REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

CRIMINAL REVISIONAL CAUSE NO. MSK-00-CR-CV- 0013 OF 1999

(ARISING FROM ORIGINAL KALISIZO CRIMINAL CASE NO. 30 OF 1991)

UGANDA PROSECUTION

VERSUS

TESIMANA ROSEMARY ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

REVISIONAL ORDER

1. This case demonstrates the ills in our criminal justice system that ought not to be tolerated in any civilised system of administration of justice. The accused, Tesimana Rosemary, was for the last nine years and three months or so, lost in the system! She did not re-surface, at least to the existence of the courts until a letter dated 8th June 1999, whose contents I reproduce below was written to the Chief Magistrate by the Officer in charge of Masaka Government Prison.
2. "RE: Remand No. 203/91 Tesimana Rose The above named female Prisoner is in our custody on charges of Murder MMA Kalisizo 45/91. She was admitted in our prison on 3/4/91. Since her admission, she showed some signs of mentally unsound person and the O/C then requested her medical examination through the Chief Magistrate, she was transferred there after to Butabika Mental Hospital where she was since then. She has now been sent back after her medical treatment and seems sound to stand trial. The purpose of this letter therefore is to request you take the necessary action on her as the period is seemingly too long." This letter was not accompanied by any medical report whatsoever!

3. This matter now comes before me by way of revisional jurisdiction, having been placed before me by the Chief Magistrate, Masaka Magisterial Area. The brief facts of this case are that the accused was charged with murder of Gataro Paul, who I understood from the bar was her husband, on the 20th February 1991. She was arraigned before a magistrate's court on the 1st March 1991. On that day the court noted, " Accused further remanded to 15.3.91 and looks to be of unsound mind. She is ordered thus [;] she be taken to hospital for examination."
4. In spite of this order, the accused remained in custody in Kalisizo and Masaka Government Prison, until about May 1991, when the prosecution started reporting to court that she was sick. On 26th July 1991 she was reported to be in Butabika Hospital. This file was regularly mentioned every two weeks and it was routinely noted that the accused was sick, or absent or in Butabika Hospital and that there was no police file up to 10th February 1994. On this date the magistrate issued a production warrant for the accused. This was regularly extended until the 30th November 1994. It was never executed or complied with the by Prison authorities! Neither was any explanation provided to or sought by court.
5. On 30th November 1994, the court made the following order; " File shelved away pending production of the accused." The file somewhat resurfaced on the 19th February 1999, more than four years later and again the accused was absent. The court made the following order; " File referred to the DPP through C/R for action." It is not evident what action the officers referred to took. Subsequently the accused resurfaced in the judicial orbit with the letter referred to above from the officer in charge of the Masaka Uganda Government Prison dated 8th June 1999, after an absence of slightly over nine years!
6. This file was placed before me in exercise of the High Court's supervisory powers over proceedings in Magistrates Courts under Section 19 of the Judicature Statute. When the matter came for hearing the Resident Senior State Attorney, Mr. Simon Khaukha, who appeared for the state, explained that this matter took this long because no information was passed back to the prosecution from prisons. After perusing the police file, he was of the view that although there was enough evidence to prosecute the accused, it would appear that at the time the accused is alleged to have committed the offence she was mentally unsound, and had a history of an unsound mind. Mr. Simon Khauka applied for an adjournment to enable him initiate a withdrawal of the charges against the accused.

7. The accused was unrepresented at these proceedings, just as she was unrepresented in the proceedings in the lower court. When it came to her turn she said she had nothing to say. Asked by if she should be released, she responded, " I forgot where I came from." Asked what the Court should do for her, she replied, " I don't know."
8. I declined to grant the application for adjournment. Exercising the inherent jurisdiction of this court, and in accordance with section 19(2) of the Judicature Statute, I ordered a stay of the prosecution of the charges against the accused. I dismissed the charges against her and discharged her forthwith. I stated that I will provide my reasons for the above decision later and I now do.
9. The first matter I should deal with is perhaps the way the accused was dealt with by the court on realisation that she was a person of unsound mind. On 1st March 1991, when the accused first appeared on the present charges before the magistrates' court, the court noted that she appeared to be a person of unsound mind. It ordered that she be taken to hospital for examination. She was subsequently taken and did not return until eight years later, albeit without a report!
10. Was this the way she should have been dealt with at law? Part X11 of the Magistrates Courts Act provide the procedure for dealing with cases of insanity or other incapacity of an accused person. It specifies two areas in which it is applicable under Section 111(1) of the Magistrates Courts Act. These are either "in the course of a trial" or "preliminary proceedings"
11. Section 111(1) provides," When in the course of a trial or preliminary proceedings a magistrate's court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of such unsoundness." Subsections (2), (3), (4) & (5) of Section 111 then deal with what orders the court is to make during and after its inquiry. Statute No. 6 of 1990, The Magistrates Courts (Amendment) Statute, repealed part XV of the Magistrates Courts Act, terminating the holding of preliminary proceedings in magistrates courts for offences triable in the High Court.
12. A magistrates court would have authority under section 111 of the Magistrates Courts Act as amended by the Statute No. 6 of 1990, to inquire into cases of insanity or other incapacity which are undergoing trial in its court only. It is no longer authorised to inquire in the same in respect of preliminary proceedings, which, as known under Section 111, have been abolished.

13. In any case, even if the magistrates court had authority to inquire into the unsoundness of mind of the accused in preliminary proceedings, it is unlikely that this would include matters of this nature where the proceedings had not yet moved into the realm of preliminary proceedings. Under section 241 of the Magistrates Courts Act, "Preliminary Proceedings are defined as the "proceedings under Part XV of this Act." Proceedings under that part were proceedings related to the committal of an accused to the High Court for trial. Apparently such proceedings did not include the initial appearance of an accused charged with a capital offence before a magistrates court. Such appearance was governed by Section 162 of the Magistrates Courts Act, out side Part XV of the Act.
14. If the remarks I make in paragraphs 12 and 13 represent the correct the position of law with regard to magistrates' courts authority to inquire into the soundness of mind of an accused, or other incapacity, it would mean that an accused who appears in a magistrates court on a charge that can not be tried by the magistrates court, can have this condition only inquired into after committal to the High Court, and presumably, only after the hearing of the charges against him has started. Perhaps, this explains the attitude and actions of the magistrate's court when the accused was first arraigned before it on the current charges. The resultant injustice of being lost in the criminal justice system demonstrates that there is a lacuna in the written law.
15. It may be that this lacuna may be addressed by legislative action by way of law reform. The attention of the Minister of Justice, the Attorney General and the Law Reform Commission will be drawn to this anomaly. In the meantime, is a magistrate court faced with the same situation powerless to hold an inquiry into the soundness of the mind or other incapacity, if there is reason to believe that the accused is of an unsound mind? I think not and the following are my reasons.
16. The general jurisdiction of magistrates courts is set out by Section 8 of the Magistrates Courts Act. It states, "The jurisdiction of a magistrates court shall, subject to the provisions of this Act and of any other written law limiting or otherwise relating to the jurisdiction of that court or of the presiding magistrate, be exercised in conformity with the law with which the High Court is required to conform in exercising its jurisdiction by the Judicature Act, 1967."

17. The Judicature Act, 1967 was repealed by the Judicature Statute No. 13 of 1996. Section 16 deals with the jurisdiction of the High Court. Section 16(2) reads in part, "Subject to the provisions of the Constitution and of this Statute, the jurisdiction of the High Court shall be exercised- (a), (b), (c) where no express law or rule is applicable to any in issue before the High Court, in conformity with the principles of justice, equity and good conscience."
18. As there is no "express law or rule" to deal with this particular lacuna in the law, Magistrates Courts and the High Court can apply "the principles of justice, equity and good conscience" to fill this lacuna. It may be that the magistrate's court in ordering the accused to be taken for medical examination was acting in conformity with the principles of justice, equity and good conscience. There is no evidence however on the file to show that this order was complied with. No examination report by a qualified medical practitioner was produced to court up to now, some eight years later! Perhaps principles of justice, equity and good conscience would require that an order for provision of medical treatment should have been made. It is clear to me, in terms of the principles of justice, equity and good conscience, that it was important to establish as soon as possible whether the accused was a person of unsound mind or not to determine the best course of action to be taken by the Director of Public Prosecutions as envisaged originally in matters under trial or preliminary proceedings before a magistrates court under Section 111(2), (3), (4) & (5). And in cases before the High Court, the procedure is set out in sections 43 to 45 of the Trial on Indictments Decree.
19. The procedure before the High Court and the magistrates courts is virtually the same. The court inquires if the accused is of unsound mind. If it forms the opinion that the accused is of unsound mind it may either release the accused on bail, if it is seized with the authority to do so. In case it is not, it then remands the accused in a safe custody and shall transmit the record or a certified copy thereof to the Minister. The Minister is authorised to order the detention of the accused in a mental hospital or such other suitable place. The Medical Officer in Charge of such institution is required to certify to the Director of Public Prosecutions as to whether the accused is capable of making his defence or not. On receipt of that certificate, the Director of Public Prosecutions makes up his mind whether to prosecute or not and informs court accordingly. Thereafter the original criminal proceedings may resume or the investigation into unsoundness of mind may continue.

20. The foregoing procedure ensures that the court does not lose sight of the accused and the proceedings against him. At the same time it seeks to secure the rights of an accused for a fair trial. The absence of a similar procedure in the instant case resulted in the accused being lost in the system and after nine years it is not clear what happened to the accused during this period! It is far from clear at the time she reappeared whether she was fit to conduct a defence from the point of view of her mental condition. I would suggest that Magistrates' Courts faced with a similar situation as the present one, ought to follow the procedure set out in Sections 111, 112 and 113 of the Magistrates Courts Act, as a necessity, based on the principles of justice, equity and good conscience, in absence of any other prescribed procedure.
21. I now turn to the issue of the nine-year delay in this case before committal for trial of the accused person. Does this delay amount to an abuse of the process of court to warrant a stay of prosecution in terms of Section 19 (2) of the Judicature Statute? In Uganda v Shabahuria Matia Criminal Revisional Cause No. msk-00-cr-0005 of 1999 (unreported) I examined the genesis and function of the provisions of Section 19(2) of the Judicature Statute. The section provides, " 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."
22. I stated in Uganda v Shabahuria Matia, " 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." This appears to be one such case!
23. In determining whether delay of the prosecution of the case was such that it required court to order a stay of prosecution, I suggested, in Uganda v Shabahuria Matia (supra), that the following factors ought to be taken into account:
    (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;

(3) prejudice to the accused.

24. The delay in the instant case is eight years. The accused was lost in the criminal justice system. For over nine years she did not appear in court. Ostensibly she was in Butabika Hospital for treatment for this period. But no report has been produced to show that she underwent treatment for her condition of being mentally unsound. The length of the delay in this case is such as to warrant an inquiry into the reasons for the delay with a view to determining whether the delay in this case was oppressive to the accused to amount to an abuse of the process of court.
25. In considering the reasons for the delay this will include, inherent time requirements of the case, the actions of the accused, the actions of the state, limits on institutional resources or systematic delays and any other possible for reasons for the delay. In an ordinary case triable by the High Court, the Platt Report suggested that five months and at the most six months was sufficient time in which the state ought to have committed the accused for trial to the High Court.
26. "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." [See Page 36 of the Platt Report]
27. I take it, following the views expressed above in the Platt Report that the inherent time requirements necessary to process the case from the arrest of an accused person, arraignment before a magistrate, completion of investigations, seeking opinion of Director of Public Prosecutions, and committal to High Court would, in an ordinary case, require no more than six months. It can not be said in the present case that the accused in any way contributed to the delay in this case. She was wholly at the mercy of the criminal justice system.
28. In considering actions of the state it should include omissions of the state in moving the case forward. It is the duty of the state to ensure that the trial of an accused progresses speedily without delay. This is in order to ensure that accused persons charged with offences are tried

and dealt with promptly according to law. Those found guilty would receive a just dessert and those innocent would be cleared of the charges against them. This is in the public interest. Society expects it to be so in light of the values and aspirations in our Constitution. At the same time the accused is entitled to be tried speedily in accordance with Article 28(1) of the Constitution.

29. In the instant case the state is guilty of the most gross inaction. For over nine years no action was taken by the state to move this case to disposition. The only reason advanced by the learned Resident Senior State Attorney was that the prosecution was not kept informed, presumably by the prison authorities, of the whereabouts of the accused. There is no evidence that the prosecution attempted to take any action whatsoever. From the address of learned counsel for the state, it was clear on the police file that at the time the accused is alleged to have committed the offence, she was of unsound mind. To have just dumped her into court and forget her existence was a dereliction of duty on the part of the prosecution. At the earliest opportunity the matter ought to have been communicated to the Director of Public Prosecutions with a view to forming a decision as to whether a prosecution ought to continue or not.
30. I now turn to the question of systematic delays or limits on institutional resources. This factor would come into play if the case was ready for trial but the court could not avail a trial date due to the pressure of work. It may be that it is not a question of pressure of work but there are no funds to finance a trial or retain counsel for the accused. Whereas delay due to pressure of work may be a factor to justify delay for a period in terms of limits on institutional resources, this can only be for a limited period, as there is a duty upon the state to organise its resources in such a manner that the rights of an accused are not rendered nugatory. Similarly, absence of funds for financing trial sessions including retention of counsel in cases where an accused is entitled to counsel at the expense of the state, can not form a justifiable excuse for delay indefinitely. Anyhow, in this particular case, it is safe to say that no portion of the delay was justified by the limits on institutional resources, as the case has never been ready for trial in the last nine years.
31. It could be suggested that the uncertainty of the law in this area may have contributed to the delay, as the various actors did not know what to do in the circumstances of this case. In the first place this was of course not raised at all by the state as a possible reason for the delay.

Secondly, if it were to be so, the state would have sought guidance from the Director of Public Prosecution or from the Courts as to the next step. This was not done. I do not find that there was any other possible reason for delay in this case, other than gross inaction on the part of the state.

32. I turn to the question of prejudice occasioned by the delay of the proceedings against the accused. I think this was monumental both presumptive and real. The accused's ability to defend herself, including recalling exactly what occurred is likely to have been affected. She no longer had an idea where her home was. Neither did she have an idea where to go after her possible release from prison. If she desired to call any witnesses for her defense, it is possible that these were not traceable. They may have died or moved away from the places the accused knew. The accused was kept in pre-trial custody for nine years and three months without a trial, rendering both the presumption of innocence, and the right to a fair and speedy hearing of no value or meaning to her.
33. In 1997 Uganda acceded to the International Covenant on Civil and Political Rights and its first protocol. This renders the jurisprudence of the human rights committee set up thereunder of persuasive value to our courts in considering matters that may have been considered by the Committee. In Lubuto v Zambia[1] the author was arrested in February 1980 and charged with the offence of aggravated robbery. On 4th August 1983 the author was convicted of the offence and sentenced to suffer death. He appealed to the Supreme Court and his appeal was dismissed in February 1988. The Committee found that the author's complaint raised, among other issues, whether Article 14, paragraph 3(c) dealing with a trial without delay had been complied with.
34. In paragraph of 7.3 of the Committee's decision it states, "The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the covenant constitute minimum standards, which all States parties have agreed to observe. Article 14, paragraph 3 (c), states that all the accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the

[1] Communication No. 390/1990, U.N.Doc. CCPR/C/55/D/390/1990/Rev. 1(1995)

final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3 (c)."

35. In our constitution the wording is somewhat different. But the import is the same. Article 28 (1) provides, "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and fair hearing before an independent and impartial court or tribunal established by law." The time starts to run once a criminal charge is laid.
36. In Uganda v Shabahuria Matia (supra) I found a period of three and half years without committing an accused for trial, without an explanation for the delay by the state, as oppressive, amounting to an abuse of the process of the court warranting the extreme remedy of ordering a stay of prosecution. The instant case is worse. There is no explanation for the delay of nine years and three months without committing the accused for trial. A period of eight years between the first arraignment of an accused before court and the completion of the proceedings including appeal to the court of last resort, in Lubuto v Zambia (supra) was found to have infringed the accused's right to trial without delay under the International Covenant for Civil and Political Rights. How much more so here where the case is not ready for trial for the last nine years without any convincing explanation for the delay!
37. I am satisfied that the delay in bringing the charges against the accused to trial in this case was so oppressive as to amount to an abuse of court process. At the same time it was a clear case of an infringement of the accused's right to a fair and speedy hearing. For those reasons I declined to accept the application by the state for an adjournment, and instead dismissed the charges, discharged the accused and ordered a stay of prosecution.
38. Before I take leave of this case, I must say the courts can not escape blame for this unhappy state of affairs in the criminal justice system, which has no remorse for caging up people in penal institutions for unjustifiable periods of time. It would appear that the magistrates courts to which accused persons are first produced before committal regard themselves as no more than an assembly line or conveyor belt, ran by the prosecution. For years on end, the court is content to record endlessly adjournments of the case for as long as the prosecution so requests. No inquiry or rather serious inquiry is made of the prosecution as to the state of investigations, and what steps the prosecution is taking towards the progress of the case. In the end the proceedings before it amount to an abuse of process of the court in so far as they become oppressive to the accused persons. In such a case I have expressed the view before

[See Shabahuria Matia v Uganda, (supra)] and I repeat it now, that the courts can not be powerless to prevent an abuse of the process of court. All courts have inherent jurisdiction to prevent abuse of process of court including, where necessary, a power to dismiss the charges pending against an accused.

39. Even though a Magistrates court has no jurisdiction to try capital charges, accused persons on such charges are brought before it to ensure that, among other things, the accused's rights are protected. The courts must be vigilant in doing so by consistently requiring the prosecution to provide information as to the state of investigations. The magistrate may order the prosecution to take certain action essential for the progress of the case by some date. And where it is evident that the prosecution is not living up to its obligations, the magistrate can send the file for revision to the High Court. Routine adjournments must come to an end.
40. In Uganda v Shabahuria Matia I drew the attention of the Minster for Justice together with the Attorney General to the need for law reform along the lines of Decree 11 of 1972 in order to stem injustice arising out of delayed action on the part of the state to commit for trial or otherwise deal with accused persons facing charges before the courts. This decree provided for dismissal of capital charges if an accused had not been committed for trial within fifteen months and a lesser period for none capital charges where no trial had taken place. This statutory scheme of providing limited periods for taking of certain actions has been adopted in the Children's Statute. See Section 100 of the Children's Statute.
41. A statutory scheme may provide the most efficient method of dealing with cases of this nature. The present case illustrates the gross injustice that arises out of inaction of the players in the criminal justice system. In light of these remarks and my earlier remarks in paragraphs 13, 14 and 15 above, I direct the Registrar of this Court to avail to the Minister for Justice and Constitutional Affairs, the Attorney General and the Chairman, Law Reform Commission copies of this ruling.

Dated, Signed and Delivered this 28th of July 1999.

FMS Egonda-Ntende

Judge