution of common purpose.

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

In the authority of **Kisegerwa and Another vs. Uganda, Supreme Court Criminal Appeal No. 6 of 1978 (unreported)**, it was stated:

"In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter, it is now settled that an unlawful common intention does not imply a pre—arranged plan — see P —vs— Okute [1941] 8 E.A.C.A. at p.80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate himself from the assault. See R —vs— Tabulayenka (supra). It can develop in the course of events though it might not have been present from the start, See Wanjiro Wamiro—vs—R [1955] 22 E.A.C.A. 521 at p.52 quoted with approval in Mungai'a case."

In the present case, the learned trial Judge found that some of the appellants were the primary offenders in the murder of the deceased person, while others were secondary offenders who had a common intention with the

primary offenders to murder the deceased. This finding has been challenged. It was contended by counsel for the appellants that the primary perpetrator of the deceased's murder was not identified on the evidence. We have therefore reappraised the relevant evidence in order to address this contention.

The prosecution case was that the deceased person was murdered in the cells at Kyere Police Station where he had been taken into custody. The appellants contended that the deceased had hanged himself at the said police station in an act of suicide. The prosecution adduced medical evidence of a report (Exibit PE3) from a post mortem examination conducted by PW6 Etolu John Wilson following the deceased's death. The report at pages 80 to 81 of the record indicates that the deceased had the following external injuries – two skin deep injuries on the right side of the neck; 1) a band clot just below the throat; and 2) a deeper band clot just above the throat. There were no injuries on the left side of the neck. The post mortem examination also found that the deceased had a hypermobile neck and cervical neck prolapse injuries which were consistent with the deceased's neck having been twisted. The deceased was also found to have suffered a broken spine.

PW6 was cross examined on the post examination report he made. He stated in cross examination at page 41 of the record that the injuries discovered during the examination were not consistent with the deceased having hanged himself using a rope, for several reasons. First the injuries were on one side of the body yet in a case of a suicide by hanging there would have been injuries on both sides of the neck. Secondly, as stated in the report there was neither externalization of the deceased's tongue nor popping of his eyes which should have happened if the deceased had committed suicide by hanging. In further cross examination at page 42 of the record, PW6 stated that there was no blood clot around the deceased's neck as would have been if he had used a rope to hang himself. He had also observed no

deep curtilage injury which would have been seen in a case of hanging using a rope.

In court cross examination at page 43 of the record, PW6 continued to support his findings that the deceased's death had not been caused by hanging using a rope. He stated that in a case of hanging by a rope, the victim's tongue would pop out and there would be damaged neck vessels which was not the case for the deceased.

As to the cause of the death of the deceased, the report from the post mortem examination indicated that the deceased had died after suffering "a cervical spine prolapse with transections of the spine causing cardio-respiratory arrest". Thus, it could reasonably be inferred from PW6's evidence that the deceased's death had come about after he was attacked by persons who deliberately inflicted blows to his neck and spine in the process leaving them broken. PW6's evidence was not challenged in cross examination. Therefore, we find that the deceased's death was not caused by hanging but by deliberate acts of other persons who inflicted fatal injuries on him. We only have to determine whether the learned trial Judge was right to find that it was the appellants who had killed the deceased.

We note that there was no direct evidence as to the manner in which the deceased was killed, and regard had to be had to circumstantial evidence. We observe that as stated in **Akbar Hussein Godi vs. Uganda, Supreme Court Criminal Appeal No. 003 of 2013 (unreported) citing with approval from the judgment of the Court of Appeal,** in the same case, circumstantial evidence is in the nature of a series of circumstances brought out in evidence that lead to the inference or conclusion of guilt when direct evidence is not available. Where a case is based on circumstantial evidence, before convicting an accused person upon such evidence, the Court must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused person, but also that the facts are such as to be inconsistent with any other rational conclusion than

that the accused is the guilty person. **(See: Iwutung vs. Uganda, Court of Appeal Criminal Appeal No. 0020 of 2016 (unreported), citing with approval, the rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136).**

The learned trial Judge found that each of the appellants had been with the deceased in his police cell just before he was killed. He found that at the very least, the 5th and 6th appellants, both working at the police station where the deceased was taken into custody were present when the deceased was killed. He then drew an inference that since the deceased had been deliberately killed and the 5th and 6th appellants had been present in his cell at the time of his death, they must have been his murderers. We earlier found that there was no direct evidence to pinpoint the deceased's killers. However, the circumstantial evidence against the 5th and 6th appellants is very strong, considering that the said appellants were both police officers on duty at the police station where the deceased died after he had been deliberately assaulted and killed while in custody in a police cell. Therefore, the circumstances of the death of the deceased supported the inference that the 5th and 6th appellants participated in his killing.

We now move on to determine whether the 5th and 6th appellants were the primary offenders in the murder of the deceased which requires re-evaluation of the evidence on record. PW1 Achola Anna Grace testified that she was at the relevant police station shortly after the deceased was taken into custody. She had gone to the police station because the police were holding her daughter Aujo Esther who had been arrested together with the deceased over allegations that the two had knowledge about the whereabouts and defilement of another minor girl, the daughter of the 1st and 2nd appellants. PW1 stated in examination in chief at page 17 of the record as follows:

> **"While there [at the relevant police station] waiting Mr. Okwii [the 1st appellant] came to us. He offered to negotiate with the mother of the**

boy under arrest [the deceased]. Mr. Okwii is the one I named in the dock. He alleged that the boy had spoilt his daughter. They failed to negotiate. Okwii wanted Ug. Sh. 3,000,000/= but that woman [the deceased's mother] failed to raise it. Okwir threatened that after 3 days her clan would clap their hands. It was a proverb I failed to understand.

Then I heard talk from the crowd around that the doctor had come to take the girl-Atyang's daughter for medical examination indeed she was taken away. The boy was not taken. Police said the boy might escape so Okwi said the boy must be examined at the station. Indeed, he was examined there. I tried to enter the cell to examine the examination but Ajotu the CID officer[the 5th appellant] stopped me.

Later Atyang [the 2nd appellant] came out with the doctor, Okwi with blood in the syringe. I do not know the doctor's name. He is the one on the extreme right (points). They were escorted by Ekellu.

Below the door was an opening. The door was blocked by the policeman standing Ajotu – half closed door.

I could see a rope through the hold below the door. The rope lay on the floor, it obstructed the door. He had to pull it out and threw it near the corner of the cells. Near the door."

The rest of PW1's evidence was that she was unable to see what transpired inside the cell where the deceased was held, but had seen the 1st, 2nd and 4th appellants emerging from that cell shortly after a doctor had taken a sample of the deceased's blood to conduct an HIV test. She had shortly thereafter left the police station at about 1.00 pm but was informed later in the day that the deceased had hanged himself while in police custody. In cross examination at page 6 of the record, the PW1 stated that she left the police station before the alleged suicide incident took place from which we infer that she left when the deceased was still alive.

We now turn to consider the evidence of PW2 Achanit Stella, the mother to the deceased. In examination in chief she stated that on the fateful day she was informed by the area LC1 Chairman of her son's arrest on suspicion that he had defiled a minor girl. The area LC1 Chairman carried her on his boda

boda to the relevant police station. When she got to the police station, she was prevented by the 5th appellant, one of the police officers on duty, from seeing her son who was held in a cell at that station.

She remained at the waiting area of the police station hoping to hear updates about her son. As she waited she saw a man entering the cell and he took a blood sample from her son. The 5th appellant, a police officer at the police station had blocked her from going into the police during the taking of a blood sample from her son yet he had allowed in the 1st, 2nd, 3rd, 4th and 6th appellants into the cell at the moment. Shortly after, PW2 went to buy food for her son the deceased but she was still refused from going into the cell to give him. Thereafter, some two other people she could not identify were allowed access into the cell where her son was kept, but she was still prevented from seeing him. She left the police station at about 1.00 p.m presumably having lost hope of seeing her son that day. Later in the day, she received distressing news that her son had committed suicide while at the police station. She stated that she doubted the information wondering how her son had carried the rope he used for hanging himself into the police cell.

In cross examination, PW2 revealed that the two unidentified persons who were not apprehended but were allowed access to her son's cell had spent close to 30 minutes in the cell. She also stated that she did not see what transpired in the police cell both at the time her son was subjected to medical examination and when he was killed.

PW3 Osore John Paul gave evidence similar to that of PW2. He said that he was the leader of the clan to which the deceased belonged and had been summoned to the police station on the fateful day in that capacity. He met PW2 at the police station but the two were blocked from accessing the deceased in the cell where he was kept. Later, he received a call from the Officer in Charge of the police station informing him that the deceased had hanged himself in police custody. He returned to the police station and was

indeed saw the body of the deceased hanging from the roof. PW3, too did not witness the events during the killing of the deceased.

We now turn to consider the defence evidence of the 1st, 2nd, 3rd and 4th appellants who gave unsworn testimony. The 5th and 6th appellants gave no evidence. The 1st appellant agreed that he went to the police station on the fateful day to follow up on a case in which the deceased was alleged to have defiled his daughter. When he reached he found that his daughter had already been taken into custody. He then facilitated some police officers at the station to arrest the deceased and bring him into custody, which was done. He further stated that he stayed at the police station and witnessed when a doctor went into the deceased's cell and took from him a blood sample for an HIV test. His daughter was taken to a facility away from the police station for an HIV test. The 1st appellant stated, however, that he had left the police station after 10.00 a.m and together with the 4th appellant, had gone to attend a wedding. He denied participating in the killing of the deceased.

The 2nd appellant testified that in the days before the death of the deceased, she had found a love letter written by the deceased to her daughter prompting her to cane the girl. The girl ran away from home. She suspected that the deceased had knowledge about her daughter's whereabouts and decided to report a case to the relevant police station. The 2nd appellant further stated that on the fateful day when the deceased was murdered, she was summoned to the police station, and on getting there found that the deceased and her daughter had been taken into custody. She agreed that she was present in the police cell when a sample of the deceased's blood was taken for an HIV test. The 2nd appellant, however, contradicting the evidence of PW2 testified that PW2 the deceased's mother was allowed into the police cells during the taking of the deceased's blood sample. She also stated that her daughter was taken for an HIV test at a nearby hospital. She testified that she left the police station and returned to her duty station

where she worked as a nurse, only to be told later the same day that the deceased had committed suicide while in the police custody.

The 3rd appellant testified that on the fateful day he had gone visiting at the home of the 1st appellant his brother but found him handling an issue concerning his missing daughter who had run away from home. He accompanied the 1st appellant to the relevant police station as he went to report a case against the deceased. While at the police station he had offered his motorcycle to transport some police officers to go and arrest the deceased who was believed to have information about the 1st appellant's missing daughter. Together with the said police officers and the area LC1 Chairman, whom he carried on his motorcycle and they went and arrested the deceased from his home. Upon arresting the deceased, he was taken into custody at the relevant police station were the 5th and 6th appellants, were the officers on duty. He left the police station shortly thereafter.

The 4th appellant testified that he was the Gombolola Internal Security Officer of the area where the relevant police station was situated, and on the fateful day, he had gone to the station to pick the 1st appellant with whom he intended to travel to attend the wedding of one Opolot Benard. At the police station he had become aware that there was a case involving the daughter of the 1st and 2nd appellants and PW2's son the deceased, concerning allegations of defilement. He found out that the deceased and the said daughter had been taken to the station on that day. He later learnt that an HIV test had been conducted but the deceased was found to be negative. The 4th appellant stated that he had been at the station for a short period after which he had gone with the 1st appellant to attend Opolot Benard's party. While at the party he was informed that the deceased had committed suicide while in police custody. Later, he was informed that he was wanted in connection with the deceased's death. He was also informed that an angry mob was threatening to kill him and he fled from the village.

Upon re-evaluation of the evidence set out above, we make the following findings. The evidence proved that the deceased was deliberately killed while in police custody at Kyere Police Station, and his killing disguised as an act of suicide. There was no direct evidence as to who the deceased's killers were but the circumstantial evidence was sufficient to support an inference that the 5th and 6th appellants both police officers were present when the deceased was killed. The two appellants were on duty at the police station when the deceased was taken into custody and were responsible for the wellbeing of the deceased. It was the two appellants who had control over who could access the deceased while in custody and they were therefore answerable for his killing. The fact that the deceased had been killed at their police station and the fact that the 5th and 6th appellants told the investigating officers that the deceased had committed suicide proves that these appellants had participated in the murder of the deceased and attempted to conceal it. We therefore agree with the learned trial Judge's finding that the prosecution evidence placed the 5th and 6th appellants at the scene of crime. In our view they were the primary perpetrators of the deceased's murder.

We now move on to consider the points regarding participation of the rest of the appellants. We note that the learned trial Judge found the 1st, 2nd, 3rd and 4th appellants to have acted with common intention to murder the deceased. On this appeal we find, and although this was not explicitly stated in the learned trial Judge's judgment, that this meant that while the 5th and 6th appellants were the primary offenders, the 1st, 2nd, 3rd and 4th appellants were the secondary offenders and all appellants common intention to murder the deceased.

We earlier laid out the principles relating to the doctrine of common intention, which in summary are that the doctrine comes into play when a secondary offender, a person who did not physically commit a crime may be held liable for the crime committed if he can be said to have had an agreement with the primary offender to commit the relevant crime. The

agreement with the primary offender to commit the relevant crime may be express, such as if the parties are found to have held a meeting where the agreement was made but it may also be implied from circumstances such as proof of the presence of the accused persons and the nature of their actions at the scene of crime, as well as omission of any of them to dissociate him/herself from the commission of the offence **(See: Kisegerwa case (supra)).**

In murder cases where the doctrine of common intention is sought to be applied, it is necessary to determine the act that caused the deceased's death. This is necessary to identify the actual perpetrators who caused the deceased's death so as to then investigate whether the other accused persons had common intention with those actual perpetrators to cause the deceased's death. In this case, the deceased died after suffering injuries in the form of a broken neck and spine which he sustained after being assaulted while in police custody. The evidence showed that the deceased was assaulted while in a police cell, and we earlier found that the actual perpetrators of the deceased's murder were the 5th and 6th appellants.

It remains to be determined whether the 1st, 2nd, 3rd and 4th appellants acted with common intention with the 5th and 6th appellants to cause the deceased's death. It must be determined whether there was any agreement, express or implied between the former and latter appellants to murder the deceased. After reviewing the evidence, we find that the prosecution did not prove that any of the 1st, 2nd, 3rd or 4th appellant had any express agreement with the 5th and 6th appellants to kill the deceased.

This leaves the other possible avenue which envisages proof that any of the 1st, 2nd, 3rd or 4th appellants had an implied agreement with the 5th and 6th appellants inferable from their being present during the killing of the deceased person. In our view, the prosecution evidence rendered it difficult to prove whether any of the 1st, 2nd, 3rd or 4th appellants were present when the deceased was killed. The evidence only showed that those appellants

were probably present when a doctor was taken into the deceased's cell to get a blood sample for purposes of ascertaining his HIV status. From the prosecution evidence, it was not clearly established that the deceased was killed during the process of getting his blood sample. The evidence of PW2 was that even after getting that blood sample, her child was still alive and she was asked to buy him food. We find it highly probable that the deceased was killed in the police cells after PW2 had left the police station.

On the other hand, the 1st, 2nd, 3rd and 4th appellants each testified that they left the police station after the deceased's blood sample was taken which implied that they left the police station when the deceased was still alive. The prosecution evidence did not rule out this possibility. Even the prosecution evidence that the 1st appellant had made threats to PW2 requiring that she pays money to him or else he would cause harm [either to her son or herself], could not in our view prove that the 1st appellant had intention to kill the deceased.

Further still, each of the 1st and 4th appellants raised an alibi stating that they left the police station when the deceased was still alive to go and attend a wedding ceremony. The learned trial Judge however rejected their alibis, finding that the 1st and 4th appellants had not adduced any evidence to prove that they had gone to that ceremony. The appellants argue that in rejecting the respective alibis of the 1st and 4th appellants, the learned trial Judge shifted the burden on those appellants to disprove their alibis. We accept that argument. It is trite law that an accused person who raises an alibi does not assume the burden to prove it, which burden lies on the prosecution to lead evidence which if accepted would justify the trial Court to reject as unsound, the alibi set up by the accused person. **(See: Sekitoleko v Uganda [1967] 1 EA 531).** The trial Court would be justified to reject the alibi if the prosecution leads satisfactory evidence placing the accused person at the scene of crime. **(See: Bogere and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997)**

In our assessment, the prosecution evidence did not place any of the 1st, 2nd, 3rd or 4th appellants at the scene of crime where the deceased was murdered. As we found earlier, the deceased was murdered in a police cell at Kyere Police Station. The prosecution evidence did not establish that any of the 1st or 4th appellants were in that cell when the deceased was murder. On the contrary, the prosecution evidence left a huge probability that the 1st, 2nd, 3rd and 4th appellants had left the police station when the deceased was killed. The 1st and 4th appellant's alibis were neither unsound nor implausible, and in our view were erroneously rejected by the learned trial Judge. As for the 2nd and 3rd appellants, we find that the prosecution evidence also failed to place them at the scene of crime, and it remained highly probable that their evidence that they had left the police station when the deceased was killed, was true.

In view of the above analysis, we find that had the learned trial Judge properly evaluated the evidence adduced during the trial, he would have found that on the prosecution evidence, none of the 1st, 2nd, 3rd or 4th appellants were placed at the scene of crime at the time of killing the deceased. Instead, had the learned trial Judge appropriately weighed the defence evidence against the prosecution evidence, he would have found it probable that each of the 1st, 2nd, 3rd and 4th appellants had left the police station by the time the deceased was killed.

We find that the prosecution evidence only succeeded in establishing that the 1st, 2nd, 3rd and 4th appellants were allowed into the deceased's holding cell at the time a doctor went there to collect a blood sample from the deceased. The prosecution evidence failed to establish that the deceased was murdered during the taking of his blood sample. It remained highly probable that the deceased's killers went into the cell where he was held, after the taking of his blood sample and murdered him. On the evidence on record, it was not established beyond reasonable doubt that the 1st, 2nd, 3rd and 4th appellants were present when that happened.

We also find that the learned trial Judge erred when he rejected the respective alibis set up by the 1st and 4th appellant's alibis. In our assessment, those alibis were not destroyed by the prosecution evidence and remained plausible. Moreover, as counsel for the appellants rightly submitted, the appellants did not bear the burden to call evidence in support of their respective alibis. The learned trial Judge therefore fell into error when he rejected the 1st and 4th appellant's alibis for the reason that they had not adduced evidence in support of those alibis.

Further, we find that while the doctrine of common intention was applicable in the present case, it could not be properly applied to convict any of the 1st, 2nd, 3rd or 4th appellants. On the evidence, it was not established either; 1) that there was an express agreement between the 1st, 2nd, 3rd and 4th appellants on one hand, and the 5th and 6th appellants the primary offenders, to kill the deceased; or 2) that any of the 1st, 2nd, 3rd or 4th appellants were present in the cell when the deceased was killed so as to support a finding that they had common intention with the 5th and 6th appellant, the primary offenders in the killing of the deceased.

However, the learned trial Judge was right in concluding that the 5th and 6th appellants participated in the killing of the deceased and was also right to convict them as charged.

Grounds 1, 2 and 4 are disposed of in accordance with the above analysis.

The manner of resolution of grounds 1, 2 and 4 makes it unnecessary and academic to delve into resolving ground 3 of the appeal.

In conclusion, we allow the appeals of each of the 1st, 2nd, 3rd and 4th appellants and quash their respective convictions for murder, and order that the 1st, 2nd, 3rd and 4th appellants be set free immediately unless they are otherwise held on other lawful charges.

The 5th and 6th appellants' appeals are dismissed, and their respective murder convictions are upheld. As the 5th and 6th appellants did not appeal against their respective sentences, we uphold those sentences.

We so order.

Dated at Jinja this ..... 22nd ..... day of ..... Dec ..... 2021.

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal

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Hellen Obura

Justice of Appeal