REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: WAMBUZI CJ, ODER, TSEKOOKO, KAROKORA AND MUKASA-KIKONYOGO, JJ, S.C.]

CRIMINAL APPLICATION NO. 3 OF 1999

BETWEEN

NAMUDDU CHRISTI NE = APPLICANT

AND

UGANDA= RESPONDENT

[Application for leave to appeal against decision of Court of Appeal in Court of Appeal Cr. Appeal No.4 of 1997 and Court of Appeal Criminal Application No. 12 of 1999]

RULING OF THE COURT: The applicant, Namuddu Christine, has brought this application by notice of motion seeking leave to appeal to this Court against the decision of the Court of Appeal in Court of Appeal Criminal Appeal No. 4 of 1997. The application is brought under section 6(5) of the Judicature Statute, 1996 and Rules 37(1) (b), 41(1) and 42(1) of the Supreme Court Rules, 1996.

There is a procedural error. The notice is sub-headed as "Appeal from the ruling of the Court of Appeal of Uganda at Kampala dated 25th November 1999". In view of the wording of both subsections (5) of S.6 of The Judicature Statute and rule 37(1) (b), this matter is a fresh application to this court even though the effect of it is to enable this court to review the decision of the Court of Appeal when it refused a certificate to appeal.

Be that as it may, the application was originally lodged on behalf of two applicants (Professor Senyonga and C. Namuddu) who had been jointly charged, tried and convicted by a Chief Magistrate in Buganda Road Court. The original first applicant was Prof. Ssenyonga and the second applicant was and is Namuddu Christine. For reasons we do not want to go into, Professor Ssenyonga decided not to pursue the application. It is the application of the second applicant, Namuddu Christine, that has been argued before us. We shall hereinafter refer to

her as the applicant.

The application is supported by an affidavit sworn by the applicant on 8th December, 1999. In the affidavit, the applicant sets out the back ground to this application.

The applicant was the Under Secretary in the Ministry of Agriculture, Animal Husbandry and Fisheries where Prof. Senyonga was the Permanent Secretary. For conduct arising from the performance of their duties in the Ministry, the two were jointly charged with and convicted of causing financial loss c/s 258(1) of the Penal Code, in one count and abuse of office c/s 83 of the Penal Code in another count. They were each sentenced to imprisonment for five years in the first count and three years in the second count, the two sentences to run concurrently. They were also each ordered to pay compensation in the sum of Shs.20m/=. They succeeded in their appeal to the High Court but on appeal against the High Court decision the Court of Appeal reversed the decision of the High Court and restored that of the Chief Magistrate. The two appealed to this Court (Supreme Court Criminal Appeal No. 6 of 1999). The appeal was lodged without a certificate of the Court of Appeal or the requisite leave of this court as required by Rule 37(1) (b) and or S.6 (5) of the Judicature Statute, 1996. The applicant and Prof. Ssenyonga thereafter applied to the Court of Appeal for certificate to enable them appeal to this Court. The Court of Appeal declined to grant the requisite certificate on grounds that the issues raised in the application to that court were not points of law of considerable public or general importance and of some novelty. Now the applicant asks us to grant leave for her to appeal against the convictions and the sentences.
The two grounds in the notice of motion are formulated as follows: -

1. The intended appeal raises matters of general importance for the court to review in order to see that justice is done.

2. Whether the doctrine of strict liability could be applied in a case where a Permanent Secretary/Under Secretary who relies on technocrats in the day to day performance of his work can be criminally liable in a matter where he has not been shown to have

benefited.

Mr. M. Kabega, Counsel for the applicant referred us to the decision of the Court of Appeal and criticised that court for its reliance on the decision of this court in Kassim Mpanga vs. Uganda (Supreme Court Criminal Appeal No. 30 of 1994). In effect Mr. Kabega contended that the two cases are distinguishable because in Mpanga's case there was overwhelming evidence against the appellant who had confessed that he had misused his powers and that he had diverted money which accrued as interest on loans. Learned Counsel criticised the Court of Appeal for upholding the conviction of the applicant because of her failure to ensure proper accountability. He cited Attorney General For Northern Ireland Vs Gallagher (1963) A.C. 349 (at page 358) for the view that "the present law" should not be strictly interpreted so as to deny the applicant a right for her case to be considered by this Court. He submitted that there is a matter of public general importance and therefore we should grant this application. Learned counsel half-heartedly stated that one of the grounds for the intended appeal was that the law and the decision based on it are bad.

For the Respondent, Mr. Michael Wamasebu, Principal State Attorney, repeated the arguments he made in the Court of Appeal that for an application under Rule 37(1)(b) to succeed, the applicant must show that the application is a proper application for which a certificate should be given.

In his view, the applicant's affidavit does not disclose evidence that the application raises matters of public or general importance. He argued that neither did the affidavit show that the Court of Appeal erred in its decision. The learned Principal State Attorney supported the decision of the Court of Appeal to the effect that S.258 (1) of the Penal Code Act does not create an offence of strict liability and that the issue of whether the applicant should be held responsible for acts and omissions of other officers working under her (her technocrats) is a policy matter and not a matter of law and that if we granted leave that leave would amount to rewriting section 258(1).

In so far as is relevant, Section 258(1) reads as follows: -

"258. (1) Any person employed by the Government, …….
……who in the performance of his duties, does an act or omits to do any act knowing or having reason to believe that such act or omission will cause financial loss to the Government shall be guilty of the offence of causing financial loss ……"

A third appeal to this Court can be entertained on a certificate given by the Court of Appeal or on leave being granted by this court to the effect that the intended appeal raises one or more matters of public or general importance which would be proper for this Court to review in order to see that justice is done: S.6 (5) and Rule 37(1)(b). Subsections (5) and Rule 37(1) (b) are worded somewhat differently but the effect of the two provisions is the same. Unfortunately both provisions do not define the expression "great public or general importance".

S.6 (5) States:

"Where the appeal emanates from a Judgment of a Chief Magistrate or a Magistrate Grade I in the exercise of their original jurisdiction and either the accused person or the Director of Public Prosecutions has appealed to the High Court and the Court of Appeal, the accused person or the Director of Public Prosecutions may lodge a third appeal to the Supreme Court with the certificate of the Court of Appeal that the matter raises a question or questions of law of great public or general importance or if the Supreme Court, in its over all duty to see that justice is done, considers that the appeal should be heard…"

It appears to us that for leave to be granted by this Court, this Court is not restricted to the decision of the Court of Appeal once that Court refuses to grant the requisite certificate. Whereas it can be said that the application to this Court is in the nature of an appeal because the application arises only after the Court of Appeal refuses to grant a certificate, when this Court considers the application to review, this Court is not necessarily confined to only the matters which were considered by the Court of Appeal before it declined to give the

certificate. To that extent Gallagher's case (Supra) is not helpful because there the House of Lords considered a provision which was not quite similar to S.6 (5) and Rule 37(1)(b). The case was concerned with jurisdiction of the House of Lords to hear an appeal where the court below had given a certificate that a point of law was involved but refused to grant leave. Gallagher is distinguishable in one other respect in that there the Court of Appeal actually certified that a point of law of general public importance was involved but the court refused to grant leave. It was the House of Lords which granted the leave and eventually allowed the appeal. Further-more the English/Irish Statute interpreted in Gallagher case talked of "general public importance" whereas S.6 (5) refers to "a questions of law of great public or general importance or if the Supreme Court, in its overall all duty to see that justice is done, considers that the appeal should be heard".

To clarify further we would like to quote section 1(2) of the Administration of Justice Act, 1960 of United Kingdom which read as follows:

> "(2) No appeal shall lie under this section except with the leave of the court below or of the House of Lords: and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, …, that the point is one which ought to be considered by the House".

There are decided cases to the effect that the House of Lords could not grant leave under that subsection without the prior certificate of the Court of Criminal Appeal: See Gelberg vs. Miller (1961)1ALL E.R.291.

We agree with Mr. Kabega that the decision in Mpanga case (supra) is irrelevant to the application before us. That case was decided in 1994 before the Judicature Statute (Statute 13 of 1996) and the current Rules of the Supreme Court were enacted in 1996. By 1994 when Mpanga case was decided there were no provisions in our law similar to S.6 (5) or Rule 37(1) (b). The Mpanga appeal was a second appeal which required no leave to institute it. In that regard Mpanga case is not helpful. Even if the case were relevant, facts are more

distinguishable from the facts of the present case.

Under subsection (5) of S.6, this Court will grant leave if the court, in its over all duty to see that just is done, considers that the appeal should be heard. In other words this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied:
(a) that the matter raises a question or questions of law of great public importance; or
(b) that the matter raises a question or questions of law of general importance.

On the other hand, this Court will grant leave if it considers that in order to do justice the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.

It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have power to consider other matters.
In that case we do not with respect agree with Mr. Wamasebu that the applicant must necessarily show that a certificate should be given.

We have not been able to lay our hands on any decided authority from Uganda or any other East African jurisdictions, which illustrates what constitutes “matters of public or general importance” or “a question of law of great public or general importance”.

We have looked at Rex vs. Mohamed Shah S/O Lal Shah (1939) 6 EACA 103 where the East African Court of Appeal dismissed an appeal against conviction for murder. The appellant sought leave to appeal to the Privy Council by virtue of Article 3(b) of the Eastern African (Appeals to Privy Council) Order in Council, 1921. The article is not available to us but judging from the judgment in the case, and the Judicial Committee Rules, 1954, we surmise that the Article generally required all intending appellants to seek leave of the E.A. Court of Appeal or the Privy Council itself and obtain such leave before lodging an appeal. In the application the affidavit in support of the application for leave was sworn by a counsel for the

applicant. In the affidavit, counsel averred that he believed that questions arising from the judgment of the court were of great general and public importance and also of great importance in connection with the conduct of criminal trials in the Colony of Kenya. Counsel cited in his affidavit instances which constantly arise in many criminal trials in courts in Kenya and elsewhere. Because of this the E. A. Court of Appeal refused leave on the ground that assuming article 3(b) applied, the court must be guided by the test as to whether the questions involved are of great general or public importance rather than the matters which must constantly occur in criminal trials. The court did not discuss what is a question of great general or public importance to be of help. But the inference we draw from the brief ruling is that the question should be sufficiently general or public in application, as would need settlement or clarification by a higher pell ourt.Irnay be that the expressions we are discussing have not been defined by Statutes because each expression covers many circumstances which when considered in a particular case can constitute a "question of great general or public importance".

In England section 33(2) of the Criminal Appeal Act, 1968 makes provision closer to our s.6 (5). The said Section 33(2), states that:

> "2 - The appeal lies (to the House of Lords) only with the leave of the Court of Appeal or the House of Lords: and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to
> be considered by the House."

In R. V. Dames and R. V. Williams (1961) 1ALL ER 290, the Court of Criminal Appeal (U.K.) considered the two applications for leave to appeal to the House of Lords under S. 1 (2) of Administration of Justice Act, 1960 which is identical to S.33 (2) of the Criminal Appeal Act, 1968 (Supra). The application sought a certificate that a point of law of general public importance was involved. The ruling is very brief and does not explain what is a point of law of general public importance. But it appears that the issue in the appeal was a misdirection of the jury by the chairman on corroboration. This was deemed an ordinary

matter and not a question of great public importance.

In Ashdon vs. R. (1973) 58 CR. APP. R. 339 the Court of Criminal Appeal considered an application under S.33 (2) of the Act of 1968 whether or not a point of sentencing policy may constitute a point of law which can be certified as of general public importance if no reasonable tribunal could have passed the sentence. In that case the Court of Criminal Appeal referred to a number of decided cases where certification was either given or refused.

The Court then concluded that where the trial judge has passed a sentence, which was within his discretion, no point of law of general public importance could arise for the purpose of an appeal against such sentence. The court did not state as to what should be regarded as a point of law of general public importance. But an instructive example is the case of Verrier vs. DPP (1966) 50 Cr. App. R. 315. That was a case where a conspiracy to commit an offence of obtaining by false pretences was charged. The substantive offence carried a maximum sentence of five years' imprisonment. On conviction of the conspiracy charge, the trial judge imposed upon the accused a sentence of seven years' imprisonment. Upon the matter going to the Court of Criminal Appeal, the court dismissed the appeal but it certified that a point of law of general public importance was involved in their dismissal of the appeal against the seven years sentence. The certificate stated:

> "Whether in the proper exercise of judicial discretion a court can pass a sentence exceeding five years' imprisonment for conspiracy to defraud by false pretences in a case where, had the conspiracy been carried out, there could only have been one charge of obtaining by false pretences".

All the English Court decisions we have referred to which arise from the provision of the 1960 and 1968 Acts relate to questions of law. The provisions in S.6 (5) of Statute 13 of 1996 and Rule 37(1)(b) do not restrict us to questions of law only.

The issue we are required to decide is whether or not the application has or has not raised such matters as are contemplated by S.6 (5) or Rule 37(1)(b) upon which we can say that we want justice to be done in the case from which this application springs.

The matters raised by the applicant before us were in our view, properly dealt with by the Court and we are unable to fault that Court.

However we note that the applicant was charged with and prosecuted for and convicted on two counts, already mentioned, in which the facts arise from the same transaction. The charge-sheet on which the applicant was charged with the two offences shows that the two counts are based on same transactions which occurred between June, 1992 and July 1993, i.e., signing Bank of Uganda cheques amounting to Shs.89,036,431/=. Therefore the question we have had to ask is whether it was proper to convict and to sentence her for the two offences which arise from the same facts? In that regard Section 20 of the Penal code Act and S.39 of the Interpretation Decree 1976 are pertinent. Section 20 reads as follows:-

> "A person shall not be punished twice either under the provisions of this code or under the provisions of any other law for the same offence".

There is a wealth of decisions to support the principle embodied in the above provision namely that if the facts of a case disclose one act and no more, an accused cannot be punished twice for that act. Because of the conclusions we have reached, we find it unnecessary to refer to more than two of those cases.

In R. vs. Dobbs (1951) 18 EACA 319, the accused, a District Officer, was convicted of (1) stealing of government trophies by a person in public service, and (2) unlawful possession of the same government trophies. He was sentenced on each count. On appeal it was held that taking into account the accused's official position the charge of being in unlawful possession of game trophies must have failed had the prosecution not been able to prove an act of conversion. Accordingly the two offences flowed from the same act. The accused had thus

been punished twice for the same act.

In Santokh Singh Kehar vs. R., (1955) 22 E.A.C.A.440 accused was convicted and sentenced to consecutive sentences on two counts (1) of attempting between certain dates to procure A. to destroy the depositions required in certain Supreme Court proceedings and (2) of attempting between the same dates to procure A. to steal the same depositions. His desire was to achieve the destruction of the depositions to prevent their being used in a Supreme Court trial. There was no finding by the trial magistrate that there were separate solicitations to steal and to destroy. On appeal it was held that accused had been punished twice for the same act, it not having been shown that there were distinct acts of solicitation.

These and many more authorities arise from the three East African Jurisdictions including that of Uganda. The appeals related to provisions identical with section 20 of our Penal Code. Similar reasoning arises from S.39 of Interpretation Decree, 1976.The provisions of section 39 of the Interpretation Decree, 1976 read as follows:

> "39. Where an act constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence"

The Kenya High Court interpreted a similar provision in Muiruri vs. Republic (1973) EA. 86. The appellant was charged with shop breaking and theft c/s 306 of the Penal Code of Kenya. In the course of the trial a second count of robbery with violence c/s 296 of the Penal code was added. The facts showed that the offences were based tin the same incident. He was convicted and sentenced to 5 years and 18 years respectively. On appeal the appellate court held that, by virtues of S.63 of Kenya Interpretation and General Provisions Act, the accused can neither be convicted nor sentenced on two charges where the same act is an offence under different laws. The court approved R. vs. Dobbs (Supra).

The Kenyan provision (S.63) reads as follows:-

> "63 Where an act or omission constitutes an offence under two or more written Laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of such Laws, but shall not be liable to be punished twice for the same offence".

Although counsel for the applicant did not raise the matter pertaining to S.20 and S.39 before us or indeed before the Court of Appeal, we consider that in order to do justice in this case, in the light of the provisions S.20 of Penal Code, and section 39 of the Interpretation Decree, 1976, we think that the applicant is entitled to a review of the case by this Court. Therefore the application is allowed.

Delivered at Mengo17th, day of 2001.

S. W. W. WAMBUZI.
CHIEF JUSTICE