

TANZANIA / JUDGMENT

19760604 TZHC Arusha

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TZHCDECIDED
4 June 1976

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IN THE HIGH COURT OF TANZANIA H7 L AT ARUSHA ALPELL102 JURISDICTION HIGH COURT
CRIMINAL APPEAL NO 0 347 OF 1974 O/F H/C CRIMINAL 1,2 PLIL N0248/74 & 303/74 ORIGINAL
CRIMINAL NO. 113 OF 1973 OP THE DISTRICT COURT OF TARUSHL DISTRICT AT ARUSHA
BEFORE: L. J. L. MWLTILSIICL, Esq, Resident Magistrate 1 DAVID JOHN O TIIT. A 1T TC\rDU . -
P DD1?TT P Nt1

- C.. LJ.&.J.Li _La.L.L.L S • S * • • S S • S • • • S .LJJU.LJJ4.h.1. 3 •NDEWARIO
KtJl'TDAELI . (Original Accused) vC-rsus THEREPUBLIC •
RESPONDENT
- . (Original prosecutor) .Trnmnirm JONLTHAN J. Th-ö .•thrc appellants were convicted
jointly.o • robbery with violence, c/as 285 and 286 of the Penal Code, and given the
inimum sentence.- The undisputed facts show that, on the relevant morning - a ah-oixb
nine-- o'clock three or four men driving in a s'colei cer arrived at the premises of Mbuguni/
Icarangai Moru Growers Co-operative Society.. No sooner - had they got through than the stored
into the office where, after subsequently assistant clerk (p.W.i) and a messenger .uion4g-
others, to terror they took from the safe-; the sl.n of i.56,429/65 c-ini - all the money there
was. they then inadvised in . that car taking the money "with them The prosecution call that he
appellants, in reference to, Whom I will in this judgment - •retain their respective
descriptions in the lower court, were the gangsters. For this reliance is placed mainly on the
evidence of P.W.1 2 P.7.4 9 P.W.5, P.W.7 and P.W.8. According to P.7,1 and P.4, - after three
people came out of the car two of them burst into the office while the third person, dressed
in an army (presumably T.P.D.P.) uniform and having a shot gun stood outside firing shots to
compel those who were around to lie down. The two men upon bursting in and finding the
witnesses tied them up together, apparently with a pair of handcuffs. They then asked for
key to the safe. It transpired that P.W.1 had one key- to the safe and a copy of the memorandum
of that society . copy key and that to open the safe. the keys had to be used. P.W.1 upon
pressure then gave the key to the man who had been tied up, namely, the 1st accused. That
key alone as just stated above would not open the safe. The gangster who had remained
outside having a gun in driving in the secretary of the society. He fired a shot at the
ceiling, the purpose of which was to have the victims

- make the second key available.- The /2 -2- The corn ñ.ttoe nail was called in to give the key to the robbers. In the meantime all the victims inside the office had been ordered to lie down.: The safe was opened. and P.W.1 on the order of the first accused assisted using one hand to put the money in a 'bank bag that lay handy. The two men after searching P.W.1 and P.W.4 for any money they might have had they undid the handcuffs and walked, with the bag containing the money. They locked the door behind them before disappearing in the car. . P.W.1 said he recognised only the first accused, although he 'had never known him previously, this because he was the one who had tied them up and who later undid the handcuffs. The witness's uncle, appeared, to have known the 3rd accused. but he seems to have been clear that he did not see him there. said that, had he been one of the robbers 'he would most probably. have known him. As for the 2nd accused he said he 'couldn't know for as far as he was concerned the office with the 1st accused because, as he said, he was not that near and he was himself looking down as ordered by the robbers. P.W.4 9 like. P.W.1, recognised only the first accused. He had been looking, down, 'he said, but he..recognised, him at the time he was untied 'the handcuffs . As to this, clearly...c, the 1st accused was wearing the version of this uniform is somewhat different from that of P.W.1. He said the accused was wearing a pullover and only the 2nd man had an army uniform on. P.W.1, on the other hand, had said the 1st accused was wearing a spotted army uniform.
- P.W.5 was the committee member with one of the foremen. He had been on a lorry outside the sacks when he saw three people, of whom one 'told' a man, 'got into the office. He was then called into the office and, believing that the visitors were cooperative inspectors, he complied. Once he was in the office, he said, the gun. man ordered him to lie down while another person do. and then gave the key to the safe which he duly. gave to the 1st. 'for money, he added the 2nd accused untied the handcuffs on P.W.1 and P.W.4.. It will be recalled that these two witnesses said this had been done by the 1st. accused. The witness did not recognise the gun man, but he claimed to have recognised the 1st and 2nd accused. In one breath he described the dress of the 1st accused as a pullover (as P.W.4 had done)' but in another he said it was an army uniform in the shape of a coat. and not to the accounts of P.W.7 and P.W.8. They were both working on board that lorry when the violent visitors came. according to the man one of them, a tall, man, was wearing an army uniform and had a shot gun which he fired and ordered them to lie down. The other two men had in the meantime entered the office. The gunman had later driven the secretary of the society '(not a witness) and the committee man into the office' and then continued, out firing more shots, 'the purpose of which was to terrorise P.W.8 in particular, thereby forcing him to run away. This witness recognised the 3rd accused as being that gunman, while P.W.7 said he recognised not only the 3rd accused but also the other two who entered the office 'and being' the 1st and 2nd accused. As regards /3 -3- As regards his identification of the 1st and 2nd accused it would be an opportunity for P.W.8, this because unlike P.W.8 he was, still on the lorry when they came out. It would be fair to appear, according to P.W.7, that there were SpCOs in the building the floor work comprising the tray of the lorry through which the witnesses were able to see what was happening. After the police received report of the robbery

P.W.10 on the same day acting on a tip-off searched the rooms of the 1st, and the 2nd accused who were tenants in tile, sexio hOUSOI r Nothing was found but a short distance from the room of the 1st cctd thu vfitnesi found a piece of cloth buried in the sand. - It contained a u: of sle.966/, all in silver. At that same spot he covered nine rounds of ammunition and a pair of handcuffs. St. two. accusci ioru then arrested At an identification parade held on the - next day P.W.1 appears to have picked out the lot accused as being one of the robbers.: The '2nd' accused. although on that parade was not picked by the witness. The 3H accused had - not been arrested as yet - and was not on that parade. No other witnesses seem to have been called upon to assist; at that parade but (it a parade. held two days later P.W.7 identified all three accused while P.W.8 identified - only the 3rd accused. no indication if P.W.5 did any identification but in the case of P.W.4 it would appear he was not called. Both the 1st and 2nd accused had a common defence as testified by the former and adopted by the latter. They admitted the money and bullets were found at the house where they live. They however denied taking part in the robbery. They said - as regards the first parade that, although the eye witnesses were present they failed to identify them. At the second parade, however, they had picked on then, this - only because they were in a bad state and had dirty, blood-stained clothes as the result of having been beaten up and subjected to dog bites by the police with a view to extracting a confession from them. The first accused produced the clothes he had been wearing. They would seem to bear out his allegation that they had been tortured, and 'I would readily think they had been tortured. The first accused when referred to the evidence of P.W.1 When he said he had identified him at the first parade he said that was not true, the truth being that he had failed to give any identification. The 3rd accused in his evidence put up an alibi in that a couple of days previously to the incident he had been to the Government hospital where a doctor gave him an .D. (excused duty) - excusing him from duty for three days because he was sick - - On the relevant day, however, he could not have been at the place where the offence was committed, especially as he was required to call on the doctor once on each of the two following days. He had duly had no say the doctor on the morning of the incident, although he could not be clear as to the time. - He was picked up by the police - as he was returning, from an extra visit he had made to the hospital. He added /4 -1. 1 A He added that he was himself a resident of the area of bi..igi..uii. where the incident occurred, and he duly argued that if he had been one of the robbers the various other witnesses would have recognised him as they know him. He called two witnesses. His father was one of them. She testified that the name of her son was near the Cooperative Society. She also said that she had come to town on the relevant day to visit her son only to find him sick and having gone to hospital. Sohasuica (D.W.2) testified he had in fact attended to the 3rd accused and given him sick leave. He had also attended him on the two following days. He would however not reveal what time of the day he had attended. The evidence respecting the 3rd accused is of some difficulty. P.W.7 and P.W.8 soon after they recognised him. They also appear to have had sufficient opportunity to watch without themselves being soon to do so. Against this however there is the evidence of P.W.1 who said that he did not see him in the group and that he was one of them who would have recognised him, apparently because he focused his attention on Give of him and the witness

familiar with his appearance • Mention of this is evaded in the judgment but the learned resident magistrate does not appear to have indicated how much, if at all, he was giving it. This aspect, with respect, is not carefully considered. The witness had moved, up and down harassing the cooperative officials for a considerable period and in my view of the three he should have been the most conspicuous. It is a little puzzling, therefore, that he should have been recognised by two witnesses only, one of whom I may say was too foolish-stricken to be clear about the identity of that person. More importantly not only would the other witness, especially P.W.1, have recognised him as a man originating from that area, if he had been one of the gangsters, but it is also hard to say that the accused while fully knowing that the cooperative officials would easily recognize him as a native of the area he could nevertheless have exposed himself to that extent • His alibi should accordingly be viewed against such background. Such alibi does not exclude the possibility of the 'appellant having been at the scene' or created at the relevant time but having regard to the circumstances as a whole in my view it raises reasonable doubt that he may not have taken part in the robbery and I think it is not irrelevant to note in addition that it is not shown what led to his being arrested. Accordingly, his appeal is allowed. The evidence in regard to the other accused may be considered together. Both P.W.1 and P.W.4 seem to have recognized only the first accused, but P.W.5, and P.W.7 say: they recognized both accused. The first two witnesses say the 1st accused was the one who both tied and untied them, although P.W.5 said the undoing of the handcuffs was by the 2nd accused. It would seem that P.W.1 and P.W.4 were in a position to see clearly at least one of the robbers both at the time he burst in and at the time of removing the handcuffs. P.W.1 had the further opportunity of assisting that man in packing the money in a bag. There...../5 _5_;

- 4 There was light in the office and overall, there would appear to have been considerable opportunity for the two witnesses to be clear about the identity of that person. As for P.W.5: he was driven into the office to hand over the key. That should have afforded him sufficient opportunity to see the two robbers. P.W.7 was probably the boot placed of the in-as-much as he was put on the lorry throughout, from where he could watch with little risk of being detected. There is reason to believe therefore, though; he should have been able to recognise the person: if only at the time they came out with the loot. Apart from this evidence of identification, a large quantity of silver coins were found hidden not far from the rooms of the accused person. The cooperative society had got the money from the bank in order to make payments to members for the produce they sold to the society and it may be supposed that part of such money would normally have been in silver coins in order to facilitate payment. In those circumstances and considering that a pair of handcuffs and rounds of ammunition were also found there, there was an irresistible inference that the silver coins were part of the loot and that the handcuffs and bullets were those used by the robbers in the engagement. In view of such evidence it would seem clear the witnesses were not mistaken when they picked out the two accused as being among the gangsters. The accused may have been tortured and had bandages on them at the second identification parade, but it is to be noted that, at the first identification parade when P.W.1 picked the 1st accused the alleged

torture had not occurred as yet. At the second parade only P.W.7 and P.V.8 were called. The latter picked on the 3rd only who, it may be recalled, had not been subjected to any torture and he would not pick on the 1st and 2nd accused even though they had signs of having been tortured. This can only suggest he was not being influenced by the fact of such injuries as may have been apparent on the accused. P.W.7 on the other hand identified all three accused, notwithstanding that the 3rd accused had no injury on him. This would suggest that in picking on the culprits he was not being guided by the existence of injuries on any of them. There are also, as already pointed out, so many contradictions in the prosecution evidence. The learned resident magistrate seems to have had regard to that. He however attributed then to the passage of time there had been between the incident and the trial with the attendant lapse of memory. I would respectfully agree, and be that as it may, the contradictions are not so basic as to render the evidence of the witnesses unreliable. Notwithstanding the contradictions to which the two appellants in their petitions appear to attach considerable weight, and the fact that the appellants appeared to have suffered so many injuries when P.W.2 identified them, I am satisfied that their convictions were deserved. In the...../6-6-. In the result the conviction of the 3rd accused is set aside together with the sentence and it is ordered he be released forthwith. The appeals of the 1st accused and 2nd accused are however dismissed in their entirety.

- (p. M. JONJ) JUDGE. Delivered this 4th day of Jimo, 1976. (I.A. JONJIT) P.I./I.T.P.M. • JUDGE.

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Prepared on 24 October 2026 · Esheria