IN THE COURT OF APPAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J. Nyamuchoncho, J.A. & Ssekandi, J.A.)

CRIMINAL APPEAL NO. 8 OF 1978

BETWEEN

SESAWO s/o KERMESI……..……..APPELLANT

AND

UGANDA ……...……RESPONDENT

(Appeal from the Conviction and sentence
of the High Court of Uganda at Kampala
(Lubogo, P.J.) dated 26th April, 1978
In
Criminal Session Case No. 22 of 1978)

JUDGMENT OF THE COURT

SSEKANDI J.A.

The 1st May, 1977 was 1abour day and a time for festivities. Bamugolodde village was no exception to other places where the day was celebrated with drinks. The appellant lived in that village with his two wives and children. On that day he and his two wives went to the home of Semuyinga (PW7) for drinks. They went at 3.00 p.m. It is not clear whether they actually drank any beer at that place. Semuyinga said they found the drinks finished but the appellant said they were drinking there until 9.00 p.m. Nakate (PW 4), the surviving wife of the appellant, said that they had a few drink but spent most of the time talking. Whatever the truth may be, it seems that the judge and the assessors believed that some drinks were consumed at the home of Semuyinga. In fact in the course of summing up to the assessors the learned trial judge said that the defence of drunkenness was available to the accused. We shall, however, revert to this issue later in our judgment.

What is of great importance in this case is what happened at the beer party. It seems that Nakate had to leave her husband behind and according to her, the co—wife as well remained at the party. The appellant did not agree. He said in evidence that both his wives left him behind at about 7.00 p.m. and went back home. Their host, Semuyinga, was also of no help. He started his evidence from the time he heard an alarm at about 9.00 p.m. when the appellant says he left the party. There is, however, no doubt that at about that time the deceased was heard raising the alarm as she was being attacked with a panga. Nakate and the deceased's son Katunguka testified to this alarm and also said that when they went out of the house they saw the appellant cutting the deceased. As one of the assessors said the cause of this vicious attack by the appellant on his wife is a complete mystery.

The trial court believed the prosecution evidence that both Nakate and Katunguka properly identified the appellant as the assailant in this case. Nakate testified that when she saw the appellant cut the deceased he was cutting around the neck and turning her over. The attack took place near the appellant's house near the kraal some 30 to 50 yards away. The witnesses raised the alarm while running towards the homes of the closest neighbours. The alarm was answered by Peter Kasirantebe (P.W.6) and Samuel Semuyinga (P.W.7). When they arrived at the scene, Nakate and Katunguka told them that the appellant had killed his wife. The appellant was apparently still at the scene. They asked him about his wife and he told them that he too was looking for her. After some interrogation, offered to lead them to where the body was. It was found about 100 yards from the house. It was covered with blood and a cut on the neck was still visible.

The appellant's clothes were bloodstained. He also produced a blood stained panga which was taken over by the Muluka chief.

Mr. Ayigihugu, for the appellant, attacked the conviction in this case on a number of grounds, He submitted, first, that the learned trial judge erred in admitting the evidence of Nakate because, as the appellant's wife, she was not a compellable witness. Secondly, that the identification of the appellant was wrongly accepted without considering the possibility of mistaken identity in view of the poor conditions in which it was made. Thirdly, that evidence relied on to convict the appellant was full of loop-holes and in many respects so marred by inconsistencies and

contradictions that it would be unsafe to allow the conviction to stand. He mentioned, particularly, the failure by the prosecution to produce the blood stained panga end the mystery surrounding the discovery of the body and its subsequent identification to the doctor who performed the autopsy.

On the first ground, we agree that a wife or husband of an accused a person in a criminal trial enjoys a privilege of non-compellability as o witness against the other spouse. According to s.l19 of the Evidence Act, the wife or husband of an accused, although, a competent witness for the prosecution without the consent of the accused person, is not compellable. The privilege enjoyed by ouch witness under the law is founded on common decency that a wife or husband shall not be compelled to give evidence against an accused person against the will of the witness. In the present case there is no indication that the provisions of s.119 of the Evidence Act complied with. After stating her name and the fact that she was married to the appellant, the court continued to receive her evidence without finding out whether she had any objection to giving evidence against her husband. It was suggested in Tefuro Tibyasansa v. Uganda (EACA) Cr. Appl. No. 169 of 1975 (unreported), and we agree, that the better practices is for the Court to inform the witness of his privilege before receiving his evidence although there is no statutory obligation so to do as is the case in the other East African countries. The main question for determination is whether failure to warn the witness is a fatal irregularity as suggested by Mr. Ayigihugu.

Mr. Ayigihugu referred us to Rashidi v. E. (1969) E.A. 138. That was a case concerned with the admission of confessions and the Court held that the admissibility of evidence is a matter for the prosecution to prove. We do not think that the decision in Rashidi (supra) is of much help in this case. There is no doubt that the evidence of a spouse is admissible oven where the accused objects. The privilege is for the witness to claim and not for the accused to take advantage of in a criminal trial. In Tafuro (supra) the court had the opportunity to deal with this matter. The court held that failure to warn a witness of the privilege so that he may take advantage of it did not occasion a miscarriage of justice in that case. We share that view.

The privilege claimed by a spouse is of a personal nature; it is not a privilege which an accused can claim. In R. v. Kiaglake (1870) 22 L.T.p.333 COCKBURN C.J. refused to quash a

conviction based on the evidence of a witness who had been wrongly compelled to answer questions which would tend to incriminate him He observed:

> "I am of the opinion that Mr. Loyibond (witness) was the only party who could take exception to his answering; and that the privilege of refusing to be examined cannot be taken advantage of by any other party….. I can see no reason for saying that when the witness is compelled to answer, although he may have objected that that is a ground of objection on the part of ether of the litigants."

In his authoritative book on evidence CROSS ON EVIDENCE, (4th Edn.) CROSS says on p. 242,; "The personal nature of the privilege means that a party will not necessarily be entitled to succeed on an appeal, or obtain an order for a new trial when the claim to privilege of his own, or his opponents witness has been wrongly rejected or accepted in the court below." In the instant case the position is even less difficult because the witness never objected to giving evidence.

We now turn to the evidence against the appellant in this case. Mr. Ayigihugu attacked the conviction mainly on the ground that in view of the contradictions in the evidence of the principal witnesses and the failure to produce the alleged blood stained exhibits, the identification of the appellant as the culprit cannot be accepted as free from doubt. We have considered the evidence in this case as a whole. It is true that the testimony of the key witnesses, Nakate, Katunguka and the two neighbours, who answered the alarm, is in some parts contradictory and we have noticed some inconsistencies. But all these were raised by counsel for the defence at the trial and the learned trial judge dealt with them adequately in his summing up to the assessors and in his judgment. He was of the view that they were not material as they did not go to the root of the case against the appellant.

On the crucial issue of identification the learned judge found that Nakate and Katunguka recognized the appellant although there was poor moonlight. The evidence of Katunguka regarding moonlight was in fact that the moonlight and not very bright moonlight. We think that in the circumstances of this case the eye-witnesses had ample opportunity to correctly identify the appellant. Nakate is his wife and Katunguka his son. They knew him very well. On the evidence, the light was adequate considering that they saw the appellant from close range.

Nakate said that she first saw the appellant cut the deceased from a distance of 50 yards. The deceased was raising an alarm. Katunguka said that they went close to see what was happening, about 4 yards. The place where the deceased was killed could not have been very far from the house. Kasirantebe said that they found a pool of blood about 50 yards from the house. We are not persuaded that in these circumstances the witnesses could not have properly identified the appellant. The learned judge adequately dealt with the discrepancies in the evidence. Both he and the assessors who saw the witnesses were satisfied that the appellant was properly identified. We see no reason to disturb their findings of fact.

We think, however, that he prosecutor in this case was extremely careless in the presentation of her case. We agree with Mr. Ayigihugu that a chief or police officer should have been called to testify as to the state of the body when it was recovered. The panga also should have been exhibited; it is of vital importance that the evidence of chiefs and police officers who visit the scone is called. However, after careful consideration of the evidence as a whole, we have come to a conclusion that the failure to adduce this evidence was not prejudicial in this case. There is overwhelming evidence to show chat the deceased was viciously cut with a panga. She sustained severe cut wounds all over the body which were seen by the doctor who performed the post-mortem. All the witnesses testified to cut wound on the neck and Kasirantebe said that the body was covered with blood. The doctor observed an injury measuring 6 x 1 x ½ from the ear to the chin. We are satisfied that this was the wound observed by Kasirantebe and which the eye—witnesses sow being inflicted, purportedly on the neck, the proximity between the chin and the neck being so close. e, therefore, ace no merit in the complaint by Mr. Ayigihugu that medical the injury seen by the witnesses is not supported by medical evidence. On the question of the pangs, the learned judge was of the view that the injury seen by the doctor was consistent with the use of a panga and was prepared to overlook the failure to produce it in evidence. e do not see any reason to disagree with his finding of fact on the matter.

On the identity of the body, we agree with Mr. Ayigihugu that a witness who knew the deceased and not a police officer ought to have been called to identify it, but the evidence of this officer was admitted at the preliminary hearing. The officer appears to have escorted the body from the scene to the mortuary on 4th May, 1977. If this be so then there could not have been any mistake as the officer took the body and identified it to the doctor. Although that evidence was hearsay,

no objection was raised at the trial, and we are unable in the circumstances, to say that any miscarriage of justice has occurred as there was no dispute about the identity of the body having been part of the admitted facts. After a careful review of the evidence, we are satisfied that there is no merit in the complaints raised by the appellant against the conviction except for the question of intoxication which we shall now revert to.

The appellant testified that he began drinking foes 2.00 a.m. to about 9.00 a.m. when this offence was committed. This evidence was to some extent supported by Nakate. The learned judge held that he did not believe that the appellant was drunk to the extent that his mind was effected by alcohol although he had clearly directed the assessors that the defence of drunkenness available to the accused. It appears that the learned judge, in his judgment, had in mind the defence set out in s.13 (l) (a) or (b) of the Penal Code. But, there is also s.13(4) of the Penal Code which states that intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

It seems to us that in the instant case s.13 (4) is applicable. The appellant was drinking for a long time before the offence was committed. We do not think Semuyinga was entirely truthful on the question of drink because he had previously been taken to task by the police about a licence for brewing beer. Nakate said that the deceased and appellant were on good terms. There is, therefore, no apparent motive for the killing. Although the prosecution need not prove motive, but, where a motive is established it becomes a relevant factor in determining intention. The only possible explanation for the killing in this case can only be that both the deceased and the appellant acre drunk and perhaps quarreled and possibly fought. We do not know what exactly happened before the appellant was seen cutting the deceased. In the circumstances, it would be unsafe to support the finding of the learned trial judge that malice aforethought was proved beyond doubt. The test in such cases is not whether there is evidence to show that the accused was so drunk that his mind was affected by alcohol as the learned judge appears to have held. The true test is whether, having regard to all the evidence, including that relating to drink, it can safely be said that the prosecution has proved beyond doubt that the accused had the prerequisite intent at the material time. We do not think this onus was fully discharged by the prosecution in this case. We accordingly allow this appeal to the extent that the conviction for murder is

quashed and conviction for manslaughter substituted. The appellant will be sentenced to 5 years imprisonment.

DATED at Kampala this 6th day of December, 1978.

Sgd: (M. Saied)
CHIEF JUSTICE.

Sgd: (P. Nyamuchoncho)
JUSTICE OF APPEAL.

Sgd: (F. h. Ssekandi)
JUSTICE OF APPEAL.

Mr. P.S. Ayigihugu of M/s Ayigihugu & Co. Advocates for the Appellant
Mr. Twesiime, Senior State Attorney, for the Director of Public Prosecutions.

I certify that this is a
true record of the original

(M. Ssendegeya)
CHIEF REGISTRAR