THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Barishaki Cheborion & Kibeedi, JJA*]

Criminal Appeal No. 361 of 2016

(Arising from High Court Criminal Session Case No.70 of 2016 at Mukono)

BETWEEN

Sekajja Fred==========Appellant

AND

Uganda==========Respondent

(*On appeal from the judgment of the High Court of Uganda (Mutonyi, J.,) delivered on the 11th November 2016 at Mukono*)

JUDGMENT OF COURT

Introduction

[1] The appellant was indicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that the appellant with others still at large on the 11th day of February 2012, at Ntawo village in Mukono District robbed one Wapamba Jimmy of his motor cycle Reg. No. UDV 483E Bajaj Boxer, one Nokia mobile phone, cash 15,000/= and at the time of the robbery, used a deadly weapon, to wit, a hammer on the said Wapamba Jimmy.

[2] The appellant denied the offence. He was tried and convicted of the same and sentenced to 45 years imprisonment. Dissatisfied with that decision he appealed against conviction and sentence, setting forth the following grounds of appeal.

> '(1) The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence of PW2, PW3

and PW4 which was full of inconsistencies and convicted the appellant thereby occasioning a miscarriage of justice.

(2) The Learned Trial Judge erred in law and fact when she relied on the hearsay evidence to convict the appellant thereby occasioning a miscarriage of justice to him.

(3) The Learned Trial Judge erred in law and fact when she passed a harsh and excessive sentence of 45 years imprisonment against the appellant.'

[3] The appellant prays that the appeal be allowed and the sentence quashed. The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing Mr Kyabakaya represented the appellant while the respondent was represented by Ms Joanita Tumwikirize, Senior Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions.

[5] In his written submissions Mr Kyabakaya submitted that the prosecution evidence of PW2, PW3 and PWd4 was so full of contradictions and inconsistencies that went to the root of the case over the involvement of the appellant in the commission of this offence. He submitted that PW2 testified that he was called by PW3 on seeing the appellant asking for his assistance to arrest the appellant and that they saw each other during the arrest of the appellant. In cross examination PW3 stated that he had called PW2 to see if he had arrested the appellant. This raises a question if these 2 witnesses were at the same scene and whether they were involved in the same matter.

[6] He attacked the testimony of PW4 who stated that he visited the appellant's village before he talked to PW1 but in cross examination he told the court that he knew of the appellant's involvement in this case after talking to PW1. Secondly PW1 testified that he did not know who took away the motor cycle but PW4 stated that PW1 had told him it is the appellant that drove away the motor cycle. In the summary of the case the offence was stated to have been committed at 9.00pm while the witnesses put this at 9.00am. This was a grave inconsistency.

[7] Mr Kyabakaya faulted the learned trial Judge for dismissing the appellant's testimony as marred with inconsistencies and contradictions especially on how he came to visit the victim in hospital. The alleged

inconsistencies and contradictions were not pointed out by the Judge. Mr Kyabakaya referred us to Alfred Tajar v Uganda EACA Criminal Appeal No. 167 of 1969 (unreported); Sarapio Tinkamalirwe v Uganda SCCA No. 27 of 1989 (unreported); and Twinomugisha Alex and 2 Others v Uganda SCCA No. 35 of 2002 (unreported) for the principle that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies and contradictions will be ignored unless they point to deliberate untruthfulness.

[8] In relation to ground 2 Mr Kyabakaya submitted that oral evidence must be direct pursuant to section 56 of the Evidence Act and as held in Seru Bernard v Uganda CACA No. 277 of 2009 (unreported). He submitted the evidence of PW2, PW3 and PW4 is largely hearsay and was therefore inadmissible.

[9] In relation to ground 3 Mr Kyabakaya submitted that the learned trial Judge had failed while determining sentence to consider that the appellant had suffered from ulcers on remand, which continue to disturb his entire system. The Judge only considered that the appellant was a first offender. There was only the evidence of a single identifying witness to put the appellant at the scene of crime which had to treated with the greatest care. This was not considered by the learned trial Judge before sentencing.

[10] Mr Kyabakaya referred to Ainebushobozi Venancio v Uganda CACA No. 242 of 2014; Livingstone Kakooza v Uganda SCCA No. 17 of 1993 for the principle that an appellate court will only alter a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material facts or the sentence is manifestly excessive in view of the circumstances of the case. He submitted that the sentence passed by the learned trial Judge was manifestly harsh and excessive.

[11] Mr Kyabakaya further referred to Bogere & Anor v Uganda Criminal Appeal No. 39 of 2016 (unreported) where the appellants, convicted of aggravated robbery were sentenced to 20 years imprisonment; Buhingiro v Uganda Criminal Appeal No. 8 of 2014 (unreported) where the appellant convicted of aggravated robbery, was sentenced to 19 years imprisonment.

[12] Mr Kyabakaya prayed that this court should quash the sentence imposed upon the appellant or substitute it with 5 years imprisonment so as to allow him walk away from prison now.

[13] Ms Joanita Tumwikirize for the respondent submitted that the evidence of PW1 and PW3 put the appellant at the scene of crime. PW1 is categorical that he knew the appellant prior to the offence being committed as a village mate. On the material day the appellant came to him at a boda boda stage and requested for a ride for himself and his 2 colleagues that were ahead in Ntawo. He gave him a ride and when they reached a certain point ahead, the appellant told him that the 2 people ahead were the ones to pick up. When he got to the 2 people PW1 was held and beaten by the appellant and his friends, losing consciousness. PW3 saw the appellant on the material day taking a ride from PW1 and subsequently received information that PW1 had been robbed of the motor cycle and been beaten.

[14] She submitted that when you consider the appellant's alibi and the evidence of PW1 and PW3 together the alibi is destroyed as the appellant is put at the scene of crime with no issues of identification as he was known to PW1. In support she referred to Jamada Nzabaikukize v Uganda SCCA No. 1 of 2015 (unreported).

[15] Ms Tumwikirize referred to Sarapio Tinkamalirwe v Uganda CA No. 27 of 1989 (unreported) which held that not every inconsistency will result in witness's testimony being rejected. It is only grave inconsistencies which unless satisfactorily explained would result in the rejection of a witness's testimony. Minor inconstancies as in this case would usually not have the same effect unless they pointed to deliberate untruthfulness. The discrepancy about time was cleared out in the testimony of the witnesses as they clearly stated it was 9.00am, rather than 9.00pm as it was indicated in the summary of the case.

[16] Ms Tumwikirize in relation to ground 2 submitted that though PW2 was not a witness to the offence PW3 saw the appellant boarding PW1's motor cycle on the material day and time. Secondly PW3 with his friends visited PW1 in hospital at Mulago who told them that it was the appellant and his friends that had beaten him and stole his motor cycle. She therefore submitted that there was no hearsay evidence.

[17] In relation to ground 3 Ms Tumwikirize submitted that the sentence in this case was not harsh given the barbarity of the attack on PW1 with a hammer. He suffered grievous injuries and now has a stammer. She referred to Sekitoleko Yudah and Others v Uganda SCCA No. 33 of 2014 (unreported) and stated that an appropriate sentence was a matter for the discretion of the sentencing court. Ms Tumwikirize contended that the

discretion of the sentencing court had been judiciously exercised by the trial Judge and therefore the sentence should not be interfered with.

Analysis

[18] It is our duty as a first appellate court to re-appraise the evidence adduced at trial and reach our own conclusions of fact and law, bearing in mind that we did not have the opportunity to observe the demeanour of witnesses at the trial. **See** Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry v Uganda, [1998] UGSC 20, and Bogere Moses vs. Uganda [1998] UGSC 22. We shall proceed to do so bearing this duty in mind.

Ground 1

[19] At the commencement of the trial it was conceded by counsel for the appellant that they did not dispute the robbery of the motor cycle in the possession of the appellant on the material day. The contention for the appellant was whether the appellant participated in that crime. And the hearing proceeded on that basis.

[20] PW1 testified that the appellant was a village mate and friend he had known for the last 20 years. On the 11th February 2012 at about 9.00am the appellant approached him at Katogo stage and requested to ferry him to Ntawo where he would pick up two of his friends. The appellant accepted and he took the appellant on his motor cycle and they rode to Ntawo. At a certain point there were two people ahead and the appellant told him those were the two they were to pick. On getting to those 2 people PW1 stopped. The appellant held him as one of those persons attacked him with a hammer, hitting him on the head twice. He became unconscious and only regained consciousness in Mulago Hospital.

[21] PW2 was the defence secretary for the boda boda riders association within Mukono district and the person who arrested the appellant and took him to the police. He was told by PW3 on phone that the appellant was one of the persons who been involved in the theft of the appellant's motor cycle and beating him up. PW3 told him where the appellant, Sekajja Fred was, describing him, and that he was walking with another person. PW2 went up to the appellant and arrested him. He informed him that the reason for his arrest was that they had robbed Jimmy Wampamba's motor cycle and he took him to Mukono Police Station.

[22] PW3 testified that on the 11th February 2012 he was at Katogo stage when he saw the appellant take a ride on the Jimmy Wampamba's motor cycle at between 9.00am and 9.30am. Later he received information that Jimmy Wampamba had been badly assaulted and his motor cycle stolen that morning. After a couple of days, they visited Wampamba in Mulago Hospital with some friends and he told them that the appellant had stolen his motor cycle. And so, when he saw the appellant on the morning of the 25th March 2012, he called the defence secretary (PW2) and requested him to arrest the appellant. He was within the area watching what was going but did not want to be noticed.

[23] In his defence the appellant stated that on that day he was not in Mukono town but in his home village where he was making bricks. He had not participated in this crime. He knew PW1 and even visited him in Mulago Hospital with some friends.

[24] The learned trial Judge considered both the case for the prosecution and the defence. The trial Judge concluded that the alibi of the appellant was false as he had rightly been placed at the scene of the crime. The trial Judge considered the dangers of relying on the evidence of a single identifying witness but concluded that the possibility of mistaken identification was excluded given the time of the day and the fact that the appellant was well known to PW1. Secondly PW3 also had seen the appellant getting on the PW1's motor cycle on the material day and time at Katogo stage.

[25] We agree. The possibility of mistaken identity was remote in the circumstances of this case. The appellant was well known to PW1. It was only 9.00am. The appellant hired PW1 to go and pick up two of his friends and take them somewhere. They rode and got to the 2 friends. PW1 stopped as directed. The appellant held PW1 as the other two molested him with a hammer, leaving him unconscious.

[26] The appellant claimed that PW1 was his friend. There is no ostensible reason why PW1 would lie about the identify of the person who hired him on that day. The question of mistaken identity was not even put to him in cross examination. One major line of cross examination concentrated on whether the appellant had communicated with the other two persons at all in the presence of PW1, as if to suggest that the appellant had no common intention with them. The actions of the appellant put that to rest.

[27] Counsel for the appellant contended that the testimony of PW2, PW3 and PW4 was full of contradictions and inconsistencies and ought to have been rejected. Whatever inconsistencies or contradictions in their testimony it was not in relation to the identity of the appellant. Appellant was principally identified by PW1 and PW3. The circumstances favoured correct identification.

[28] It is true that the summary of the case had stated that the robbery took place at 9.00pm. The summary of the case is not the testimony in the case. There was no contradiction or inconsistency in the testimony of PW1 and PW3 as to the time the appellant boarded PW1's motor cycle at the Katogo boda boda stage. It was about 9.00am. To challenge the prosecution evidence on this point it would have been necessary to show the witnesses' statements that they had made previously on this point. It was clear that no statement had been recorded from PW3 as he was called at the time the hearing of the case had started at the direction of the court. The statement of PW1 was not put to him on this point.

[29] Though a summary of the case is prepared by the prosecution and should therefore represent the case the prosecution intends to prove it is just a summary of the case. The question of the time the offence was committed was not made an issue at all during the course of the trial. It ought to have been made an issue at the trial for it to be rightly raised on appeal. Not having been raised at the trial it can not be raised for the first time on appeal.

[30] We find no major contradiction and or inconsistency in the testimony of PW2 and PW3. PW3 is the one that rang PW2 and asked him to arrest the appellant telling him, over the phone, where the appellant was. PW2 arrested the appellant and took him to Mukono Police Station and that is why the appellant was arraigned before a court of law. It was not suggested that the testimony in relation to the arrest of the appellant was false. He was arrested on the basis of information provided by PW1 to PW3 who in turn requested PW2 to arrest the appellant. PW2 did so. And the appellant was then confronted with the offence he was convicted of.

[31] We hold that ground 1 is without merit.

Ground 2

[32] It is correct to say that part of the evidence recorded from PW2, PW3 and PW4 was hearsay and ought not to have been recorded or admitted in evidence. However, the essential portion of evidence from these

witnesses was direct. PW2 was the arresting witness on information received from PW3, by way of a phone call. PW3 saw the appellant and informed PW2, asking him to arrest him for the robbery of PW1's motor cycle. PW3 had seen the appellant board the motor cycle ridden by PW1 on the material day. This evidence was direct and is sufficient to support the case against the appellant. PW4 was the investigating officer who should normally testify on the investigation of the case.

[33] We find no merit in ground 2.

Ground 3

[34] Turning to ground 3 this faults the learned trial Judge for imposing a manifestly harsh and excessive sentence. The learned trial Judge sentenced the appellant to serve 45 years imprisonment.

[35] We agree, as submitted by Mr Kyabakaya, that an appellate court will not ordinarily interfere with a sentence by a trial court unless the trial court acted on a wrong principle of law, or ignored some relevant factor or the sentence was manifestly harsh and excessive. See Livingstone Kakoza v Uganda [1994] UGSC 17.

[36] In a lengthy sentence order the learned trial Judge concluded that the aggravating factors outweigh the mitigating factors. The learned Judge stated in part,

> 'I appreciate his involvement in religious studies while on pretrial remand. It is good for his spiritual renewal since he had become a moral degenerate. He had however not reached the level of Zacharias the Chief Tax Collector of Jericho mentioned in the Gospel of Luke 19: 1-10. He returned to Jesus and confessed all the robberies he committed through tax collection.
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> An accused person who is converted and knows he committed the crime does not want to exercise his constitutional right. Things have even been made better with the introduction of plea bargaining in our Criminal Justice System. The convict is a hardened criminal and this Court is viewing his tears as that of a crocodile. He had seen his chances of starting from where he stopped become very slim. The savage and gruesome manner in which his co-accused who he refused to disclose descended on the victim deserves serious retribution. The convict had an opportunity to change his mind but he insisted and led the victim to a death trap.'

[37] Earlier on in the sentencing order the learned trial Judge had observed,

> 'He has refused to disclose his accomplice to the crime. This calls for a deterrent sentence because the others are still at large. Who knows, they could even be in Court attending the Trial.'

[38] It is clear to us that the learned trial Judge took into account matters that ought not to have been taken into account such as not pleading guilty or not engaging in a plea bargain process. The appellant is being punished for having gone through a full trial. One cannot be punished for insisting on one's constitutional rights. Neither should one be punished for refusing to cooperate with the law enforcement authorities. One should be punished for the offence he has been convicted of only.

[39] After taking into account matters that ought not too have been taken into account it is therefore not surprising that the learned trial court settled on what is clearly a harsh and excessive sentence that is out of range with sentences for aggravated robbery.

[40] However, it is clear that this sentence is illegal on account of not complying with article 23 (8) of the Constitution. The learned trial Judge held in the sentencing order, '**He is sentenced to 45 years imprisonment period spent on remand inclusive.**'

[41] It appears to us that this is directly contrary to the constitutional requirement that the period spent in pre trial detention must be taken into account pursuant to article 23 (8) of the Constitution. In Rwabugande v Uganda [2017] UGSC 8 the Supreme Court adopted an arithmetical approach at implementing the above provision. The sentencing court is required to take a 2-step process. After considering both the aggravating and mitigating factors the court should determine what is an appropriate sentence for that particular offence and convict. The court would then deduct the period spent in pre trial custody to arrive at the sentence to be imposed on the convict.

[42] The Supreme Court in earlier decisions like Kabwiso Issa v Uganda, SC Criminal Appeal No. 7 of 2002 (unreported) Kizito Senkula v Uganda SCCA No.24/2001, (unreported); Kabuye Senvawo v Uganda SCCA No.2 of 2002 (unreported); Katende Ahamed v Uganda SCCA No.6 of 2004 (unreported) and Bukenya Joseph v Uganda SCCA No.17 of 2010 (unreported) had been satisfied with the sentencing court indicating that

in arriving at the sentence imposed upon a convict it had taken into account or had considered the period spent on remand. This approach was departed from in Rwabugande v Uganda (supra).

[43] This approach, the non-arithmetical approach, has also been found by the Supreme Court to be compliant with article 23 (8) of the Constitution in Abelle Asuman v Uganda [2018] UGSC 10, in a subtle departure from its decision in Rwabugande v Uganda, (supra), in the following words,

> 'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. **This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.**
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> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution. [Emphasis is ours.]

[44] In the instant case the sentencing order simply states the period of imprisonment 'remand period inclusive.' What does this mean? Is it that the period of imprisonment includes the time the convict has spent on remand? It is not stated in the order when the sentence was to start running. If the period of remand is included in the sentence it is then clear that it has not been excluded in compliance with Rwabugande v Uganda (supra). Neither does it suggest that it has been taken into account, 'to the credit' of the appellant, especially as the date it is supposed to commence is not stated. If it is included in the sentence then it would suggest that the sentence would have to commence from the date he was first remanded to prison for this offence. However, by law, sentences are to commence from the day the sentence is imposed, pursuant to section 106 (2) of the Trial on Indictments Act. It leaves those who are to administer the sentence to interpret what the learned Judge meant. To that extent it is vague and confusing, and therefore unconstitutional.

[45] We therefore find this sentence illegal and set it aside accordingly. Exercising our powers pursuant to section 11 of the Judicature Act, we shall now proceed to sentence the appellant.

[46] The appellant is a first offender. He was 24 years at the time this offence was committed. Together with others not before the court, he committed a very grave offence in a most barbaric manner. The maximum punishment for this offence is the death penalty. However, a first offender who is young with the possibility of reform will ordinarily not attract the maximum punishment. The learned trial Judge noted that robbery of 'boda bodas' is a rampart crime. We accept that. We are satisfied that a sentence of 20 years imprisonment would be appropriate. We shall deduct therefrom the period spent on pre trial custody which we have established to be 4 years 7 months and 2 weeks. We impose upon the appellant a period of imprisonment of 15 years, 4 months and 2 weeks to commence on the 11th day of November 2016 when he was convicted.

[47] In addition, under section 285 (4) of the Penal Code Act it is mandatory to order compensation where the death sentence is not imposed. Taking into account the value of the motor cycle stolen; the injuries sustained by the complainant, we order the appellant to pay to the complainant shs.10,000,000.00 as compensation for the loss suffered by the complainant on account of this offence.

Signed, dated and delivered at Mbale this 13th day of September 2020

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal