

UGANDA / JUDGMENT

Kivumbi v Uganda (Criminal Appeal 27 of 1993) [1994] UGHC 57 (21 January 1994)

[1994] UGHC 57

COURT

High Court of Uganda

BEFORE

Mukanza, J

CASE / FILE NUMBER

Criminal Appeal 27 of 1993

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The Hon. Mr. Justice F. M. S. Egonda. Nota

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CRIMINAL APPEAL NO. 27/1993 ORIGINAL CRIMINAL CASE NO. 662/90 ARISING FROM CHIEF MAGISTRATE'S

COURT OF BUGANDA ROAD

RICHARD KIVUMBI;:::::::::::::::::::::::::::::::::APPLICANT

-versus

\$UGANDA;:::::::::::::::::::::::::::::::::;\$

\$J U D G M E N T:-\$

The appellant Richard Kivumbi appeals to this court against the decision of His worship Joseph Mulangira Magistrate grade I Buganda Road delivered on 23rd April 1993 whereby the appellant was convicted of fraudulent false Accounting contrary to sections 305 (e) of the penal code and conspiracy contrary to section 373 of the same code and sentenced to 30months imprisonment on each count. Both sentences to run concurrently. The appeal is against both conviction and sentence.

According to the charge sheet A1 Phery Kwindo (a female adult and Richard Kivumbi A2 (appellant now) with other still. at large were charged of the following offences: -

Count 1. fraudulent false accounting contrary to

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section 305 (a) of the penal code.

ii. conspiracy to commit a felony contrary to section 373 of the penal code Act.

iii. embezzlement contrary to section 257(b) of the same code.

The particulars of the offence were that between the months of January and April 1990 at Kampala U. E. B. District office and Amber House U. E. B. Headquarters Phery Kwindo A Richard Kivumbi and others still at large being cashier and data control clerk respectively with U. E. B falsified 145 Bills payment receipts to read 775, 558 shillings instead of \$. / 2.\$

shillings 10, 134,045 the property of Uganda Electricity Board. And in the same period place and time the two accused and others still at large conspired to commit a felony to wit embezzled Shs. 9,358,457/= the property of U. E. B. And the same time. they embezzled Shs. 9,358,457/= \$.

After a full trial A1 and A2 were convicted of the offences as charged on counts i and ii but were both acquitted on count iii. A1 was fined Shs. 500,000/= on each count and in default was sentenced to 30 months imprisonment. Sentences to run concurrently. Appellant was sentenced to 30 months imprisonment on each count sentence to run concurrently.

As stated earlier on the appeal is against both the conviction and sentence. The appellant was represented by Mr. Kabugo whereas the state was represented by Mr. Semayombe from the department of public prosecutions; .

The appeal was preferred on the following grounds.

- (1) That the learned magistrate misdirected himself in law and in fact in convicting the appellant of fraudulent false accounting of computer run off which offence the appellant was not charged and or in convicting the appellant under S. 305 (c) penal code which had no relevance to the facts of the case.
- (2) That the learned trial magistrate misdirected himself in law in failing to strike out or reject the charge sheet for containing the charge of conspiracy and the substantive charge of embezzlement and in convicting the Appellant of conspiracy.
- (3) That the learned trial magistrate erred in law and in fact in holding that in the circumstances of this case there was no way that information on the public receipts could appear on the computer run off without the participation of the appellant and in holding that there was common intention between the appellant and the first accused (A1) or at all.
- (4) That the learned trial magistrate misdirected himself in putting the burden of proof on the Appellant and in believing the prosecution witnesses and failing to consider or consider sufficiently the defence raised, by the appellant. (5) That the sentences given to the Appellant was harsh and excessive in the circumstances.

Before I considered this appeal I was aware of the duties of this court as an appellate court to scrutinise and evaluate the evidence of the court below and draw its own conclusion bearing in mind that this court did not have the opportunity to see the witnesses testify as was the case with the lower court case. See: D« Pindya 7s. h: 195⁷ .5.70.«... P-uwala vs. - B.1957 EA 570 Okenoks Republic 1972 S-1 *2?. **

I am of the view that it ^j.^s appropriately ¹ summarise the evidence for both the prosecution and the defence before considering the grounds of appeals.

The prosecution called a total of about eight witnesses. PW1 was Stephen Kirongo. He was the senior internal auditor of the UEB. His testimony was the effect that A1 was one of the cashiers in the District office where the appellant used to work in the computer section as an input controller clerk at the Uganda Electricity Board Kampala offices.

In ¹⁹⁹⁰ he carried out some auditing in Kampala district concerning a period January 1990 to May 1990 of revenue corrections.

As he carried out the exercise he discovered that the receipts (duplicate) which were supposed to be filed some were missing. The duplicate receipts which were pink were

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were missing. The originals were ^e white whereas the triplicate were yellow. When a consumer has a cashier issues a white receipt which is the original receipt. It is even marked original. It is given to the consumer. The duplicate receipts are sent to the Revenue supervisor accompanied by the summary of the days collection whereas the triplicate are filed within the office concerned.

The revenue supervisor cross checks by adding the individual amounts on the duplicate receipts accompanying the accounts summary. After balancing he sends the duplicate receipts to the computer room to be fed in computer when he checked he found some duplicate receipts missing. From the computer the duplicate are sent to the finance department where they are stored. He never found the missing receipts. He requested the computer section to give him a summary run off of the period he was interested in. The summary run off contains the figures from the duplicate receipts. If things are run smoothly/normally the amount of three receipts should agree with the amount on the summary run off. He wanted to find out whether those reached the computer room.

He got the computer run off and he compared them with the missing duplicates and found the figures not agreeing. In that particular matter the figures on the run offs were much higher than the figure on the triplicate receipts, • ¹

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He referred to particular receipt and when he got the computer run off not agreeing with the figures on the triplicate and in view of the fact that the duplicates were missing he went to the computer supervisor for an explanation as to why the figures were different and the receipts in

question were missing. The supervisor referred him to A2 (the appellant). He did not meet A2. He contacted A1 and the cashier responsible for all the missing receipts. He pointed out to her the missing receipts, She apologised of what had happened after interviewing her. 'He looked at certain receipts and found that the

figure were different; iron that on the triplicate on the other hand some computer figures agreed with the original receipt. He pointed out that figures found on the duplicate receipts bore cashiers signature and she accepted that. He particularised that in the case of .11 one. ouaer cashiers he had come across they intend to make sure that the figures they put on the original receipt or the figures they put on the original receipt or the figures reflected the cash paid by the customers. Then they can afford to put particular figure on the duplicate and triplicate which audit is not regularly done and it takes time to detect the grounds.

The lesser figure on the duplicates and triplicates : indicates that the balance is pocketed. It was very possible that the cashier A1 connived with the man in the computer (2 the appellant) to make sure the figure fed in the computer tallies with the figure the consumer knows.

A1 apologised having forged the figure. He referred her to the head of the department who decided to refer the matter to the legal department and later it was a police case.

That Shs. 10,154,045/= had been misappropriated. The board received only 775,558/= for the period of 1st January to 31st May representing the loss of 95,558,457/=

When cross examined U1 replied that that A2's duties were to receive the duplicate receipts and distribute to machine operators to feed in the machine the figures. At the end of exercise he is supposed to balance to make sure that it agrees with the control that remains with him. A2 supervises the machine operator and works under computer supervisor. From the figure he got from the computer he confirmed that A2 connived with the computer supervisor). (A-1),

The evidence of Paulo Lingula IV/2 was that he was a senior computer operator in U. E. B. A2 was working in computer section as a double controller. His duties are:

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generally was supervise the well of the computer to see to it that they produce what they were expected to do. The computer is concerned with auditing. Its main use is to produce bills. A2 a data control clerk was given a special job regarding cash control. He knows how the receipting is done in U. E. B. When payment is made in a particular transaction the receipts are made in triplicates. The original is taken by the consumer. The duplicate and triplicate are the exact replace of the original. The duplicate is forwarded to revenue section which in turn forwards the same to computer section. The triplicate remains on the dispensing office.

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When writing on a rec int carbon papers an inter linked between the original and the duplicate and between the triplicate so that when one writes an a waceint all the three must bear the same information. The average receipt are sent to the revenue section. Receipts are received on computer from the revenue section every day. They are accompanied by a control slip indicating the range of recoints and the total amount there from.

The date control clerk in charge of cash receives those receipts and batches them out (gives them a batch not to enable him to identify his control of receipts on that day). The data control clerk passes those receipts over to data in put staff and retains the controll slips. He retains these control slips to be used later as a check off against the list he will eventually receive from the computer operator. The date in put staff reads off and transmits the necessary information into a computer file. After keying in information he returns the The totals receipt to the data control clerk for reconciling. against his control slips with receipts against the list. The list is the computer run off. The difference in totals is initially detected by comparing the control slips with the given totals on the computer run off. Whe data control clerk has the responsiblity of doing to doing the detects any mistake in the

figure he goes back to the receipts and checks them one by one against the computer run of call he strikes where the difference might be,

The evidence of $\mathbb{R}/2$ further showed that when there is inconsistence he is only left with the duty of informing the computer operator that all is well with that batch and that he can go ahead with other processes,

If the inconsistencies remain the data control clerk. That it is his duty to see his immediate supervisor who in that capacity would be senior computer operator and together they might find what the problem is. The receipts are sent to the accounts section for faling and safe custody.

During the period from January to around May 1990 the data control clerk was Richard Mivumbi (Appellant). As regards the final out put in his area is concerned he was the sole controller.

In May 1990 he was approached by the Internal Auditor who asked him to give him a last of all the Kampala District receipts issuing from January to a date in May 1990. The list he gave him was indicating the account numbers, receipt numbers, date issued and that amount on each receipt. He posted out a certain receipt No. Kampala 6539067 which was holding a computer Sigure of Shs. 962.505/= and the duplicate receipt was bearing 9.625/= shillings. That was an anomaly since the receipts were written in triplicate with carbon. That anormally must have seen detected by the date control clark who was checking that cash but not using the triplicate as it does not come to him. If the duplicate had a figure as what of the triplicate the date control clerk could not have missed to see such difference. That the batch he checked with the audit had all the values the customers had or still had on their receipts.

In cross examination RM2 replied that he was A2's supervisor that even his supervisor supervises him. A2 was date controller clerk in charge of carta was the sole man in charge though

there was a woman Catherine Kabuala understudying him. They could not accept work from her. His title was that of Data Control Clerk.

That work was done between January to May 1990 to his satisfaction. He did not know the manager who brought the cash control slip and the duplicate receipts in his office. But they were received by Richard Kivumbi because they were being batched and controlled by him. The receipts did not show who controlled them. There was no evidence of receipt of those receipts. At that time it was only Richard Kivumbi who could batch and control the receipts. If it happened that Kivumbi was sick he could receive the receipts, but it was not for any person to receive the receipts, Christine Kasule was not authorised to receive documents but she could have received these documents. At the time of that incident there was no register for movement of documents. They now have a register to avoid appearing in court again. The absence of a register created a loophole which could lead to frauds.

PW3 was Francis Boengo deputy commercial and consumer service manager then revenue supervisor in U. E. B. His evidence as regards the issuance of receipts was similar to that of PW1 & PW2. He discovered some fraud in the computer section. Duplicate receipts did not tally with the originals nor did they tally with the duplicates. They did not recover all the original duplicate and triplicate receipts involved in the fraud. (He identified the duplicate receipts involved in the fraud.

At the time of the day's business all duplicate receipts are totalled and must tally with the cash collected. After that the renewing cashier hands over to the chief cashier who cross checks the totals and balances in readiness to bank the proceeds the following day. \$...19.\$

When banking is done by the chief cashier the duplicate receipt is prepared by the chief cashier and brings it in with the receipts showing all the totals on the receipt,

A computer is supposed to produce a cash run off which is a measure of checks and balance is supposed to be equal with the value of the receipts. That cash run off is later sent to the district for them later of reconcile.

The witness pointed out receipt No. Kampala 6584775 where there was the original triplicate, the triplicate read 10.000/= and the original read 100.000/= Shs and the computer run off read 10.000/= The rest of the information except the value were correct. The duplicate is missing and the amount on the triplicate is 10,000/=, Instead of 100.000/= shillings. That represented the fraud he was talking about where duplicate receipts are interim with computer centre and therefore missing to cover the fraud.

When cross examined replied that there are records to show movements of receipts i.e the stock card and memos that accompany those receipts ^w¹ >ver they are going There are also daily cash receipts book which indicates the number of receipts, using the serial numbers and the amount banked. The control slip accompanies the receipts wherever they go^w He could not see the control slip among the exhibits, Also could not see the duplicate c^z ' [~] " r>t No.. 658475*

In re-examinations replied. That the control slip is prepared by the chief cashier. The chief cashier at that time was Paulo Lwanga. All the receipts from the Kampala district office must be accompanied by control slips to his office and then transit to the computer. The final destination is the computer and that is where they are kept.

The control slips in relation to these receipts must have been prepared by the chief cashier Mr. Paulo Lwanga. Before the control slip is prepared, the triplicate duplicate

receipts must tally with the cash that is being handed in. When the chief cashier had done the banking, that is when he prepares the control slip showing the value that has been banked. The chief cashier does not compare the duplicate receipt with the triplicate receipts. Eversto Baguma PW4 catechist Christ of the king church.

In March 1990 he was sent to U. E. B. to pay in there money to the Electricity Board. They had two accounts there.

He was given 21,890/= shillings to pay for the first count. On the second count he paid shillings 24,150/=. He was issued with receipts in the names of the church. He was issued original with receipts which bore the figure 21,890/= dated 17.3.1990 but its triplicate reads Shs. 2,189/=. And on the second amount the receipt No. Kampala 6578413.

The fifth witness was Eldad Meme Sulamu Olowo Ongwen Internal Auditor with East African Development Bank. He had an account with the U. C. B. In February 1990 he met his electricity bill. He paid shillings 40,000/= according to the photocopy but on the triplicate the figure read 4000/= that he paid that money to A1. That he was issued with receipt No. 6576592 for shillings 40,000/.

On 2.8.90 One Osika went to his office with a duplicate receipt which only showed 40,000/.

The sixth witness was Apollo Mutasherarwa Ntarirwe a government analyst. He works on questioned documents mainly from the police but they could also come from other bodies e.g. lawyers.

A certain senior security officer from U. C. B brought him some documents (receipts) Exhibit A, Receipt No. 6576592 dated 9.3.90 Exhibit B2 U. E. B. slips for the month of January and February 1990. There were also exhibits CII and CIII U. E. B. There were also exhibits Exh D1 Exhibit D11 and those \$.../11.\$

were U. E. B receipts Nos. 6538482, 658483, 6489789, most of those documents were given to him as specimen,

His instructions were whether the signature appearing on receipt ^A by the writer that wrote the signature on B1, B2, D1, D2, D3, and on the writing on Exh ^A whether they were made by the writer of the specimen on 01, 02, D1, D2 and D3.

He compared the questioned document and writings on receipt EX ^A with the specimen provided and observed consistent similarity between the questioned signature as exhibit ^A and the specimen Exh. B1, B2, 02, D1, D2 and Dg.

In his opinion the writer of these specimen was reimportsib¹ e for the questioned signature Exhibit A. It was also his opinion that to order of the specimen to exhibits 02, D[^], D^o and B3 wrote the body writings (entry) on Exhibit "A". The handwriting report and rationed specimen were exhibited in a bundle and narked Exhibit A.

The seventh witness was Paulo. Lwanga PW7 formerly chief cashier at Kampala U, EIB. District office the Assistant Accounts Officer Kampala U. E. B. District office.

In 1990 he was the chief cashier in U. E. B Kampala District office. His duties were to receive money from the three cashiers and bonk it in Barclays Bank on Kampala Road in ¹⁹⁹⁰ Phery Kwondo was suspended on allegations of misappropriation of money (fro.: U. E. B The three cashiers each used to naote receipts on a form from receipt*number he/she started on to the last receipt and signs the form. He/she states the number of the 1st receipts he starts with and. the number of t ^e last receipt for that day and the number filled. He/she passes the duplicate receipts with a form 'and the' money collected are passed over to him. After the ³ cashier and the duplicate recoiyts he sends to the head office for account ability purposes. Ke does not check duplicate receipts because the ori-inat goes with consumer and triplicates ².,

remains with the cashier. He could rely on the Head Office that whatever information he sends there was the amount of money they received from Kampala U. E. B. District Office.

\$12\$

P78 was Mennoth Claki Senior Security Officer with U. E. B. Kampala. He investigates cases related to U. EB and also used to do administration of security staff. He used A1 and A2. A2 was working in inder House in Computers. He was receiving ell the receipts from the Districts and punching them in the computer i.e. feeding information of duplicate receipts sell from all the District. His testimony was similar to that of PW1 and PW2 & PW3 as regumds the issuance of receipts by the cashier. When he receives money from the cashier and the data control clerk uses the duplicate receipts to feed in the computer.

He was told to investigate A1 & A2. He could not see A2. He learnt was sick and was in Mulago Hospital. He went there and made inquires which revealed that A2 was not on their records as a variant. A2 was interrogated and denied having fed the information in the computer. There were about 140 receipts missing. They contacted century Bottle Company which had paid them a cheque of 202.350. The duplicate was missing and the triplicate was found reading 20350. The computer

run off as actually reading what was on the original receipt. He also visited nowlen in Bukoto who paid them a cheque of shillings 962.505/=. The duplicate was missing and the triplicate was reading 9625. He concluded that there was connection between the date controller and some one in the district office.

There is a procedure that the bills are computerised and credited on the consumers amount and sent to him. If it indicates less then the consumer could come to complain which the cashier and date control clerk which the cashier and data control clerk had to corroborate. A2 must have been getting

\$13.\$

lists of figures from the cashier to feed the computer.

He got some of the receipts which were given to them by the consumers control returns, payslips, which had signed voluntarily and sent them to the handwriting expert for his opinion. They checked the computer entries and were not tallying with what was then the duplicate receipts.- And with that anomaly A2 (the appellant) would have queried the chief cashier of the district where the receipts came from and notify the. office supervisor immediately which he failed to do.

The evidence of the Appellant showed that he was working in U. E. B as a data control clerk and his duties were to check and balance cash. He used to check by using duplicate receipts against the controls slip from the cashier. If there was a difference he would take back the receipts from his supervisor. . He used not to get the receipts from hisrsupervisor. He used not to make any record of the receipts received. They were two data controllers. There was a lady known as Cissy Kasule and she was doing the same work as the Appellant. If there was no difference he passes his check list to the data inputs machine operators then they key in the machine computer. And when he gets the receipts checks them vis the controls. He gives the receipts batch numbers before they are keyed in. The batch numbers help the computers to identify the particular work. He gave the batch nos according to the Districts where the receipts come from. The purchasing operators enter any job given to them in the computer. They dockey in the particular are the account number of consumers, box numbers, date and amount of money which has been paid. There is no other documents from where they get particulars. After keying in the computer operator issues ^a check list for him to check against the duplicate receipts to see whether they are balancing and also the control slips. If they were not balancing he hands"the check list to his supervisor so that he bills the consumer.

\$14\$ \$B_{i}\$ \$r\$ comprise to The duplicate receipts and the control slips are just damped. into an open cupboard. He did not know how to operate a computer they are regions. \$\mathcal{M}\$ \cong \mathcal{M} \oplus \mathcal{M}\$ and was not allowed to enter the computer room. He could not check at the the pain to check know what happened to the originals and triplicate receipts. vert Te \$\sigma_{TP}\$ His supervisor was responsible for the receipts put in the open on ere. v.r. \$\begin{array}{cc} 3 & 1 \end{array}\$ cupboard. He was sitting in the Amber House whereas A1 was wiscu so that he bills . Working in the district office in a different department. It

is possible that any information on the computer sheet could be altered by the computer operators. He had never dealt with any money of the board.

Beatles Villette

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The control slip could assist information on duplicate. receipt to whether the infromation is correct or not. The original receipt must be the same with the duplicate receipt. This he never made a false accounting, conspire and embezzle money belonging to the board.

In cross examination he replied that his supervisor was supposed to check after his checking.

That was the evidence as chuced by the prosecutor and the defence at the lower court after which the learned trial, magistrate convicted the Appellant as explained above.

The first ground of Appeal was that the learned trial magistrate misdirected himself in law and in fact in convecting the appellant of fraudulent false accounting fo computer and of which offence the appellant was not charged and or in convicting the appellant under section 305 (a) of the penal code which had nor relevance to the facts of the case.

On this ground Mr. Kabugo submitted that the question was whether the trial magistrate was justified in convicting. the appellant under S305 of the penal code or at all. The relevant part of the first count that he falsified 145 bills of payment receipt to read in that be paid shillings 775, 588 instead of only 10.134.145/= theproperty of U. C. B. He submitted \$.15.\$

\$.250\$

that section 505 (a) refers to physical tampering with a document where a figure is altered to rend differently or as dest-poyed. And a charge under section (a) is different from subsection (i)b of the same section. They objected to that anomaly as there was no physical tampering by the appellant but the court rejected their objection in no case to answer and in final judgjQgj^ta It is possible if the learned trial magistrate had considered ^S 505 (a) would have come to a different conclusion not to convict the appellant. And according to the charge the accused is supposed to have falsified 14-5 receipts to read figures shillings 10.154.04-5.

The right document were 14-5 bills of payment receipts and not computer run off. But the learned trial magistrate went ahead convicted the appellant not falsifying the payment of such receipts but of computer run off which carried 14-5 entries which were different from each other. The appellant could not falsify any receipts because he never worked in the cash office. At the hearing of the case the computer run off was put in evidence and proved. At the same time only two originals were proved by PW4- and PW5 "but the duplicate said to have been falsified was never produced in evidence.

And according to the evidence of PW2 the computer in court was for the month of January to May 1990. The Appellant saw the computer for the first time in court and had never handled it before. None of the computer the appellant examined and proved daily were produced in court. They did not know what the appellant examined and proved on that ground alone the conviction cannot stand.

On the other hand Mr. Semayombi counsel appearing for the respondent submitted that the magistrate rightly convicted the appellant under ^S 505 of the penal code act. The section gives the circumstances under which the offence of false accounting might be committed. The learned trial magistrate convicted • .../16.

the appellant of falsifying the computer which carried *14-5* entries which were different from each other, the section gives the circumstances under which the offence of false documenting may be committed physical tempering which has learned friend referred to is catered under the following same section. Whereas falsifying the documents with which the Appellant was charged including this feeding in of false information which the appellant fed the computer with which led to the computer ran off containing false information which documents, were themselves false.

As already explained above the appellant was charged and convicted of fraudulent false accounting contrary to section 505 of the penal code in the first count. The particulars however showed that the Appellant and others as a data control clerk falsified 145 Bills payment to read ⁷⁷⁵ [&] 558 shillings instead of shillings 10.134.045/= the property of U. C. B. Under ^S 505: The offence is committed by any person who,

- being a clerk or servant or being employed or acting in the capacity of a clerk or servant does any of the acts following with intent to defraud that is to say—
- (a) destroys, alters, mutates or falsified any book, document valuable security or account which belongs to or is in the possession of his employer or has been received by him on account of his employer or any entry in any such books document or account or is privy to any such act -
- (b) makes or is privy to making any false entry in any such book document or amount omits or is privy to omitting any material particular from any such book, document or accounts.

In the case of George Woogate vs. R. 1959 p 525 at 527 • • • / • ⁷ •

their Lordship had this to say that in order to convict the appellant upon these three charges under ³ 505 it was necessary for the crown to prove three things:-

> First that the entries were in fact false, Secondly that the appellant made then knowing them to be false.

And thirdly that he made them with intent to defraud.

In the instant case there was evidence from JW1* PW2, PWJ to the effect that when ^a customer pays for the electricity bill, he was issued with a receipt by the cashier v/ho in t&is respect was A1 who never appealed here. The receipt is made in three copies. The original receipt is given to tho consumer•• The duplicate is forwarded to the revenue section which in turn forwards the same to computer section. The triplicate remains in the dispatching office. By using the carbon paper all receipts bear the same information and all the receipts are sent to the revenue section - They are accompanied by a control slip indicating the range of receipts and the total amount there from.. The data control, clerk who was the appellant on receiving the receipts sends them to machine operators tho feeds in the information to computer. The fraud was that the amount on the duplicate showed a lesser figure as opposed to the original and triplicate receipts^ The appellant was blamed for that. And the duplicates a total of 145 receipts were said to be missing* ' However the offence under section ³⁰⁵ (a) is committed by ^a person who with intention to defraud for this particular charge falsified 145 Bill payment receipts. No evidence was adduced to show that the appellant falsified the 145 j^ayment receipts. The said duplicates were never produced in evidence and even if any one of these was ever produced at all there was nd evidence that they were written and or falsified by tho Appellant. Even then the accompanying control slip was never ez-diibited indicating the range of the receipts. In fact no evidence was adduced .,^8.

shoeing who handed the receipts to the Appellants There were .sOMEMACHINE operators who fed the computer, none of these was called as a witness. There was- another Data Control Clerk Cissy Kasule who used to work with the Appellant she could have tampered with the receipts, let alone the machine operator. /mother point, the Appellant had his immediate supervisor P.72. The latter could have discovered anomalies. The supervisor in his evidence said that. before this incident there was no register for the movement of receipts but now they had then provided remedy by establish-?** ing ^a register. With that type of evidence anything could have happened to these duplicators.

The appellant should not be the scapegoat because of the bad administration then existing in the Uganda. Commercial Bank.

In fact no evidence was adduced to show that entries were false. The duplicate receipts were not exhibited and that was the backbone of the charge. I am however mindful of the fact that the prosecution tendered in evidence t\0 original receipts from tvzo consumers namely mowlem cons jruction Bukoto and Christ the King Kampala (Church). See P75 and compared the same with the duplicates. The original receipts showed the correct figures whereas the duplicate showed the lesser figure. There was however no evidence that the duplicates wore written and falsified by the Appellant. Even the t .0 consumers should have been called as witnesses otherwise reference to them was in my opinion hersay evidence which was inadmissible.

In essence there was no evidence that the appellant made the entries, knowing them to be false nor was evidence adduced to show that they were made with intent to defraud. And there was no evidence of any collusion between the appellant and the cashier A1 to show that the Data control clerk the Appellant did not act innocently in working on the basis of A1's figures. The question of common intention as stipulated under section 22 of the penal code does not therefore arise.

I am however of the view that the evidence adduced on this count is purely circumstantial since there was no direct evidence that the appellant participated in the commission of the crime. However to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and the burden of proving facts to justify the drawing of the inference of guilt from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused person. See *Simon Musoke vs. R.* 1958 p.15* *Anderea Obonyor* other 1962 5^2.

Had the learned trial magistrate taken into account the ingredients of the offence and the evidence adduced to prove the charge he could have come to a different decision. The appellant was not a party to the fraud and as such he could not have committed the offence in court No. 1. He even informed the court he did not know how to operate a computer. The trial magistrate never made any finding on this. Moreover it was a misdirection on the part of the trial magistrate when he said that he convicted the appellant of fraudulent false accounting of the computer run off. The charge was of fraudulent false accounting. The offence would be committed by falsification of the 145 bills payment receipts. And this meant that the Appellant ought to have physically tampered with the duplicate receipts a matter which the prosecution failed to prove. In the premises the first ground of appeal succeeds.

The second ground of appeal ;as that the learned trial magistrate misdirected himself in law in failing to strike out or reject the charge sheet for the charge of embezzlement and in convicting the appellant of conspiracy.

In fact I was not addressed on this ground by Mr. Kabugo because after submitting on the first ground he went straight .../20«

to consider the third ground. I. T. Semeyamba on the other hand chose to argue grounds 2 & 4 together. I found it difficult to relate the two grounds they seem to have been mixed up. I chose therefore to consider this ground without the aid of the learned counsels.

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However both the appellant and A1 were convicted of the offence of conspiracy to commit a felony contrary to section 373 of the penal code which states:-

> "Any person who conspires with other to commit any felony or to do any act in any part of the world which if done in Uganda would be a felony and which is an offence in the laws in force in the place where it is proposed to be done is guilty of a felony and is liable if no other punishment is provided to. imprisonment for seven years or, of the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years then to such less punishment."

Archbold on criminal proceedings evidence and practice 36th Edition paragraph 4052 page 14:67 "conspiracy to commit any offence punishable by law" had this to say: -

"Nature of crime " Every a scement between two or more persons to commit any offence is conspiracy and indictable whether the offence is punishable on indictment or summary conviction."

In his judgment the learned trial magistrate had this to say:-

"But because A2 was involved in the fraud, such frauds went on undetected. Hence I infer that conspiracy existed between A1 & A2 and that the act of conspire to defraud was done. And the conspiracy to conceal the fraud and share the loot."

$\ldots$

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In the present case the appellant and A1 were both U. E. B employees, A1 was the cashier endowed with the responsibilities of issuance of receipts and the appellant used to receive duplicate receipts with a view to feed the same in the computer \$.../21.\$

data* There was no evidence that the appellant had any role to play in the issuance of receipts> Even the way those receipts found their to the computer was not clear from who handed over the duplicate receipts to the Appellant. The movement of the receipts from the cashier A'l to the Appellant was not ahly explained. There was evidence f om PW2 that there was loophole in the movement of the duplicate receipts before streamlining the same after this incident. The Appellant in his evidence showed that he was working/sitting in the Amber House whereas A1 was working with district Office in a different department altogether. He also testified that he had never known A1 before. That piece of evidence was not considered by the trial magistrate. There was therefore no agreement between A1 and the Appellant to comit this offence of conspiracy to comit a felony. Evidence was insufficient to establish that th'e appellant was acting in concert with A1. See Ongodia and Erimu vs. Uganda ¹⁹⁶⁷ 'AY p. ¹>7_. The learned trial magistrate therefore erred in law in holding that the offences of conspiracy to comit a felony between A1 and the appellant had been established*

As to the complainant that the learned trial magistrate erred the failing to strike out or reject the charge sheet for containing the charge of conspiracy and the substative charge of embezzlement.

In Uganda vs. Mulenge and, others 1970 EAP 269 several accused persons were charged jointly on five counts with various criminal offences. The first count being conspiracy to defraud which first count substantive offences in the four remaining counts. At that stage both advocates for the respondent objected to that charge as it stood in that it contained account of conspiracy along with other four substantive offences forming the conspiracy. Hence the application that the count for conspiracy be struck out. The

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objection was argued before chief magistrate, The court held that it was undersirable to join account of conspiracy with other counts charging the specific offence if the specific offences are based on wholly some facts as the conspiracy. Such grounds is not illegal and would not necessarily order for a retrial order for a separate trial unless the court is satisfied that the accused will be embarrassed."

In the instant case the trial magistrate was justified in trying the Appellant with the offence of conspiracy to commit a felony with other two substantive offences/charges since there was nothing on the record to show that the Appellant was in anyway embarrassed. There was therefore no requirement to strike out the charge of conspiracy from the charge sheet. This ground of appeal partly succeeds.

The third ground of appeal is that the trial magistrate erred in law and in fact in holding that in the circumstances of this case there was no way that information on the duplicate receipts could appear on the computer run off without the participation of the Appellant and in holding that there was common intention between the Appellant and the first accused or at all.

I have already dealt with this ground when considering the Prst ground of appeal. J. held that the duplicate, receipts ^5 except two of these were never exhibited plus the computer run off. And held further that there is no way it could be stated that the Appellant falsified the duplicates. He never physically tampered with the receipts or with the information on the computer run off. Also I held that there was no common intention between Ai and the Appellant as stipulated under ^S 22 of PCA. However this ground of appeal succeeds.

The fourth ground of appeal was that the trial magistrate misdirected himself in shifting the burden of proof to the A

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Mabungo submitted that the trial magistrate considered the defence and the burden of proof before convicting the Appellants. The prosecution never produced any evidence $\frac{1}{2}$ to prove guilty on part of the prosecution. They encountered on administration of his duties. If they had any case if $\mathbb{E} = \mathbb{E}[\mathbb{E}[\mathbb{E}^{\mathbb{E}}]]$ have been his failure to perform his duties and not the for extraud. That the Appellant gave evidence which was never or traud. That the Appellant gave evidence which was never or traud. convicted considered by the trial magistrate. It was referred to the said indement. 1.1.10 of the said judgment. count. They were 11 first offenders, Mr. Semayembe on the other had submitted that it was $H_{\{\text{OLO}\}} = 0.00, 0$ or observed that proof beyond reasonable doubt does not mean proof common terms of as lighted at bus of the or the original proof indenoit" beyond shadow of doubt referred me to the case of Hoes vs. \$2500\$ Minister of Health. He submitted that the prosecution moved its case beyond reasonable doubt. erere ? At page 11 in her judgment the learned trial magistrate had this to say: "There are people who were working with her in a higher capacity and as such they very well know her dissatisfaction. In her defence she denied that she was not a cashier for that category but she never called any witness to give evidence on her behalf to create a shadow in the prosecution evidence." His most and $\mathcal{D} \subseteq \mathbb{R}^n$ There are a wealth of authorities to the effect that the Betaivprosecution has the burden in criminal cases to prove the guilty of the accused persons beyond reasonable doubt and the that burden never shifts except in a few exentions. Sec: colming vs. DP 1935 AC 462, Paulo Male vs. Uganda Cr. Application No.6 of 1978 Rep Volume 1978 judgment of the court of appeal for Uganda May/August 1978. Uganda vs. Joseph vs 1978 III page 269.

$\mathcal{H}(\mathcal{A}_1)$ By stating in his judgment that the cashier (A1) never called any witness to give evidence on her behalf to create shadow in the prosecution evidence the learned trial magistrate \$.../24\$.

was shifting the burden of proof to A1. Unfortunately never appealed here either against the conviction or sortencod. All the same in his defence the Appellant testified that "e did not know A1 and that he never falsified the receipts and also never handled the computer control run off. P.72. in fact, came up in his evidence and stated that there were loopholes in handling of the movement of documents and that after the incident the administration had streamlined the movement of documents by having the documents recorded in a register and of the view that the learned trial magistrate considered defence case he could have observed that the prosecutions created some doubt. The Appellant has been availed that doubt end had him acquitted of the charge.

The fifth and last ground of appeal was that the given to the Appellant was harsh and excessive in the circumstances;

Mr. Kabemgic submitted that at the lower court the magistrate and gave reasons for mitigation of sentence. But the learned trial magistrate never gotterred to this submissions. He gave A1 a lenient sentence and A2 a harsh one;

Itc-r- S-e«x^yo»A>o ^M-bm5. thp aouto^oa -./vs not harsh *miA* excessive because the Appellant was sentenced to only 50 months imprisonment whereas maximum sentence the Appellant would have served, would be 7 years imprisonments •

According to the records Ai and the Appellant were convicted on both counts ¹ and ¹⁴ and both were acquitted on the third count. They were all first offenders.

A1 was sentenced to pay fine of shillings 500.000/= on each count ¹ and ¹¹ and in default was to serve 50 months imprisonment on each count the sentences were to run concurrently "here as the Appellant was sentenced to 50 months imprisonment on each count and without the option to pay fine. The sentences were to run concurrently. In giving the reasons for his sentence

the honourable trial magistrate said that she took into account that the accused persons were first offenders and that in mitigation the defence counsel had laboured to convince court to pass sentences which were lenient against the accused. Then she went on to say that to punish A1 with a custodial sentence would be to indirectly be punishing her children some of which are sick.

From what has been explained above it is not true to say that the trial magistrates never considered the reasons given in mitigation of sentence. I do have uphold the submission of the learned counsel for the Appellant in that the trial magistrate was a bit harsh on the part of the Appellant. I say so because if the accused persons were convicted of the same offence. I saw no good reasons for the disparity in punishment. The Appellant too should have been given an option of paying the fine. This ground of appeal succeeds.

All in all having considered the evidence as adduced in the lower court and the submissions by the learned counsels it is my considered opinion that the judgment of the lower court can not be allowed to stand. In the premises the conviction is quashed and the sentence of 50 months imprisonment is set aside and unless the Appellant is being held for any other cognisable offence. I order for his immediate release.

> I. MUKANZA i': J ^U ^D ^G ^Z 21.1.1994"

21,1,1994,

Appellant present

Mr. Kabugo for the Appellant absent Court Clerk in attendance - Miss <Crcrtru.de> M.adudu
Court Judgment is read and signed»

> I.. MUK^TZA' JU DV^G £' 21.1.1994.

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