IN THE COURT OF APPEAL FOR UGANDA
AT KAMPALA

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

CRIMINAL APPEAL NO. 6 OF 1978

BETWEEN

NO. 441 P.C. ISMAIL KISEGERWA
NO. 8674 P.C BUKOMBI ……APPELLANTS

AND

UGANDA…….... RESPONDENT

(Appeal from a decision of the High
Court of Uganda at Kampala (Butagira, J)
dated 22nd March, 1978.)
in
Criminal Session No. 8 of 1978

JUDGMENT OF THE COURT

NYAMUCHONCHO, J. A.

The appellants, Ismail Kisegerwa (to whom we shall refer as the 1st appellant) and Bukombi (to whom we shall refer as the 2nd appellant) were charged with the murder of Paul Serwanga a Makerere Law Student (to whom we shall refer as the deceased) but were convicted of a lesser offence of manslaughter and sentenced to 15 years' imprisonment. They have now appealed against the conviction and sentence.

The brief facts of the case, which were not in dispute, are that on 5th March, 1976, the two appellants, police officers attached to Naguru Public Safety Unit, were sent on patrol duty. Each appellant was issued with a self—loading rifle and 20 rounds of 7.62mm ammunitions. They commenced their patrol duty around 9.30 p.m. They were under the command of Cpl Makubuya.

When it was nearing 3 a.m. on 6th March, 1976, they took Bombo road and drove towards Wandegeya. At Wandegeya, they saw two men standing at a door of a house. The suspected that they were about to commit an offence, to wit burglary and theft. They stopped the car. As the driver was reversing, the two men started running away. The two appellants got out of the car and chased them. They opened fire and shot one of them dead. On the evidence it was not possible to tell whose shot killed the deceased.

At the trial, the appellants' defence was that of justifiable homicide. Both appellants admitted that they fired one shot each. The let appellant said that he aimed at the deceased's legs. The 2nd appellant said his gun went off accidentally. Each appellant denied that that his short killed the deceased. The learned trial judge disbelieved then and convicted them of manslaughter.

One of the issues argued on appeal was whether the learned trial judge was right to convict then of manslaughter. Counsel for both appellants argued that it was the appellants' duty to arrest the suspects and in doing so they had to use reasonable force to prevent their escape and that the force used in order to effect arrest was reasonable in the circumstances.

The learned trial judge considered whether the force used by the appellants was reasonable. He referred to s.18 of the Penal Code which governs the use of force in effecting arrest, and to Smith and Hogan, Criminal Law, 3rd Edn. at p.260. He said:—

> "Proceeding to the last extremity of causing death in order to effect an arrest can only be justified in exceptional cases. It is not reasonable to cause death in effecting arrest unless it is necessary to do no, and the evil which would follow from failure to prevent the arrest is so great that a reasonable person will feel justified in taking another's life to avert that evil. Now let us see the facts of this case. The deceased and his companions were not armed apart from refusing to stop after being told to do so. There is no other indication of resisting the arrest as for instance trying to assault the accused persons. There is nothing to suggest whatsoever that the deceased and his companions were dangerous people to reckon with. The lives of the accused persons were not in danger. There is no indication that the members of the public would be exposed to the risk of harm if these two people were at large. I do not think in these circumstances therefore that the evil which would

have resulted from failure to prevent the arrest would have been so great that a reasonable person would have felt justified in killing the deceased. The killing of the deceased could not therefore be justified."

This is a clear statement of the law. A killing in the course of preventing crime or in arresting offenders can be justified only if there is an apparent necessity to do so. In this ease there was no such necessity. The second appellant had examined the door and found no signs of breaking, no one's property was in danger. Their lives were not in danger. The two suspects were unarmed. They were not carrying dangerous or offensive weapons or a house—breaking instrument from which it could be inferred that they intended to commit a violent crime. In view of all this, there was no apparent reason for the appellants to resort to drastic measures in order to effect the arrest. There was no need to open fire. We respectfully agree with the learned trial judge that the force used was unreasonable and excessive. Where excessive force is used in effecting arrest and death ensues, the killing is either murder or manslaughter. ARCHOLD, CRIMINAL PLEADING EVIDENCE AND PEACTICE, 38th Edn, at para 2526 (p.940) states the law to be:

"There must be an apparent necessity for the killing, for if the officer were to kill after the resistance had ceased or if there were no reasonable necessity for the violence used upon the part of the officer..... the killing would be manslaughter at the least."

This question was considered in Muhidini —vs- R [1962] E.A. at p.388, where the former Court of Appeal said:—

"It must be considered, under section 18 of the Penal Code, whether the degree of force used as reasonable in the circumstances for the apprehension of the deceased, taking into account the gravity of the offence believed to be committed; and, if The degree of force used was unreasonable it must be considered whether the offence committed was murder or manslaughter. Where an injury is lawfully inflicted in order to effect arrest an inference does not arise unless the degree of force used is incompatible with bona fide belief that such a force was reasonable to effect the arrest."

In this case the learned trial judge held, though with considerable hesitation, that there was no malice aforethought. We share the learned judge a hesitation in view of the medical evidence

which clearly shows that the deceased was shot at close range. We believe the force used was unreasonable and unnecessary although without malice aforethought. In our opinion the appellants were rightly convicted of manslaughter.

The second important issue argued by counsel for both appellants was whether the learned trial judge was right to amply the doctrine of common intention to the facts of this case. They argued that the doctrine of common intention was not applicable because the two appellants had a lawful intention to apprehend the suspects. The learned trial judge directed himself on the law on this issue and in a carefully worded judgment, said—

> "The two appellants were engaged in the same enterprise. They each set out to chase the two people whom they perhaps suspected were about to commit an offence. They both fired presumably to effect the arrest. In my opinion they shared a common intention of chasing the suspicious characters and using a firearm on them if need be in order to arrest them. None desisted from this objective. It is not necessary that there should have been any concerted agreement between the accused persons prior to the attack on the deceased. The common intention nay be inferred from their presence, their actions and the commission of any of them to disassociate himself from the attack — see R vs- Tabulayenka s/o Kirya and Others [1943] 10 E.A.C.A. 51. There are cases where even a person is convicted on the doctrine of common intention despite the fact that he did not participate in the assault, see Andrea Mutebi and Anor —vs— Uganda Cr. App. 144/75 E.A.C.A)"

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. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence see Mutebi's case (supra).

In this case both appellants participated in the assault. They both fired at the deceased, one of the shots killed the deceased. There is no dispute about this. We have already said that before they chased them one of them examined the shop where the alleged thieves were standing and found no signs of breaking. No one's property was in danger. The appellants' lives were not in danger. They shot at the deceased in the dark; according to the 1st appellant, at that time, they had completely lost vision of the people they wore chasing. According to the medical evidence, the deceased was shot at close range. There was no justification for shooting the deceased in this manner. This shooting was an unlawful act. The appellants exceeded their statutory powers of arrest. The common intention to pursue an unlawful common purpose developed in the course of events at the time when they decided to shoot at the deceased. From that moment they shared a common intention to pursue an unlawful act which culminated in the killing of the deceased. We think that s.22 of the Penal Code applies to the facts of this case.

Mr. Ayigihugu submitted that the learned trial judge ought to have made a finding a to which of the appellants shot and killed the deceased in order to convict both of manslaughter and that in the absence of such a finding he should have acquitted both appellants. Mr. Mpungu submitted that on the evidence the trial judge ought to have found that the 2nd appellant's shot killed the deceased.

Mr. Ayigihugu's argument can be sustained only if the doctrine of common intention is not applicable. Its application destroys that argument. Where the doctrine of common intention applies it is not necessary to make a finding as to who actually caused the death — see R —vs— Salmon [1880] 6 Q.B 79, C.C.R. In that case A, B and C went into a field in proximity to certain roads and houses, taking with them a rifle for the purpose of practicing firing with it. B placed a board which was handed to him by A, in the presence of C in a tree in the field as a target. All

three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field. A, B and C were all found guilty of manslaughter.

Mr. Ayigihugu relied on Gitau -vs— R [1967] E.A. 449 to support and his argument that a finding had to be made as to who shot and killed the deceased before convicting both appellants and so wished to distinguish Salmon's case. In Gitau's case, the two appellants, policemen, were on night patrol and were armed with loaded rifles. They saw a man who was on his way home whom they mistook for a Masai. They challenged him, and, when he ran, they both fired. One r other of them in doing so hit and grievously injured him. Both appellants were convicted of jointly and unlawfully doing grievous harm. They appealed. One of the grounds of appeal was that there was no common intention. The appeal was allowed on this ground. The learned judges referred to R—vs— Salmon (supra) but did not follow it, on the ground that the injury they caused could not be said to be a probable result of what they agreed to do, But the learned judges did, however, agree that s.22 of our Penal Code could readily be applied to the facts in Salmon came though it did not apply to Gitau's case. Salmon's case is clearly an authority which applies to the facts of this case.

With regard to Mr. Mpungu's submission, we do not agree with him that on the evidence it was possible to make a finding that it was the 2nd appellant's shot which killed the deceased, The testimony of the appellants and the evidence of Cpl. Makubuya and D/Sgt. Ezira of what the appellants told them soon after the shooting, clearly shows that no one could tell which of the two shots killed the deceased.

Since the death of the deceased was a probable consequence of the appellants' unlawful action, we are of the view that both were properly convicted.

The last ground of appeal argued by both counsel for the appellants was that the sentence of 15 year's imprisonment was harsh and excessive. The learned trial judge gave cogent reasons for imposing the stiff sentence and we are unable to say that he erred. In fact, we think these appellants were lucky to get away with manslaughter. The medical evidence clearly shows that

they shot the deceased at close range. There are no mitigating circumstances to warrant a lesser sentence. It was a very bad case which calls for a severe, deterrent sentence. In the circumstances, we do not think we would he justified to interfere. The appeal of each appellant is accordingly dismissed.

DATED THIS 19th DAY OF OCTOBER, 1978,

M. Saied
CHIEF JUSTICE

P. Nyamuchoncho
JUSTICE OF APPEAL

F. N. Ssekandi
JUSTICE OF APPEAL

Mr. P. K. Mpungu of M/s. Mpungu & Balikuddembe Advocates for appellant No. I
Mr. F. S. Ayigihugu of M/s. Ayigihugu Advocates for the appellant No. II.
Mr. Twesiime, Senior State Attorney, for the Director of Public Prosecutions.

I certify that this is
true copy of the original.

(M. Ssendegeya)
CHIEF REGISTRAR