Hon. Justice Tsekoko

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

CRIMINAL SESSION CASE NO.243 OF 1992

UGANDA :: PROSECUTOR

V E R S U S

A1. NO.17778 P.C. ADAM KAIGO
A2. NO.18186 P.C. KASIIRA SULA :::::::::::::::::::::::::::: ACCUSED

BEFORE:- THE HON. MR. JUSTICE C.N. KATO

J U D G M E N T

The accused person NO.18186 P.C. KASIIRA SULA, whom I shall hereinafter refer to as the accused, is indicted for aggravated robbery contrary to the Provisions of Sections 272 and 273(2) of the Penal Code Act. He pleaded not guilty to the indictment.

It has been the case for prosecution that on the morning of 10/8/91 while at Wairaka village in the District of Jinja the accused robbed one Joginder Patel of a sum of 4,000,000/=, 50 rolls of "Jiwa" textile materials valued at about 3,000,000/=, 6 Video Cassattes worth about 60,000/= and a m/v Reg.NO.UPA 802. During the robbery the accused is alleged to have been in company of another man called Adam Kaigo who was armed with a pistol. The accused is said to have been identified at the scene of crime by both Joginder Patel and Hasmuklal Dahyabhai Patel. These two Asians are said to have set off from Iganga to Kampala via Jinja but on reaching Wairaka they were stopped by the accused who drove away the vehicle in which the two witnesses were travelling together with the above mentioned articles leaving them stranded with their driver Baraka. The vehcile was later recovered abandoned somewhere in Iganga. The accused was identified by the two witnesses at an identification parade conducted at Jinja central police station on 20/8/91.

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On his part the accused denied having been involved in the alleged robbery and he set up a defence of alibi to the effect that on the morning the alleged robbery is alleged to have taken place he had been guarding an Egyptian Embassy in Kampala and that the identification parade where he was picked was not properly conducted as he was made to dress differently from the other people who participated in the parade.

There are two preliminary points which I feel I should dispose of before I embark upon the task of dealing with the real issues in this case. The first point concerns a man called Adam Kaigo (A1). This man appears in the indictment as A1; but it was sadly learnt that he died on 18/4/93 when this case was about to be heard. He died at Kirinya prison as per medical report from that prison dated 19/4/93. This judgment therefore is in respect of Kasiira Sula (A2) alone although he had originally been jointly indicted with Adam Kaigo.

The second preliminary matter concerns the manner in which Hasmuklal Patel's name was included in the indictment as a second complainant. The impression one got from such inclusion was that both Hasmuklal Patel and Joginder Patel were robbed of some property but during the trial it became clear that all the property which was robbed was that of Joginder. Where two or more persons are robbed in one robbery exercise it is better to have different counts with each count for each person robbed. This inclussion or mention of Hasmuklal's name in the indictment as one of the persons robbed in the same count was irregular but that irregularity was not so vital to this case as it was eventually cured by the evidence which clearly revealed that the person whose property was actually robbed was Joginder. Even if such property belonged to a partnership still it would not have been necessary to mention the names of all the partners in the indictment, mention of one partner from whom the property was actually robbed should suffice as he was in a position of a trustee or bailee (See Archbold Criminal Pleading, Evidence and Practice 38th Edition page 48 paragraph 107).

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So much for the two preliminary points. I must now decidedly turn to the real issues in this case. It is vital that I should start by pointing out that the duty is upon prosecution to prove accused's guilt beyond reasonable doubt, that burden does not shift to the accused person: Woolmington v D.P.P. (1935) AC 462, Uganda v Joseph (1978) HCB 269 at page 270, Y.M. Kiiza v Uganda (1978) HCB 279 at page 280 and Okethi Okale v Republic (1965) EA 555 at page 559. It is also part of our law that an accused person should never be convicted on the weakness of his defence but on strength of the case as proved by prosecution; Uganda v Oloya s/o Yovan Omeka (1977) HCB 4 at page 6 and R v Israili Epuku s/o Achietu (1934) I EACA 166 at page 167. In a case of aggravated robbery like the one now under consideration prosecution is required to prove beyond reasonable doubt that there was theft accompanied by violence and that there was a deadly weapon used or threatened to be used immediately before or after the theft. (See sections 272 and 273(2) of the Penal Code Act). Prosecution is further required to prove that the accused was directly or indirectly involved in commission of the offence.

In a bid to prove the first element of this offence prosecution produced the evidence of two witnesses namely Joginder Patel (PW4) and Hasmuklal Dahyabhai Patel (PW5). Both of these witnesses testified that on 10/8/91 when they were travelling in a pick up registration NO.UFA 802 they were stopped by a man dressed in police traffic uniform who was in company of another man also dressed in police uniform. After stopping they were ordered out of the vehicle which was driven away with all its contents which included hard cash of 4,000,000/=, some rolls of Jiwa textiles from Pakistan. (The witnesses did not agree as to the number of rolls, according Joginder they were 50 but according to Hasmuklal they were about 20 but the fact remains that they were among things taken in the vehicle) and some 6 Video Cassates.

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The vehicle was later recovered and due to fear of being attacked in it again the owner (PW4) sold it.

The selling of the vehicle before the completion of this case was obviously improper as it was a material exhibit in this case although the complainant's fears might have been justified. Be that as it may, the mere fact that the vehicle was taken and later on abandoned by the thieves does not mean that it was not stolen because the act of theft was accomplished the very moment the vehicle was removed from the owner, according to the doctrine of asportation, it would be shallow thinking to say that the thieves never intended to deprive the complainant of his vehicle permanently, the moment property is forcefully removed from the owner by a stranger it is reasonable to assume that the strangers's intention is to deprive the owner of his property permanently. (See Halsbury's Laws of England Volume 10 3rd Edition pages 767 to 768 paragraph 1484).

As regards to the rolls of "Jiwa" textiles, the witnesses only difer as to the number of rolls stolen but they are in full agreement that some rolls were stolen, since Joginder was the owner his figure of 50 rolls should be taken as a correct one although Hasmuklal says he is the one who loaded them on the vehicle it would seem he never took any trouble of counting them accurately. There seem to be some confusion as to what might have happened to 4,000,000/=, according to the evidence of Joginder the money was recovered by the police but the same policemen took it, this evidence seems to have some support from that of John Ngwire (PWIII) who says some 2 bags full of money were recovered from the home of Yusufu Namabale on the night of 10/8/91 and he was made to carry one of them (bags) but after putting the bags on a vehicle which was occupied by the policemen he did not hear of the money again.

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According to the available evidence that money might have been part of the money taken away in Joginder's vehicle, it is only unfortunate that such huge sum of money should disappear in thin air possibly at the hands of the policemen who recovered it!

I believe the evidence of Joginder Patel and that of Hasmuklal Dahyabhai Patel that a car Reg.NO.UFA 802, 50 rolls of "Jiwa" textiles, 6 Video cassettes and 4,000,000/= were on 10/8/91 stolen from Joginder. Prosecution has therefore proved beyond reasonable doubt that there was theft.

I believe
The next issue to be considered is whether or not there was violence when this theft was being committed. In an English case of : R v Shedley (1970) Cr. L.R. 49, it was stressed that there is no such thing as robbery without violence, a similar view was indirectly held in a Kenyan case of: Gilbert v Republic (1972) EA 51. In their evidence both Joginder and Hasmuklal say that when their vehicle stopped after it had been signalled to stop they were ordered out of the vehicle together with the driver. An object which they thought was a pistol was placed on the stomach of Hasmuklal as the two witnesses were made to face away from the vehicle which had been travelling from Iganga side towards Jinja and which turned towards Iganga and it was driven away. I am of the opinion that what transpired to these two witnesses amounted to violence within the meaning of section 272 of the Penal Code Act. The force used was certainly intended to take away and keep or retain the vehicle and its contents. I hold that prosecution has proved beyond reasonable doubt that there was violence.

That leads me to the issue of whether or not there was use of a deadly weapon as defined in section 273(2) of the Penal Code Act. In the now celebrated case of: Wasaja v Uganda (1975) EA 181 it was emphatically stated that before any conviction could be obtained for aggravated robbery it had to be proved by prosecution that a gun was a deadly weapon in a sense that it was capable of causing death and that

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that it was not a mere toy, at page 183 of the judgment, it was however pointed out that where a gun has been fired the court will find no difficulty in holding that it was a deadly weapon. In the case of: Uganda v Firimigio Kakooza(1984) HCB I the court found no difficulty in holding that a deadly weapon had been used because there was a gun shot. In the present case Joginder said that before the vehicle took off he heard one gun shot, but Mr. Kania who appeared for the accused in this case disputed that piece of evidence on the ground that the other witness Hasmuklal Patel (PW5) who was at the scene did not mention that important fact. According to Mr. Kania if the gun had been shot at all this witness (PW5) could not have failed to remember that point. With due respect to the learned defence counsel, I agree with his line of argument on this point, if there was any a gun shot PW5 who was at the same place with PW4 could not have failed to hear it and if he heard it he could not have failed to remember it when giving evidence in court; the only logical conclusion to be drawn from the above reasoning is that there was no gun shot and what Joginder Patel told the court on this point might have been an imagination or exaggeration.

As no evidence was adduced to establish conclusively that what PW4 and PW5 saw was a gun capable of firing and causing death it would be highly unsafe to hold that a deadly weapon was used in the robbery. In view of my earlier holding that there was theft and violence, I find that a simple robbery was committed under section 273(1)(b) of the Penal Code Act but not aggravated robbery: Wasaja v Uganda (1975) EA 181 followed:

At this point I would like to point out that the two gentlemen assessors who assisted me in this case advised me to convict the accused for simple robbery, I found their advice rather strange because both of them had made a finding that a deadly weapon had been used and yet they proceeded to give advice which was inconsistent with that holding, it is most likely that the two gentlemen assessors were not well conversant with the distinction between aggravated robbery and simple robbery. As the

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Be that as it may, my finding that the offence of simple robbery was committed is not based on their illogical advice but on the evidence as I saw it; at any rate their opinions are not binding on me.

I now turn to a pertinent question which must be answered. That question is: did the accused person Kasiira Sula take part in the commission of this simple robbery? Connected to this question are the issues of identification and defence of alibi put up by the accused person.

It is the case for prosecution that the accused actively participated in the commission of the offence. Prosecution presented the evidence of 4 witnesses to prove their case in this respect. The first was IP Martin Othieno (PW1) who testified that he conducted an identification parade at which the accused was picked by PW4 and PW5 as the person who had robbed them on 10/8/91. The accused seriously disputed the manner in which the parade was conducted. The accused complained that while he and three other people were made to wear police traffic uniform at the parade the other people who participated in the parade were made to wear ordinary police uniform, he also testified that while the other people were wearing shoes and looked smart he was not wearing shoes and he was shabby. In his evidence the accused however said that Joginder Patel failed to recognise him at first but when he made a second round he picked him as a person who had robbed him and that despite his alleged peculiarities Joginder could not pick him up straight away. The accused also alleged that before he went to the identification parade he had been shown to PW4 and PW5 but both of these witnesses and PW1 denied the accused having been introduced to the two witnesses prior to the identification parade. I take their denial to be genuine. According to police form 69 which was tendered in this court by prosecution a EXP1 which gives the details of the manner in which the parade was conducted the accused is indicated as having complained that he was identified because he had been made to line up with fellow policemen while wearing the same uniform.

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Since the accused was himself a policeman I see nothing wrong in having him lined up with fellow policemen for the purpose of the identification. Considering the report of the identification parade: EX.PI and the evidence on record, I find that the identification parade was properly conducted in accordance with procedure laid down in the cases of: Sentale v Uganda (1968) EA 365 at 369 and Mwango s/o Manna v R(1936) 3 EA CA 29.

The next witness to be called by prosecution in connection with the issue of accused's involvement in the robbery was Yusufu Namabale (PW2). Before I proceed to consider the evidence of this witness and the remaining other witnesses I would like to outline factors that are usually taken into consideration when dealing with the issue of identification which were pointed out in the case of: Abudala Nabulere v Uganda (1979) HCB 77 which was cited in the present case by Mr. Wamasebu the learned prosecution counsel. Among those factors which the court must consider are the distance from the witness to the person whom the witness alleges to have seen at the scene of crime, the period taken by the witness while observing the accused, the source of light and whether or not the accused was known to the witness before the incident.

In his evidence Yusufu Namabale said that on 4/8/91 when he visited his late brother Adamu Kaigo he found him with the accused and another man called Moses Baloda discussing a certain matter and they were using such words as "deal" and Bayindi (Indians). This piece of evidence is obviously unhelpful to the prosecution as the witness never followed what the 3 men were exactly talking about. This same witness said that on the night of 10/8/91 at about 8.00 p.m. when he went to his father's home, where he apparently had a house also, he found the accused there with the late Adamu Kaigo together with Moses Baloda, they had 3 bags which he was ordered to bury in his incompleted house, he obeyed his brother's order and burried the bags. Mr. Kania the learned defence counsel attacked the evidence of this witness with much vigour.

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In the first place he said that this witness had made 2 statements to the police and in each statement he had given a different account of what h happened especially as to where he found the accused. The two police statements were presented to the court for identification only but they were never tendered as exhibits by those who recorded them so they cannot be relied upon by defence as part of their evidence. Mr. Kania also described this witness as a liar because the bag which he had identified as that of his late brother Adam Kaigo was later identified by Joginder as his own bag which had been robbed from him. Yusufu Namabale impressed me as an emotionally talkative fellow and at times an exaggerating witness, but that is not the same as saying that he lied when he said that he saw the accused on the evening of 10/8/91. He said in his evidence that he had decided to reveal everything because he was prepared to die for the truth. I believe this witness when he says that on that evening he saw the accused at their home in company of his late brother Adam Kaigo, this witness who knew the accused so well could not have mistaken him for anybody else, after all on that evening they were together for a considerably long time while burying the bags.

The evidence of the remaining two witnesses Joginder Patel and Mr. Hasmuklal Dalyabhai Patel is rather similar, I therefore propose to deal with it at the same time. These two witnesses stated that on the morning of 10/8/91 at about 7.00 a.m. they were proceeding to Jinja from Iganga, when they reached near Wairaka (according to PW4 they had reached Kakira but according to PW5 the place was called Wairaka, I have been advised that the two places Wairaka and Kakira are within the same neighbourhood, they were stopped by the accused who was wearing a police traffic uniform, the accused was in company of another man who was also wearing a police uniform.

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The two witnesses do not seem to agree as to exactly what happened after they had stopped regarding the role of the accused and his colleague. According to PW4 the accused and his colleague went behind the vehicle together with the driver but according to PW5 it was only the accused who went behind the vehicle with the driver. The two witnesses are also in direct conflict as to where the accused sat when the vehicle took off facing Iganga direction, according to PW4 the accused sat in the front seat with the other policeman but according to PW5 the accused sat at the back of the vehicle. The two witnesses in their evidence frankly told the court that they did not observe as to who was driving the vehicle at the time it was driven towards Iganga, although later when under cross-examination PW5 stated that the 3rd person who was by the road side and who was wearing civilian clothes was the one who drove the vehicle away but PW4 in his examination - in-chief insisted that this man in civilian clothes in fact was sitting at the back of the vehicle when it took off so that person could not have been seen driving the pick up when he was sitting at the back. This was yet another contradiction between these two key witnesses.

Mr. Kania the learned counsel for the accused tenaciously and assiduciously attacked prosecution case on the ground of those inconsistences. It is now a well established principle of our law that where there are contradictions in the prosecution case and such contradictions are so serious that they go to the root of the case and cannot be satisfactorily explained away the contradictions.should be resolved in favour of the accused but when the court considers them to be minor and not going to the root of the case they should be ignored altogether: Uganda v Ndesire (1988) - 1990) HCB 46 at page 47 holding No.4, Uganda v Suleiman Ndamagye (1988 - 1990) HCB 66, and Uganda v Sabuni (1981) HCB I at page 2. In the present case witnesses differed in details but not in substance of their evidence and their inconsistences did not amount to deliberate untruthfulness.

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These contradictions could be as a result of the long time it had taken to have this case heard, an allowance should always be given to human mind being at times rather feeble in remembering each detail of an incident of this nature. The contradictions were minor and did not go to the root of this case, the important thing here is that the witnesses were agreed that the accused was one of the two persons who stopped them and took away the vehicle with all its contents; the witnesses agree as to how the accused was dressed and how he stopped them. When under cross-examination PW4 stated that although he was frightened but he only became frightened after he had clearly recognised the accused.

The two witnesses explained that they were in a position to re-recognise the accused because although it was still early in the morning at about 7.00 a.m. it was not so dark so as for them not to recognise him. According to PW4 the whole incident lasted for nearly 1 minute but PW5 estimated the time to have been between 5 and 15 minutes. Both witnesses, however, agreed that the accused was a stranger to them so his face was not familiar to them and they had no reason for telling lies against him.

At the identification parade both witnesses were able to pick the accused as the very person who stopped them and who was wearing a police traffic uniform. The accused in his defence complained about the unsatisfactory manner in which the identification parade was conducted but I have already ruled out that the parade was properly conducted in accordance with the established rules. Here again the memories of the two witnesses did not seem to be on the same frequency, because PW4 says when he identified the accused he was wearing ordinary police uniform but PW5 says when he identified him he was wearing police traffic uniform. The accused himself says he was dreesed in a manner described by PW5 which means PW4 must have made a mistake as to how the accused was dressed.

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His mistake must have been a genuine one because the accused agrees with both witnesses when they say that they picked him from some other volunteers at the identification parade.

In his defence the accused put up the defence of alibi. The law relating to this kind of defence is that when an accused puts it up he does not assume the duty of proving it, the duty remains with prosecution to produce evidence that may destroy it by putting the accused at the scene of crime at the time the crime was committed: Sekitoleko v Uganda (1967) EA 531, Sabuni v Uganda (1981) HCB I Teper v R (1952) 2 AC. 480 and Uganda v George Kasya (1988-1990) HCB 48. The accused said on the morning of 10/8/91 when this offence is said to have been committed he was at Kololo in Kampala guarding the Egyptian Embassy. I have carefully considered this evidence along with the evidence as adduced by prosecution witnesses regarding the identification of the accused person at the scene of crime and at the identification parade and I have come to the conclusion that the accused was correctly identified by PW4 and PW5 at Wairaka as conditions for correct identification existed, his defence that he was in Kampala at the material time cannot be accepted as being truthful, if at all he was in Kampala at the Egyptian Embassy he must have left that place early enough so as to be at Wairaka by 7.00 a.m. which is quite possible. This court takes a judicial notice of the fact that due to lack of proper supervision quite a number of policemen in Uganda do not report to their places of work for night duty even if they have signed at their stations that they are going to guard such places!! I find that prosecution has by evidence sufficiently destroyed the accused's defence of alibi. I agree with the two gentlemen assessors when they say that the accused was properly identified.

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One more matter which must be considered before this case is finally put to rest concerns common intention. As I said earlier in this judgment the two eye witnesses did not appear to be sure as to which of three people (a man dressed in civilian and two dressed in police uniform) drove the pick up away with its contents what is clear however is that the accused was seen going away in the same vehicle and later on in the evening he was seen by PW2 carrying one of the bags which had been in the pick up. The accused did not at any time disassociate himself from the acts of the other two attackers, he must have had a common intention with others to rob the complainant therefore he is bound by their acts. That common intention may be gathered from his conduct which as I have just said included his failure to disassociate himself from the other two men and his active participation at the scene of crime when he stopped the vehicle and later on ordered the driver to get out pretending to check his driving permit.

In all these circumstances I find that the offence of aggravated robbery has not been proved against the accused and I find him not guilty of that offence he is accordingly acquitted of aggravated robbery, but I find that prosecution has proved beyond reasonable doubt that the accused commited the offence of simple robbery contrary to sections 272 and 273(1)(b) of the Penal Code Act. I find him guilty of that offence and I do accordingly convict him of simple robbery.

C.M. KATO
J U D G E.

15/6/93.