

TANZANIA / JUDGMENT

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. ' ,. IN THE HIGH COURT OF TANZANIA ATMWANZA APPELLATE JURISDICTION HC. CRIMINAL APPEAL NO.SB OF 2006 (Original Cr. Case No.123 of 2005 of the District Court of Bunda District at Bunda Before: M.P. NDAGIJE - District Magistrate} JUMA s/o BUNYIGEAPPELLANT Versus THE REPUBLIC RESPONDENT 27/6/2007 & 25/7/2007

JUDGMENT

RWEYEMAMU, 1: The appellant Juma Bunyigo was charged with another for the offence of armed robbery c/s 285 & 286 of the Penal Code as amended. He was convicted and sentenced to serve 30 years imprisonment, a decision he now appeals. His colleague, 2nd accused at trial was acquitted. In his four (4) grounds of appeal, drawn on his behalf by Mr. Outa Advocate, he faults the trial court for; failing to analyze the evidence regarding his arrest - "failure to rule in whose room the stolen medicines were found" (i.e. challenges evidence of possession); basing conviction on uncorroborated evidence of accomplices; failure to take cognizance of his alibi. Mr. Makwega assisted by Mr. Yakhout state attorneys for the Republic support conviction submitting in response that; possession was proved because the room where stolen medicine (herein after, the property) were found belonged to the appellant as testified to by Pw5' the appellant's landlord, supported by Pw4 a Sungusungu commander and Pw8 a police officer among others. Further they submit; that there was sufficient evidence proving that the appellant was the one who showed and opened the room in which the property was found; that the property was recovered shortly after it was stolen; that as no reasonable explanation was given by the appellant consistent with innocent possession, the appellant was guilty under the doctrine of recent possession. Regarding the appellant's alibi, they submit that the distance between the scene of crime and the appellant's home was so short that his alibi did not exclude the possibility of his having committed the offence. They discredit the claim that conviction was based on uncorroborated evidence of accomplices by submitting that the same had no factual basis, and that even if the witnesses were indeed accomplices, of which they were not, what mattered was their credibility. From the evidence on record and parties' submissions, the fact that; the offence committed was armed robbery; the medicines stolen therein, recovered and tendered in court as exhibit belonged to the complainant Pw5; and that the appellant offered no explanation consistent with innocent possession, are not disputed. The contested issue is whether there was sufficient proof that the stolen medicines were found in the appellant's possession? The answer

to that question is dependant on the finding on three sub issues; one, whether the prosecution witnesses who testified to the fact of possession were credible ones, two, whether 2 " those witnesses were accomplices, and three, whether the appellant's alibi raised a reasonable doubt in the prosecution's case. I have no hesitation to state at this juncture that the appellant's appeal has no merit. Why? The facts and evidence at trial on the main support arguments raised by the two learned state attorneys. Those facts and evidence at trial were as follows: On the night of 15/5/2005 the pharmacy shop of Pw 5 was broken into by armed bandits and the night watchman Pw 2 attacked and slashed with machete, a fact witnessed by Pw 1 who was sleeping in the house in question. Pw 5 was called in about 1.00 am the same night and an alarm was raised and the police informed. In the meantime shortly after that break in, the appellant turned up at his home about 3.00 am carrying luggage and Pw 3 (it would appear a co-tenant) opened the door for him. According to that witness, the appellant deposited the luggage, left, and returned later about 6 am as she was boiling morning tea. She testified that soon thereafter, a crowd of people with Sungusungu, surrounded their house, recovered the luggage the appellant had brought which was found to contain "certain medicine"~ She was initially apprehended with the appellant, but only the appellant was later taken to the police and charged. On those facts, was Pw 3 an accomplice? In my opinion, I think not. Why? The answer to the question whether a witness is an accomplice or not is one of fact, it has to be determined in light of surrounding circumstances in each case. Although it has been held 3 that "a person who has seen a crime committed, but keeps quiet is no better than an accomplice"; the facts here were different. First, there was no evidence that Pw 3 knew that the luggage the appellant brought was stolen. Further, according to evidence the property was brought in about 3.00 am and the arrest followed early the following morning, as such, even if she had suspicions about that night luggage, she had not had opportunity to take appropriate action. She came clean at the first opportunity by telling the search party what she saw happen. Two, her account was not controverted by the appellant in cross examination or in his own testimony at trial, rather the appellant admitted that the two were co tenants. Neither did the appellant suggest or give reasons why Pw3 would fabricate the story against him. For the above reasons I find that Pw 3 was not an accomplice in fact and therefore that her testimony was properly relied on. But there is more regarding recovery of the property, Pw3's story was fully supported by other witnesses as follows: There was Pw 5,'s testimony, the appellant's landlord, who also confirmed that the appellant was his tenant; testimonies of those who responded to the alarm and made a follow up to the appellant's home including, Pw4 the area Sungusungu commander, Pw6, Pw7, Pw9 and Pw 10 among villagers who responded to the alarm and a police officer Pw8. These witnesses were clearly not accomplices, but villagers and neighbours who answered the alarm and provided a kind of 'first aid'; as per usual practice in most communities in this country, of forming an instant search party to go after the culprits 4 and recovery of stolen properties, luckily this time the police were involved sooner. The account of events by all the above witnesses was similar in material particulars, and it corroborated Pw3's testimony regarding events at the time of recovery of the property and what the appellant said there and then. They all said that it was the appellant who opened the room where the baggage with the property was; that after interrogation they heard him claim that the property was brought by other people (a version the appellant abandoned at trial), who he proceeded to

mention among them the 2nd accused and several others. According to those witnesses, those mentioned by him were arrested, beaten by the mob leading to death of one of them, one SIMBA MZEE. The appellant was in fact lucky to escape with his life after sustaining injuries from the beating due to presence of Sungusungu and the police officer - Pw4 and Pw8 respectively, who prevailed over the crowd. From the above account, the trial court can not be faulted for finding that the appellant was found in possession. Even if Pw3 is treated as an accomplice (of which I have already concluded that she was not), in law the court may act on that evidence even if uncorroborated if it is satisfied considering the surrounding circumstances, that the evidence could be safely relied on. See *The OPP v. P2261 Capt. Sam Mwanidela and 3 others (CAT)*, Cr. Appeal 14/1991 (Mbeya sub-registry, Unreported). On the facts, possession was testified to by Pw3 whose story was corroborated by other witnesses named above, who were clearly neutral witnesses. In view of that, I agree with the trial court and submissions by the Republic that the appellant was found in possession of property stolen a few hours earlier. Under such circumstances, where the accused gives no reasonable explanation of possession, he is found guilty of the offence charged under the long established legal precedent that; "..... if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case the court may legitimately infer that he is a thief or breaker or guilty receiver"~ See *OPP V Joachim Komba* 1984 TLR 213. The appellant gave no explanation in court of that possession instead he relied on the defense of alibi. That alibi was apparently not considered by the trial court as rightly submitted by the appellant. The question for decision now is what was the effect of that omission, and what should this court do? Being the 1st appellate court I am empowered to reevaluate evidence and come to a decision on the issue (See *TCA in Kulwa Kabizi, Paulo Besu V R* (1994) TLR 210 and *Salum Mhando V R*, (1993) · TLR 170 among others). In that regard, I note from the record that the appellant did not give notice of the alibi "before hearing of the case" or "at any time before the case of the prosecution is closed" as required under section 194 (4) & (5) respectively of the Criminal Procedure Act. What is the effect of that? When an accused raises an alibi without following that procedure, the court must take cognizance of it, but in its discretion ~ ~ ; is entitled to give it no weight- see *Charles Samson v. R*, (1990) {TCA} ? } TLR 39 where that court allowed an appeal where the trial court had taken no cognizance of an alibi though given contrary to the cited provision. See also *Tongeni Naata v. R*, 1991 TLR 54 and a recent TCA decision (16/4/2007) stressing the point in *Ogawa Butunga & James Elikana Magori v. R*, Cr. Appeal 121/2005 (Mwanza sub registry, unreported). The court can also give no weight to an alibi raised as per procedure or not, if in the circumstances of the case, the same is not found to be worth of belief, a position I take in this case. Considering that the alibi was not raised as per procedure; the compelling evidence above, including the fact that when the appellant was caught 'red handed' so to speak, his first reaction was to name other people as the ones who brought the property to him; a claim he chose to abandon at trial, I find that the alibi was not credible enough to raise doubt in the otherwise strong case of the prosecution. In a nutshell, I concur with the trial court finding that the appellant was found in possession of very recently stolen property; that he gave no reasonable explanation of possession, and that his alibi, was. not sufficient to raise any doubt at all in the prosecution's case. He was therefore properly found guilty of the offence charged under the doctrine of recent possession. The appeal has no merit and is hereby

dismissed. Sgd: R. M. RWEYEMAMU . JUDGE 20/7/2007 7 •/, ,,,.,. t'l~) /-• , AtMwanza 1 . •' 4
25/7/2007) !>w Delivered in the presence of the appellant in person and Mr. Yakout - t State
Attorney - Trainee for the republic this 25th day of July 2007. ' \ . ~ight of Appe_al Explained. Sgd:
R. M. RWEYEMAMU JUDGE 25/7/2007 I' . 8 \

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