THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, MUKASA-KIKONYOGO, J.J.S.C.)

CRIMINAL APPEAL No. 51/99

B E T W E E N

NYAKAHUMA MOHAMED

>>>>>>>>>>>>>>APPELLANTS

BAGONZA WILBERFORCE

A N D

UGANDA>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>RESPONDENT

(An appeal from the judgment of the Court of Appeal (Okello, Engwau and Twinomujuni, J.J.A.) dated 11th October, 1999 confirming the conviction and sentence imposed on the appellants by the High Court at Fort Portal (Katutsi J.), on 19th November, 1998 in Criminal Session case No. 275 of 1993)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the Court of Appeal dismissing the appellants' appeal against conviction and sentence for aggravated robbery contrary to sections 272 and 273 of the Penal Code Act.

The facts of the case are that in the night of 23rd August, 1991, at around 8.30 p.m. the occupants of motor vehicle Reg. No. UPN 342, who were

travelling from Kampala to Fort Portal were stopped and fired at shortly after reaching Kyenjojo in the Kabarole District. The occupants who included Beatrice Basemera Butiime, a Minister's wife, Hon. Deo Rwabiita, a member of Parliament, Miss Florence Mutegeki, a housegirl, and Mr. Denis Tibandeke, a driver, fell into an ambush staged by three robbers two of whom were armed with a gun and a stick respectively. The victims were ordered out of the vehicle and forced to lie down. They were beaten up. The third robber ransacked the vehicle and took away personal effects of the occupants mentioned above . Some of the occupants had their persons searched by the attackers and robbed of property they had with them. After the incident, the robbers ordered the occupants of the vehicle to return on board and be driven away, which was done.

At the earliest opportunity in the morning, the victims reported the incident to Kyenjojo police post. In the course of their investigations, that same day, the police stopped a bus coming from Fort Portal with passengers in it. Two suspects who turned out to be the appellants were identified as two of the robbers. They were arrested and later charged and convicted of aggravated robbery and sentenced to death. Their appeal to the Court of Appeal was heard and dismissed. Hence this appeal.

The Memorandum of Appeal contains the following grounds;

1- The learned Justices of Appeal erred in law when they confirmed a conviction and sentence of robbery, based on the doctrine of recent possession of property that was not the subject of the indictment.

2- The learned Justices of Appeal did not properly apply the principles of the doctrine of recent possession to the facts of the case, thus erring in law when they confirmed the sentence.

3- The learned Justices of Appeal erred in law to uphold a conviction and sentence relying on the evidence of PW6 and PW7 which was full of contradictions and inconsistencies.

4- The learned Justices of Appeal did not reevaluate the evidence and subject the same to fresh scrutiny.

During the course of his submissions, Mr. Tayebwa, learned counsel for the appellants, abandoned grounds 3 and 4 of the appeal. On ground 1 of the appeal, Mr. Tayebwa submitted that the basis upon which the appellants were convicted and sentenced to death for aggravated robbery was the doctrine of recent possession of stolen property. He submitted that whereas the appellants had no problem with the manner in which both the learned trial judge and the Justices of Appeal defined and perceived the doctrine *per se,* it was his contention that the learned judge wrongly applied the doctrine to the facts of this case while the Justices of Appeal failed to reevaluate the evidence and therefore were unable to detect the error made by the trial court.

Mr. Tayebwa contended that the particulars of the offence in count 1 of the indictment against the accused in the High Court show that the property listed therein belonged to one Mrs. Beatrice Butiime, PWI, and yet the conviction on that count was based on the evidence and stolen property of other witnesses, namely, Deo Rwabiita, PW6, and John Alenda, PW7. Counsel further contended that in any event, the trial judge had rejected the evidence of Mrs. Butiime whom he described as a liar and unreliable witness and therefore any property disclosed by her

false evidence could not be relied upon as the foundation of the indictment. It was therefore an error on the part of the learned trial judge to rely on that property as justifying the application of the doctrine of possession of recent stolen property. Counsel further contended that the omission by the learned Justices of Appeal to detect this error and reevaluate the evidence so as to enable them come to their own conclusions as a first appellate court was such an error as to amount to a miscarriage of justice. Learned counsel cited sections 20 and 137 of the Trial On Indictments Decree, 1971 and section 8 (2) of the Magistrates' Courts' Acts 1970 to support his submissions. He also cited **R.V Tambuvi** (1958) E.A 212, **Mawanda Edward v. Uganda,** Crim. Appeal No. 4 of 1999 **(S.C.)** (unreported), and **E. Kasaija v. Uganda** Crim. App. No. 21. of 1991..

For the respondent, Mr. Okwanga, Senior State Attorney, initially supported both the conviction and sentence of the appellants on both counts. He contended that the appellants and the deceased convict had been jointly and severally found in possession of all the property robbed from the complainants and had acted under a common purpose and the law did not require that a victim or victims be named in an indictment.

During the course of his submissions, Mr. Okwanga conceded that the drawing up of the indictment in count 1 was erroneous. The stolen property of Deo Rwabiita, PW6, and John Alenda, PW7, should also have been enumerated in count 1 of the indictment. Mr. Okwanga however, contended that ~~as~~ section 20 of the Trials On Indictment Decree does not require that victims of a robbery be named, and that it is still permissible under the law for this court to uphold the conviction on count 1.

In our view, the doctrine of recent possession of stolen property is a species of circumstantial evidence which, a court considers sufficient to justify a conviction for a crime committed, other than that of mere receiving of the stolen property in question. Since it is based on circumstantial evidence, the doctrine is not to be taken lightly either by the prosecution or the court. To justify its application, the evidence to which it is to relate and the link between that evidence and the suspect must be of such nature as to leave no reasonable doubt that the linkage has no other explanation than that it implicates the suspect firmly and irrefutably to the alleged commission of the offence. In a series of previous decisions, courts have stated and amplified the principles governing the doctrine of recent possession of stolen property. In **Andrea Obonyo V.R** (1962) E.A. 542, in which a gang of men carried out a raid on a small trading centre at Muganga in East Lake Province of Tanganyika, none of the prosecution witnesses could identify the appellants as having participated in the robbery and in the murder committed in the raid. The appellants were nevertheless convicted of the murder of a man found dead after the raid, on the basis of the application of the doctrine of recent possession of stolen property because the appellants were found in possession of some of the stolen property during the raid, six days after the commission of the offence. The same principle was applied in **Mawanda Edward v. Uganda,** Crim. Appeal No. 4 of 1999 (S.C.) (unreported), **Izongoza William v. Uganda,** Crim. Appeal No. 6 of 1999 (S.C.), (unreported) and **Kaddu George William v. Uganda,** Crim App. No. 11 of 1999, (S.C.), (unreported). In all these cases, however, the linkage between the stolen property and the accused persons led to the irresistible inferences that the accused persons had stolen the property during the commission

of the offences for which they were indicted. The cases reflect the principle contained in the provisions of S. 112 of the Evidence Act which provides that:

> *"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".*

However, for the doctrine to be applied properly, the evidence of the property alleged to have been recently stolen must be credible and the witnesses identifying the same must be truthful. In any event, the stolen property must be clearly and properly identified and found in possession of the accused. Count I of the indictment against the appellants and the deceased convict in this case read as follows:

> *"Count I* <u>*STATEMENT OF OFFENCE*</u>
> *Aggravated Robbery C/SS 272 and 273 (2) of the Penal Code Act.*
> <u>*Particulars of Offence*</u>
> *"Mohammed Nyakahuma, Wilberforce Bagonza and others still at large, on the 23rd of August, 1991 at Ngezi village in the Kabarole District robbed Mrs. Beatrice Butiime of cash Shs. 370,000. Handbag containing many valuables, three passports one with No. U070841, one camera, one dress, one kitenge, two bundles of keys, two novels, one man's hat, one cheque book and at or immediately before or immediately after the time of the said robbery used a deadly weapon, to wit a gun on the sad Mrs. Beatrice Butiime."*

It is quite clear from the evidence of witnesses that none of the items enumerated in count I were found on the persons of the appellants and the deceased after they were arrested and searched. The testimony regarding these items of property was given only by Mrs. Beatrice Butiime of whom and others, the learned trial judge said,

> *"I found PW1, Mrs. Butiime, PW3 Denis Tibandeke, and PW4, John Kamanyire, to be disgraceful witnesses. Each of them made*

claims which examined in light of the whole evidence were clearly false."

Having so observed, we are of the view that with respect the learned trial judge was in error to consequently conclude that, "I am therefore in complete agreement with both gentlemen assessors, that the prosecution have proved their case on each count.

We agree with learned counsel for the appellants that count I of the indictment does not comply fully with the provisions of sections 20 of the Trial on Indictment Decree, 1971, nor do we think that section 137 of the same Decree saves the conviction under the same count.. The Court of Appeal ought to have reevaluated the evidence in relation to ground 1 and as they did not do so, the appeal on this ground must succeed. We therefore allow the appeal on this ground. The conviction is quashed and sentence set aside.

On ground 2 of the appeal, Mr. Tayebwa submitted that both the trial court and the Court of Appeal erred in failing to consider the possibility that the appellants and the deceased convict were mere receivers of stolen property and not robbers. He contended that the two courts were in error to place greater emphasis on the evidence of Deo Rwabiita, (PW6), and John Alenda (PW7) merely because they appeared to be truthful witnesses. The prosecution did not disapprove the defences of alibi offered by the two accused persons at their trial. The possibility that they had been mere receivers of stolen property was not ruled out. Counsel contended that, therefore, on that basis, ground 2 of the appeal ought to succeed.

For the respondent, Mr. Okwanga supported the conviction on count 2 of the indictment. Counsel contended that, no error had been committed by either the learned trial judge in assessing the evidence or by the learned Justices of Appeal in reevaluating it. He contended that the evidence about the stolen property found in possession of the appellants and which came to be enumerated in count 2 included one wrist watch identified as belonging to Deo Rwabiita, PW6, and found in the possession of the first appellant and a shirt and a jacket identified as belonging to John Alinda, PW7, and worn by the Wilberforce Bagonza, the second appellant..

We agree with Mr. Okwanga that the watch, the shirt and the jacket had all been robbed from the witnesses the previous night during the raid on the motor vehicle in which the witnesses had been passengers. The trial judge found PW6 and PW7 to be truthful witnesses. Their evidence was accepted by the learned trial judge and his decision was confirmed by the Court of Appeal. The evidence of these two witnesses was corroborated by the fact that, on questioning, the two accused persons were able to take the investigating police officers and others to the nearby bushes where they had hidden the gun they used in the robbery and the said gun was recovered by the police. In our view, the trial judge was correct to conclude that,

"And talking about the doctrine of recent possession, accepting the evidence of Hon. Rwabiita, M.P. as I do that his wrist watch was found with the accused men on the morning following this robbery, I find that the two men were the thieves. This wrist watch could not have exchanged hands within such a short time"

The facts that there was a robbery in which property had been stolen and a deadly weapon used were stated in and accepted by the trial court. The learned Justices of Appeal having remarked that the trial judge

based the conviction of the two appellants on the doctrine of recent possession reiterated that doctrine thus,

> *"This doctrine states that a person who is found with goods or properties (*sic*) recently stolen will be presumed to be the thief unless that person sufficiently explains how he came to be in possession of those goods or property. In the instant case, the trial judge was satisfied on the evidence that the two appellants were found in possession of stolen property barely twelve hours after they were robbed at gun point. The appellants never gave any explanation as to how they came to possess the property."*

In our view, both the learned trial judge and the Justices of Appeal correctly assessed the evidence and rightly applied the doctrine of possession of recently stolen property to the facts and circumstances of this case. In **Izongoza William v. Uganda** (op.cit), we said,

> *"The present case is one of the exceptions to the rule that the onus of proof in criminal cases always lies on the prosecution. In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduced adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation otherwise the evidence of recent possession is sufficient to convict the accused of robbery."*

Let us reiterate what was said in **Simon Musoke v. R.** (1958) E.A. 715, that,

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding on a conviction, find that inculpatory facts are incompatible with innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

In consequence, we find that there is no merit in the second ground of appeal. It must accordingly fail and in the result the appeal on conviction is dismissed. In respect of that count.

Having convicted the appellants on both counts, the learned trial judge sentenced them on the first count but suspended sentence on the second count. We have allowed the appeal on ground I, quashed the conviction and set aside the sentence but confirmed the conviction on ground 2 which covers count 2 of the indictment. Accordingly, we are obliged to impose sentence ourselves which we do under section 8 of the Judicature Statute, 1996. Mohamed Nyakahuma and Wilberforce Bagonza you shall each suffer death in the manner authorised by law.

DATED AT MENGO, THIS 12th DAY OF DEC. 2000

A..H. O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

L.E.M. MUKASA-KIKONYOGO

JUSTICE OF THE SUPREME COURT