L/BRARY

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 45 OF 2003

(ORIGINATING FROM TEMEKE AT TEMEKE DISTRICT COURT CRIMINAL CASE NO. 313 OF 1999)

1. **ADAM UMBE**
2. **MOHAMEDI S/O ATHUMANI @ MAZENGO** } . . . **APPELLANTS**

VERSUS

DIRECTOR OF PUBLIC PROSECUTION . . . RESPONDENT

JUDGMENT

ORIYO, J.:

The appellants, Adam Umbe and Mohamed Athumani @ Mazengo were convicted of the offences of conspiracy to commit an offence and breaking into a building and committing an offence, contrary to SECTIONS 384 and 296 (1) of the Penal Code, respectively. The particulars were that on material date, 5/7/99, at about 6.30 a.m at TAZARA area, Temeke District, Dar es Salaam, they broke into the godown of M/S ZAHRAN ENTERPRISES and stole a variety of goods with an estimated value of shs.19,462,000/=.

At the trial, five prosecution witnesses testified. The first appellant testified on his own behalf and had no witnesses to call. The second appellant refused to testify; he kept quiet.

Dissatisfied with the trial courts decision, the appellants appealed against both the convictions and the sentences. The sentences of 9 months imprisonment for the first count and 7 years imprisonment for the second count imposed on each of the appellants were to run concurrently. They were also condemned to refund to the complainant the value of the stolen goods; shs.19,462,000/=. They filed four grounds of appeal. Grounds one to three contained complaints that the trial court convicted them without sufficient evidence. Ground four complained that the convictions were based on the weakness of the defence. For the purposes of the judgment grounds one to three were considered together as ground One and ground four became ground Two.

At the appeal, the appellants proceeded in person as they had no legal representation. The respondent was represented by Ms Mkwizu, learned State Attorney. The appellants submissions were basically a repeat of the contents of the Memorandum of Appeal. For the respondents, the learned State Attorney stated, that she supported the convictions because the testimony on record proved the charges against the appellants beyond all reasonable doubt. She relied on the Cautioned Statement of the first appellant in which he

had admitted involvement in the incident, told the police that he knew where the stolen goods were taken to and actually led the police to the venue where the goods were found. She submitted that the first appellant did not object to the admission of the Caution Statement when tendered. For the second appellant she stated that there was ample evidence on record that he was employed by the complainant and that he was on duty at the material time and that he disappeared after the incident until he was arrested several days later. She further stated that he even failed to explain reasons for his disappearance at the trial. It was Ms Mkwizu's further submission that the appellants defence, if any, did not raise any doubt in the prosecution testimony. She concluded that it was proper for the trial Court to attach the weight that it did on the prosecution evidence and accordingly convicted them.

In dealing with grounds 1 and 2 as consolidated, there was only one issue for consideration, namely on whether there was sufficient evidence on record to support the convictions beyond all reasonable doubt. Testimony tendered against the first appellant was his own admission of involvement in the Caution Statement made to a police officer and admitted as exhibit without any objection from him. The second appellant's Caution Statement also mentioned him (Adam) as one of the six people involved in the incident on that night. There is also the testimony of the first appellant, (DW 2) that he knew the second appellant from before.

Testimony against the second appellant was his own Caution Statement in which he admitted involvement for a reward. Although he objected to its admission because he alleged to have made the statement under threats; the court admitted it after warning itself. Testimonies of Manishi Solanki (PW 3) and Kiumbe (PW 4) were adequate proof of his employment with the complainant; involvement in the incident and his long disappearance after the theft. To cap it all was by his conduct; he refused to say anything in defence at trial and the court was entitled to make an adverse inference. On the admissibility and the relevance of the caution statements; the first appellant did not object to the admission of his statement as exhibit. But when he was testifying he denied to have made any statement to the police. In my view, the trial magistrate was correct to convict him because the information in the statement led the police to the place where the goods were stored, at Kwacha Transport Company premises. Further, the second appellant identified him at the scene of crime as they knew each other from before. In addition and as correctly observed by the trial court, there was no evidence of the alleged "heavy beatings". Before I conclude on the conviction of the first appellant; I wish to correct a misapprehension evident in the trial court's judgment that it erred by not conducting a trial within a trial before admitting the first appellant's caution statement in order to establish whether it was freely made or at all. It appears to me that there was no similar observation made by the court in connection with the second appellant's caution statement whose

admission was objected to on the ground of having been made under threats. But let it be as it may, it is trite law of procedure that a trial within a trial is only conducted at the High Court when a judge sits with the aid of assessors. It is intended to protect the assessors (who are not legally trained) from hearing evidence which may possibly be inadmissible. Their exclusion from the trial within trial is meant to avoid confusing or prejudicing them on which of the evidence is admissible and which one is inadmissible at the trial. It would be highly artificial to conduct a trial within a trial where the judge or magistrate, as in this case, is in a trial in which assessors are not sitting and the trial magistrate decides both on facts and on the law (See Court of Appeal Judgment in the case of **WILLIAM ADEMBA** vs R; Civil Appeal No. 10 of 1998, Mwanza Registry, unreported). Similarly, the Caution Statement of the second appellant was rightly admitted; in my considered view, because it explained his involvement and his whereabouts for the period he was missing after the incident; he was staying at a Guest House. The statement also provides corroboration in some material particulars to the testimonies of the first appellant that the stolen goods were loaded into a lorry which ferried them away from the premises. It also corroborated the prosecution testimony that the gates and locks to the premises and the godown were disabled by the use of gas.

The law on the relevance of information received from an accused person in police custody is provided under SECTION 31 LAW OF EVIDENCE ACT 1967, which states:-

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant" (emphasis added)

The clear language of the law is in support of the admission and the weight attached to the appellants' caution statements as alluded to before. On the second appellant's statement which implicated the first appellant; a co-accused the law permits such evidence so long as the same is corroborated pursuant to the provisions of SECTION 33 (1) and (2) of the Law of Evidence Act. It was therefore proper to rely on the statement of the second appellant which named the first appellant as one of those present at the godown during the incident. This information was corroborated by the first appellant himself.

I think I have sufficiently demonstrated on the foregoing that there was adequate evidence on record to convict the two appellants. I accordingly uphold the convictions.

Now let me look at the legality of the sentences imposed; though none of the parties made any submissions on the sentences. The sentence provided on conviction on the offence of Conspiracy to commit a felony under SECTION 384 PENAL CODE, is seven years imprisonment. The sentence of 9 months imprisonment imposed is within the law, though on the lower side. SECTION 296 (1), PENAL CODE, prescribes the sentence on conviction on the offence of breaking into a building and committing a felony, to ten years imprisonment. Again the sentence of seven years imprisonment imposed on the second count is within the confines of the law. Therefore the sentences imposed for the two offences were legal and are upheld.

Lastly for consideration is the order of refund of shs.19,462,000/= to the complainant being the value of the stolen goods as estimated by the complainant. There was no evidence adduced at the trial on the values attached on the various items listed in Exhibit "P 3". The sum of shs.19,462,000/= was arbitrarily arrived at. In the absence of any proof; I will reduce the estimated value by 50%. The total value of the stolen goods will now be

pegged at shs.9,731,000/= and each appellant shall refund the complainant a sum of shs.4,865,500/= only.

It is on the basis of the foregoing that I uphold the convictions and sentences. Accordingly the appeal is dismissed except for the variation made on the amount of money to be refunded to the complainant.

For the avoidance of doubt, let me place it on record that the second appellant was released from prison on a Presidential Pardon due to ill health and old age. Notwithstanding that he will continue his stay out of prison after this judgment; his conviction and sentence are not affected.

It is so ordered.

(K.K. ORIYO)

JUDGE

29/4/2005