THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 2 OF 1995

FROM JINJA CRIMINAL CASE NO. MJ. 348/93

CHRISTOPHER LUBAALE ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

This is an appeal by one Chritopher Lubaale whom I shal hereinafter refer to as the appellant. He was charged with the offence of shop breaking and theft c/ss 252 and 283(a) of the Penal Code Act. He was convicted and sentenced to 18 months with 2 other people who did not prefer any appeal.

The matter was handled by Magistrate Grade I at Jinja court. The short facts of this case as may be gathered from the records of the lower court are that on the night of 24-3-1993 the shop of one Fred Mukubira the complainant in this case, was broken into by thieves who stole from there a number of articles which included one amplifier, Deck recorder, ten boxes of recorded tapes, 5 boxes of unrecorded tapes, one big box containing cosmetics, hard cash of 1.8m/= plus some other shop materials. The appellant and the other accused were later on arrested at different places and times. After his arrest the appellant's house at Buwenge was searched and some tapes were found there which were later on identified by the complainant as part of his property which had been stolen from his shop. The appellant on the other hand denied ever having taken part in the alleged shop breaking exercise and that the tapes found at his home in Buwenge were his own property. He also maintained that those

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tapes were not tendered in court and that the property tendered as exhibits were not the property that had been recovered from his place at Buwenge. He also put up a defence of alibi to the effect that on the night in question he was at Mbiko where he used to reside.

The appellant through his counsel Mr. Kania put up 4 grounds of appeal which are as follows:-

1. The learned trial magistrate failed to evaluate the overwhelming evidence in favour of the appellant and this arrived (sic) at the wrong decisision by finding the appellant guilty of the offence.

2. The trial magistrate misdirected himself and erred in law by shifting the burden of proof on to the appellant thus occasioning a miscarriage of justice.

3. The learned trial magistrate mis directed himself in law and in fact by convicting the appellant on uncorroborated evidence of an accomplice.

4. The sentence of 18 months passed against the appellant was too harsh and excessive in the circumstances.

Mr. Kania who appeared for the appellant while arguing his first ground of appeal complained quite arduously that the learned trial magistrate did not evaluate the evidence as put before him properly and that if he had done so he would have come to a different decision. It was his contention that although there were boxes found at the home of the accused no search warrant had been issued for the search as such the search was illegal. He relied on the cases of: Mohanlal v. R. (1957)EA 355 and that of: Uganda v. Musisi (1977)HCB 298.

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I will deal with this point briefly bearing in mind that this court being a first appellate court has the power to evaluate the evidence of the lower court and come to its own conclusion keeping in mind that the trial court had the benefit of seeing the appellant and the witnesses in the witness box a benefit which this court does not have: Pandya v. R. (1957)EA 336 and Williamson Diamond v. Brown (1971)EA 1. The case quoted by the learned counsel in this respect can easily be destinguished from the present case in that in the 2 cases the court was dealing with the prävisions of section 117 of the Criminal Procedure Code whereby a search was to be conducted after a search warrant had been obtained but in the present case the search was conducted under the provisions of sec. 116A; both sections were repealed under section 242(3) of the Magistrates courts Act 1970, but section 117 was replaced by section 69 and section 116A by section 68 of M.C.A which reads as follows:- (in pari materia)

> "68. When a police officer has reason to believe that material evidence can be obtained in connection with an offence for which an arrest has been made or authorised, any police officer may search the dwelling or place of business of the person so arrested or of the person for whom the warrant of arrest has been issued and may take possession of anything which might reasonably be used as evidence in any criminal proceedings."

My reading of this section shows that a search warrant was not necessary as the accused had already been apprehended, I therefore find that the search carried out at Buwenga was not illegally carried out. The position would have been different if the search had been carried out under section 69 of M.C.A. The decision in the case of Mohanlal (supra) is not applicable to the present case.

There was also a complaint about the chain of exhibits, according to Mr. Kania the learned counsel for the appellant there was a likelihood of the exhibits having been interfered with and he based his argument on the case of: Uganda v. Musisi (1977)HCB 298. This argument would

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have been valid if the learned counsel had shown incidence of such break in the chain of the movement of the exhibits. The evidence on record is that after the exhibits of the tapes had been recovered at the home of the accused they were taken to the C.P.S whereby the complainant identified the tapes as his own tapes so I do not see the likelihood of the exhibits having been interferred with. The case of: Uganda v. Christopher Musisi (supra) upon which Mr. Kania based his argument must be distinguished from the present case as the facts in the two cases were entirely different.

Mr. Kania further complained that the appellant's evidence that he was a trader in similar goods as that of the complainant was not properly rejected by the trial magistrate. The mere fact that the appellant was dealing in the same type of business as the complainant does not necessarily mean that he could not steal from the complainant; the complainant in this case was able to identify the tapes which were recovered from appellant's shop as those which had been stolen previously from his (complainan's) shop, so the claim by the accused that he was dealing with the same type of business with the complainant is not a valid defence.

Considering the evidence as adduced by prosecution generally I do not think the learned trial magistrate misdirected himself in anyway when he came to the decision which he came to. There was overwhelming evidence against the appellant which the learned trial magistrate evaluated and considered before he came to his conclusion. The evidence on record showed beyond reasonable doubt that the accused (now the appellant) was involved in the burglary at the shop of the complainant. That puts an end to the first ground of appeal.

Regarding the second ground of appeal the learned counsel for the appellant argued that the learned trial magistrate misdirected himself by shifting the burden of

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proof to the accused and by holding that the accused had failed to prove his alibi. He based his argument on the cases of: Woolmington v. DPP (1935)AC 462; Okathi Okale v. R. (1965)EA 555; Uganda v. Dusmani Sabuni (1981)HCB 1 and Isreil Epuku s/o Achietu v. R. (1934)1 EACA 166.

The offending passage in the judgment of the learned trial magistrate which was the source of this complaint is to be found on page 24 of the judgment of the lower court and it reads as follows:-

> "On the whole demeanour of the accused persons was wanting and they looked evasive and did not mention what happened on the night of 24th/25th March 1993"

According to the learned counsel for the appellant the above sentence ammounted to shifting of the burden of proof to the appellant and his fellow accused. With due respect to the learned counsel for the appellant I do not think that the learned trial magistrate shifted the burden of proof. What he was saying, as stated by Mr. Okwanga who appeared for the respondent in this case, was that he was not satisfied with the demeanour of the appellant. I however agree with Mr. Kania when he says that the duty is upon the prosecution to prove its case against the accused beyond reasonable doubt and the accused has no duty of proving his innocence. I also agree with him when he stated that the appellant had no duty of proving his alibi as stated in the case of: Dusmani Sabuni (supra), in the present case however prosecution discharged the burden placed upon it by law by calling evidence that established the guilt of the appellant. That evidence consisted of the goods which were found at the home of the appellant and which were identified by the complainant as his property. It is the law of this land that where a person is found in possession of property which was recently stolen that person is either a thief or a guilty receiver. In this case the learned trial magistrate was of the view that the accused was in fact a thief. The

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complainant's property having been stolen on the 24th and having been found at the home of the accused on 27-3-93, the accused was expected to offer an explanation on how he came to be in possession of the complainant's property. The accused did not offer any satisfactory explanation apart from insisting that he did not steal anything from the complainant's shop and the tapes found in his house were his own tapes, an explanation which the learned trial magistrate rejected and in my view was quite right.

As regards to the defence of alibi, it is the law that once the accused has put up a defence of alibi the prosecution is duty bound to destroy that defence by puting the accused at the scene of crime at the time the crime was being committed, the accused does not bear the duty of proving that defence: Sekitoleko v. Uganda (1967) EA 531. In the present case the learned trial magistrate did not directly deal with this issue but he indirectly covered it in his judgment at pages 21 and 22 when he said: "But according to the evidence of PWII A1 hired him to carry goods from Kutch road to Madhvan building near Dam Waters Resort, he identified A1 physically as the one who hired him, this seems to corroborate with the evidence of A2 as an accomplice". This sentence shows that the learned trial magistrate had accepted the evidence of PWII that he had seen A1 at the scene of crime on the night in question and therefore his defence that on that night he was in Mbiko was being rejected. It may be said here, in passing, that Mbiko is not geographically very far from Jinja, it is possible for a person to commit a crime in Mbiko or Jinja and then move to the other side on the same night.

The learned trial magistrate did not shift the burden of proof to the appellant nor did he fail to consider the defence of alibi put up by the appellant. I find no merit in this second ground of appeal.

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I now move to the third ground of appeal. In this ground of appeal the appellant is saying that the evidence against him was not corroborated. Mr. Kania maintained that as a matter of practice evidence of an accomplice should not be acted upon when it has not been corroborated. Mr. Okwanga the learned Resident Senior State Attorney contended that by provisions of section 131 of the Evidence Act no corroboration is required to base a conviction on evidence of an accomplice and he pointed out that even if such a corroboration was required still prosecution had provided it in the evidence of PW2. I agree with learned counsel for the appellant when he says that as a matter of practice our courts do require corroboration for evidence of an accomplice although this is not a legal requirement. Leo Mabuzi v. Uganda (1974)HCB 84. Davis v. DPP (1954)38 Cr. App. 11. I also agree with Mr. Kania when he says that evidence of an accomplice cannot corroborate that of another accomplice: Solu wa Tutu v. R. (1934)1 EACA 183 and R. v. Ramazani bin Mawingu (1936)3 EACA 39. In the present case however there has been abundant corroboration of the evidence of the accomplice (A2). I would like to say here that PW2 was not an accomplice he was merely hired to go to do a job without knowing that the things he was carrying had been stolen so his evidence does not require corroboration it is therefore capable of corroborating the evidence of A2, the evidence of those who found the stolen tapes at the home of the appellant also corroborates the evidence of A2. The evidence of the complainant himself that he identified his property which had been recovered from A1's house is also of a corroborative nature. The learned trial magistrate in his judgment at page 23 exhaustively dealt with this matter and he found as a fact that the evidence of A2 had been sufficiently corroborated and I quite agree with his finding on that point.

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The fourth and last ground of this appeal is in relation to the harshness of sentence. The learned counsel for the appellant argued strongly that the sentence of 18 months imposed on the appellant was harsh and excessive but the learned counsel for the respondent was of the contrary view. The appellant's counsel argued that the accused was a first offender, he had a family to look after and that he was a victim of AIDS so he requires special treatment. When imposing the sentence the learned trial magistrate gave his reasons why he imposed the sentence of 18 months against the appellant. The maximum sentence for this type of offence is 7 years imprisonment and I feel, considering the circumstances of this case, the sentence of 18 months imprisonment was not out of proportion with the nature of the offence committed. It is the law that an appellate court will only interfere with the sentence imposed by the trial court when that sentence is manifestly excessive or was imposed contrary to the established sentencing prinicples: R. v. Mohamedlal Jamal (1948)15 EACA 126, James s/o Joram v. R. (1951)18 EACA 147 and Ogalo v. R. (1954)21 EACA 270. In the present case I do not find these situations being established. Being a victim of AIDS is a grave misfortune which may attract a great deal of sympathy from the court but it is not in itself a ground for interfering with the decision of the lower court. This ground of appeal, like the other three fails.

In all these circumstances this appeal cannot be sustained it is accordingly dismissed.

C.M. KATO
JUDGE
12/5/1995