IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Mwakasendo, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 10 OF 1979

B E T W E E N

1. MUKENDI MASUMBABIDIA and)
2. ABUBAKAR FERUZ) . . . . . APPELLANTS

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the Judgment of
The High Court of Tanzania
at Dar es Salaam) (Samatta, J.)
dated the 15th day of August, 1977

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Criminal Appeal No. 319 of 1976 and
Criminal Appeal No. 14 of 1977

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

These two appellants, charged in the magistrates' Court as accused 2 and accused 3 were, together with 2 other accused, convicted in the trial court of stealing on two counts, one of stealing shs. 35,000/- from Mariam and one of stealing a wrist watch valued at shs. 2,000/- from Zainabu. The first accused absconded before delivery of judgment. On first appeal 2nd accused's appeal was dismissed in its entirety, and 3rd accused's appeal was dismissed as to the count concerning the theft of shs. 35,000/- but allowed in respect of the wrist watch count, and the 4th accused's appeal was allowed. They are now appealing to this Court.

Complainants Mariam and Zainabu were sisters and were running a furniture and timber business and apparently had some money. The two appellants and the 1st accused

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were introduced to these complainants, and there were talks between them about the appellants and the 1st co-accused appointing the complainants their agents for a transport business or for the purchase of the appellants' motor transport lorries. A meeting took place at the complainants' house and a further meeting was arranged for 23rd July, 1976, at Bahari Beach Hotel. On their way to the Bahari Beach Hotel on 23rd July the complainants and 1st accused picked up appellant 2nd accused and together went to the Hotel where they met up with appellant 3rd accused. A business discussion took place between the complainants and 1st accused and appellant 3rd accused - the appellant 2nd accused did not take part. The complainants alleged that they were served two bottles of "fanta", but that the bottles were brought to them by 1st accused already opened. They drank the fanta, and immediately thereafter they felt dizzy and left with 1st accused and appellant 2nd accused to return to their home, leaving appellant 3rd accused in the hotel.

On arrival home Zainabu alleged that she felt as if she was under the influence of drink and very dizzy. At that stage 1st accused, in the presence of appellant 2nd accused ordered her to hand over money to him. She said she had perforce to comply, and handed over shs. 35,000/- to accused 1, apparently towards the purchase of the trucks. 1st accused also ordered Zainabu to hand over her wrist watch, which Zainabu did. Zainabu also was dizzy. Thereafter the 1st accused and appellant 2nd accused left, and both Mariam and Zainabu fell asleep. It is difficult to know what time that was; but on the evidence adduced it would be around midday or so. At about 5.30 p.m. the same day P.W.4 Helena a nurse by profession, came to the complainants' house and found both

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Mariam and Zainabu asleep in their room. She tried to wake them up, but both appeared to her very dizzy and did not reply when she spoke to them. They appeared to her drunk. She has known them for 13 years and she knew that both of them do not drink alcohol.

Mariam eventually woke up and looked for the appellants and their co-accused the following day in the Dar es Salaam hotels, but failed to see them. On 24th July she spotted 1st accused in a taxi, and on or about 26th July the complainants reported the matter to the police who eventually arrested the two appellants and their two co-accused, and thereafter the parties were charged with theft.

The prosecution case was that both Mariam and Zainabu were drugged when they drank their fanta at the Bahari Beach hotel, the noxious drug being administered by the appellants and their co-accused through the instrumentality of 1st accused. When Mariam and Zainabu parted with their property they were not free agents, being under the influence of a noxious drug, as they were stupefied and were incapable of resisting the slightest demand or intimidation. The trial magistrate and the first appellate judge both found as a fact that the complainants were so drugged as alleged by the prosecution, and as a result of being so drugged, parted with the sum of shs. 35,000/- and the wrist watch to the 1st accused and appellant 2nd accused. The trial magistrate found all the 4 accused persons had acted in pursuit of a common object and in concert and were all guilty, but the first appellate judge acquitted the 4th accused as not being involved in the thefts. The appellant 2nd accused in his defence had alleged that the complainants had discussed with him the sale of diamonds; that he had offered them diamonds worth shs. 100,000/-;

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that they eventually agreed on a price of shs. 80,000/-; that a sum of shs. 13,000/- and not shs. 35,000/- was paid by Mariam in part payment, and that the wrist watch was also handed over to make the part payment amount to shs. 15,000/-. The appellants denied drugging the fanta or any drink and denied that the complainants had not voluntarily handed over their money or the watch. Mr. Raithatha who appeared for the appellants before us submitted that the Courts below were wrong to have rejected the appellant 2nd accused's version of the incident, which was more consistent with the facts and circumstances than the unlikely story of their being administered a noxious drug as they alleged. He submitted that the Courts below failed to take into consideration certain other evidence. If they had they would not have come to the inference that a noxious drug had been administered to the complainants. He submitted that such failure to take into account this other evidence was an error of law, and this error of law would entitle this Court to interfere with the concurrent findings of fact of the Courts below. We have considered this other evidence pointed out by Mr. Raithatha; we have taken note that the administering of a noxious drug was an inference from established facts, that the circumstances and happenings at Bahari Beach Hotel were somewhat odd and unusual, and that P.W.5 Elias apparently did not notice anything untoward when the complainants returned home on 23rd July, though when he went to talk to the complainants he found them asleep.

We ourselves think that the complainants perhaps were not telling the whole truth; on the evidence as a whole we would be perhaps inclined to think that the appellants and their co-accused and the complainants had entered into some irregular

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or possibly illegal transaction in which the complainants were deceived and then the appellants acting in concert had obtained money by false pretences from the complainants, and gave nothing in return.

But we are satisfied that there was evidence to support the finding of fact by both the Courts below that a noxious drug had been administered to the complainants. The evidence pointed out to us by Mr. Raithatha is only of marginal significance, and cannot operate in the way Mr. Raithatha has suggested. Although on our own evaluation of the evidence we might perhaps have arrived at a conclusion different from that of the Courts below in so far as the nature of the offence committed is concerned, we are not prepared to disturb their concurrent finding since in our view there was credible evidence to support it. Mr. Raithatha has conceded that once the findings on this aspect of the Courts below is upheld then the appeal must be dismissed.

We dismiss the appeal of both the appellants.

Dated at Dar es Salaam this 7th day of November, 1979.

A. MUSTAFA
JUSTICE OF APPEAL

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR