THE HON. MR. JUSTICE TSEKOKO

Bail

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HC. CRIMINAL MISC. APPLICATION NO. MMB 12/92

ALI FADHUL.....APPLICANT

VS

UGANDA.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE A. N. KARCKORA

RULING:

This is an application by Ali Fadhul for bail pending hearing of his criminal case of murder which was adjourned to the next convenient session of the High Court at Mbarara, after his advocate had failed to turn up to defend him on a date which had been fixed with his consent.

The application is supported by applicant's affidavit which sets out 18 grounds for his application. Probably before considering the application, it is necessary to go into the background of this application.

The applicant was arrested in 1986 and charged with murder. He was tried and convicted of murder on 27th September, 1989. His appeal to the Supreme Court was allowed, but a retrial was ordered. So he has been before High Court on 25/2/91, 28/1/92 and 24/8/92 for retrial. However, retrial never commenced on each of these dates. Reasons for adjournment had been for lack of funds except for the session of 24th August, 1992 when the case failed to take off on grounds of his lawyer, Mr. Elue, failing to turn up.

Now, because the retrial has not been commenced he is applying for bail. Mr. Butagira, who represented him rehearsed the grounds contained in the affidavit sworn in support of his application and cited the case of Gordon Buhazi v Uganda Criminal Misc. Application No.7/1992

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where it was held that the High Court had powers to entertain and grant bail to applicant who had already been committed to High Court for trial.

That being the legal position, he invited me to grant bail to the accused who had been on remand since 1986 and whose case had not been disposed of through no fault of his. He was a Brigadier and Minister of Local Government in Amin's regime. He has a fixed place of abode at Bulamagi Nyanga - Bwikwe in Mukono District where he was born and had lived since his childhood. He produced two sureties who are residents of Mbarara and submitted if the applicant was released he would not abscond.

At the moment the applicant's case had been adjourned indefinetely. So this was a proper case where the applicant should be released on bail so that he could organise his family, concluded Mr. Butagira, counsel for applicant.

Against the above submission, Mr. Kabiito Senior State Attorney opposed the application on the ground that the fact that the case did not take off on 24/8/92 could not be blamed on the state. It never took off solely on account of the failure of the applicant to give sufficient instruction to his lawyer when the prosecution had all its witnesses. So the argument that the case had taken many years without being disposed of through no fault of his could not stand, especially in view of the fact that the applicant had refused an advocate on state brief. Therefore, it was submitted the applicant cannot be heard to say the case has not been heard through no fault of his.

He distinguished the case of Buhazi V. Uganda (supra) because in Buhazi's case the case had not been listed for

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hearing in the 1992 Criminal Session whilst in this application, the applicant's case had been the 1st case on the cause list for the 1992 Criminal Session, where the case failed to take off through applicant's fault.

He further submitted that the applicant was more interested in being released on bail than on being tried. As someone who was in exile as per his paragraph 12 of his affidavit, if he is released, he was likely to abscond into exile.

He therefore invited me to reject the application.

I have carefully considered the application, affidavit and submissions by counsel on this application and have addressed my mind to the law governing conditions to be considered when granting the bail and must state that the conditions in Gordon Buhazi v Uganda (Supra) are not exclusive and exhaustive. i.e. There the court held that at this stage

> "the High Court has to consider whether the accused has a fixed abode within the jurisdiction and whether he has sound sureties and whether there are other pending charges against him."

I must say that the overriding consideration in deciding whether or not to release an accused on bail is whether he will not abscond. This is very clear under Act 5/85 where exceptional circumstances are defined. This consideration is important especially in cases where the applicant is already committed.

So in this case, whereas there is uncontroverted evidence that the applicant has a fixed abode within the jurisdiction of this court and whereas some sureties were shown to court the court must be satisfied that there is no likelihood of the applicant absconding from the country

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considering the fact that he was in exile after 1979 war. I would accept Mr. Kabiito's submission that someone who had fled into exile at the end of the 1979 war could easily flee into exile from being tried if he got a chance to be free, bearing in mind the gr vity of the charge he is facing. For instance the fact that Amon Bazira in Bazira v Uganda (ureported) was released on bail with sureties did not deter him from absconding from being tried.

The possibility of Ali Fadhul absconding when released on bail is very high. Further, I must state that I think I would not be doing justice if I released someone already committed for trial on account of his own failure to either get a lawyer of his own choice or accept a lawyer on state brief.

In view of the above, this application must fail and accordingly it is dismissed as having no merit. The case shall be on the list for early 1993 Criminal Session.

A. N. Karokora

Judge

12/12/92

4/1/93 Ali Fadhul present.

Mr. Kabiito, Senior State Attorney for the state.

Naiga of Butagira & Company Advocates.

Ruling read.

A. N. Karokora

Judge

4/1/93