REPUBLIC OF UGANDA

IIN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT MISCALLENOUS CRIMINAL APPLICATION NO. 157 OF 1999

(ARISING FROM HC CRIMNAL CASE NO. CR 944 OF 1998)

SSEMANDA ALEX BURTON APPLICANT

VERSUS

UGANDA RESPONDENT

BEFRORE THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant, Ssemanda Alex Burton, is indicted of the offence of defilement contrary to Section 123 (1) of the Penal Code Act. He was committed to the High Court for trial. He seeks to be released on bail while awaiting his trial. It is in respect of that application that this ruling is issued.
2. The brief facts of this case are that the applicant was charged before Buganda Road Chief Magistrates Court with the offence of defilement on 5th April 1998. He was remanded into custody, appearing periodically for mention until his committal to this court for trial. On the 16th March 1999 he was committed to this court for trial. Since then to this day his case has not been listed for trial. On the 26th August 1999 he applied for bail and his application was heard this morning. The applicant is unrepresented. Mr. David Ndamurani Ateenyi, a State Attorney, represented the state.
3. The notice of motion sets out two grounds for this application. Firstly that the applicant has been on remand for twelve months which at the hearing of the application the applicant amended to read twenty-one months the actual period he has spent on remand. Secondly that the applicant is facing terrible loses of his projects due to his absence. At the hearing of the application the applicant relied on both his notice of motion and the affidavit in support. In addition he urged that his right to a speedy trial had been infringed. Ever since he was committed he claimed six sessions had been held at Kampala but his case had not been listed for trial among them. Even now he claimed a session was going on but his case was not one

of those to be tried. He asserted that cases that were committed later than his case have been listed for trial in some of the current and past sessions. He therefore prayed that he be released on bail pending his trial.

4. Mr. David Ndamurani Ateenyi, the learned State Attorney who appeared for the state, opposed this application. He submitted that the application was incompetent on two grounds. Firstly it did not state the law under which it was brought, and was being urged. Secondly because it did not disclose any exceptional circumstances as required by Section 14 A of the Trial on Indictments Decree. Counsel stated that the applicant has been committed to this court for trial. This was indicative of the state's desire to have him tried expeditiously. He conceded that the applicant has been inconvenienced but this did not arise out of a failure or refusal of the state to meet its obligations to have him tried expeditiously.
5. Mr. Ndamurani Ateenyi went on to say that the courts are clogged so much so that there are prisoners who were committed even before the applicant who the state is anxious to try but this has not been possible because the courts are clogged. I asked Mr. Ndamurani Ateenyi that in light of that, was the applicant without remedy, in spite of the provisions of Article 28 (1) of the Constitution conferring the right to a speedy trial. Mr. Ndamurani replied that the applicant was without remedy, and his application for bail could only be considered in terms of Section 14 A of the Trial on Indictments Decree.
6. I agree with Mr. Ndamurani Ateenyi that the applicant has not proved the existence of any exceptional circumstance as provided or defined in Section 14 A of the Trial on Indictments Decree. I do not however agree that that is the end of the matter. Section 14A of the Trial on Indictment Decree is not mandatory barring consideration of release on bail of an accused where no exceptional circumstances have not been shown. The discretion is left with the court to determine whether in the circumstances of that case exceptional circumstances would be required for consideration of release of an applicant on bail. Authority of this view is available in previous decisions of this court in the cases of Dorcas Nabatanzi v Uganda Miscellaneous Criminal Application No 34 of 1999 and Byaruhanga Rugyema Jese and Another v Uganda Miscellaneous Criminal Application no. 87 of 1998, to name only a few.
7. The previous Section 14A of the Trial on Indictments Decree which was amended by the current provisions stated in part, "……shall not be granted bail unless he proves to the satisfaction of the court , (a) that exceptional circumstances exist justifying his release

on bail; and". The current equivalent provisions now state in part, "…..the court may refuse to grant bail to a person accused of an offence specified in subsection (2) of this section, if he does not prove to the satisfaction of the court- (a) that exceptional circumstances exist justifying his release on bail; and " The legislature in its wisdom saw it fit to replace the use of the word "shall" with "may", removing the impression that this was a matter no longer in the discretion of the court. It may well be that the existence of the previous provision may have been contrary to the Article 23 (6) (a) of the Constitution which reposed in the courts discretion to release persons charged with criminal offences on bail on such terms as the courts considered reasonable.

8. Article 23(6)(a) provided," Where a person is arrested in respect of a criminal offence- (a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable." No law in my view can be enacted that diminishes in content the right to an accused implicit in this provision, and the discretion reposed in court by this constitutional provision, without risk to being struck down as unconstitutional by the relevant court.
9. The applicant complains that his trial has delayed. He has been on remand for twenty-one months. He does not know when he will be tried and apparently from the address of learned counsel for the state, neither does the state know when this trial will take place. The state pleads that the courts are clogged. And that the applicant therefore has no remedy. I do not agree that the applicant can be without remedy when one of his constitutional rights is breached or threatened to be breached. This would mean that the bill of rights is without meaning. The rights it recognises are merely paper rights, not worth the paper they are inscribed on. This can not be, and definitely not before a court of justice, whose duty under the Constitution is to enforce compliance with the provisions of the constitution and any other law.
10. In R v Morin [1992] 1 S.C.R. 771, the Supreme Court of Canada noted while considering the right to a trial within reasonable time that this right is inter alia intended to secure for an accused a right to liberty, by preventing unnecessary pre trial incarceration. The same point was made in the case of Bruce R Sanderson v The Attorney General of Eastern Cape CCT 10 of 1997 by the Constitutional Court of South Africa. Kriegler J put this way in paragraph 24 of his judgment, " The right to a trial within a reasonable time also seeks to render the

criminal justice system more coherent and fair by mitigating the tension between the presumption of innocence and the publicity of trial. It acknowledges that the accused although presumed innocent is nevertheless "punished" and in some cases, such as pre trial incarceration, the punishment is severe. The response of the Constitution is a pragmatic one- the trial must be "within a reasonable time".

11. Article 28 (1) of our Constitution provides, "In the determination of civil rights and 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." Among other things this provision seeks to ensure that an accused does not suffer unduly excessive pre trial incarceration while waiting for trial of any criminal charge against him. If it is shown that a trial for reasons outside the control of the accused person is to be delayed or is delayed can it be said that such an accused is without remedy?
12. I can not agree that an accused in those circumstances can be without remedy. As I noted in Shabuharia Matia v Uganda High Court Criminal Revision Case No. 0005 of 1999 at Masaka District Registry, " 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."**
13. In Bruce R Sanderson V Attorney General (supra) the Constitutional Court of South Africa noted that there several remedies in cases of a breach of the right to trial within a reasonable time. Kriegler J in paragraph 39 put it this way, " Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused."
14. In the present case the applicant has not had a trial within twenty-one months. It is not known when his trial will be listed for trial. He has continued to be detained in custody pending his trial. I am informed that the courts are clogged with cases and therefore it is not known when his trial will take place. I find that his right to a speedy trial is seriously threatened, if not

already infringed. In those circumstances to prevent excessive pre-trial incarceration, I am inclined to allow this application and release the accused to bail.

15. I admit the accused to bail on the following terms. He shall deposit in this court a sum of Shs. 500.000/= cash. He shall produce for approval before the Deputy Registrar (crime), High Court of Uganda two sureties to be bound in the sum of Shs.1.000.000/= not cash. He shall appear before the Registrar or Deputy or Assistant Registrar as the case may be, every third Wednesday of the month until his trial or until further orders of this court.

Dated at Kampala this 19th day of January 2000

FMS Egonda-Ntende

Judge