IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Platt, Gachuhi & Apaloo JJA)

CRIMINAL APPEAL 8 & 19 OF 1986

BETWEEN

MAINA & 3 OTHERS .....APPELLANTS

AND

REPUBLIC.....RESPONDENTS

(Appeals from the High Court at Nairobi, Owuor & Schofield JJ)

JUDGMENT

At about midday on October 11, 1984, Detective Corporal Maina who was on patrol duty with two other police officers, received certain information. The information came from a police informer. That intelligence led the police to believe that a certain criminal offence was going to be committed in the late afternoon or early evening that day. It was going to be at High-Ridge in Parklands, Nairobi.

The police decided to nip this plan in the bud. So shortly before 5.30 pm that afternoon, Corporal Maina and a number of police officers laid ambush quite close to the house of a man called Denani. They were armed. Around 5.30 pm they saw four persons walking together and talking. And they were walking in the direction of Denani's home.

Although three of the persons appeared to carry nothing one of the men carried a black brief case. It seems these men answered the description of the persons the police were looking for. So when the men were at a distance variously estimated at between 20 to 30 metres from Denani's house, the police sprang into action. They intercepted the men. The police identified themselves and proceeded to search the brief case carried by one of the men. It contained a live pistol and ammunition. The police searched the persons of the three other men. They found *simis* tucked in their trousers. It turned out that the pistol belonged to the Uuplands Bacon Factory. The factory was robbed on July 30, 1984 and the pistol and cash Kshs 14,111/ 70 were stolen. All these persons were there and then apprehended.

The 1st appellant was the person who carried the black brief case and the other appellants were identified as the three persons who had *simis* tucked in their trousers. The prosecution say, all the four appellants took part in the robbery on July 30 at the Bacon Factory and that they all prepared to commit robbery on October 11, 1984. Although only the 1st appellant was found in physical possession of the brief case in which the pistol and ammunition were found, the prosecution say, all appellants were in possession of the pistol and ammunition.

All the four appellants were accordingly charged jointly with one count each of 1 robbery, 2 preparation

to commit a felony, 3 being in possession of firearm without firearm certificate, 4 being in possession of ammunition without firearm certificate. They were all brought before the senior resident magistrate, Kiambu and when asked to plead, each and everyone of the appellants pleaded not guilty. They were tried on diverse dates between December 27, 1984 and February 6, 1985. On February 8, 1985, all the appellants were convicted on each and every one of the four charges. The learned magistrate having listened to pleas in mitigation on their behalf, saw no reason to impose on them anything less than the mandatory minimum sentence of 10 years on counts 2. Each was also sentenced to one year imprisonment on count 3 and 4. Each appellant was also sentenced to 6 strokes and were to be subject to police supervision for 5 years after their release.

All the appellants appealed to the High Court against their conviction and sentences. That court sustained the conviction for robbery only against the 1st appellant but reduced the sentence to 6 years. In respect of counts 2, 3 and 4 the conviction of the 1st appellant was upheld as well as the sentences. The court allowed the appeal of the 2nd, 3rd and 4th appellants on counts 1, 3 and 4 quashed their convictions and set aside their sentences. The outcome of the appeal in the High Court was as follows; The convictions of the 1st appellant was sustained on all the counts. Only his sentence on count one was reduced to 6 years. But the sentence on this count was ordered to run concurrently with the other counts on which his conviction was sustained. With regard to the 2nd, 3rd and 4th appellants the only conviction upheld against them was in count 2 ie preparation to commit a felony for which each received the mandatory minimum sentence of 10 years.

All the appellants appealed to this court against their conviction and sentences. Except the 3rd appellant who was represented by Mr Khaminwa, all the appellants appeared in person. They each prepared home-made grounds of appeal and supplemented them with further written grounds. In addition, we allowed them to address us fully on the original and supplementary grounds of appeal. They referred us to various portions of the evidence from which they argued that their convictions were wrong.

Most of these were factual matters but they also echoed the only point of law raised before us was by counsel for the 3rd appellant. It was that inadmissible hearsay evidence was admitted and that this was highly damaging to all the appellants.

We will give consideration to that complaint later. It is however necessary to consider the factual grounds raised. It was the conviction of the 1st appellant alone that that court below upheld on the counts of (1) robbery, (111) being in possession of firearm without firearm certificate and (1V) being in possession of ammunition without firearm certificate. As we said, the 1st appellant contended by references to various portions of the evidence, that the conviction on these charges were wrong. To what extent is this complaint made out?

Three persons employed in the Bacon Factory gave evidence from which it is safe to conclude that the factory was broken into at midnight on July 30, 1984. The thieves made away with cash and a pistol. In order to overcome the resistance of the employees in the factory, the thieves tied and immobilized them. If this evidence is accepted, and it was plainly accepted by the trial magistrate, the persons who broke into the factory and made away with the cash and pistol committed robbery within the meaning of section 295 of the Penal Code (cap 63).

The question of importance on this aspect of the case, is whether the evidence led was such as to justify a conclusion that the 1st appellant was one of such persons. We think such evidence must reach the degree of certainty required to sustain conviction in a criminal trial. The three witnesses said quite frankly, that they could not identify any of the persons who broke into the factory and made away with the cash and pistol. The only apparent connection between the 1st appellant and the crime of robbery, is the pistol allegedly found in his possession. This was shown to be one of the two stolen by the robbers that night.

The question for decision here is, is this possession sufficient to sustain a conclusion that he participated in the robbery on the night of July 30? How proximate in time in relation to the date of the robbery was the pistol found in his possession? Before answering this question, it is necessary to state the principle of law germane to a consideration of this matter. In *R v Loughin* 35 Cr App R 69, the Lord Chief Justice of

England said:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker."

That is the well-known doctrine of recent possession. In *Loughin's* case, drinks stolen from a pavilion in the dead of night were found about 2 hours afterwards in the appellant's possession and he gave no acceptable explanation of how he came by them. How does the principle enunciated in that case fit the facts of this case? The breaking and the robbery took place on July 30, 1984. The pistol was not found in the appellant's possession until October 11, 1984 – that is about 2 1/2 months afterwards. It cannot be truly said an item stolen in the Bacon Factory was found in the appellant's possession shortly afterwards. The time lag between the date of the theft and the discovery of the pistol was so much that it would be unreasonable to hold that the mere possession of the pistol on this date is sufficient to found a conclusion that the appellant participated in the robbery.

Neither the trial magistrate nor the High Court pinpointed the evidence they considered cogent enough to justify the conclusion that the 1st appellant participated in the robbery. The fact must not be lost sight of that all the witnesses from the Bacon Factory said, they did not know any of the robbers. When the appellant was confronted with the charge of robbery, he denied it and put the burden of proof squarely on the prosecution. We do not consider that the evidence produced by the prosecution is sufficient to establish the offence of robbery against the 1st appellant. We think that the conviction of the appellant on count one ought not be allowed to stand.

The convictions on count 3 and 4 stand on a slightly different footing. They are the counts dealing with possession of firearm without certificate and being in possession of ammunition without certificate. The 1st appellant contests his conviction on those two counts and invited us to hold that he was wrongly convicted of those two charges also.

We think it should be possible to differentiate between the evidence led in proof of the robbery and these later two offences.

All three police witnesses swore that they found the 1st appellant with a brief case. They took possession of it and it was opened in his presence. It contained the pistol and ammunition. If this evidence was believed, then the conclusion that the appellant was in possession of these two items cannot be avoided. The learned magistrate believed the evidence of the police officers. There is nothing improbable about that evidence. That being so, whether the 1st appellant was in possession of the pistol and ammunition, was a simple issue of fact and was so found.

The next question is: did he have lawful authority for having them in his possession? In other words, did he have the necessary certificate required by the Firearm Act? The evidence shows that he did not. One Kagocho testified the certificate for the pistol was issued in his name on behalf of the company. He produced that certificate in evidence. We think on these two charges, the offences were brought home to the 1st appellant. It follows that there is no good ground on which we can interfere with the 1st appellant's conviction on counts 3 and 4.

That brings us to count 2 – the offence of preparation to commit a felony. In order to sustain a conviction on this charge, it must be shown that the appellants were armed with a dangerous or offensive weapon. And secondly, that the circumstances must indicate, that they were so armed with intention of committing a felony. There is evidence that the 1st appellant was in possession of a pistol and the three other appellants each had in his person a *simi*. The pistol and the *simis*, we think, answer the description of offensive weapon. The next question is: was it shown by admissible evidence that their object in being so armed was to commit a felony? Leaving aside for a moment the hearsay evidence objected to before us, the furthest the evidence went, was that the four appellants were seen walking together on what was admitted to be a public land. Only the 1st appellant carried a briefcase. The other appellants were not seen to be carrying anything. They were accosted and arrested by police. It is difficult to think the evidence

standing as it is, provided any basis for holding that the appellants carried the offensive weapons, because they were minded to commit robbery with them.

The paucity of evidence on the mental element was, made up by what is clearly hearsay evidence. All the three police officers told the court they had a tip off that 5 persons had planned to commit robbery at around 5.30 pm – 6.00 pm at Denani House at High Ridge Parklands that day. The would-be robbers were going to carry a pistol and *simis,* according to the police informant. It was for this reason that they laid ambush for them. The appellants who fitted the description of the would-be thieves were intercepted and apprehended. The informant was not put in the witnessbox. Accordingly, the evidence narrated to the court about what the informant told the police was inadmissible as hearsay evidence and ought to have been rejected by the trial court.

That evidence was not excluded. The learned magistrate in his review of the case related it as part of the admissible evidence and reached the conclusion expressed by him as follows:

"I find they were preparing to commit robbery"

As we said, the appellants appealed to the High Court against their conviction on this as well as the other counts we related. In the court, it was clearly realized that the information which the police officers obtained and which they narrated to the court was hearsay evidence. The court observed.

"In his consideration of the evidence, the learned magistrate was in error in several respects. He took into consideration hearsay information they had received."

That hearsay evidence was particularly damaging to the appellants. The High Court, beyond saying it was hearsay information said no more about it. The reason for this appears to have been because Mr Gathaara, counsel for the state is recorded to have submitted that:

"Hearsay evidence is not material. The evidence we rely on is the factual situation."

It does not seem to us that the court below excluded the hearsay evidence of the police witnesses. If it did, would have said so, and explained the relevance of the remaining evidence especially as the appellants were not found to be in common possession of the pistol. It was a material but prejudicial piece of evidence on the question of *mens rea* of this offence. In this court, that was the main plank on which Mr Khaminwa for the 3rd appellant, rested his argument. He contended, we think rightly, that what the police witnesses told the court was hearsay evidence and ought not to have been admitted. He said that that damaging evidence must have influenced the mind of the magistrate and led him to conclude that the appellants prepared to commit felony. Counsel contended that if the hearsay evidence was excluded, the circumstantial evidence led was insufficient to lead irrestibly to the guilt of the appellants. He cited and relied on the appellate decision of the High Court in *K Njunga v Republic* (1965) EA 773.

The head note in that case reads:

(1) The trial magistrate had before him hearsay evidence of a very damaging nature and made no attempt to disabuse his mind of it.

(2) Without the hearsay evidence the court below could not have found the necessary intent to commit a felony.

This case seems to us to be on all fours with the instant one. It is, of course, a decision of the High Court which is not binding on us. But we think it stated and applied the principles of law correctly. We respectfully approve it. Faced with this decision, Mr Gathaara did not, as he did in the court below, suggest that the hearsay evidence was of no moment. He frankly conceded that it was wrongly admitted. But he referred us to section 175 of the Evidence Act (cap 80) and submitted that even if the hearsay evidence was excluded, there was enough circumstantial evidence to warrant the conviction of the appellants on the charge of preparation to commit a felony. He said, as no substantial miscarriage of

justice has occurred, the conviction should not be disturbed.

We think this a fair contention. We have related earlier in this judgment, the facts and circumstances of this case. It is not necessary to reproduce the legal test which circumstantial evidence must meet to justify guilt in a criminal case. This is well known. In our opinion, the circumstantial evidence led in this case is not such as would compel the conclusion that the only object of the appellants in carrying the offensive weapons was to commit a felony. It is not for us to direct the police what evidence they should lead in a criminal case. But we think, had the police not acted somewhat precipitately but waited for a few seconds and actually saw the appellants about to enter Denani's house or made the slightest attempt at gaining entry into that premises, our conclusion may well have been different.

At all events, we are in no position to say if the damaging hearsay evidence had been excluded, the learned magistrate would necessarily have come to the same conclusion. That being so, we think it would be unsafe to allow the conviction for preparation to commit a felony to stand.

Accordingly, we allow the appeal of the 1st appellant on count one, quash the conviction and set aside the sentence of 6 years imprisonment imposed on him.

On count 2, we allow the appeal of all the appellants, quash their convictions and set aside the sentence of 10 years imprisonment imposed on each of them. For these, we substitute a finding of not guilty.

We dismiss the appeal of the 1st appellant on counts 3 and 4. Unless they are in custody for some matter, we order that the 2nd, 3rd and 4th appellants be discharged. We notice that the 1st appellant has also fully served the concurrent sentence of one year imprisonment imposed on him on counts 3 and 4. Unless he is also in prison for some other matter, he also is entitled to be discharged. We so order.

Dated and Delivered in Nairobi this 25th day of November 1986.

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

F.K.APALOO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR