IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0020 of 2018

In the matter between

OBITA FRANCIS **APPELLANT**

And

UGANDA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law *— Arson C/s 327 (a) of The Penal Code Act — There should be proof of existence of a building or structure, whether completed or not, that belongs to another, the building or structure was destroyed or damaged by fire which was set willfully and unlawfully and that the accused set or participated in setting the fire. —.Arson is an offence involving a specific intention to cause a specific result having regard to the interpretation of "wilfully— "Wilfully" requires proof that the accused either: (a) had an actual intention to do the particular kind of harm that was in fact done; or (b) deliberately did an act aware at the time he or she did it that the result charged in the charge sheet was a likely consequence of his or her act and that he or she recklessly did the act regardless of the risk. — A building or structure belongs to another person where that person had possession or control of it, a proprietary interest in it, or a charge on it. It is immaterial that the person who does the damage or destruction has a partial interest, or an interest in it as joint or part owner or owner in common— The expression "sets fire to" refers to conduct which causes the building to be set on fire. It is not limited to conduct involving physically igniting the building. — Defence of intoxication —Where the charge preferred is one of specific intent, meaning that the accused must have had the specific intent to commit the crime in question, involuntary intoxication can be a defence only if it prevents the accused from forming the intent that is required.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant was charged with three counts; in the first Count he was charged with the offence of Arson C/s 327 (a) of *The Penal Code Act*. It was alleged that the appellant on 19th August, 2016 at Lacor Trading Centre sub-ward in Gulu District, wilfully and unlawfully set fire to a grass thatched house, the property of Kidega Louis Armstrong. In the second Count he was charged with the offence of Stealing a motor vehicle C/s 254 and 265 of *The Penal Code Act.* It was alleged that the appellant, on 19th August, 2016 at Lacor Trading Centre sub-ward in Gulu District, stole a bicycle Hero make, Frame. No. R564748 valued at shs. 230,000/= the property of Kidega Louis Armstrong.

[2] In the third Count he was charged with the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act.* It was alleged that the appellant, on 19th August, 2016 at Lacor Trading Centre sub-ward in Gulu District, stole a wheel barrow valued at shs. 90,000/= the property of Kidega Louis Armstrong. He was convicted for the offence of Arson C/s 327 (a) of *The Penal Code Act* but acquitted of the offence of Stealing a motor vehicle C/s 254 and 265 of *The Penal Code Act,* and that of Theft C/s 254 (1) and 261 of *The Penal Code Act*. He was sentenced to eight years' imprisonment for the offence of Arson.

The appellants' evidence in the court below.

[3] In his defence, the appellant denied the offences. He stated in his defence that he neither burnt the complainant's house nor saw the burnt house. He was at his place of work at a car washing bay from 8.00 am to 5.00 pm when he returned home. It is then that his grandfather told him that the complainant's house had

caught fire. Shortly after, he saw the complainant approach with the police. He was arrested on suspicion of having set the house on fire, yet he never had any matchbox in his possession. He had no knowledge as to who set the house on fire.

The Defendant's evidence in the court below.

[4] The prosecution case was that the appellant is a nephew of the complainant. Sometime around 3rd August, 2016 the complainant's solar panels were stolen. He suspected the appellant's brother, a one Okot Ronald, to have stolen them and he thus caused his arrest 8th August, 2016. This annoyed the appellant who therefore confiscated the complainant's bicycle and wheelbarrow, which he hid at the home of his grandmother, stating that he would only return those items after the complainant had caused the release of Okot Ronald. On 19th August, 2016 at around 5.00 pm, the complainant proceeded to the police station to report theft of his bicycle. While at the police station, he was told the appellant had set his house on fire. He returned home only to find the house completely burnt alongside all his household property. The appellant was implicated as the arsonist and was arrested an hour later.

Judgment of the court below.

[5] In his judgment, the trial Magistrate found that the court was left in no doubt that the appellant committed the offence of arson. The other two offences were not proved. P.W.2 Lamunu Everlyn was an eyewitness. She saw the appellant light a match and set the house on fire. She had no reason to falsely incriminate the accused. She was a truthful witness. The appellant made pleas asking to be allowed to compensate the complainant. He would not have made such pleas if he were innocent. Taking away the bicycle and the wheelbarrow did not constitute offences of stealing and theft respectively since the appellant did not have the intent to permanently deprive the complainant of those items. He

intended to return them upon the release of his brother from police custody. A thief could not have kept the items at his grandmother's home from where they were recovered. The appellant was thus convicted for the offence of Arson C/s 327 (a) of *The Penal Code Act* but acquitted of the offence of Stealing a motor vehicle C/s 254 and 265 of *The Penal Code Act,* and that of Theft C/s 254 (1) and 261 of *The Penal Code Act*.

[6] The appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did counsel for the respondent file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of a first appellate court.

[7] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[8] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first

appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Ingredients of the offence of Arson.

[9] For the appellant to be convicted of the offence of Arson C/s 327 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Existence of a building or structure, whether completed or not, that belongs to another.
2. The building or structure was destroyed or damaged by fire.
3. The fire was set wilfully.
4. The fire was set unlawfully.
5. The accused set or participated in setting the fire.

1st issue; whether a building or structure, completed or not, that belongs to another, was involved.

[10] The common law element concerning a dwelling was expanded by section 327 of *The Penal Code Act* to include any type of residential, commercial, or industrial structure. A building or structure belongs to another person where that person had possession or control of it, a proprietary interest in it, or a charge on it. It is possible for the accused to commit an offence by damaging or destroying property that he or she co-owns with someone else. It is immaterial that the person who does the damage or destruction has a partial interest, or an interest in it as joint or part owner or owner in common. However, setting fire to one's

own building or structure cannot be punished as arson, although it could qualify as a different less serious offense, where the destruction by fire involves fraud.

[11] It was the testimony of P.W.1 Kidega Louis Armstrong that he was not at home when his house was set on fire. He had gone to the police to report a case of theft of his bicycle at around 5.00 pm. It was described as a grass thatched hut. This evidence regarding the existence, possession and ownership of the building was neither discredited by cross-examination, nor was it manifestly unreliable. No evidence was led to controvert it. I therefore find that the trial court came to the right conclusion when it found that commission of the offence involved a building.

2nd issue; <u>whether building or structure was destroyed or damaged by fire.</u>

[12] There must be proof of some change to the physical integrity of the building as a result of fire. This can be by evidence of a permanent or temporary change. To "destroy" means an act rendering the building or structure useless for the purpose for which it exists. To "damage" means the permanent or temporary reduction of functionality, utility or value of the building or structure. The damage or destruction must have occurred by fire.

[13] A burning could include even the slightest damage caused by charring, but merely causing smoke discoloration to a building or structure is insufficient (see *R v. Joinbee [2013] QCA 246*). The expression "sets fire to" refers to conduct which causes the building to be set on fire. It is not limited to conduct involving physically igniting the building.

[14] P.W.2 Lamunu Everlyne testified that she saw the building being set alight and tried to put out the fire without success. She raised an alarm and several people came to the scene but they too could not put out the fire. By the time the police came to the scene, the roof had collapsed. They took photographs of the burnt

house (exhibit P. Ex.1). P.W.3 Ongom Bernard testified that on arrival at the complainant's home, he found the house was engulfed in fire. P.W.4 No. 29966 D/C Acere Acet testified that he visited the scene at around 6.00 pm that day and found a hut was on fire. This evidence was neither discredited by cross-examination, nor was it manifestly unreliable. No evidence was led to controvert it. I therefore find that the trial court came to the right conclusion when it found that the complainant's house was destroyed by fire.

3rd issue; <u>whether the fire was set wilfully.</u>

[15] Arson is an offence involving a specific intention to cause a specific result having regard to the interpretation of "wilfully" in *R v. Lockwood, ex parte A-G [1981] Qd R 209*. "Wilfully" requires proof that the accused either: (a) had an actual intention to do the particular kind of harm that was in fact done; or (b) deliberately did an act aware at the time he or she did it that the result charged in the charge sheet was a likely consequence of his or her act and that he or she recklessly did the act regardless of the risk. The word "likely" in the direction concerning recklessness conveys a substantial, a real and not remote chance. Therefore there must be proof that the accused either had an actual intention to set fire to the building or structure or deliberately did an act, aware at the time he or she did it, that the building or structure's catching fire was a likely consequence of his or her actions and that he or she did the act regardless of the risk. The accused must have acted wilfully and with wrongful intent. Thus, starting a fire by accident is not sufficient. A person "wilfully" sets a fire if his or her purpose or one of his or her purposes is to destroy or damage the building or structure; or he or she knows or believes that his or her conduct is more likely than not to result in destruction of or damage to the building or structure.

[16] There are two ways in which the prosecution can prove this element of the offence. First, they can prove that, whoever did the act, it was his or her purpose to damage or destroy the building or structure by fire, or one of his or her

purposes. Alternatively, they can prove that, whoever did the act, knew or believed that his or her actions were more likely than not to result in the building or structure being damaged or destroyed by fire.

[17] "Knowledge" and "belief" are both ordinary words. For this element to be proven on the basis of the accused's knowledge or belief, the prosecution must prove that the accused thought about the likely consequences of his or her actions. If he or she did not think about whether his or her actions would cause the property to be damaged or destroyed by fire, then this element will not have been proved. It is not enough to find that the person simply thought about the possibility of damage or destruction. This element will not be met if the accused thought his or her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that he or she knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire, or that at least one of his purposes in setting the fire was to damage or destroy the property by fire.

[18] P.W.2 Lamunu Everlyne testified that she had just come out of her house at around 5.00 pm when she saw the appellant carrying a matchbox. She then saw him strike a match and set the roof alight. P.W.1 Kidega Louis Armstrong testified that upon arrest, the appellant admitted having set the house on fire. He requested for an amicable settlement and undertook to pay compensation, after selling off his livestock. P.W.4 No. 29966 D/C Acere Acet testified that when he arrested the appellant that very day at around 7.00 pm, he appeared drunk.

[19] In the first place, the testimony of P.W.1 Kidega Louis Armstrong to the effect that the respondent upon arrest by the police, confessed to have set the house on fire was inadmissible. According to section 23 (1) (a) of *The Evidence Act*, no confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of assistant inspector.

The circumstances in which it was made were not compliant with the requisite procedure laid down by the Judges Rules of England alongside the administrative instructions dated 2nd March, 1973, entitled "Recording of Extra-Judicial Statements" issued to all magistrates by the Chief Justice (see *Festo Androa Asenua v. Uganda, S.C. Criminal Appeal No. 1 of 1998* and *Namulobi Hasadi v. Uganda S. C. Criminal Appeal No.16 of 1997*). The trial Magistrate therefore misdirected himself when he took that evidence into account.

[20] Although the defence raised by the respondent was alibi, the testimony of P.W.1 Kidega Louis Armstrong to the effect that at the time he went to the police station he left the respondent alone at home, drunk and quarrelling; demanding that he causes a release of his brother, and that of P.W.4 No. 29966 D/C Acere Acet who testified that when he arrested the appellant that very day at around 7.00 pm, he appeared drunk, raised the possible defence of intoxication. This possible defence was not considered by the trial Magistrate yet it is the duty of the trial court to deal with all the alternative defences, if any, if they emerge from all the evidence as fit for consideration notwithstanding that they are not put forward or raised by the defence, and not to do so constitutes a grave miscarriage of justice (see *Mancini v. D.P.P. [1942] AC 1* and *Didasi Kebengi v. Uganda [1978] HCB 216*).

[21] A person is considered intoxicated if as a result of his or her consumption of intoxicating liquor or drugs, his or her physical and mental faculties, or his or her judgment, are appreciably and materially impaired in the conduct of the ordinary affairs of his or her daily life. However, under section 12 of *The Penal Code Act*, intoxication is not a defence to any criminal charge except if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing and either; (i) the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or (ii) the person

charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[22] Where the charge preferred is one of specific intent, meaning that the accused must have had the specific intent to commit the crime in question, involuntary intoxication can be a defence only if it prevents the accused from forming the intent that is required. Arson is one of those offences that can only be proven if the court is satisfied that the accused intended to cause a particular result, where the offender must have intended to cause a specific result. The issue then is whether the accused formed the specific intent referred to in the charge notwithstanding his state of intoxication at the time. There is no obligation cast upon the accused to prove that he was intoxicated to a level that he could not or did not act with that intention. It is for the prosecution to prove beyond reasonable doubt that the accused had the intent in spite of the evidence of his consumption of alcohol before the alleged conduct giving rise to the charge.

[23] However, the fact that the accused's judgement was affected so that he acted in a way different to how he would have acted if sober does not necessarily mean that he was not acting with a specific intention. Where the alcohol only removed the inhibitions of the accused so that he acted in a way which he would not have done if sober, he will still be guilty if he was able to, and did in fact, form the required mental element of the offence (see *A.G. for Northern Ireland v. Gallagher [1963] AC 349* and *R v. Kingston [1995] 2 A.C. 355*). A drunken intent is still a wilful intent (see *R v. O'Hare [1999] EWCA Crim 771* and *R v. Sheehan and Moore (1975) 60 Cr App R 308*).

[24] In the instant case, the eye witness to the act P.W.2 Lamunu Everlyne testified that she saw the appellant carrying a matchbox, walk to the house, strike a match, set the roof alight, watch for a while the fire spreading and then walking away without uttering a word. This description of the appellant's conduct was not that of a person who was too drunk to form the specific intent to set the house on

fire. To the contrary, it describes conduct of a person in full control of his mental faculties, undertaking the deliberate act of setting the house on fire. He may have been intoxicated, but not to an extent that deprived him of the capacity to form the requisite intent. Despite the lapses in the trial court's evaluation of the evidence, it came to the right conclusion when it found that the prosecution had proved beyond reasonable doubt that the fire was set wilfully, not accidentally.

4th issue; whether the fire was set unlawfully.

[25] Section 327 (a) of *The Penal Code Act* makes it an offence to intentionally and without lawful excuse destroy or damage another person's building or structure, whether completed or not, by fire. "Unlawfully" in that context means "not justified, authorised or excused by law." The prosecution must therefore rule out the possibility of the fire having resulted from an accident. The prosecution must prove further that the accused had no lawful excuse for damaging or destroying the building or structure. An act which destroys or causes damage to the building or structure of another, and which is done without the owner's consent, is unlawful unless it is authorised or justified or excused by law. The law recognises that a person has a lawful excuse for damaging or destroying property if he or she, e.g. honestly believed that the owner of the building or structure had consented to the damage.

[26] Some the other available lawful excuses are;- (i) that the accused believed that the building or structure belonged solely to himself or herself; (ii) that the accused believed he or she held a right or interest in the building or structure which authorised him or her to engage in the conduct; (iii) the people he or she believed were entitled to consent to the destruction or damage had consented, or would have consented if they had known the circumstances of the destruction or damage; (iv) the accused believed that it was necessary to engage in the conduct to protect property belonging to himself or herself or another and the accused believed that property was in immediate need of protection, and the

means adopted by the accused to protect the property were reasonable. The common law defences of self-defence and consent are also considered lawful excuses. These excuses must only have been honestly held by the accused at the time that the accused damaged or destroyed the property and the accused's belief does not need to have been correct or justified.

[27] The focus of this element is on what the accused actually believed at the time he or she performed the act. It does not matter if that belief was neither accurate nor justified. It is not for the accused to adduce evidence showing that he had a lawful excuse. Instead, it is for the prosecution to prove beyond reasonable doubt that the accused did not have a lawful excuse.

[28] The eye witness to the act P.W.2 Lamunu Everlyne testified that she saw the appellant carrying a matchbox, walk to the house, strike a match, set the roof alight, watch for a while the fire spreading and then walking away without uttering a word. This description of the appellant's conduct does not suggest any of the possible justifications and excuses outlined above. A person acts unlawfully when he is aware that his actions present a substantial and unjustifiable risk of causing a fire, or when he ignores that risk in circumstances where ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation. This evidence was neither discredited by cross-examination, nor was it manifestly unreliable. No evidence was led to controvert it. I therefore find that the trial court came to the right conclusion when it found that the fire was set unlawfully.

5th issue; <u>whether the respondent set or participated in setting the fire.</u>

[29] The prosecution must rule out the possibility of mistaken identity. It has to prove that it was the accused who did the relevant act and not someone else. The court has to determine whether or not the identifying witnesses relied upon by the prosecution are credible and reliable.

[30] P.W.1 Kidega Louis Armstrong testified that at around 5.00 pm he left the appellant at home; he was drunk and quarrelling, demanding that he releases his brother a one Okot Ronald. He was summoned back with information that his hose was on fire. He found the appellant was missing. He was arrested an hour later at the home of Dr. Ongom. P.W.2 Lamunu Everlyne testified that she had just come out of her house at around 5.00 pm when she saw the appellant carrying a matchbox. She then saw him strike a match and set the roof alight. He stood for a while to watch the fire spread and then he walked in the direction of a neighbour, Dr. Ongom's. She tried to put out the burning fire without success. The appellant was arrested in front of Dr. ongom's house. She heard him promise to sell his cow and compensate the complainant. P.W.4 No. 29966 D/C Acere Acet testified that he arrested the appellant on that very day at around 7.00 pm. He appeared drunk. In his defence, the appellant denied having committed the offence. He testified that he was at the home of Dr. Ongom at the material time, only to be surprised by the arrest. The respondent in essence raised the defence of alibi.

[31] An accused that raises such a defence does not have to prove that alibi. The burden is on the prosecution to place the accused at the scene of the crime, and sufficiently connect him to the commission of the offence (see *Uganda v. Sabuni Dusman [1981] HCB 1; Uganda v. Kayemba Francis [1983] HCB 25; Kagunda Fred v. Uganda S.C. Criminal Appeal No. 14 of 1998; Karekona Stephen v. Uganda, S.C. Criminal Appeal No. 46 of 1999* and *Bogere Moses and Kamba v. Uganda, S.C. Criminal Appeal No. 1 of 1997*). Where prosecution evidence places the accused squarely at the scene of crime at the material time, the alibi is destroyed (see *Uganda v. Katusabe [1988-90] HCB 59*).

[32] To rebut the alibi, the prosecution relied on the testimony of a single eyewitness, P.W.2 Lamunu Everlyne. Where prosecution is based wholly or substantially on the correctness of the evidence of an identifying witness, the Court must exercise

great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. The prejudice often associated with identification evidence is that, although mistaken, it is frequently given with great force and assurance by the person who made the identification. A mistaken witness can be a convincing one and a number of such witnesses can all be mistaken (see *R v. Turnbull [1976] 3 All ER 54*). In order to satisfy itself that the evidence is free from the possibility of mistake or error, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

[33] This witness knew the appellant very well as they lived in the same homestead. The incident occurred before nightfall, meaning there was sufficient light to aid correct identification. The witness stated that she talked to the respondent although he did not respond, suggesting that she was in close proximity. After he set the house on fire he stood by for a while watching the fire spread, giving the witness ample opportunity to recognise him. There is nothing to suggest that she was motivated by any ulterior motive to implicate the respondent. Having considered the evidence, I find that thee were no significant unfavourable circumstances capable of causing an erroneous or mistaken identification. This evidence disproved the respondent's defence of alibi. I therefore find that the trial court came to the right conclusion when it found that the prosecution proved beyond reasonable doubt that it was the respondent who set the cpomplainant's house on fire.

[34] Before considering the propriety of the sentence, it is necessary to make some observations concerning the views expressed by the trial magistrate regarding the element of intent in the two offences of stealing a motor vehicle and that of

theft. In both counts, the prosecution had to probe beyond reasonable doubt that the bicycle and wheelbarrow were intentionally taken wrongfully or without a claim of right. Both offences are committed when the items are taken by persons not having lawful access, or converted by persons who had such acces. Section 254 (1) of *The Penal Code Act*, defines theft as “fraudulently and without claim of right [taking] anything capable of being stolen," which may occur either by "taking" or "converting" the thing capable of being stolen. Theft involves an unauthorised taking, keeping, or using of another's property. It is committed by a person who has no lawful justification in taking or retaining possession of the property in issue.

[35] Therefore, the “act of taking” as an *actus reus* of the offence includes taking possession, refusing to give up possession upon demand, disposing of the goods to a third person, or destroying them, provided that it is also established that there is an intention on the part of the accused in so doing to deny the owner’s right or to assert a right vested in the owner.

[36] Stealing of a vehicle involves a person who without having the consent of the owner or other lawful authority, takes the vehicle for his own or another's use or, knowing that the vehicle has been taken without such authority, drives it away. The offence of stealing a vehicle is committed when the vehicle is taken by persons not having lawful access, or converted by one who had lawful access. For conversion to amount to stealing, it must be done with one of the fraudulent intents under section 254 (2) of *The Penal Code Act.*

[37] When he took the two items, the appellant stated that he only meant to keep them until the complainant caused the release of his brother. He was in effect asserting a lien as justification. A lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. English common law recognises a lien as a right to refuse the return of goods to the owner or another person asserting ownership or title over

them until the debt owed has been satisfied (see *Hammonds v. Barclay (1801), 2 East 227, 102 E.R*). A lien can arise in one of the following ways: by equity; by the operation of law (a legal or common law lien such as those engaged in business in which they are required by law to receive the goods; see *Robins & Co. v. Gray, [1895] 2 Q.B. 501;* or where there was an enhancement in value of the goods as a result of the work); can be bargained for, or extended, as a matter of contract (a contractual lien), or may be created by statute (a statutory lien). A particular lien gives the lienholder the right to retain goods to secure payment of charges for services provided in relation to those goods. A general lien gives the lienholder the right to retain the goods to secure charges other than those relating to the goods retained (such as for previous charges in respect of goods that have been returned to the debtor).

[38] In the instant case, the appellant could not purport to assert a lien based on common law since all of the common law liens which arise by operation of law are particular liens. General liens do not arise out of operation of law, but must be founded upon an express agreement or implied from a usage of trade (see *Trottier v. Red River Transportation Co., (1875-83) Man. R. 255, at 261-2 (Q.B.*). Outside the recognised realm of liens, one may not take or retain property to force another to take a particular course of action.

[39] An accused may be regarded as having the intent permanently to deprive even though he or she did not intend the victim to lose the chattel itself. It is enough if he or she intended to treat the item as their own to dispose of regardless of the victim's rights. An accused will be deemed to have an intention to permanently deprive the owner of the property if the taking was for a period, or in circumstances, which made it equivalent to an outright taking or disposal. For example under section 254 (2) (c) of *The Penal Code Act*, intent to permanently deprive may be inferred from imposing a condition as to its return which the owner may be unable to perform. Intent to ransom the property back to the owner is intent to permanently deprive (see *R v. Lloyd [1985] 1 QB 829*). On the other

hand, with regard to stealing a motor vehicle, intention on the part of the accused in denying the owner's right or to assert a right which is inconsistent with the owner's right is enough.

[40] The appellant treated the two items as his own, by undertaking to restore them to the owner only on the complainant undertaking a particular course of action. The intent to return the items upon the occurrence of an uncertain future event, such as the one he imposed under these circumstances, is tantamount to an intent to permanently deprive the owner of the items because the intent to return them was too tenuous and illusory to have any legal effect. Intent to keep the items indefinitely as ransom was an intent to deprive permanently. That the items were recovered only after his arrest does not compel the conclusion that the appellant intended only to temporarily deprive the owner of these items. The trial Magistrate thus misdirected himself when he found that the appellant did not have the intent to permanently deprive the complainant of those items since he intended to return them upon the release of his brother from police custody.

[41] Now turning to the sentence imposed, an appellate court will not interfere with a sentence imposed by a trial Court merely because it would have imposed a different sentence. It is now settled, that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstance (see *James v. R. (1950) 18 E.A.C.A. 147*; *Ogalo s/o Owoura v. R. (1954) 24 E.A.C.A. 270*; *Kizito Senkula v. Uganda, S.C. Criminal Appeal No. 24 of 2001*; *Bashir Ssali v. Uganda, S.C. Criminal Appeal No. 40 of 2003*, and *Ninsiima Gilbert v. Uganda, C.A. Criminal Appeal No. 180 of 2010*). The sentencing court, unlike the appellate court, has the benefit of being able to directly assess the other evidence, the testimony and the submissions of the parties, as well as being familiar with the needs and current conditions of and in the community where the crime was committed.

[42] The most important offence-specific sentencing considerations are the extent and value of the damage or destruction caused; the risk caused by the offender's conduct; the method used to cause damage or destruction; the degree of planning involved; the offender's purpose; the type of property damaged; and the drain caused on public resources.

[43] The maximum punishment for the offence of Arson C/s 327 (a) of *The Penal Code Act*, is life imprisonment. The appellant was sentenced to eight years' imprisonment. When sentencing the appellant, the trial Magistrate noted that the appellant had been on remand for eight months and was only 19 years old. He nevertheless considered the fact that at that age, the appellant should have controlled his emotions better. The illegal act was unprovoked. The complainant suffered considerable loss.

[44] The sentence is neither illegal, nor is it founded upon a wrong principle of the law. There is neither a failure to consider a material factor nor or is it harsh and manifestly excessive in the circumstances. It is not disproportionate in light of the aggravating factors. There is therefore no justifiable reason to interfere with it.

Order:

[45] In the final result, the appeal has no merit. It is accordingly dismissed.

Delivered electronically this 24th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :