THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM*:** ***HON. MR. JUSTICE G.M.OKELLO, JA
HON LADY JUSTICE C.K.BYAMUGISHA, JA
HON. MR. JUSTICE S.B.K.KAVUMA

CRIMINAL APPEAL NO.138/2001

BETWEEN

OWOL WILLIAM:::APPELLANT

AND

UGANDA:::RESPONDENT

[***Appeal from conviction and sentence of the High Court of Uganda Sitting at Kampala (*Zehurikize J) *dated 6th November 2001 in HCCSC No.343of 2000***]

JUDGEMENT OF THE COURT

Owol William, the appellant in these proceedings, was indicted with Mugamba Robert (A2), Namboze Grace (A3), and Semakula Dan (A4) for the offence of robbery contrary to the provisions of **section 286(2)** of the Penal Code Act. It was alleged in the particulars of the indictment that on the 15th day of December 1999 at Plot 39/41 Martyrs Way Ntinda Nakawa Division in the District of Kampala, they robbed Ravinda Singh Chauhan of his money and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a mark 4 rifle on the said Ravinda Singh Chauhan.

At the end of the trial, the court acquitted the appellant's co-accused. It found him guilty of simple robbery and sentenced him to 10 years imprisonment -hence the instant appeal.

The prosecution called a total of 7 witnesses to prove its case. The appellant and his co-accused gave evidence on oath. The case for the prosecution as found and accepted by the trial court was as follows: Interid, a private security organisation, employed the appellant as a security guard. He was deployed to guard the residence of the complainant Ravinda Singh Chauhan (P.W.1). The second accused was a brother of the third accused who was employed as a housemaid by the complainant. On the day material to this appeal, at about 9.30 p.m P.W.1 was in his sitting room when two men entered the house. One of them had a gun and he put him at gunpoint. The second intruder picked the complainant's mobile phone near the television set and even asked for the second one that he also picked. He went further and disconnected the landline telephone. The intruder with a gun, guarded the complaint's wife while the second one went with him to the bedroom where he stole the sum of US $ 3,500, £ 2,500 and an unspecified amount of Uganda shillings. After that they left.

When the complainant went outside to look for the appellant, he was no where to be seen. He had even gone with the keys of the gate. He went to a neighbour's house and telephoned one Mr Bakunda, the Interid boss. Later the matter was reported to police. The appellant was arrested in Lira and detained at Lira Police Station from where he was collected by a police officer, Detective Pithua, (P.W.2). He was brought to Kira Road Police Station and interrogated by Detective Constable Tusiime Patrick (P.W.5). He revealed that A4 had participated in the robbery and that he was the one who had a gun and entered the house with A2. A2 led the police to arrest A4. During the course of interrogation, A1, A2 andA4 showed willingness to confess and they were taken to Detective Inspector of Police Perez Kabungi (P.W 7) who recorded a charge and caution statement from them.

In their defence all the accused persons denied the offence and retracted their confessions. The trial judge acquitted A2, A3 and A4. The appellant in his evidence on oath stated that when the intruders came, they removed his gun from him. They tied

him up and put him in the boot of the car that was parked outside. After about 20 minutes they returned and drove the car away while he was still in the boot. After driving for about one hour, they stopped, opened the boot of the car, untied his hands and told him to run away. He did not report to his employer because he was frightened. He claimed that his supervisor had warned him that if anyone removed a gun from him he would be dead. He decided to go to Lira. The learned trial judge rejected that version of events. He found that the appellant's conduct of running away to Lira was incompatible with his innocence. He also found that there was no evidence to prove that the weapon used was deadly and he, therefore, found the appellant guilty of simple robbery and sentenced him to 10 years imprisonment- hence this appeal.

The memorandum of appeal filed on his behalf contains the following 7 grounds:

1. **The learned trial judge erred in law and fact to find that the gun recovered was the gun used in the alleged robbery.**

2. **The learned trial judge erred in law and in fact to find that the gun used in the robbery belonged to the appellant.**

3. **The learned trial judge was wrong in law to have admitted the gun in evidence.**

4. **The learned trial judge erred in law and fact in relying on the retracted confession of the appellant.**

5. **The learned trial judge erred in law in admitting in evidence the retracted confession of the appellant.**

6. **The learned trial judge erred in law and fact in failing to properly direct his mind to the defence case, which was prejudicial to the appellant.**

7. **The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at a wrong decision.**

When the appeal came before us for final disposal, Mr Ali Gabbe, learned counsel for the appellant, argued grounds 1-3 together and the rest of the grounds also together. In submitting on the first three grounds, learned counsel complained that the prosecution failed to prove that the gun which was exhibited was the one recovered from the scene of crime, that it was the gun in possession of the appellant and whether it was used in the commission of the offence. He claimed that the gun in question was not the one issued to the appellant by his employer, it was not the one recovered from the scene of crime and it was not the one used in the commission of the offence. Learned counsel contended that P.W. 1 who was the only eye witness was not shown the gun during the trial, in order to identify it as the one the robbers used. He claimed that failure to produce the gun for identification was fatal to the prosecution's case. He further submitted that the doubts about the gun should have been resolved in favour of the appellant because there was no ground for convicting him of simple robbery.

In reply, Mr Gilbert Alule supported the findings of the trial judge. He argued that the appellant stated in his evidence that the robbers used his gun.

In dealing with the evidence of the gun, the learned trial judge on page 3 of the of the judgement said:

"The next element to consider is whether a deadly weapon was used. Section 273(2) defines "deadly weapon" to include any instrument made or adapted for shooting or cutting or any instrument which, when used for offensive purposes, is likely to cause death. In the instant case P.w.1 said that he saw a gun with one of the attackers who put him at gun point and also his wife. Denis Kabirinda(P.W3) said he recovered the gun in the compound but it had no ammunitions. He handed the gun to Bakehemura(P.W.4) who handed it to police. P.W.5 is the one who received the gun from P.W.4 and later sent it to P.W.6 Gakyaro Francis, the ballistic expert who testified it and found it capable of discharging bullets. In his statement A1 stated that it was his gun which the robbers grabbed from him and used it to commit the robbery".

From the above extract, it is clear to us that the learned trial judge did not base the conviction of the appellant on the gun. Earlier in his judgment the trial judge made a finding to the effect that there were threats to use actual violence by means of a gun in order to obtain or retain the stolen property. It was immaterial whether the gun used to threaten the complainant was the same gun that was exhibited. The gun was exhibited for purposes of proving that it was deadly at the time of committing the offence. However, the learned trial judge found that it was not and he convicted the appellant of simple robbery. With respect, we failed to appreciate the complaint raised by counsel for the appellant in the above grounds. They will accordingly fail.

The complaint in the rest of the grounds was that the learned trial judge erred to admit the confession which was taken by an officer below the rank of Assistant Inspector and the appellant's explanation as to why he disappeared after the commission of the offence. He argued that the appellant's evidence to the effect that he ran away because of the threats of his employer was not challenged. He claimed that the trial judge failed to appreciate the defence case.

The state supported the trial judge and invited us to dismiss the appeal.

We shall first deal with the charge and caution statement recorded by Detective Inspector of Police Katungi(P.W.7). At the time of recording the confession he was an Assistant Inspector of Police. **Section 23(1)(a)** of the **Evidence Act** provides that

"***No confession made by any person while he or she is in custody of a police officer shall be proved against any such person unless it is made in the immediate presence of-***

(a) ***a police officer of or above the rank of assistant inspector; or***

(b) ***a magistrate".***

The confession or the charge and caution statement was recorded by a police officer of the rank of assistant inspector as the law requires. No error was committed by the trial court in admitting the same.

The charge and caution statement was retracted at the trial and the appellant claimed that he was tortured. The learned trial judge was alive to the practice of such retracted confession to be corroborated by some other evidence. He found that the confession was true. He also found corroboration of the confession in the conduct of the appellant. At page 7 of the judgement he said:

"Further A1's confession is corroborated by some other evidence. According to A1 the robbers used his gun after disarming him. After the robbery they took him away but later released him. He did not report to his bosses or to police. He merely ran away to Lira from where he was arrested. This conduct cannot be of an innocent man. This conduct corroborated his confession **See Uganda v G.W.Simbwa Cr.Appeal No.37/95 S.C.(unreported).**

On the appellant's claim that he ran away because he feared, the trial judge rejected that as a pack of lies.

We have considered the evidence as a whole. We think there was ample evidence on which the conviction of the appellant could have been based without the confession. P.W.1 in his evidence testified that the appellant is the one who had the keys of the gate. It therefore possible that the robbers might have gained entry to the compound and eventually to the house with his assistance. Even if we accept that the robbers forcefully carried him away and dumped him on 4th street, his conduct thereafter was inconsistent with his innocence. He fled to Lira but the long arm of the law followed him. We are satisfied on the evidence as a whole that the learned trial judge reached the right conclusion in finding the appellant guilty of simple robbery. The appeal against conviction and sentence is dismissed. We uphold the sentence imposed by the trial judge.

Dated at Kampala this 14th day of January 2005.

G.M.Okello

Justice of Appeal

C.K.Byamugisha

Justice of Appeal

S.B.K.Kavuma

5 **Justice of Appeal**