REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: **HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ**
HON. JUSTICE G.M. OKELLO, J.A.
HON. JUSTICE C.N.B. KITUMBA, J.A.

CRIMINAL APPEAL NO.48 OF 1998

BETWEEN

1. TURAHI MUGAMBE ::APPELLANTS
2. NUWABIKA STEPHEN

AND

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court
(Musoke-Kibuuka .J.) dated 31st day of March.
1998 in criminal Session case No.210 of 1995).

JUDGEMENT OF THE COURT

The two appellants were on 31/3/98 at Mbarara, convicted by the High Court of aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act and were sentenced to death.

Briefly, the background facts are that the complainant Patrick Mugarura (now deceased) was a dealer in hides and skins and was on 12/8/94 travelling with others in motor vehicle No. UAA 371 towards Kikagati in Mbarara District to buy hides. On reaching at a place called Karama after Kitwe at about 9.00 a.m. they were stopped at gunpoint by three men one of whom was armed with a gun. Realising that these were robbers who had stopped them, the driver of the vehicle carrying the complainant and others immediately stopped and jumped out of the vehicle. His passengers followed him. The all ran into the nearby bush where they hid themselves.

Thinking that the robbers had left the complainant and his group attempted to return to their vehicle when the robbers fired three gunshots in their direction forcing them to scamper for their dear lives. They did not identify their attackers.

When they later attempted for the second time to return to their vehicle their attackers had already left. The complainant and his group discovered however that the robbers had stolen from the vehicle property which included money and a weighing scale belonging to the complainant. Thereafter, the complainant reported the matter to the Police naming no immediate suspects.

Upon investigations, the Police arrested the second appellant and recovered from the home of the first appellant a weighing scale which was allegedly identified by the complainant as his that was stolen in the robbers. Subsequently the first appellant was arrested. It would appear that both appellants later made confessionary statements which were admitted in evidence after a trial within a trial. Eventually the appellants were jointly indicted for aggravated robbery.

At the trial, the appellants set up a defence of alibi: the first appellant told court that at the material time he was in Tanzania visiting his sick mother. The second appellant, on the other hand testified that on the material day he was for the whole day at his home repairing bicycles. The trial judge rejected the appellants' defence and convicted them as stated earlier in this judgment.

Each of the appellant filed separate grounds of appeal. The first appellant Turahi Mugambe filed 7 grounds but only three were argued the rest having been abandoned. The grounds argued are:-

(l) that the learned trial judge erred in law and fact when he admitted the appellants charge and caution statement.

(2) the learned trial judge erred both in law and fact when he rejected the appellants defence of alibi and

(3) the learned trial judge misapplied the doctrine of recent possession in this case to the prejudice of the appellant

For the second appellant 8 grounds were tiled though only 7 were argued in three batches of 1, 2, 4 — 6, 7 and 8. Ground 3 was abandoned. The grounds argued are:-

(1) (a) the learned trial judge erred in law and in fact when he based his finding on the uncompleted and/or unconcluded evidence of PW4.

(b) the learned trial judge was wrong in la and was irregular to have allowed the assessor to put question to PW3 before the end of his examination in-chief.

(2) the learned trial judge was wrong in holding that there was corroboration and as a result arrived at a wrong conclusion.

(4) the learned trial judge erred in and in fact in accepting the charge and caution statement purportedly made by the appellant.

(5) the learned trial judge erred in law and in fact in holding a trial within a trial concurrently for both statements purportedly taken from both appellants and or in other words the learned trial judge failed to hold/conduct a trial within a trial for/of each appellant separately.

(6) the learned trial judge failed to properly evaluate evidence in the trial within a trial and thus arrived at a wrong conclusion.

(7) the learned trial judge was wrong in law and in fact in accepting circumstantial evidence and thus relying on same to convict the appellant. The trial jud.ge did not evaluate said evidence and

(8) The learned trial judge failed to properly evaluate evidence generally and as a whole and thus came to a wrong decision.

The common complaint in this appeal as can be discerned from the above grounds is the admissibility of the confessions of the appellants. Mr. Tayebwa learned counsel for the first appellant, criticised the approach adopted -by the trial judge in the trial within a trial to determine the admissibility of the appellants' confessions. He argued that from the very beginning of the trial within a trial, the trial judge was set to establish the relevance rather than the voluntariness of the confessions as required by law. Counsel submitted that, that was a misdirection which led the trial judge not to evaluate the relevant evidence relating to the

voluntariness of the confessions and consequently failed to make a specific finding on the point. He pointed out that the trial judge admitted the confessions because they were relevant rather than that they were voluntary.

Ms Lwanga Principal State Attorney, who represented the respondent, contended that under the Evidence Act, a confession is relevant only if it is voluntarily made. She argued that in considering the relevance of the confessions, the trial judge considered their voluntariness. She pointed out that since the trial judge stated in his judgment thus:

"I also have not any doubt about their voluntariness." shows that he was alive to the need of voluntariness of a confession.

Ms Lwanga did not tell us the provision of the Evidence Act she had in mind but we think that she had in mind Section 25 as amended by the Evidence (Amendment) Act No. 2 of 1985 which provides that:-

> **"A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused persons and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made."**

We agree that from the above provision of the Evidence Act, the relevance of a confession is dependent on its voluntariness. Because voluntariness is the main essential to its relevance where admissibility in evidence of a confession is challenged, the court after concluding a trial within a trial must make a specific finding on the voluntariness of the confession first before considering its relevance.

In the instant case, the trial Judge's remarks complained of started as follows: —

"Court: -

Order: - Trial within a trial for proofs of the contents of the two statements to commence,"

After concluding the conduct of the trial within a trial, the trial judge made the following short ruling: –

"I am of the considered view that the two statements are relevant and therefore admissible in evidence against both accused. I will give reasons for this decision in the final judgment in this case."

In our view the above was, with respect to the trial judge misdirection. He admitted the confessions in evidence because they were relevant rather than that they were voluntary. Section 25 of the Evidence Act above lays emphasis on the voluntariness of a confession first for its relevance Ms Lwanga argued that the trial Judge had in mind the Importance of the voluntariness of the confession That may be true because later in his judgment the trial judge stated thus:-

"As required by our Criminal procedure, a trial within a trial had to be conducted to establish the relevance of both statements within the meaning of section 25 of the Evidence Act. At the closure of the trial within a trial the relevance of each statement was duly proved as their voluntariness was undoubtedly established."

It is clear that the above passage still shows that the trial judge conducted the trial within a trial to establish the relevance rather than the voluntariness of the confession He found that the confessions were relevant as their voluntariness was undoubtedly established. Unlike section 25 of the Evidence Act above, the trial judge though was alive to the importance of the voluntariness of a confession, he subordinated importance of the voluntariness to its relevance.

Mr. Tayebwa submitted that because of the misdirection, the trial judge did not evaluate evidence relating to the question of voluntariness of the confessions. We agree. The record shows that the trial judge did not analyse the conflicting evidence for and against before he satisfied himself that the confessions were voluntary. To drive our point home, we reproduce here the record of ho he dealt with the issue:

"**PW1 was AlP James Kanvankore. In 1994, he was attached to Mbarar4 police station. On 20 August 1994, he recorded charge and caution statements from Al and 42. Each of the two accused was brought to PWI by D.C. Mugarura for the purpose of recording their charge and caution statement.**

According to PWI Al in his charge and caution statement admitted participation in the theft which took place at Karama on 12th August 1994. Al had been admitting the offence since his arrest and detention at Kikagati and Kitwe Police Posts and at Mbarara before the statement was recorded. Similarly A2 had been admitting the offence all the way from Kikagati, Kitwe and Mbarara. When he was charged and cautioned by PWI he emphatically admitted the offence. And like Al, A2 gave details of how the robbery was planned and executed.

Through their counsel Mr. Katembeko, both Al and A2 retracted their confession during this trial. Learned counsel for both accused submitted that the two accused were tortured before making the statements and that they were made to sign pre-prepared texts whose contents they did not know.

As required by our criminal procedure, a trial within a trial had to be conducted to establish the relevance of both statements within the meaning of section 25 of the Evidence Act. At the closure of the trial within a trial, the relevance of each statement was duly proved as their voluntariness was undoubtedly established. The statement of Al was admitted in evidence as prosecution Exhibit P1. That of A2 was marked as Exhibit P2."

We think that it is incumbent upon the trial judge to analyse the evidence of the prosecution in the trial within a trial pertaining to the voluntariness of the confession against the defence's claim of torture before deciding one way or the other on the voluntariness of the confession. It is not enough to simply say that I am satisfied that the confession is voluntary. That would be window dressing.

On the authority of ***Pandya vs. R [1957] EA 336,*** as a first appellate court, this court has a duty to re-evaluate the evidence to satisfy itself that the finding of the trial court can be upheld.

In his evidence PWI who recorded the appellants' confession statements denied that any of the appellants complained to him of having been tortured at Kikagati Kitwe Police Posts and

Mbarara Police Station. PW2 who escorted each appellant to PW I for recording their charge and caution statements also denied that any of the appellants complained to him of any torture nor informed him of any injuries on him. He denied that he beat any of the appellants. He stated that even when he was returning them to the cells after their statements had been recorded the appellants were in good health. None of them had any injuries.

Yet, the first appellant gave a grim account of how he was tortured at Kikagati police Post. Kitwe police post and even at Mbarara Police Station. He stated that at all these places his torturers used a wire whip. At Mbarara Police Station he was last beaten by PWI and PW2 in the former's office on 27/8/94. He sustained injuries on his body. The trial court confirmed the presence of a scar on his back. Then on 29/8/94 he was brought to the same office where PW1 forced him to sign pre-prepared documents whose contents were not revealed to him. Due to fear the appellant thumb-printed the document.

The second appellant also narrated a similar story of his torture. He stated that on the day he was brought to sign a pre-prepared document, he was beaten by PWI for writing his name as Stephen Muwabire instead of Stephen Nuwabika which PWI wanted. He sustained injuries on his both legs and later developed both swelling due to the torture.

In our view the allegations contained in the appellant's evidence are serious. It would appear there was no time for the threats imprinted in the minds of the appellants to clear before they signed or thumb-printed the statements. Their signatures or thumb-marks were secured by duress. These allegations called for satisfactory explanation from the prosecution. Mere denials by the alleged torturers are not enough. Some kind of medical evidence showing the condition of the appellants soon after their arrest and the approximate age of any scar found on them was in the circumstances of this case necessary. None was made available. That left a serious doubt about the voluntariness of the confession.

Considering the above, we think that had the learned trial judge properly analysed the evidence available before him in the trial within a trial, he would probably have found that the statement purportedly voluntarily made by each of the appellants was not voluntary within the meaning of

section 25 of the Evidence Act as Amended by the Evidence (Amendment) Act No.2 of 1985. We find merit in this complaint.

Mr. Edward Muguluma Ddamulira learned counsel for the second appellant criticised the trial judge for conducting a joint trial within a trial for the confessions of the two appellants. He contended that that was irregular. He did not cite any specific provision of the law to support his view. When we asked him whether that procedure occasioned any miscarriage of justice to any of the appellants, Mr. Muguluma could not say that it did.

We find no merit in this criticism as the question of separate trial is a matter of discretion of the trial judge. See ***Pyaralal Meloram Bassam and Wathobia s/o Kiambu vs R [1961] EA 521.*** It has not been shown that the trial judge exercised his discretion wrongly or that the procedure occasioned a miscarriage of justice. Each of the appellants was through his lawyer availed opportunity to cross-examine all the witnesses examined by the prosecution. They were also allowed opportunity to give evidence on their behalf and call witnesses in their own defence. No miscarriage of justice was therefore occasioned by that joint trial within a trial.

The next is ground 5 of the first appellant and ground 7 of the second appellant. These grounds in effect raised the question whether there is sufficient circumstantial evidence to justify the convictions of the appellants.

It is not in dispute that a weighing scale (Exh. P4) was found in the house of the first appellant when he was not present. It is also not in dispute that a firing pin of a gun was found in the home of the same appellant. It is further not in dispute that a gun without a firing pin was found in the compound of the father November. November is said to be appellant No.2 but he disputes that name. The firing pin and the gun bore same serial numbers.

Upon the above background Mr. Tayebwa contended that the finding of the weighing scale in the first appellants' house when he was not present was not sufficient proof that it was brought by him. Counsel argued that the machine could have been planted there or brought there by the appellants' wife without his knowledge.

As for the firing pin Mr. Tayebwa contended that there is no evidence that the gun found in the compound of the father of November and which bears the same serial number with the firing pin found in the home of the first appellant was the vet- gun that was used in the robbery of 12/8/94.

Ms. Lwanga submitted that the weighing scale was not planted in the first appellants' home. She argued that in his confessionary statement, the first appellant explained in detail how he left the scale in his house before he left for Tanzania. As for the firing pin, the learned Principal State Attorney conceded that there is no evidence that the gun found at the home of the father of November and which bears the same serial number with the firing pin found in the first appellants home was the very gun used in the robbery.

The trial judge found that the weighing scale Exh.P4 that was found in the house of the first appellant was the very weighing scale that was stolen in the robbery. He relied on the evidence of No.25500 D/Constable Ayibe (PW5) of Kitwe Police Post who identified it in court saving the owner, late Mugarura had identified it at Kitwe Police Post.

It is clear from the record that the weighing scale Exh.P4 was not identified in Court by the owner because he died before the trial. PW4 the driver who had worked with him for some time and thereby came to know the weighing scale did not also identify or describe it. When the case was adjourned for him to identify the scale, he never turned up. The trial judge relied on the letters 'MP' stated to be marked on the scale. According to him, those letters stood for Mugarura Patrick, the name of the owner. It is not clear from where the learned judge got that explanation as PW4 did not give that description of the scale. The trial judge believed that the weighing scale was the very one stolen in the robbery because PWS told court that the owner had identified it at Kitwe Police Station.

We think that that was not sufficient proof that the scale Exh.P4 was the very scale that was stolen in the robbery. The fact that the scale was identified by the owner at Kitwe Police Post is not sufficient proof that it was the very scale found in the first appellant's house. That piece of evidence is hearsay. The only person who could have validly identified the weighing scale was PW4. He could have confirmed the evidence of PW5 that that was the very scale that was stolen

in the robbery. As it is the scale remains insufficiently proved to be the very one that was stolen in robbery.

If it were Mr. Tayebwa submitted that the weighing scale could either have been planted in the first appellant's house or was taken there by the first appellant's wife without his knowledge since the first appellant was not at home then.

The law regarding recent possession of stolen property was stated in the case of ***Kantilal Jivraj and Anor vs R [1961] EA 6*** to be that a person in possession of stolen goods soon after the theft is either the thief or a receiver with knowledge of its theft unless he can account for his possession thereof To justify an inference that he is the thief and not the receiver from the fact of possession, the evidence available must exclude the possibility that he received the article. See ***Andrea Obonyo and Anor v R [1962] EA 542.***

In the Instant case the evidence of the recover-v of the weighing scale in the house of the first appellant was given by D/Constable Ayibe of Kitwe Police Post. He told court that on 17/8/94 they received information about a robbery with a gun in the area. Upon investigation they arrested the second appellant with items like, a woman's bag, Kitenge (cloth), a new travelling bag etc. which they suspected to be stolen property. Thereafter, the second appellant referred them to the home of the first appellant. They did not find the first appellant at home though his wife was. They searched the house and recovered a weighing scale. The witness conceded that no local council official of the area or any local chief was present during the search.

We think that there is no conclusive evidence that the first appellant was in possession of the weighing scale. On D/Constable Avibe's words against that of the first appellant the possibility of the weighing scale having been planted in the first appellant's house or brought there by his wife during his absence was not ruled out. The trial judge was persuaded to believe D'Constable Ayibe because of the first appellant's confession which we found was wrongly admitted in evidence.

As for the second appellant there is evidence by D/Constable Ayibe that he (2nd appellant) was arrested with certain items which were suspected to be stolen proper. However, none of the items was claimed or identified by anybody as being his and that it was stolen in the robbery. Those items remained suspected stolen property without any proof that they were infact stolen. Their being found with the appellant therefore does not link the appellant with the robbery. Apart from the confessions which we have found to have been wrongly admitted in evidence, there is not circumstantial evidence on which the convictions of both appellants could be sustained. In view of the above findings, we find it unnecessary to consider the other grounds.

In the result, we allow the appeal, quash the conviction of both appellants and set aside the sentence.

Dated at Kampala this 24th day of May 2001

L.E.M. MUKASA-KIKONYOGO
DEPUTY CHIEF JUSTICE,

G.M. OKELLO,
JUSTICE OF APPEAL.

C.N.B. KITUMBA.
JUSTICE OF APPEAL.