REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

CRIMINAL REVISIONAL CAUSE NO. MSK-00-CR-0005 OF 1999

(ARISING FROM CRIMINAL CASE NO. MMA 435 OF 1995)

SHABAHURIA MATIA ACCUSED

VERSUS

UGANDA PROSECUTION

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

REVISIONAL ORDER

1. This file was set before me by the Chief Magistrate of Masaka Magisterial Area with the following remarks. "The accused person was charged with Murder on 5.9.95. Todate the State has not taken interest in having him committed to High Court for trial or dispose of the case in any other way.

   This is one case of abuse of court process and accused is now on remand. I forward the file to Your Lordship, for action and directions under the Judicature Statute 1998."

2. I directed that notice of these remarks be brought to the attention of the Resident State Attorney and that the state and the accused appear before me for a hearing of this matter. The matter was heard on the 7th June 1999.

3. The facts in this case are not in dispute. The accused was arraigned before the magistrate's court at Masaka on the 5th September 1995 on a charge of murder. It was alleged that the accused on the 9th August 1995 at Bujja village, Masaka District had murdered one Twebaze Ronard. As the court did not have jurisdiction his plea was not taken. He was remanded into custody until the 19th September 1995. Thereafter he was regularly returned to court every

two weeks and was further remanded into custody for another two weeks. The prosecution, on all those occasions, stated that the inquiries continue. From the 24th June 1996 to the 14th October 1996 he was not produced in court despite production warrants issued for his production.

4. On the 14th October 1996 the accused was finally produced before a magistrate grade 111. The accused applied for release on bail having spent more than 365 days on remand. He was released on bail on terms of shs.50.000/= cash or to produce a substantial surety. In default, he was remanded into custody until the 28th October 1996. He failed to meet the terms for his release on bail and stayed in custody. He again started regularly appearing in court every two weeks. On the 11th November 1996 he informed court he was sick. The matter was adjourned to the 25th November 1996, with the court stating, it would consider the bail then.
5. On the 25th November 1996, the accused applied for bail again but the court did not deal with the application at all. The prosecution stated, "I have written to the O.C. CID to forward the matter before the R.S.A. for action. I pray for one last adjournment" The matter was adjourned to the 9th December 1996. On the 9th December 1996 the prosecution told court, " Inquires continue. I promise that I shall see RSA. The RSA had not seen the file from the O.C. CID but he had sent for it." The accused was further remanded until the 23rd December 1996.
6. On the 23rd December 1996 the accused reappeared in court and the prosecution put in their usual information. " Inquires continue." The accused stated, "I have overstayed on remand for 16 months." The Prosecution responded, "File to sent to the RSA for action." The court ruled that the accused's bail application will be considered on the next adjournment and adjourned the matter to the 7th January 1997.

7. On the 7th January 1997 the accused reappeared in court. The prosecution stated, "Inquires continue. The order by court to submit the file to the RSA was complied with but (no) response yet." The accused stated, " I have overstayed on remand for over 16 months. I apply for bail. I don't have a surety. My relatives are very far in Kabale. I'am also sick. Some time I have mental problems." The magistrate ruled that since the accused was released on bail and he failed to meet the terms, the court could not revise the terms, as it had no revisionary powers. He ordered the file to be placed before the Chief Magistrate for action. He did not appear before the Chief Magistrate until the 4th February 1997 when he was released on bail on a shs. 500.000/= not cash and on his own recogniscance.

8. The accused regularly appeared in court from that date till the 20th August 1997 when he failed to turn up in court. During this period the prosecution when it was represented stated that either there was no police file or inquiries continue. On a number of occasions the prosecution was not represented in court. On the 20th August 1997 a warrant of arrest was issued by court for the arrest of the accused. And on the 30th November 1998 the accused was produced before court on a warrant of arrest. He was remanded into custody. He started reappearing in court every two weeks.

9. On 28th December 1998 the accused appeared in court. The prosecution stated that inquiries continue. He was further remanded into custody. From 11th January 1999 to 7th April 1999 the accused appeared in court five times. The state was not represented in court at all during those five times. The court routinely remanded the accused for another two weeks regularly.

10. On the 28th May 1999 the magistrate before whom this file appeared gave up. He made the following order, " Place file before the Chief Magistrate for forwarding to the High Court.

Case has overstayed. Mean while accused to appear on 14.6.99." And thereafter the Chief Magistrate placed the file before me with the comment set out in Paragraph 1 above.

11. Mr. Simon Khaukha, Resident Senior State Attorney, appeared for the state and the accused was unrepresented. The learned Resident Senior State Attorney had this to say.

" I was not adequately prepared for this revision but we can proceed. It would appear that the accused has been held on remand for long. On account of the fact that he defaulted on the bail conditions. I checked my records and noted that my office does not possess this file. Without this file in our possession it would render the accused person staying on remand endlessly without a clear position being communicated to court. The action I would wish to take in this case is to submit it for formal withdrawal. If this court pleases, it may grant the accused bond or bail on terms it deems fit. I would suggest that within three weeks time I would be ready to submit a formal withdrawal in this case."

12. I inquired of the Resident Senior State Attorney in the following terms. " Why should the accused be put at risk of further prosecution in light of what appears to be a serious violation of his right to a speedy trial?" Mr. Simon Khaukha responded, " I was proceeding on the premise that the file may not easily be obtained. Delays can be occasioned by the courts. It should not be blamed on the prosecution alone. Perhaps all other players should be here to say something."

13. The accused stated, " I am very sick. I hardly get enough food in prison. I apply for bail having been in prison for a long time. I receive only a spoon of beans once a day. I have heard mental sickness and it was during a relapse that this offence arose."

14. In accordance with the inherent jurisdiction of this court to prevent abuse of court process, and in accordance with Section 19(2) of the Judicature Statute, I ordered a stay of prosecution of the charge against the accused, dismissed the said charge of murder and discharged the accused, setting him at liberty forthwith. I said I would give my reasons on 30th June 1999. I proceed to do so now.

15. The matter at hand can be dealt with under two different but supporting heads. One is under the inherent power of courts to prevent abuse of it process. And the other is under articles 28 (1) and 50 of the Constitution of Uganda. I proceed with abuse of process.

16. Section 19 of the Judicature Statute states, "(1) The High Court shall exercise general powers of supervision over magistrates' courts.

(2) With regard to its own procedures and those of the magistrates' courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecution as may be necessary for achieving the ends of justice."

17. In subsection (1) of section 19 of the Judicature Statute, the High Court of Uganda is clothed with jurisdiction to supervise the subordinate courts to it. In subsection (2) of the same section the common law doctrine of inherent powers of the High Court to prevent abuse of court process both with regards to its own procedures and those of the subordinate courts is restated with particular reference to stemming delayed prosecutions. It is interesting to note that the legislature deliberately restates the existence of this power, and commands the High Court to apply it with regard to delayed prosecutions!

18. It may be worthwhile to note that in the final report, popularly known as the Platt Report, of the Commission of Inquiry (Judicial Reform) set up under Legal Notice No. 3 of 1994 by the Minister of Justice, it was drawn to the attention of the courts, at page 34,

"There has been debate on the Courts' inherent powers to deal with delayed cases. The Commission would like to point out that Courts are empowered by the Judicature Act 1967, to follow the doctrines of the Common Law. It is one of these doctrines that a court will not permit an abuse of its process. If it should be that a delayed prosecution reaches the point of an abuse by jeopardising the defence (inter alia), or by deliberately prosecuting an accused merely to harm him, then the Court should stay the proceedings."

It appears that the restatement of the existence of this inherent power of the courts in Section 19(2) of the Judicature Statute is intended to draw the attention of the Courts to the fact that

this power ought to be used in appropriate cases to deal with delay in the courts which is now known to have reached scandalous proportions.

19. It may be useful to explore the rationale, justification and application of this power of inherent jurisdiction to prevent abuse of court process in criminal proceedings from other common law jurisdictions to understand its full purpose and function, given the fact that the Courts in Uganda are just being prodded by the legislature to exercise this power in the area of criminal prosecutions.

20. In the United Kingdom this matter was considered in the case of Mills v. Cooper [1967] 2 Q.B. 459. Lord Parker C.J., stated at page 467: " ....every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court."

21. This matter received some consideration in the case of Connelly v. DPP [1964] 1254. Lord Morris of Borth-y-Gest stated at page 1301, "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process." Later on the same page he continued, "The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused from oppression or prejudice."

22. In the same case Lord Devlin at page 1354 stated, " The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To

questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

23. The doctrine of abuse of power was revisited in another House of Lords decision case: Regina v Humphreys [1977] A. C. 1. There was concern that it should not be applied to the extent of the courts entering the arena of prosecutorial discretion, a matter that lies entirely in the hands of the Executive. Lord Salmon observed at page 46,

" I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as matter of policy, it ought not have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should jealously preserved. ……. I express no concluded view as to whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus: See Mills v Cooper [1967] 2 Q.B. 459."

24. The doctrine of abuse of power is applied in virtually most common law jurisdictions. In New Zealand the Court of Appeal in Moevao v Department of Labour [1980] 1NZLR 464 at page 482 explained it this way: " The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of justice under law. It may intervene in this way of if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, thorough multiple or successive proceedings) as to cause improper vexation or oppression. The yardstick is not simply fairness to the particular accused….That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It

is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of process of the Court."

25. Earlier on the court provided the rationale for application of this doctrine. It stated at page 481, " It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by the state and citizen alike. And that due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of Law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

26. In the Australian case of Jago v The District Court of New South Wales And others (1989) 168 CLR 23 the High Court of Australia, the federal court of last resort, considered certain aspects of abuse of court process doctrine. Mason C.J. stated in paragraph 2 of his judgment, "2. It is convenient to commence by considering the inherent power of courts to prevent abuse of their process. It is clear that Australian Courts possess inherent jurisdiction to stay proceedings which are an abuse of process:……. Subject to statutory provision to the contrary, a court also possesses the power to control and supervise proceedings brought in its jurisdiction, and that power includes power to take appropriate action to prevent injustice:……But it may be that "injustice" in this context has a limited meaning, although the power is not to be confined to closed categories:"

27. The doctrine of abuse of process as an aspect of the common law is also applied in Canada. See R v Conway [1989] 1 S.C.R. 1659; R v Scot [1990] 3 S.C.R. 979; R v Potvin [1993] 2 S.C.R. 880 and R v Power [1994] 1 S.C.R. 601. I have looked at several jurisdictions to demonstrate that this doctrine of abuse of court process is firmly ingrained in the common

law. Its purpose and full extent is fairly well brought out. It serves to prevent, in case of criminal prosecutions, the maintenance of proceedings that are either instituted for an improper motive or purpose, or proceedings that are oppressive or vexatious to the accused person.

28. In the case of Uganda Section 19(2) of the Judicature Statute specifically recognises delay of prosecutions as an aspect of abuse of the process of court for which criminal prosecutions may be stayed. This is a statutory innovation. There is no need for further authority beyond this provision though further authority exists in terms of the constitutional right to a fair and speedy trial. Article 28 (1) of the Constitution provides,

"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

The common law and the bill of rights working from somewhat different angles seem twined at this point to achieve protection both for an individual and for the values that society at large holds as essential in the implementation of criminal law. The question is what amount of delay would justify the imposition of a stay of prosecution and probably at what stage of the prosecution as relief for abuse of the process of court?

29. In dealing with delay in criminal prosecutions the starting point may be to consider the factors to be taken into account in assessing the delay. It may be useful to examine the considerations that have been developed in the right to a speedy trial, or trial within a reasonable time, jurisprudence in other common law jurisdictions and international tribunals in respect of whose founding treaties or conventions Uganda has acceded to.

30. In Barker v Wingo 407 U.S. 514 the United States Supreme Court determined its approach to the enforcement of the right to a speedy trial. It singled out four factors to be considered in determining a breach of the right to a speedy trial. It stated at page 530,

"The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trials on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in a different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

31. This approach was cited with approval by the Judicial Board of the Privy Council in the case of Herbert Bell v Director of Public Prosecutions and another, [1985] 1 A. C. 937, on appeal from the Court of Appeal of Jamaica. The Board was considering an appeal where it had to determine whether the appellant had been afforded a trial within reasonable time as required by the Jamaican Constitution.

32. Canadian Jurisprudence, while in agreement with Barker v Wingo (supra), to the extent of the necessity for a balancing test, and to the interests of the accused, which the right is intended to secure, has developed in somewhat a different direction, specifically determining that an accused person has no obligation to assert his right to a speedy for trial. Account though, is taken of his actions whether or not they contributed to the delay. In R v Morin [1992] 1 S. C. R. 771 the Supreme Court of Canada considered trial within a reasonable time as provided within its charter of rights and reviewed its earlier decisions on the subject. Sopinka J. writing for the majority of the court explained that the right to trial within a reasonable time was intended to secure three primary interests of the accused. These were, (1) the right to security of person, (2) the right to liberty, and (3) the right to a fair trial. He stated,

"The right to security of the person is protected……by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that the proceedings take place while evidence is available and fresh."

33. Sopinka J then went on later to set out the factors he considered essential in determining whether the right had been breached or not. He stated, "The general approach to a determination whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against the factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra, "it is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p.1311). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows: 1 the length of the delay; 2 waiver of time periods; 3 the reasons for the delay, including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the Crown, (d) limits on institutional resources, and (e) other reasons for the delay; and 4 prejudice to the accused."[1]

34. R v Morin (supra) and in particular the general principles in delay cases set out in the judgment of Sopinka J., were cited with approval in the case of Martin v Tauranga District Court [1995] 2 NZLR 419 decided by the Court of Appeal of New Zealand. The Court of Appeal though warned that the time periods of reasonable delay set out in overseas cases would not of course be automatically followed in New Zealand. The same must be true of Uganda, owing to the different conditions and somewhat different problems obtaining in Uganda.

35. While taking some guidance from Barker v Wingo (supra) and R v Morin (supra), the Constitutional Court of South Africa, in Bruce Robertson Sanderson v Attorney General of Eastern Cape CCT 10 of 1997 warned of the use of foreign precedents in the following words, in paragraph 26 of the judgment of Kriegler J., " … the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management. Thus, for example, one should not resort to the Barker test or the Morin approach without recognising that our society and our criminal justice system differ from those in North America. Nor should one, for instance, adopt the "assertion of right"

[1] Decision pulled from the Internet http://www.droit.umontreal.ca on 30th May 1999. No page number is available for the quotation.

requirement without making due allowance for the fact that the vast majority of South Africans accused are unrepresented and have no conception of a right to a speedy trial. To deny them relief….because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of our society are concerned. It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment."

36. The Court in Sanderson v Attorney General (supra) decided to consider, in determining delay beyond a reasonable time, three factors. These were, (1) the nature of prejudice suffered by the accused person, (2) the nature of the case the accused was facing, and (3) the systematic delays. I entirely agree that in using foreign precedents we have to be careful to tailor them to the meet the conditions obtaining in our own jurisdiction rather than just a direct transplant. Indeed just like South Africa, in Uganda the majority of our people are unaware of their rights and access to counsel is the exception rather than the rule. As in this case, though the accused is entitled to counsel at the expense of the state, the practice is that Counsel is not assigned until the case comes to trial, at times, long after committal to the High Court for trial. The accused appeared in this revision unrepresented! Since he was arraigned before the magistrate's court on 5th September 1995 to date on capital charges he has not had benefit of counsel.

37. Considering the circumstances obtaining in Uganda, now and some time past, I would think that the following factors would provide sufficient guidelines in determining unreasonable delay, and to a certain extent when delay would amount to being oppressive and unjust so as to be an abuse of court processes. These are: (1) the length of the delay;
(2) the reasons for the delay, including (a) inherent time requirements of the case, (b) actions

of the accused, (c) actions of the State, (d) limits on institutional resources or systematic delays, and (e) other reasons for the delay; and (3) prejudice to the accused.

38. In looking at the length of delay one looks at the period between laying of the charge and the completion of proceedings against the accused or up to the time an issue is made out of the time that has passed since the laying of the charge against the accused. See the case of Lubuto v Zambia[2] of the Human Rights Committee under the International Covenant for Civil and Political Rights. In the instant case we are looking at the period between the 5th September 1995 and 6th June 1999 when this file came up for a revisionary hearing, a period of three years and nine months. Between the laying of the charge and the hearing of this revision, the state had not committed the accused to the High Court for trial as required by the Magistrates Courts Act. Committal to High Court was a necessary step to trial of this case. Without committal the case would never be tried. In light of the provisions of article 28 (1) of the Constitution conferring upon the accused a right to a speedy trial, and to avoid unnecessary oppression of the accused by use of court processes, it must be incumbent on the state to proceed promptly with bringing the accused to trial, by committing his case to the High Court for trial. A period of three years without committal to the High Court for trial is expectionally long so as to raise an inquiry as to whether the proceedings against the accused are not oppressive or otherwise in breach of his right to a fair and speedy trial.

39. In 1972 when the ugly head of delay appeared to be noticed by the legislature, a decree was enacted providing a statutory scheme to deal with it, to minimize the pre-trial detention and

[2] Communication No. 390 of 1990, UN Doc. CCPR/C/55/D/390/1990/Rev. 1 (1995).

the hanging of a charge over an accused's head. Section 74A of the Magistrates Courts Act, as amended by Decree No. 11 of 1972, provided for a cap on the number of days an accused remanded for a crime punishable with death can spend in custody on remand to three hundred and sixty five days. And if the state sought an adjournment to carry out further inquiries, and such an adjournment was granted, the magistrates court was to discharge the accused person and dismiss the charges at the expiry of ninety days, following the three hundred and sixty five days. This statutory scheme to prevent prejudice to accused persons operated until 1985 when it was repealed, without replacement by the Magistrates Courts (Amendment) Act, Act 4 of 1985.

40. In 1990 The Magistrates' Courts (Amendment) Statute, No. 6 of 1990 somewhat reversed this position by restricting pre-trial detention on charges punishable with death to a period of four hundred and eighty days. This period has been reduced back to three and sixty days by the Constitution, under article 23 (6) (c), where an accused is not committed for trial to the High Court.

41. These periods provide the time periods to be observed by the courts with regard to pre-trial detention. Pre-trial detention is only one of the elements of prejudice suffered by an accused, presumed innocent, of the offence with which he is charged. The same period in my view serves as guide with regard to the other prejudice that an accused suffers as a result of not being brought to trial with the speed ordered by the Constitution. This other prejudice includes the anxiety, concern and stigma of a criminal charge hanging over his head.

42. In dealing with committal of cases to the High Court, the Platt Report at page 34 stated,

" As we have said, once the remand reaches five months, we recommend that the Chief Magistrate steps in to ascertain why committal to the High Court has been delayed. The State Attorney should be able to explain within a month, the cause of the delay and when he estimates that the accused will be committed for trial. If

there is no excuse at all, the matter must be reported to the Chief Justice via the Chief Registrar, who will usually contact the Director of Public Prosecutions. If there is indeed no case, no doubt the case will be withdrawn."

43. I refer to the foregoing recommendation, not so much for the administrative guidelines it was recommending, which as this case illustrates, have not been implemented. I do so in relation to the time frame, the commission thought reasonable for committal proceedings to have been completed, a period of about five months since laying of the charge.

44. In my view, everything considered, in this particular case, once the accused was not committed for trial after twelve months, this would raise an inquiry into whether any further delay was reasonable. That then takes me to the second factor to consider. And that is the reasons for the delay. The prosecution at the hearing of this revision did not explain at all the delay in this case. All that the learned Resident Senior State Attorney did say on this issue was that delays are caused by different players, including court. I agree but that does not make delay excusable in the least! If one takes it that the inherent time requirements of this case, being a charge of murder, would take six months before the file was submitted to the Resident State Attorney to decide whether to commit or not, the Resident State Attorney would have more than ample time in the next six months to complete committal of the accused before the High Court.

45. On 25th November 1996 the Prosecution informed court that the matter was being forwarded to the Resident State Attorney for action. By the 9th December 1996, no further progress appears to have been made. On 7th January 1997 the court was informed that the file had been submitted to the Resident State Attorney. Since that day to date no action is known to have been taken by the Resident State Attorney. The Police, who are supposed to turn up for the state in the magistrate's court to explain the position of the case, from the court record, did

not turn up in court from July 1997 to November 1998! When the police did turn up on 30th November 1998, it was to produce the accused on a warrant of arrest and to seek that he be remanded as inquiries continue. Again from the court record, the police was not in court from 11th January 1999 to the 14th April 1999, an absence on more than five occasions when the case was mentioned in court.

46. In my view there can be no clearer case of delay rendering a proceedings against an accused so oppressive as to require intervention by the courts to put an end to this abuse of court process, as the instant case. There is no indication whatsoever that this prosecution is headed anywhere, least of all on the track for trial. The state is content with the status quo with no plans at all to take a step essential for the trial of the charge against the accused. There is no claim here for lack of institutional resources necessary for the progress of the case. Whereas regard may be had to this factor, it does not displace the constitutional duty of government to provide sufficient resources for the administration of justice.

47. It is true that the accused had been released on bail after over sixteen months in custody. He did comply with his bail terms between his release on 18th February 1997 and 23rd July 1997, a period of about six months. He then jumped bail. This action has not been cited at all as contributing to the delay or failure for the accused's committal to the High Court, or for the progress of the case. In one sense it is not surprising that the accused jumped bail. From the charge sheet and the record of proceedings, the accused was porter a from Kabale who had presumably come to work in Masaka, approximately two hundred miles away from Kabale, at the time the offence was committed. On his release on bail, he presumably had to go back to Kabale. He had to travel to court about five times during this period. Transport alone, for a person who has been in prison for over one year, with no job or independent means, or

welfare by the state, imposes quite a hardship. It can not be expected, much as he must comply with his bail terms, that he has to travel to court endless times. I think that after a couple of times, attendance becomes a real hardship, especially where the state's management of the proceedings is with such reckless disregard to both the public interest in bringing trials of crimes to their logical conclusion, and to the accused's right to a fair and speedy trial.

48. Prejudice to the accused, presumptive and real, is extremely grave in the circumstances of this case. The ability of the accused to mount a defense is affected with the passage of time. The witnesses may not be traceable. Their memories may fade with time. If on bail, accused must incur travel and accommodation expenses regularly. If he can not afford these expenses and jumps bail, he is certain to be re-arrested, as happened in this case. In detention, his right to be presumed innocent becomes a mockery, existing only in name, as he languishes in pre-trial detention. It is no secret that in our penal detention centres for adult prisoners, the conditions are extremely severe. The accused must in the meantime bear anxiety, concern and stigma of exposure to criminal proceedings not headed anywhere.

49. I was satisfied that the unexplained delay of three years and nine months, without the accused being committed for trial, while bearing the very grave charge of murder on his head, is so oppressive as to amount to an abuse of court process, warranting the extreme step of ordering a stay of prosecution. For those reasons I declined to grant the accused bail or grant an adjournment to the state to set in motion a process leading to a possible withdrawal of the charges against the accused.

50. I am aware that a stay of prosecution is not, except in the extreme of cases, the only remedy available to a court. Depending on the circumstances of the case, bail, an order fixing a trial

date, refusal of adjournment, dismissal of charges and discharge of the accused are other possible remedies that may be considered in an appropriate case.

51. I now turn to one matter before I take leave of this case. Rather than being the exception, cases like this one are substantial in number in this magisterial area. They are estimated to number slightly over six hundred. The question is, are the magistrates not able to deal with the situation some way other than referring it to the High Court for revision? The view that seems to prevail was stated by the Platt Report at page 20 to be,

"It was equally widely assumed by the Chief Magistrates that they could not interfere with the prosecution of cases, and however they might resent being used as rubber-remanding –stamps, or rubber-bailing stamps, and however much they might point out the dire plight of some accused persons, at the end of the homily to the prosecutor, the court could do nothing, if the prosecutor did nothing."

52. It is not clear why it is presumed that the magistrates are powerless to prevent an abuse of process in their courts. May be it is because they do not have jurisdiction to try the capital charges. It may be the 1985 repeal of the 1972 Amendment to the Magistrates Courts Act that authorised magistrates to dismiss the charges in cases where a certain period had been passed

53. An examination of authorities dealing with the inherent jurisdiction of the courts does not restrict this power to the superior courts only. See paragraphs 20 to 27 above. They refer to just to a courts' inherent jurisdiction to prevent abuse of its processes. In fact in Mills v Cooper (supra) a magistrates' court in the United Kingdom had in fact exercised such inherent jurisdiction to protect its own process from abuse. On appeal the power of these courts to protect their own process was specifically recognised, though it was found that in that particular case it had been wrongfully exercised.

54. The magistrates have no jurisdiction to try capital charges. But they have jurisdiction to read the charges to the accused persons. They have jurisdiction to remand the accused persons into custody. Proceedings in relation to these charges continue in magistrates courts until the accused is committed for trial to the High Court or the case is withdrawn ordinarily or on any other orders of superior courts in relation thereto. Is the magistrate intended only to be a conveyor belt set in motion by the state, without any power to affect the conduct of the proceedings before him or her? I would think not. I believe on authority referred to above in paragraphs 20 to 27 that these courts possess inherent jurisdiction to prevent abuse of the process of the court. For example, they should be able to require the state, after the expiry of some reasonable period of time following the expiry of three hundred and sixty days of remand of the accused in custody, the mandatory threshold established by the constitution for release of the accused, to commit an accused for trial to the High Court. And in case, the prosecution did not, the court would be entitled to refuse a further adjournment of the case or remand of the accused into custody to prevent abuse of the process of a court for oppressive or vexatious purposes or other improper motives.

55. The order or orders which a magistrates' courts could make in such circumstances would have to be considerably different from a court with jurisdiction to try the offence. Whereas in this case, it is clear the High Court has powers to order a stay of prosecution, the magistrate court would not have the authority to make a similar order in a case which it lacked jurisdiction to try. However, it could be able to dismiss the charges and discharge the accused, in the clearest of cases, on the ground that the proceedings before it amount to an abuse of process for being oppressive and vexatious. The prosecution would be free to reopen charges against the accused persons, once it puts its house in order, subject to the accused

taking any action available at law to protect his rights under the bill of the rights before a competent court.

56. I am aware that of course that the foregoing remarks are obiter, not necessary for the decision in this case. As such they are not binding on the lower courts. In addition, if this view was put into effect, perhaps more confusion could result rather than improve the situation in the criminal justice system. To remove the current uncertainty of the law in this area, or until higher courts are able to settle this question, I would recommend to the Minister responsible for Justice and the Attorney General that it in light of the grave crisis in the criminal justice system in the country at the moment, reform of the statutory law along the lines of the now repealed Section 74A of Decree 11 of 1972, the Magistrates Courts (Amendment) Decree would be preferable. I accordingly direct the Registrar of this Court to forward to the Minister of Justice and to the Attorney General a copy of this revisional order.

Dated, Signed and Delivered at Masaka this 30th day of June 1999.

FMS Egonda-Ntende
Judge