Hon. Mr. justice
J. W. N. Tsekooko.

No case

Robb

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 6 OF 1993

UGANDA .....PROSECUTOR

VERSUS:

RA. NO. 36058 SGT AUGUSTINE OLIMA ALIAS RICHARD BYARUHANGA ... ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

R U L I N G:

The accused is indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

In the particulars of offence it is alleged that RA No. 36058 Sgt. Augustine Olima alias Richard Byaruhanga and others still at large on or about the 16th day of December, 1990 at Plot No. 35 Republic Street in the Mbale District robbed Wilson Wandega of cash Shs 420,000/- (Four hundred twenty thousand shillings) and at or immediately before or immediately after the time of the said robbery threatened to use a deadly weapon to wit a pistol on William Wamaungo.

Under section 64 Trial on Indictment Decree, the following evidence was admitted:-

The Medical Officer, PW1, attached to Mbale hospital examined the accused on 17.12.90 and found him to be of an apparent age of 25 years. He had a cutwound on the back 1"x1"; an abraision on the right elbow 2"x2", an abraision on the right forearm 3"x2"; an abraision on the right side of the face 3"x2" and his mental condition appeared normal.

In his testimony, PW2 stated that on 16.12.90 at around 10.30 p.m he was on duty at Mbale Police Station in-charge of the counter when he heard an alarm being raised at Nkokonjeru Terrace immediately followed by two gunshots. He armed himself together with another Policeman and in the company of soldiers on patrol, they went to the scene at Plot No. 35 Nkokonjeru Terrace where he noticed some people were struggling inside the shop.

Before going to the scene, one Twaha an N.R.A. soldier who had parked an army Land Rover outside the Police Station, had brought a man under arrest allegedly involved in what was happening at Plot 35 Nkokonjeru Terrace. However, on reaching the scene, the witness saw 2 people emerge from the shop and one was holding the other who was struggling to run away.

By that time many people had gathered at the scene wanting to beat the person who was struggling to run away. He was armed with a pistol and the said Twaha personally appealed to the crowd not to kill the man but instead to take him to the Police Station.

In that onfusion, Twaha removed the pistol from the man who escaped and started to run towards Nkokonjeru Court. The crowd and the patrol soldiers including the Police chased the man and arrested him. He was taken to the Police Station bare chest where he identified himself as Olimi an N.R.A. soldier, now the accused before court and he was detained in the Police cells.

The witness in the company of PW8 went back to the scene of crime where they recovered a blood stained shirt with grey stripes and a hat which they took and treated as Police exhibits all of which he identified in court. According to PW3, the hat was worn by the said Twaha. Later, the witness learnt that Twaha was also involved in this matter but failed to arrest him because he had already disappeared.

Evidence of an eye witness, PW3, is that on 16.12.90 at around 6 p.m. the accused and his friend came to the shop and asked for tomatoe sauce and biscuits. After telling them the prices of those commodities, they went away without buying a single item and there were also other customers in the shop. The accused was dressed in civilian clothes with an army hat and the shirt was white and long sleeved with stripes. In court he was able to identify the shirt and the hat.

At about 10 p.m. when the witness was opening the shop door to allow the girl who had already prepared supper for him to go away, the accused and his friend entered the shop still asking for the same goods saying that they had a patient in the hospital who wanted them. The price of tomatoe sauce was shs 450/- but the accused paid only Shs 400/-.

Before paying the balance of shs 50/-, the accused again asked for biscuits. When the witness brought the packet of biscuits and placed on the counter, the accused pretended to be getting money from the pocket only to pull out a pistol with which he pointed at him. At that stage the accused demanded for money.

Both the accused and his friend were standing on the opposite side of the counter and the order was not to look at the friend but only at him. The witness got out shs 120,000/- from the box in the counter and gave them but still more money was demanded.

It was at this point that the friend of the accused jumped over the counter and removed the remaining shs 300,000/- from the box. He packed the whole total sum of shs 420,000/- into their bag and went into the bedroom where he again got a brief case containing money belonging to one Buyi Isaac. He returned to the shop and banged down the brief case but it did not open. The accused advised him not to bang the brief case against lest the Police would hear.

When the witness was looking for the key to the brief case, he was ordered not to be near but tactfully managed to grab the accused together with his pistol. The friend on seeing that dropped the brief case at the door of the shop but ran away with the bag containing shs 420,000/~~00~~. As the shop door was still open, the witness kicked it and it got locked but the struggle still continued. He threw the accused down and the pistol fell aside. Both the accused and the witness then started struggling for the pistol. As the head of the pistol faced the leg of the witness, the bullet got off and fortunately shot the floor. As the struggle continued towards the door, again two shots went up and demaged the door glass. The accused opened the door but the witness was holding him together with the pistol.

When the witness and the accused got outside, neighbours, the Police and the soldiers on patrol had arrived. He again threw the accused down where then the Police and the patrol soldiers arrested him. He was ordered to sit down but until then the episode took about 15 minutes. Nonetheless the accused threw down his shirt and took off but was chased, arrested and taken to the Police Station bare chest.

Before the accused started to run, the witness saw one Twaha disarm him of the pistol. Twaha was not the friend of the accused with whom he went into the shop. The said Twaha is well known to the witness as a regular customer and there is no evidence to show that he ever handed the pistol to the Police. However, PW4 took a pistol No. 29024892 together with the 7 live amunitions to the Government expert but in court he identified a pistol No. 29024892 - 99 quite different from the one he originally took to the Government expert which was not admitted in evidence.

PW5 is a neighbour who heard an alarm coming from the direction of the shop and went there. He heard scuffle therein and through the glass at the door of the shop, he saw the accused and PW3 struggling. Later the accused opened the door but PW3 was holding round the body from behind. He was armed with a pistol from which the witness heard two gunshots. However, the accused was complaining that PW3 had wanted to grab his money.

When the soldiers on patrol together with the Police arrived the accused was arrested but all the same managed to escape and started running towards Nabweya Lane. As he was running, he was unbuttoning his shirt which he dropped down but the witness on the chase picked it up before eventually arresting the accused in the bush near Plot 120 - 121, a distance of about 120 - 140 metres away from the scene.

Evidence of PW6 is that his duty includes keeping Police exhibits store. On 17.12.90 he received and registered a Pistol No. 29024892 - 99 Exhibit P1, together with 7 rounds of live ammunition and one empty cartridge. On 7.3.91, PW4 took them to the Ballistic expert in Kampala but on 4.8.91 returned the pistol with only 6 live ammunitions Exhibit P2 and 2 empty cartridges Exhibit P3.

PW7 who is allegedly robbed of cash shs 420,000/- says that for the whole of 16.12.90 he was not at the shop. He had left his shop assistant, PW3 with cash of shs 200,000/- only. For the sales between 15.12.90 and 16.12.90, PW3 had realised another shs 220,000/- to make the total Shs 420,000/-.

At around 10.15 p.m. he heard an alarm and a gunshot coming from the direction of his shop. While at home, he stood for about 15 minutes listening to what had happened when his neighbours David and James reported to him that his shop had been robbed. He went with them to the Police Station where he found 2 suspects bare chest but PW3 was making a statement to the Police. The Police visited the scene the same night and also the following morning after which he was authorised to run his business normally.

On 16.12.90 at around midnight, PW8 who was an orderly officer received a report of robbery at Plot 35 Republic Street just opposite Mbale Police Station. He went to the Police Station and found the accused already arrested.

He went to the scene and found the door to the shop wide open and goods therein scattered. He also observed a crack on the floor which PW3 informed him was from the Pistol when the bullet got off during the struggle between him (PW3) and the accused. He drew the sketch plan of the scene Exhibit P4. On 17.12.90 the accused made a confession to him which confession was ruled out in trial within a trial as inadmissible on the ground that it was not made freely and voluntarily.

At the height of all that the defence offered a submission of no case to answer. Both the prosecution and the defence sides concede that a theft was committed and in the course of that theft violence was used with a deadly weapon to wit a pistol.

The only issue of controversy is whether the accused is the person who robbed the alleged property. The prosecution puts the accused at the scene of crime. Evidence of PW3 is that the accused and his friend went to the shop 2 times on the day of the incident. On the first occasion they asked for tomatoe sauce and a packet of biscuits and went away. Although they did not take long and although there were other customers in the shop, PW3 managed to recognise them and described the clothes they were dressed in.

On the second visit at 10.30 p.m. again the accused and his friend returned dressed in the same way and again asked for the same goods that they had a patient in the hospital. With the help of an electric light in the shop, PW3 was able to see the accused pull a pistol from the pocket and pointed it at the witness while demanding some money. PW3 got out shs 120,000/- and gave them but being not satisfied the friend of the accused jumped behind the counter and removed another shs 300,000/- all of which he loaded in a bag. Accused's associate again went behind the shop and removed a brief case.

It is the submission of the State Counsel that at the initial stages the relationship between PW3 and the accused and his friend was that of a shop attendant and customers. He was therefore able to recognise the thugs. When the accused and his friend entered the shop, they had formed a common intention and the accused facilitated the theft by putting the shop attendant at gun point. There was ample light and it took sometime before the accused made their design known to PW3.

It is further submitted that "other" evidence of identification is that of PW2 and PW5. Before the accused ran away from the scene PW2 had already identified him because there was light. As for PW5, he even talked to the accused before he ran away where the accused alleged that PW3 wanted to grab his money but the witness advised him to report the matter to the Police but he ran away. PW5 chased the accused in the presence of security light without loosing sight of him until his arrest. In the premises, the accused was properly identified at the scene of crime.

On the other hand, the defence submits that the evidence of identification submitted by the prosecution does not establish the identity of the accused. PW2 went to the scene when the struggle in the shop was still going on and immediately 2 people emerged out and in that confusion the pistol was removed and the assailant ran away. He could not recognise the accused in the background of security light which was facing him. In cross-examination, he did not know who arrested the accused when it is alleged that he ran away nor did he know how long it took before the assailant was arrested which means that PW2 just received a man handed to him by the mob.

As regards PW3 he says that the accused ordered him while pointing a pistol at him across the counter only to look at the accused but admitted in cross-examination that he was frightened as it was night. At the same time, PW3 says that during the struggle he was holding the accused from behind all along and when both of them went outside the accused briefly sat down as ordered by the security personnel but immediately ran away. In such a situation identification was difficult and as PW5 says that he arrested the accused after a distance of 120 - 140 metres away from the scene, it is submitted, that was far enough a distance for the chasing party to arrest a wrong party and indeed they arrested a wrong man on a mistaken identity.

Whereas the prosecution and the defence agree that a theft was committed in the instant case, the court revisits the matter as follows:-

Evidence is that on 16.12.90 at around 10 a.m. Wilson Wandega, PW7 left for home leaving the shop assistant, PW3 in possession of cash shs 200,000/- only.

He never attended to the shop on that day and even when the alleged robbery took place he was at home repairing his radio. Now there are fundamental questions which need to be addressed: Can robbery be committed on the basis of ownership of property allegedly robbed even when the owner is not at the scene of crime? Another issue is, Can robbery be committed on the basis of mere possession of property allegedly robbed from the person in possession of such a property?

In addressing the first question, this court holds the view that the alleged robbery in the instant case was not committed on the grounds that the goods (shs 420,000/-) must be proved to have been taken either from the person of the complainant (PW7) or in his presence. It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the robber (accused), under the compulsion of that degree of fear and apprehension. The complainant must either show that he was actually in bodily fear, from the accused's actions, at the time of the robbery, or proof of circumstances from which the court and the assessors may presume such a degree of apprehension of danger as would induce the complainant to part with his property.

An actual taking either by force or upon delivery must be proved and in the course of that transaction violence is used or threatened to be used by a deadly weapon on the person of the complainant. In the instant case none of those essentials applies to the complainant, PW7 because he was not at the scene of the alleged crime. In the premises, ownership of property allegedly robbed in the absence of the owner at the scene of crime is not robbery against him just because he is a general owner within the meaning of section 245 of the Penal Code Act.

An answer to the second question, without prejudice to the foregoing, is that robbery as herein charged, can be committed against a person who has any charge or lien upon the property in question or any right arising from or dependent upon holding possession of the property in question. In the instant case, the shop assistant, PW3 had possession and was in charge of the cash shs 420,000/- at the material time of the alleged robbery.

Whereas it is on record that nobody actually saw any of the 2 accused persons hit the fatal blow but it is not disputed that they participated in assaulting the deceased. There is no evidence to show that the deceased ever fell on any hard surface. The only evidence is that the deceased was assaulted which negates injury by other means. Injuries described by medical report could not be sustained by groaning and kicking legs which is a process of death. Nobody said the deceased was knocking his head on something hard.

There is no provocation in the instant case anywhere. The so-called disciplining as a method of interrogation instead of keeping the suspects in safe custody, was unlawful act and each of the accused is liable for the fatal blow. A1 was at the scene according to PW2, PW4 and PW5. He never went anywhere as he claims. He also lied when he said that he made the report with PW1 to the Police at Butiru Police Post because PW1 so denied. His conduct is that he ran away for sometime from the scene until his arrest the following day after the incident. Similarly A2 ran away from the same but lied when he said he reported the matter to the Zonal Commander at Busia the following day. He was arrested on 31.7.90 and handed to the Police at Mbale Police Station. His conduct similarly points at his guilt in the same way as A1.

According to the evidence on record, the court finds the 2 accused persons guilty of and convicted them of a lesser cognate offence of Manslaughter contrary to sections 182 and 185 of the Penal Code Act and thereby differs with the opinions of the gentlemen assessors with due respect to them.

STEVEN GEORGE ENGWAU

J U D G E

26.10.93.

28.10.93: The 2 accused persons present.
Mr. Wegoye for A1 on private brief.
Mr. Dagira for A2 on State brief.
Ms. Khisa for the State.
Judgment delivered in open court.

STEVEN GEORGE ENGWAU

J U D G E

28.10.93.

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In addition, the prosecution witnesses gave different descriptions of the shirt and hat purportedly dressed on by the accused which were recovered. All that creates great lacuna in the evidence of identification of the accused bearing in mind that the incident happened at night. In that context, a possibility that the mob might have arrested a wrong person cannot be ruled out benefit of which goes to the accused person.

In conclusion, even if the accused chose to keep mute, any reasonable tribunal properly directing itself on the evidence and law cannot convict him: Bhatt Vs: R. (1957) EA 332. Accordingly, the prosecution has not made a prima facie case against the accused and under section 71 (1) Trial on Indictment Decree, he is acquitted and set free forthwith unless being held lawfully for some other crimes.

STEVEN GEORGE ENGWAU

J U D G E

27.10.93.

1.11.93: Accused present in court.
Mr. Mudangha for accused on State brief.
MS Khisa for the State.
Ruling delivered in open court.

STEVEN GEORGE ENGWAU

J U D G E

1.11.93.

SGE/eg