THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI, J.S.C. & PLATT, J.S.C)

CRIMINAL APPEAL NO.18 OF 1992

BETWEEN

Al BRIGADIER SMITH OPON ACAK==========APPELLANTS
A2 AHMED OGENY

AND

UGANDA==========RESPONDENT

(Appeal against High Court ruling holden at Kampala

(Hon., Mr. Justice Tabaro) dated the 25th day of

February 1992)

IN

H.C.C. SS CASE NO. 277 OF 1991

JUDGMENT OF THE COURT

The Appellants Brigadier Smith Opon Acak and Ahmed Ogeny lodged this appeal against the refusal of the High Court to accept their pleas in bar which they had put forward on the basis that they had been pardoned. This occurred on the 12th February 1992 after the learned Judge had tried the issue whether the Appellants had in fact been pardoned. The appeal is wide ranging and covers matters, which might be suitable for a constitutional court and certainly suitable for trial As we see the situation we think that it is necessary to be clear about the nature of the appeal before us which is confined to the issues arising out of the High Court's rejection of the evidence upon which the Appellants relied to prove that they had been pardoned.

At the commencement of a criminal trial, the usual situation is that the indictment or charge is read to the accused person, and he is required to plead whether he is guilty or not guilty of the

offence. But in special cases the accused has a right to put forward a plea, which would bar further proceedings, because such proceedings are null and void. The three pleas of this nature are, whether the accused person has already been convicted of the same offence, or whether he has been acquitted of the same offence, whether he has been pardoned. At this stage the court must ascertain the fact whether there is a previous conviction, a previous acquittal or a pardon. If it is matter where the accused person, feels that he ought to have been pardoned, either because there were circumstances in which his case ought to have attracted a pardon, or considering his constitutional rights, the President ought to have granted him pardon, these are all matters in which there being no certainty of pardon at the commencement of the trial, the trial should proceed and these issues taken up later on in the defence. The procedure of a plea in bar is the procedure whereby the accused can have the second proceedings declared null, on the sound principles that no man should be tried for the same offence if he has once been convicted or acquitted, or he has been absolved from that offence by a pardon.

These principles have received statutory authority and we would do well to commence with Article 15 (1) & (6) of the Constitution, which provides: -

> ***"15 (i) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.***
>
> ***(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."***

Passing on then to matters more particularly in point there is S.59 (1) of the **Trial on Indictment Decree** which provides: -

> ***"1) Any accused person against whom an indictment is filed may plead***

a) ***That he has been previously convicted or acquitted, as the case may be, of the same offences;***

or

b) That he has obtained the President's pardon on his offence.

2) If either of such pleas are pleaded in any case and denied to be true in fact, the Court shall try whether such plea is true or not.

3) If the Court holds that the facts alleged by the accused do not prove the plea, or if ii finds that it is false in fact, the accused shall be required to plead to the indictment."

Following upon these provisions, the Court in the present case proceeded to try whether the plea of pardon was or was not true. It came to the conclusion that there was not one iota of evidence which suggested that the plea was true. Accordingly, the Court called upon the Appellants to continue with the trial.

The Appellants now appeal on various grounds which we may divide into different categories. In the first category are ground 1 and 2 which are as follows: -

1. That the trial Judge erred in law in not including in the record the Court proceedings (a) statement(s) to the effect that during the hearing of the evidence on the 22nd of January 1992, Counsel for the Appellant asked to be allowed to lead evidence from each one of the Appellants in support of their pleas of statutory amnesty and Presidential pardon but the Court overruled the said application. Affidavits of OPON ACAK, AHMED OGENY and G.O. EMESU annexed hereto.

2. That the learned trial Judge erred in law in refusing to hear the evidence from each of the Appellants and/or putting each one of them in the witness box, to give such evidence, in support of their respective pleas of Statutory amnesty and/or pardon. The burden of arguing these grounds fell upon Mr. Emesu who appeared for the Appellants at the trial as well as on this appeal.

In the second category there were the grounds which Mr. Emoru undertook to argue starting with ground 3.

3. That the learned trial Judge erred on the facts in holding that there was no iota of evidence to show that the Appellants were pardoned by the President.

Ground 4 was not pressed because the arguments concerning an amnesty under the Amnesty Statute of 1987 was withdrawn from the appeal.

The remaining grounds complain that the Appellants had been granted a presidential pardon but that their release was later cancelled by a resolution and order of a High Command. It is claimed that the Appellants should have been released because of the Prior Legal pardon. On the other hand, as so many persons being held were being released, it was wrong for the High Command to specify who were to be released and who were to be persecuted, because that was an unconstitutional act since it discriminated against these Appellants. As far as the second Appellant is concerned his name was not referred to in the orders of the High Command and his name ought to have been included amongst those who were to be released.

Finally it was said that all those errors, omissions and irregularities constituted, and occasioned a miscarriage of justice. We must state clearly that all these matters concerning the claim or claim of the appellants to be granted a pardon concern matters of defence in the circumstances of this case. What this Court has to decide is whether there was any evidence adduced by the Appellants to show that the President had pardoned then even if there were

orders to be prosecuted by the High Command. The procedure is that it is for the Appellants to establish their pleas on the balance of probabilities and if they do not do so, they are unable to bar further proceedings against them and must proceed to trial, raising such natters as they consider to be open to then in defence.

In trying the issue of a pardon, the learned Judge noted in his proceedings that the accused persons were at liberty to call witnesses in an endeavour to show whether or not they were pardoned. This observation is attacked by Mr. Emesu because it does not show whether the Court thought that the accused persons themselves could take part in the trial. According to the notes, which Mr. Emesu took of the proceedings on his brief, the Court had actually held that Mr. Emesu's request to call the accused persons first was not proper. They should call independent witnesses to prove their claim,. Thereafter independent witnesses were called. This constitutes a challenge to the record, and as such, this Court would normally proceed to inquire from the Judge, whether Mr. Emesu 's notes are correct. But for reasons which we shall give presently we do not think that course is necessary, and we shall proceed upon the basis that what Mr. Emesu has said is correct. On that supposition we should point out that the accused persons if they wished to make a statement or give evidence on their behalf should have been allowed to do so. First of all it is always important to have the clear words of an accused person when he is putting forward a plea. It is not wise to rely in such matters on the statement of their counsel. Secondly, the issues for trial are likely to become clearer as to what, how and who granted the pardon. It did seem at first-sight that this irregularity was fundamental, but the situation has been clarified because in their appeal to this Court the Appellants have set out in an affidavit the matters which they would have relied upon had they been allowed to give evidence. It has been confirmed by Counsel that these affidavits contain the full statement of their case. We think therefore that as the Appellants have been in custody from 1987, it is better to consider their affidavits together with the other evidence adduced, and so to judge the appeal on that basis.

The affidavits of the Appellants are similar and are as follows: The Appellant Brigadier Acak that he was the Chief of Staff of Staff of the Uganda National Army before the overthrow of the Government of President Obote in 1985. He left Uganda and lived in exile until 1987. In November, 1987 he learnt from Radio Uganda and the BBC, that an Amnesty Statute had

been enacted and Presidential Pardon declared in Uganda granting a general pardon to all Ugandans fighting the present government, and all members of the various security organisations in the former government in Uganda. On the 26th November 1987 at a place called Bugema some 11/2 miles from Mbale he was arrested by soldiers who took him to Mbale Military Police.

He had been walking along the road to Mbale to report to the authorities. He was taken before Brigadier Sheifi Ali, who promised to transfer him to Kampala to be released on Presidential general pardon. He was taken to Lubiri Military Barracks where he was detained for two years. During his stay at Lubiri he was visited by several senior army officers whom he did not know, who told him that he had been pardoned by the President, and that he was only being held in detention for security reasons, Later, he was transferred to Upper Prison Luzira where he was detained with other people who were prisoners of war. It was here that he met the second Appellant Ahmed Ogeny. He was visited by the Minister of State for Internal Affairs, Mr. Kahinda Otafire who told the Appellant that he had been pardoned by the Presidential order, but a former Senior Army Officer he would not be released immediately for security reasons. Ho referred to the New Vision Newspaper account of the release of the prisoners of war dated 20th June, 1988. In July 1989, the officer commanding Upper Prisons Luzira Mr. Kitambu said that his expected release on account of the Presidential pardon had been cancelled by the NRA High Command, who had identified and earmarked the Appellant as a rebel leader to be prosecuted for treason. He saw several prisoners of war being released by Mr. Kitambu on the same Presidential pardon. But in January, 1990 the two Appellants were taken to Court and charged with treason.

The second Appellant had been the head of the Special Forces before General Tito Okello took power in May 1985. He then went into exile. In 1987 he was in Kenya receiving medical treatment and he learnt through the newspapers of the Presidential pardon having been declared in Uganda, granting a general pardon for all political offences by Ugandans who were actively fighting the NRM government and all other persons who had worked in the security organisations such as Police and Prisons services. In November, 1987 he decided to come back to Uganda and also his foot was swollen. He was walking through Bududa where he asked villagers for assistance to help him contact the authorities. The villagers reported to

the NRA soldiers, who later came and escorted him to Mbale Military Police. He was then taken before Brigadier She Sheifi Ali who told the second Appellant that the latter would be escorted to Kampala to be released on general pardon. He was actually escorted up to Mbuya Barracks, From there he was transferred to Luzira Upper Prison as a lodger. It was there that he met Brigadier Opon Acak the first Appellant. At this place he was visited by the Minister of State for Internal Affairs Mr. Kahinda Otafire who told him that they had all been ordered by the President to be released on general pardon. However they would be released in phases for security reasons. He also referred to the article in the newspaper dated 20th June, 1988 Later on in July 1989, he was told by the officer commanding Upper Prison Mr. Kitambu, that the general pardon had been cancelled on the order of the NRA High Command on the ground that he had been identified as a rebel leader and that he was to be held back for prosecution for treason. In January, 1990 Brigadier Opon Acak and himself were taken to court and charged for treason.

The article in the New Vision newspaper, to which the Appellants referred, does not appear to carry the matter any further forward.
It is headed, “Released prisoners of war go home.” The article states that a total of 1671 prisoners of war had been released from prison around the country. The release of the prisoners was part of the peace accord between the NRA/UPDA. The screening exercise for the release of the prisoners had been carried out at district levels by the RC’s, elders and DA’s office during the past two months and the process was still likely to continue. The Minister of State for Internal Affairs Mr. Otafire who had been visiting Luzira Prison to see how the release exercise was being carried out, told the New Vision that all those prisoners exonerated, would eventually be released in stages. The Minister did not say how many prisoners of war were still held at Luzira but added - “this has been a result of the peace talks. Our intention has been to release these young men all along, but we could not send them back because of the trouble in their regions”. The Minister, however, ruled out the immediate release of people like Professor Isaac Newton Ojok, Brigadier Smith Opon Acak and Major Olwol who he said were still being held for security reasons.

They were responsible for the miseries of these young men here. The Minister also noted if the Holy Spirit rebels could be salvaged, they could also be rehabilitated and resettled. There were combatants and non-combatants, the latter saying that they had been taken from their

homes.

The evidence given was that of Hon. Ateker Ejalu. It seems that from February 1988, he was a Minister in the Office of the President. He had taken part in the peace campaign explaining the Presidential pardon and the Amnesty Statute and encouraged people to surrender or report to the authorities. The pardon did not cover any people particular it was supposed to cover those who surrendered and reported themselves. The purpose of the pardon was to advance peace and reconciliation in the country. It. extended to political offences and excluded criminal offences.

The next witness was Mr. P. Edyomu, Senior Superintendent of Prisons, in Prisons Headquarters in Kampala. He explained how Article 73 of the Constitution was operated. He thought that to exercise the prerogative, the President signed the instrument sent to the Minister of Internal Affairs, who later directed the Commissioner of Prisons by forwarding the Presidential Order to the Commissioner, So far this procedure applied to convicted prisoners mainly those sentenced to death. In the case of the prisoners of war who were lodged in the prisons for safe custody in 1989 some of them had been released by the directive of the Minister of Internal Affairs asking the Commissioner to implement the decision of the High Command. The Prison Headquarters gave the directive on the 2ls July, 1989. The directive had been issued under the Amnesty Statute. It did not mention any names. But Prison authorities drew up a list of those affected. That list did not include the names of the two Appellants since the Minister's directive stated that rebel leaders were not to be released. He produced the list of those to be released exhibit D2 while the Minister's directive was marked as exhibit Dl.

The last witness simply noted that in 1987 the Appellant Ogeny was visited by Lt. Col. Nassur Izaruk.

On this evidence there is no direct statement that the President actually signed an instrument of pardon. The nearest one gets to a statement that an order had been made appears in the affidavit of the Appellant Acak when he related what occurred when Mr. Kahinda Otafire

visited him in prison. It was alleged that this Appellant had been pardoned by the Presidential order. In these circumstances the Advocates for the Appellants submitted that the court should rely upon circumstantial evidence to prove that an order of pardon had been made, and indeed must have been made. On the other hand the Principal State Counsel submitted that the evidence put forward was only of a hearsay nature and was not confirmed in evidence. Whether it was circumstantial or not, still depended on whether the links in the circumstantial evidence were properly proved.

It is not clear why the Appellants chose to rely on the statements made to them by Mr. Otafire. In the first place it is not apparent why Mr. Otafire must know whether or not the President had signed an instrument of pardon or gave verbal directions. Secondly, in view of the necessity of showing that there had been a pardon, we would have thought that Mr. Otafire would have been called to Court to give evidence. He was not, and we have not been able to ascertain any good reason why this should have been so. The result is that the evidence suggesting that there had been an order is insubstantial.

Another aspect of this problem is that Mr. Otafire would not appear to have taken a corroborative line, in what he is reported to have said in the New Vision article. The vital point seems to be that the Minister had indicated that the Governments intention all along had been to release the young men, but that could not be done because there was still trouble in their regions.

The Minister however ruled out the immediate release of people like Professor Isaac Newton Ojok, Brigadier Smith. Opon Ocak and Major Olwol, who he said were still being held for security reasons. These people had been responsible for the miseries of the young men. In our view, it must have been impossible for the Minister to make that announcement, if there had been an order of pardon by the President.

It may be useful to observe the time-scale in this matter because it is said that there was a change of mind and that the pardon had been cancelled, by the High Command. The Appellants were arrested in November, 1987. Sometime apparently in 1988 they alleged that Mr. Otafire had told then that they had been pardoned. In June 1988 Mr. Otafire had already

ruled out the released of the appellant Acak. In 1989 a decision was taken by the High Command that they should be released to be prosecuted in the courts of law, and charged with treason.

In January, 1990 they were so charged. It is clear that long before the letter of the High Command, the Minister had ruled out the possibility of releasing, these Appellants and this was confirmed by the directions of the High Command. As the evidence stands there does not seem to be any case of change of mind, and it seems doubtful whether the Appellants have reported accurately what occurred during, their conversation with Mr. Otafire.

There was no doubt a peace campaign in which a general pardon had been broadcast so long as the people concerned had not been involved in criminal activities. Minister Atoker Ejalu explained the nature of the campaign. He was very clear on the point that no names were involved and no specific orders of pardon had been made.

The hostilities in Uganda amounted in several instances to civil war. Those combatants who were opposed to the present Government's forces and were captured in the course of the battle were treated as prisoners of war, and detained in prisons, being called lodgers. They had never faced any charges, and it would be suitable for the authorities if they so wished, to simply release them, whether they were entitled to an amnesty or to a pardon. It appears that other persons who were not combatants were also arrested whom the government forces considered to have aided the opposition. It is clear from the list of prisoners of war who were listed in August 1989 that this list was drawn up for the Commissioner of Prisons by the officer in charge of Upper Prisons Luzira. The list does not include the names of either of the Appellants. The list clearly represents an act of state.

The High Command was dealing with the prisoners taken during the civil war. It is to be noted, that as required by the Constitution of the High Command, the President was the Chairman, when it was decided to release prisoners of war in safe areas in phases, but the rebel leaders were to be prosecuted. The conclusion which we have reached is that a general pardon had been announced under the peace campaign, and that no specific instruments of

pardon had been signed for any particular person, and that there had been no change of attitude towards persons such as the Appellants.

Mr. Emesu nevertheless contended that a general pardon was sufficient for the Appellants to rely upon, in putting forward their pleas in bar and that their particular pardon could be ascertained from circumstantial evidence. It was not necessary to show an instrument of pardon. Against that the Principal Statute Counsel submitted that the nature of the President's powers to order a pardon would result after advice from the Committee of the Prerogative of Mercy in a signed instrument of pardon. The President's powers are as follows as enacted in Articles 73, 74 and 75: -

> ***"73. The President may,***
>
> ***(a) grant to any person concerned in or convicted of any offence a pardon, either free or subject to lawful conditions'***
>
> ***(b) grant to any person a respite, either indefinite or a specified period, of the execution of any punishment imposed on that person for any offence;***
>
> ***(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or***
>
> ***(d) remit the whole or part of any punishment imposed on any person for an offence or any penalty or forfeiture otherwise due to the Government of Uganda on account of any offence.***
>
> ***74. (1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of,***

(a) the Attorney General, who shall be Chairman;

(b) not less than six nor more than nine other members appointed by the President

(2) A person shall not be qualified for appointment as a member of Advisory Committee f he is a member of the National Assembly or a member of the Council of a District.

(3) A member of the Advisory Committee appointed by the President shall hold office for three years, so however that his seat on the Committee shall become vacant;

(a) If any circumstances arise that, if he were not a member of the committee, would cause him to be disqualified, would cause him to be disqualified for appointment as such; or

(b) If he is removed from office by the President for inability to discharge the functions of his office, whether arising from infirmity of mind or body or from any other cause, or for mis-behaviour.

75. (1) The Advisory Committee shall advise the President as to whether he should exercise any of his powers under article 73 of this Constitution."

Mr. Emesu also relied upon Article 79(1) of the Constitution which provides that; where the President has exercised his prerogative or acted in accordance with any advice which by law he must consult or consider is not a matter which shall be inquired into by any Court.

It is apparent from Article 73 that the President may grant a free pardon or pardon subject to lawful conditions or to order a respite or to substitute a less severe formal punishment or to remit any part of punishment.

In all these cases it is difficult to see how the President can have signified his decision, except by a written instrument. While it may be that in this appeal it is only Article 73(a) that is involved, even so the authority carrying out the President's order, should know whether it is a free or conditional pardon. As explained by Mr. Edyomu, when the President exercises his prerogative he signs an instrument to the Minister of Internal Affairs who then directs the Commissioner of Prisons to carry out the order by forwarding the Presidential Order to the Commissioner.

That practice is particularly relevant when sentence of death or other punishments are concerned. But having in mind that Article 73 (a), relates to any person concerned in an offence as well as convicted of an offence, a pardon may be granted before punishment is imposed. Even so, in the usual way one would expect an order stating whether the President had decided to grant a. free pardon or a conditional pardon.

It may be, that the usual rule would have exceptions and, for instance if the records were destroyed in the fire, that secondary evidence or circumstantial evidence may be admissible to prove the existence of the instrument of pardon, Mr. Emesu is right when he contends that there is no actual provision in Article 73 or 74 or indeed Article 15(6) which lays down any procedural or evidential requirements, to prove that an order of pardon was made.

Nevertheless, because of the nature of Article 73, some indication must be made as to the type of pardon granted. We cannot foresee all the circumstances which may arise, so we are content to say that the general rule must be considered when the exceptions arise, if and when they do. But in the circumstances of this case, there are no exceptions.

As we have said there was a general announcement there would be a pardon except in the case of criminals. That situation has been experienced before in England as long ago as 1775 especially in 1834. The English court took what we consider to be a sound view of that situation by holding that a proclamation promising a pardon does not have a legal effect of a pardon, but following such a proclamation the court could defer execution of sentence and so allow time for the prisoner to apply for a pardon.

(See Halsburys Laws of England Fourth Edition Volume 8 paragraph 953). It is clear that the present Appellants could not plead a pardon to pre-empty the proceedings against them because of the general pardon. It is also clear that there would be no point in deferring the present proceedings because the President as the Chairman of the High Command has made it clear that no pardon would be granted to these Appellants, But during the course of the further proceedings it is open to the Appellants to take whatever action they wish.

As we have said the other flatters raised in the Memorandum of Appeal whether the Appellants ought to be granted a pardon are flatters to be taken in defence.
In the same way any claim to an Amnesty under the Amnesty Statute of 1989 may be taken at that time.

We have noted on behalf of the Appellant Ogeny that he was not singled out for prosecution specifically by the Minister in the newspaper article or in the directions of the High Command of July, 1989. We do not think that has any significance. The list given by the High Command of those to be prosecuted was not exhaustive and he was treated as a rebel leader.

Finally there is the question whether the President exercised his prerogative constitutionally. That is again a matter for the constitutional court. Counsel for the Appellants asked us not to treat this matter with undue formality. It is however a technical point of procedure by which the Appellants have the burden upon them to prove on the balance of convenience that they were pardoned.

That is all that this appeal is concerned with. It is obvious that criminal proceedings commenced in accordance with the criminal law and cannot be barred on flimsy grounds. We agree with the learned Judge that there was no sufficient evidence to show that the Presidential pardon had been granted to these Appellants and on what terms. Consequently in our judgment the appeal fails and the orders of the High Court are upheld with the consequence that the Appellants must return to the High Court and stand their trials, which should take place as soon as possible.

Delivered at Mengo this 5th day of November 1993.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

B.J. ODOKI

JUSTICE OF THE SUPREME COURT

H.G. PLATT

JUSTICE OF THE SUPREME COURT