

herein refer to them by names as "Wate," "Kakala," "Natsheba" and "Francis", respectively.

The facts of the case, as found by the trial court may be summarised as follows:-

On 6th December 1995, in the afternoon, the deceased, a tailor, was at her place of work at Kikholo Trading Centre, with her daughter, Felista Nasike, who worked with her. Suddenly a mob of people surrounded her and when, out of fright, the deceased tried to escape, she was grabbed by the attackers and was taken away being assaulted with sticks, clubs, pangas and stones. She was taken to Bushika Sub-county headquarters first, but was finally taken to, and dumped at Bududa Police Station, where she died shortly thereafter. Part of the way, she was made to run with the mob which, while continuing the assault on her, was chanting words that indicated she was going to be killed. Towards the end, the deceased collapsed and was dragged on the road up to where she was finally dumped. The whole episode lasted from about 4 p.m. to about 8 p.m. A medical examination was carried out on the deceased's body the following day, and the cause of death was found to be internal brain haemorrhage. The case against the four appellants was that they were part of the mob, and that they had each actively participated in the assault on the deceased, which assault, led to her death.

The case rested on the evidence of two eye witnesses, namely: Felista Nasike who gave evidence as PW3, and Davis Wamaniala, who gave evidence as PW2. Felista Nasike testified that she was working with her mother when the mob pounced on the mother and took her away assaulting

This complaint is directed at the statement in the judgment of the Court of Appeal, where the learned Justices of Appeal said this of Watete, Kakala, and Natsheba:

“1. *The learned Justices of Appeal erred in mixed law and fact on the issue of alibi in respect of the 1st, 2nd, and 3rd appellants.*”

There are three grounds of appeal to this Court. The first ground is:

Both witnesses testified that they had recognised the four appellants among the mob, as well as other persons who were not charged, some of whom had apparently fled from the area after the incident. Each of the two witnesses described what role each of the appellants played in the assault on the deceased. In addition, Davis Wamaniala testified that on an unspecified date, prior to the incident, the elders of Bumusisho Parish had convened a meeting at which it was resolved that persons practicing witchcraft, who were listed, should be dealt with. He attended the meeting and, according to him, so did the four appellants.

They continued to assault the deceased and took her away. She followed the mob and witnessed what was done to the deceased up to Bududa Police Station, where the deceased was dumped and died. Davis Wamaniala, a Parish Chief of Bumusisho Parish testified that on the fateful day at about 5 p.m., he was at Bushika sub-county headquarters when the deceased was brought there by a mob, which he estimated to be about 50 people. She was being assaulted, allegedly because her brother, Nambaale, had kept his instruments of witchcraft with her. He told the mob not to assault her, and not to punish her for Nambaale's wrongs, but to take her to police, and to bring Nambaale instead. The mob did not heed his advice.

According to the trial judge's notes, however, that sentence is part of the unsworn statement of Natsheba. Watete's unsworn statement is a narrative about his arrest on 17.2.96 allegedly on a charge of threatening one Sam Nambaale, about his appearances in court until 1997 when he was informed of other charges for an offence committed in 1995, and about his committal to the High Court for trial. He did not say anything on, or about where he was on 6.12.95 when the deceased was killed.

"I denied the allegation with reasons that most of the time I don't stay in the village, but I reside in Mbale."

In contending that Watete had set up an alibi at the trial, counsel erroneously ascribed to him the following statement appearing at p.46 of the record of appeal, i.e.

Mr. Nsibambi, counsel for the appellants, submitted to us, that each of the first three appellants had also set up a defence of alibi. He contended that Watete set up the defence in his unsworn statement to court at the trial, and that Kakala and Natsheba set up theirs in their statements to the police.

"The accused all made unsworn statements in their defence and made an outright denial, but A4 also pleaded an alibi."

The learned trial judge had implied the same thing when he said in his judgment:

It was the fourth appellant who put up a defence of alibi....."

".....they did not set up an alibi as a defence. Learned Counsel for the appellants was therefore wrong in criticising the learned trial judge for not considering the alibi set up by the first, second and third appellants."

The defence of alibi is set up when an accused person, wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of the crime. The law is well settled, that an accused person who puts forward an alibi as an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been. This emanates from the general principle propounded in the well-known decision of the House of Lords in WOOLMINGTON vs DIRECTOR OF PUBLIC PROSECUTIONS (1935) A.C. 462 to the effect that, with the exception of the defense of insanity, and some other statutory defences which are not relevant here, no burden ever rests on an accused person to establish his defence. That is true of the defence of alibi also. An accused person does not have any burden to prove his alibi. Needless to say, however, that for the prosecution to negative it, and more so, for the court to

Ms Khisa, Principal State Attorney, supported the view held by both courts below, that the three appellants did not set up alibi in their respective defences. She submitted that in any case, failure to consider the alleged alibi did not occasion any miscarriage of justice in view of the quality of the identification evidence which was believed and relied upon.

For Kakala and Natsheba, Mr. Nsibambi made the proposition that each had set up the defence of alibi in the statement made to the police under charge and caution, on the premise that the statements were produced in evidence, as Exh.D3 and Exh.D4 respectively, and thereby became part of the defence evidence. He submitted that each of the statements put forward an alibi, which the courts below had erroneously ignored.

He too did not repeat that in his defence at the trial but, as we noted earlier in this judgment, he said in general terms, that at the police he had denied the allegations against him because "most of the time" he did not stay in the village but resided in Mbale. We agree that if what each of the two appellants said to the police was repeated to the trial court it would have amounted to putting forward an alibi in answer to the charge against him.

"On that day I was not even in the village but I was in Mbale Town."

He there said:
He did not, however, repeat that when, after the prosecution closed its case, he was called upon to answer the charge against him. Similarly, Natsheba was more specific in the charge and caution statement to the police, Exh. D4.

"on that day I never went out of my village."

In the instant case, the position of Watete is very clear. We have already indicated that, at the trial, he did not put forward any alibi as an answer to the charge against himself. And unlike the other appellants, he never made any statement to the police. Kakala also did not directly put forward any alibi in his unsworn statement at the trial. He gave a narrative, similar to that of Watete, about his arrest on 12.10.96 on allegations that he had threatened to kill Sam Nambaale; about his appearances in court and release on bail; about his re-arrest on 14.2.99 on the wrong accusation that he had jumped bail; and about his committal in May 1997. During that narrative, however, he said that in a statement he made to the police he denied the allegations against him. In the statement, produced as Exh.D3, what he had told the police, so far as is relevant, was:

consider it as the defence, the alibi has to be put forward as the answer to the charge.

We also agree that there was reasonable similarity between what each one said to the trial court and what he had said to the police. We, however, do not accept the inference implicit in Mr. Nsibambi's proposition, that because each appellant's charge and caution statement was produced in evidence, the contents thereof automatically became the maker's answer to the charge he faced at the trial. Subject to what we shall say later in this judgment on the latitude to be accorded to an accused person, in the instant case it is pertinent to consider the purpose of tendering the statements, Exh. D3 and Exh. D4, in evidence. We think that purpose can be deduced from the defence counsel's final submissions to the trial court. He submitted:

"...PW2 and PW3 testified that the accused persons remained in their village after the death of the deceased. This is in itself conduct from which the court may infer that they did not participate in the crime or else they would have run away as the RC III ChairmanIn their dock statements the accused repeated what PW2 and PW3 stated that they remained in Bushika until their arrest.

- A2 (i.e. Natsheba) was arrested 3.2.97. He has a charge and caution statement dated 6.2.97 (i.e. Exh.D4).
- A3.....
- A4 (i.e. Kakala) was arrested 12.10.1996. He exhibited his charge and caution statement dated 6.2.97 (i.e. Exh.D3)."

Clearly the purpose was to show how long it took for the appellants to be arrested, after the offence was committed. In our view the statements were not produced in evidence to set up alibi. We are fortified in this view by the fact that, in his final submissions to the trial court, defence counsel canvassed the defence of alibi for Francis (A5) only, and not for Watete, Kakala or Natsheba the other appellants (A2, A3 and A4).

Mr. Nsibambi, in his submissions to us, sought to also rely on a concession, made by counsel for the state at the hearing of the first appeal, that the trial

judge did not consider the alibis set up by the three appellants. We find no substance in this submission, because the concession, such as there was, does not amplify the content of what the appellants stated to the trial court in answer to the charge against them, which contents, as we have held, did not set up any alibi.

We should observe that generally the court should go a long way to give an accused person, particularly one on a capital charge, latitude in the presentation and interpretation of his defence. The court should, where appropriate, consider any relevant material lawfully before it, if it be favourable to the defence. However in view of all the foregoing, we are unable to fault the Court of Appeal for the stance it took, that the three appellants, i.e. Watete, Kakala and Natsheba, did not put up the defence of alibi. What is more, we are satisfied that in the instant case, having regard to the evidence as a whole, even if Kakala and Natsheba were taken to have put up alibi as their respective defences through Exh.D3 and Exh.D4, the same would have failed, as did that of Francis. Consequently, the first ground of appeal fails.

Mr. Nsibambi chose to argue the second and third grounds of appeal together. They read:

- “2. The learned Justices of Appeal erred in mixed law and fact when they did not consider PW2's evidence as accomplice evidence and/or evidence of a person with a purpose of his own.
- 3. The learned Justices of Appeal erred in law when they failed to properly re-evaluate all the evidence before it thereby upholding the erroneous findings of the trial court”

The question in the second ground was not raised in the Court of Appeal. However, because the question raised was an issue of law, we allowed Mr. Nsibambi to argue the ground before us. Counsel submitted that PW2, Davis Wamania, was an accomplice witness or, in the alternative a witness who had a purpose of his own to serve, and that in either case his evidence ought not to have been relied upon without the court warning itself of the need for corroboration. In support of the contention that the witness was an accomplice, counsel argued that by reason of having attended the meeting at which it was resolved to round up and kill persons practicing witchcraft, that witness was guilty of inciting the incident in which the deceased was killed. In respect of the alternative, counsel pointed to the witness's evidence about his attending the said meeting, where he said:

“It was my duty to collect information affecting security and pass it on to my superiors.”

On basis of that, counsel invited this Court to conclude that Davis Wamania was a witness who had a purpose of his own to serve, and whose evidence was unreliable in absence of corroboration. Counsel relied on R vs BECKS (1982) 1 ALL ER 807; and R vs PRATER (1960) 1 ALL ER 298, in support of his alternative submission. In conclusion, he submitted that if the Court of Appeal had properly re-evaluated the evidence it would have found that PW2's evidence was unreliable.

In reply Ms Khisa argued that PW2 cannot be classified as an accomplice merely on the ground that he attended the meeting convened by the elders. She argued that he did nothing in furtherance of the resolution of the meeting. On the contrary, the only evidence available showed that he did not approve the decision of the meeting. She also submitted that the Court of Appeal had thoroughly evaluated the evidence on record.

It is trite law, that in a criminal trial, it is unsafe to rely on accomplice evidence unless it is corroborated. However, the trial court may do so, if, after warning itself of the danger, it is satisfied that the evidence is reliable. An appellate court therefore will quash a conviction based on accomplice evidence, if it is uncorroborated and the trial court failed to warn itself accordingly, (see OBELI vs UGANDA (1965) EA 622). In the instant case, we have to determine first whether PW2 was an accomplice witness, before considering if his evidence required corroboration, and/or the courts below ought to have treated it with caution.

In a criminal trial, a witness is said to be an accomplice if he participated, as a principal or an accessory, in the commission of the offence which is subject of the trial. The clearest case of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after trial. However, even in absence of such confession or conviction, a court may find, on strength of evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly, evidence that a witness conspired to commit, or, (as is contended by Mr. Nsibambi in this case) incited the commission of the offence under trial, would be sufficient evidence of such participation and would justify the trial court in treating such a witness as an accomplice; and if the trial court fails so to do, the appellate court would quash a conviction based on that witness's evidence if it be uncorroborated, (see D.R. KHETAN vs R (1957) EA 563).

In the instant case, however, we have found no evidence on record that Davis Wamaniala participated in the offence in question. The only evidence

We now turn to counsel's alternative submission, that Davis Wamaniahala was "a witness with a purpose of his own to serve." No previous decision of this Court or its predecessors pronouncing on such categorisation of a witness was referred to us, nor have we found any. The category, or, more aptly, the description appears to originate from the English decision of the Court of

the Court of Appeal to classify PW2 as an accomplice. hold that there was no evidence that would have justified the trial court or in question: see KAMAU vs REPUBLIC (1965) EA 501. Accordingly we participant in the preparations for, let alone in the commission of the offence and/or failure to report to the sub-county chief or police did not render him a furtherance of that resolution. Mere passive attendance of that meeting in there was no evidence to show that Davis Wamaniahala did anything in the resolution to kill the witches and wizards. We agree with Ms. Khisa that evidence that he was party to, or that he otherwise supported or encouraged inference, his assertion that he disapproved of the meeting. Nor is there any *village to village*. There is no evidence to contradict, expressly or by chief, he reported it to the RC III Chairman who, as a result, went from He also testified that though he did not report the meeting to the sub-county "I disapproved of the meeting."

young men to kill witches and wizards. However, he added: this in cross-examination, when he said that the meeting resolved to select that those who practiced witchcraft should be dealt with. He elaborated on whom he named. In examination-in-chief he said that the meeting decided the meeting was convened by the elders of Bumusisho parish, some of such participation, was given by Davis Wamaniahala himself. He testified that concerning the meeting from which Mr. Nsibambi would have us deduce

Criminal Appeal in R vs PRATER (1960) All ER 298, where at p.300 the

court said:

“The court, in the circumstances of the present appeal, is content to found itself on the view which it expresses that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given.”

The witness envisaged in that proposition, is apparently one who is likely not to testify truthfully because of some personal purpose he wishes to serve or effect, as for example to cover up his wrong doing. However, the proposition in R vs PRATER (supra), was so watered down in subsequent decisions, that it appears to be no longer an authority of substance. Four years after that decision, the same Court of Criminal Appeal, in R vs STANNARD (1964) 1 ALL ER 34, at p.40, explained the proposition in the following terms:

“The rule, if it be a rule, enunciated in R vs PRATERS (supra) is no more than a rule of practice. I say deliberately “if it be a rule” because, reading the passage of the judgement it really seems to amount to no more than an expression of what is desirable and what, it is to be hoped, will more usually than not be adopted, at any rate where it seems to be appropriate to the learned judge. It certainly is not a rule of law”

In a much later judgment of the Court of Appeal, Criminal Division, in R vs BECKS (supra), a number of decisions since R vs PRATER (supra) were reviewed, and the court opined that the Prater case did not extend the law regarding accomplice evidence. The conclusion of the court on the issue was as follows:

“While we in no way wish to detract from the obligation on a judge to advise a jury to proceed with caution where there is material to suggest that a witness’s evidence may be tainted by an improper motive, and the strength of that advice must vary

according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

We agree with that conclusion. Whenever the court is evaluating evidence and assessing its credibility, all factors likely to colour, taint or in anyway affect a witness's truthfulness or accuracy, must be carefully considered. The witness's motive for testifying, when evident, is one of such factors. Similarly, a witness's opportunity to observe what he claims to have witnessed; and a witness's experience on matters on which he gives opinion evidence, are factors that the court takes into consideration. All those and other factors, when applicable, assist the court to determine, what weight and therefore, reliance, if any, to place on the witness's testimony. However, the legal requirement for a warning on the need for corroboration is in respect of accomplice evidence. What is akin to that is the requirement, which has grown in practice, and which has been pronounced on by this Court in many of its decisions, for the court to warn itself of the danger of convicting solely on identification evidence, especially of a single witness, where the circumstances were not favourable to correct identification. There is no legal requirement to treat a witness who has a purpose of his own to serve in a special way, though that purpose may be taken into consideration when assessing the witness's credibility.

The thrust of Mr. Nsibambi's argument in describing Davis Wamaniala as a witness with a purpose of his own to serve was not clear, but it was hinged on the following statement made by the witness in cross-examination:

“It was my duty to collect information affecting security and pass it on to my superiors. I reported to RC III Chairman as a result of which he moved from village to village.”

We do not accept that, that statement *per se*, was indication that the witness had a purpose of his own to serve, rendering his evidence so suspect as to require it to be treated with caution. The role of a chief in matters concerning security, as well as in matters of maintaining law and order in his locality, is a matter of common knowledge and is prescribed by law: see Section 33(1) (f) and (h) of the Local Government (Resistance Councils) Statute No.15 of 1993 which was in force then. In gathering information on those matters and reporting it to his superiors, or giving testimony on that information to court, the witness was not serving a purpose of his own but was serving the state he is employed to serve. Furthermore, he was not shown to have lied or exaggerated in order to cover up any wrong doing on his part.

On the whole we do not find any reason why, the Court of Appeal, or for that matter the trial court, should have treated the evidence of Davis Wamaniala with any more caution than is necessary in respect of an ordinary witness. Besides, it must be said, Davis Wamaniala was not the only eye witness who implicated the four appellants. They were also implicated by Felista Nasike, another eye witness, as already pointed out earlier in this judgment. Finally we are satisfied that the Court of Appeal amply re-evaluated the evidence as a whole. The second and third grounds of appeal must also fail.

In the result the appeal fails and is dismissed.

DATED at Mengo this 20th day of November, 2000.

A.H. ODER


Justice of the Supreme Court

J.W.N. TSEKOOKO

Justice of the Supreme Court

A.N. KAROKORA


Justice of the Supreme Court

J.N. MULENGA


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