THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA, AND KATO JJ.S.C.)

CRIMINAL APPEAL NO. 36 OF 2002

ARVIND PATEL :::APPELLANT

AND

UGANDA:::RESPONDENT

(Appeal from the judgment of the Court of Appeal of Uganda at Kampala (Mukasa-Kikonyogo. D.C.J, Mpagi-Bahigeine and Kitumba, JJA) dated 31. 1. 2002, in Criminal Appeal No. 27 of 2001)

JUDGMENT OF THE COURT

This is a third appeal. The appellant, Arvind Patel, was convicted with another person, Andrew Okello, now deceased, of conspiracy to murder, contrary to section 201 of the Penal Code, by the Chief Magistrate's Court of Kampala, and sentenced to five years imprisonment.

The brief facts of the case are that the appellant and one Andrew Okello between March and April 1998 at the Railways Goods shed conspired to murder one Rahuel Patel alias

Bhikhu Patel. The two engaged the services of Sgt. Nsubuga Frank, PW2, Richard Jumbo, PW3, and Andrew Odeke, PW4 to achieve their purpose.

However, PW2, PW3 and PW4 withdrew from the plan and instead reported the mater to the police. Thereafter, the police gave PW3 and PW4 recording machines by which each of the recorded conversations with the appellant regarding the conspiracy. They returned the recorded audiotapes to the police.

As a result of the report and the recordings, the appellant and Andrew Okello were arrested and charge with conspiracy to murder. On 21.8.1998, when the case was placed before Ruhinda, the Chief Magistrate of Buganda Road, Andrew Okello, who was accused No. 2, changed his plea and pleaded guilty. The charge and the facts were read to him, which he admitted. He was convicted on his own plea of guilty, and sentenced to a fine of shs. 500,000/= or six month's imprisonment. He opted to pay the fine. He died one month later, before the appellant's trial commenced. The appellant was tried alone. In his defence, the appellant denied participation in the conspiracy. He put up a defence of alibi and said that the prosecution witnesses had grudges against him. He claimed that the grudges were due to indebtedness to him by the prosecution witnesses who were unwilling to pay him and a vendetta between him and the complainant over the Swamirayan Temple in Kampala.

The trial court rejected the defence evidence and believed the prosecution witnesses. She found the appellant guilty and convicted him as charged, sentencing him as we have already mentioned. The trial of the appellant in the magistrate's court was conducted by three magistrates. The record shows that Mr. Ruhinda Asaph Ntegye, Chief Magistrate, was the first magistrate to handle the case. He took the plea of the appellant, on 22**nd** May 1998. On 5**th** June 1998, the case was mentioned before the same chief magistrate. On 8**th** June 1998 Andrew Okello's plea was taken and he denied the charge and both accused persons were granted bail by the same chief magistrate. The case was again mentioned on 22**nd** June 1998, 27th July 1998 and 21**st** August 1998. On 26**th** August 1998, when both accused persons again appeared before the same chief magistrate, Andrew Okello

changed his plea to guilty. The facts were read to him, which he admitted and he was convicted and sentenced as has already been mentioned in this judgment. On 5th October, Mr. Asaph Ntegye Ruhinda disqualified himself from hearing and withdrew from the case, following allegation of bias by the appellant.

It appears that on the same date another magistrate, Mr. Isingoma, Magistrate Grade 1, took over the hearing of the case and recorded the evidence of the first prosecution witness. Anthony Ndidde, PWl on 19th October 1998, the appellant appeared before a magistrate whose names and other particulars are not recorded. The appellant's bail was renewed on new terms and conditions.

On 3rd November 1998, another Grade I Magistrate, Ms. Tibulya took over the trial of the case and recorded the evidence of Sgt. Nsubuga Frank (PW2). Thereafter she conducted the trial up to the end. She recorded the evidence of the rest of the witnesses who testified in the case.

The learned trial magistrate rejected the defence evidence and believed the prosecution witnesses. She found the appellant guilty and convicted him as charged, sentencing him as we have already mentioned. The appellant's appealed to the High Court and the Court of Appeal were dismissed. Hence this appeal, which came to this Court on a certificate of the Court of Appeal that the matter raises a question or questions of law of great public or general importance, under the provisions of section (5) of one Judicature statutes 1996.

The Memorandum of Appeal to this Court originally contained four grounds, but the last two were abandoned at the hearing of the appeal. The remaining two grounds are that:

1. The learned Justice of Appeal erred in law to hold that the trial was proper when it was conducted by 3 trial Magistrates in contravention of S.142 of the Magistrates Courts Act.

2. The learned Justices of Appeal erred in law in taking into account the plea of the first accused person in upholding the conviction against the appellant.

Mr. Stephen Mubiru represented the appellant before us. His argument on ground one of the appeal was based on the provisions of section 142(1) of the Magistrate's Courts Act, 1970(MCA) and the interpretation made by the Court of Appeal for East Africa of section 196(1) of the Criminal Procedure Code of Tanzania in *Eustance v Rep. (1970) EA 393.* The Tanzanian Statute was worded in identical terms with section 142(1) of our MCA, which provides:

"142 (1) Whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded whether by virtue of an order of transfer under the provisions of this Act or otherwise, by another magistrate who has and who exercises such jurisdiction the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly by himself, or he may resummon the witnesses and recommence the trial: Provided that, (a)In any trial the accused may, when the second magistrate commence his proceedings, demand that the witnesses or any of them be resummoned and reheard.

(b) The High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was held, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new inquiry or trial."

In the case of *Eustance vs. Republic (supra)* the appellant was charged in July 1967 in the court of a resident magistrate with stealing money which had come into his possession by virtue of his employment in the public service, and which was the property of the Tanzanian Government.

The trial began on 4th September 1967 before Mr. Agege, when the evidence of one witness was taken. After five adjournments, the trial was resumed on 8th November 1967, when the evidence of another witness was taken. After four further adjournments the evidence of a third witness was taken on 29 th January 1968. There were further adjournments, during which Mr. Agege went on leave and his place was taken by Mr. Thomas. On 10th April 1968, the trial was resumed, when the advocate for the appellant

stated that he did not wish any of the witnesses who had given evidence to be recalled. Three further witnesses were called for the prosecution and the appellant himself gave evidence. After the court had been addressed on behalf of the prosecution and the defence, judgment was reserved until 2nd May 1968. Thereafter nothing appears to have happened until 22nd July 1968, when Mr. Meela sat as resident magistrate. The prosecutor is recorded as having said that the proceedings should be recommenced de novo, except as regards one witness. The appellant asked that no date should be fixed for the hearing in the absence of his advocate. There was a further mention before Mr. Meela, on 5th August 1968, and a mention before another magistrate on 17th October 1968. On 5th November 1968, the appellant appeared before yet another magistrate, Mr. Osakwe, when his advocate indicated that he had no objection to a judgment being written by Mr. Osakwe. The appellant himself concurred and said that he did not wish any of the witnesses recalled. Judgment was given by Mr. Osakwe on 16th November 1968. The appellant appealed unsuccessfully to the High Court. He then applied for leave to appeal to the Court of Appeal for East Africa and leave was granted by the Chief Justice.

About section 196(1) of the Tanzanian Criminal Procedure Code, that court said:

"We think that this section, on a true interpretation allows one magistrate to continue and complete a trial begun by another magistrate, we do not consider that it can properly be read as authorizing the conduct of a trial by a succession of magistrates. It may be noted, although we do not base our decision on this, that the proviso to sub-s (1) refers to "the second magistrate," which appears to confirm that the section applies only to two magistrates.

Mr. Osakwe was the third magistrate to conduct the trial of the appellant and we think that as such, he had no jurisdiction to continue the trial; it follows that the conviction and sentence passed are a nullity and the trial as a whole was abortive. In these circumstances, we see no alternative to quashing the conviction of the appellant, setting aside the sentence passed on him and ordering that he be retried de novo, and we so order."

In the appeal before us, the appellant's learned counsel contended that, contrary to the finding of the learned Justice of Appeal, Chief Magistrate Ruhinda did, in fact, record evidence during the appellant's trial. This meant that three magistrates participated in the appellant's trial, which was irregular in view of the decision in the case of *Eustance vs. Republic (supra).* In the learned counsel's view, *"evidence"* as defined by S.3 of the Evidence Act, includes admission by an accused person and ocular observation by the court in its judicial capacity. In the instant case, Chief Magistrate Ruhinda recorded a plea of guilty by Andrew Okello. A2, the appellant's co-accused, and proceeded to convict and sentence him.

Learned counsel contended that the recording of A2's guilty plea constituted a recording of evidence against the appellant. It follows that as this was a joint trial on a charge of magistrates who should hear and record evidence in a trial. He submitted that in the often cited case of Eustance vs Republic (supra) the court made a wrong interpretation of s.196 (1) of the Tanzania Criminal Procedure Code. Under the section, a magistrate succeeding another in a trial has power to resummon witnesses and recommence the trial. The learned Deputy DPP referred to the definition, of the word "any" in Stroud's Judicial Dictionary in support of the view that "any" does not impose any limit to or qualification of the number concerned; and that it is as wide as possible. In the circumstances, section 142 (1) of the MCA does not impose a limit on the number of magistrates who may try a case.

The learned Deputy DPP has conceded, because recording pleas is part of trial. However, he contended that that did not nullify the trial in view of the interpretation of section 142 (1) of the MCA put forward by him.

We agree with the submission of the learned Deputy DPP regarding s.142 (1) of the MCA. In our considered opinion, the interpretation of the section made in the case of Eustance vs The Republic (supra) is too narrow. Stroud's Judicial Dictionary of Words and Phrases, 4th edition volume 1 on page 145 defines the word "Any" as follows:

(1) "Any" is not confined to a plural sense (Eaton v. Lyon, 3 Ves. 694). (2) "Any" is a word which excludes limitation or qualification (per Fry L.J., Duck v.

Bates, 12 Q.B.D. 79); "as wide as possible" (per Chitty J., Beckett v. Sutton, 51 L.J. Ch. 433). A remarkable instance of this wide generality is furnished in Re Farquhar (4 Notes of Ecc. Cases, 651,652, cited Wms. Exs.), wherein the words "any soldier" etc. (Wills Act 1837 (c. 26), s. 11), were construed as including minors, so that soldiers and seamen, within that section, can make NUNCUPATIVE wills though under age. So, a power in a lease, enabling the lessor to resume "possession of any portion of the premises demised, "enables him to resume all (Liddy v. Kennedy, L.R. 5 H.L. 134) so a notice of an extraordinary meeting (Companies Clauses Consolidation Act 1845 (c.16), s. 70-see now Companies Act 1948 (c.38), Sched. I, reg.96, "to remove any of the present directors," justifies a resolution to remove them all).

In our view, the expression "any magistrate" at the beginning of s. 142 (1) of the MCA, does not mean only one magistrate, but many magistrates. It follows that any number of magistrates can hear and record the whole or any part of evidence in a trial, ending with one who gives judgment where applicable. The section itself provides a safeguard against injustice which may arise from a trial conducted by a succession of magistrates. That safeguard is that a succeeding magistrate on his / her own initiative, or on application by the accused person, may recall witnesses or any of them, and re-hear the evidence.

We do not think that the use of the expression "the second magistrate" in paragraph (a) of the proviso to s.142 (1) indicates any intention on the part of the legislature to limit the application of the section to only two magistrates. The expression is equivocal. It is significant that in Eustance's case (supra) the court was careful to say that it did not base its decision on that expression.

There are many reasons why magistrates who commence trial may not complete the hearing of cases and have to be succeeded by other magistrates. The cause may be administrative, illness or death, transfer to other stations or other reasons. Consequently, if only two magistrates can try a case, it means that only one magistrate may take over a case from the one who has commenced the trial. This would bog down trial of cases in magistrate's Courts. The present situation of backlog of cases would go from bad to worse. In our opinion in Eustance v Republic (supra) the interpretation put on the Tanzanian Statutory provisions was too restrictive. With the greatest respect to the

distinguished Court of Appeal for East Africa, we are not persuaded to apply the same interpretation to s.142 (1) of the MCA of Uganda. Our view is that any number of magistrates as necessary may hear and record evidence in a trial of a case throughout its progress. What matters is to ensure that the accused person is not thereby prejudiced by applying the proviso where appropriate. In the circumstances, ground one of the appeal must fail.

Under ground 2 of the appeal, the appellant's learned counsel criticized the Court of Appeal for upholding the learned trial judge in taking the plea of guilty by Andrew Okello, A2, as evidence against the appellant. Learned counsel contended that this was an error in law, and relied on the case of Frederic Moore V.R. (1956). 40, Cr. Appeal Report, 50 for his proposition. Learned counsel prayed for the appeal to be also allowed on this ground.

In his submission under ground 2 of the appeal, the learned Deputy DPP, said that the cases of conspiracy are different from other cases, because one person cannot conspire alone. If a co-accused on a charge of conspiracy is acquitted, it follows that the other accused must also be acquitted. Learned counsel relied on *R V. Shannon (1974) 2, ALLE 1009, at 1020 and 1021*. In the instant case A2 pleaded guilty to conspiracy and a full trial of the appellant followed. In her judgment the learned trial magistrate said that although Okello A2 pleaded guilty of conspiracy, with which the appellant was jointly charged with him, Okello's plea of guilty could not and would not in any way prejudice the appellant since criminal liability is personal. The prosecution has the burden to prove its allegations against each accused person beyond reasonable doubt. In the instant case, the prosecution had to prove that the appellant conspired with Okello to commit the offence charged. This was regardless of the fact that Okello pleaded guilty to the charge. The learned trial magistrate therefore, did not rely on the plea of guilty by Okello to convict the appellant. The learned Deputy DPP however conceded that the Court of Appeal misdirected itself to say that Okello's plea of guilty should be taken into account against the appellant. Such a misdirection, however, did not prejudice the appellant because there was other evidence which amply supported conviction of the appellant. He contended that this ground of appeal, should therefore fail.

This is what the Court of Appeal said in this connection:

"By changing his plea of guilty, agreeing with the facts has narrated and showing remorse, Okello must have agreed to kill the complainant. We do not agree with counsel for the appellant that the plea of guilty should not have been relied on to convict the appellant. It could not be ignored but considered together, with all the evidence on record. Okello voluntarily changed his plea of not guilty to that of guilty and did not retract it, as the appellate judge rightly observed. The only reasonable inference to draw was that Okello agreed with the appellant to kill the compliant."

With respect, we are unable to agree with the learned Justices of Appeal that Okello's plea of guilty could not be ignored as against the appellant. In our view this was misdirection, because Okello's plea of guilty should not have been allowed in any way, to prejudice the appellant. Criminal responsibility is personal to an individual, even in the case of conspiracy. This view is supported by the House of Lords decision in *R. V Shannon (supra).* In that case the respondent and T were charged on an indictment with having conspired together dishonestly to handle stolen goods. The respondent pleaded guilty to the charge. There was no evidence that he did not appreciate and understand what he was doing when he did so. He was sentenced to four years imprisonment. T, pleaded not guilty (i) To the conspiracy charge and (ii) To a Count charging him with handling stolen goods. The jury were unable to agree on their verdict and T was retried. A few days later, T was found not guilty of handling stolen goods. The prosecution offered no evidence against him on the conspiracy charge and a formal verdict of not guilty was entered in that Count. The respondent thereupon appealed, contending that as T had been found not guilty of conspiring with him, his own conviction and sentence following his plea of guilty to conspire with T could not stand. The Court of Appeal, in purported exercise of its power under s.2 (1) of the Criminal Appeal Act, 1968, allowed the appeal and quashed the respondent's conviction. The Crown appealed. It was held by the House of Lords that the appeal would be allowed and the respondent's conviction restored for the reasons, inter alia, that where one or two alleged conspirators had been fairly and properly tried and, on the evidence adduced, rightly convicted, there was no reason why his conviction should be invalidated if for any reason the other conspirator was acquitted at a subsequent trial. Accordingly just as the respondent's conviction on his own plea of guilty was not relevant

to (and therefore not admissible evidence to prove) T's guilt, so was T's acquittal irrelevant to the respondent's conviction.

In the instant case, the learned trial magistrate made a thorough evaluation of the evidence as a whole, from both the prosecution and the defence, and came to the conclusion that the prosecution had discharged the burden of proof to the required standard. She was satisfied beyond reasonable doubt that the appellant committed the offence with which he was charged with Andrew Okello, A2. The learned trial magistrate did not rely on Andrew Okello's plea of guilty. She acted on other prosecution evidence, which was sufficient to convict the appellant. The findings of the learned trial magistrates were upheld by the learned appellate High Court Judge. The learned Justices of Appeal agreed with this when they said in their judgment:

"In agreement with Mr.Byabakama, there is over whelming evidence to prove the agreement; to show that the purpose of the agreement was to kill the complainant and that it was the appellant who masterminded it. As can be seen from the record the appellate judge confirmed the findings of the trial judge in the credibility of the prosecution witnesses including PWl, Ndide, the appellant's accountant, PW2, Sgt Nsubuga, PW3, Jumba, the appellant's driver and PW4, Andrew Odeke who were supposed to carry out the mission. We agree with both Courts that PWl, Ndide, was a truthful witness and heard the appellant making the agreement with Andrew Okello and Odeke. He was not part of he plot, but came to prove of it (sic) as he was employed by the appellant. We are satisfied that the first meeting held at the Railways Goods shed Kampala connected the appellant with the offence. In fact it was at that meeting that the offence was completed."

It is clear, therefore, that inspite of what the learned Justices of Appeal said to the effect that Andrew Okello's plea of guilty should be taken into account against the appellant, they were satisfied that there was other prosecution evidence which proved beyond reasonable doubt the appellant's guilt of the offence he was charged within in this case.

We agree with the Learned Justices of Appeal in this regard.

In the circumstances, the misdirection by the Court of Appeal to which we referred earlier in this judgment, did not cause a failure of justice.

The second ground of appeal must, therefore, fail. In the result, this appeal is dismissed, and it is ordered that the appellant's bail be and is here by cancelled. He must be taken into custody immediately, to resume serving his term of imprisonment.

Dated at Mengo this 27th day of October 2003.

A.H.O Oder

JUSTICE OF SUPREME COURT

A.N. *Karokora*

JUSTICE OF SUPREME COURT

J.N. Mulenga

JUSTICE OF SUPREME COURT

G. W. Kanyeihamba

JUSTICE OF SUPREME COURT

C.M.Kato

JUSTICE OF SUPREME COURT