**Uganda v Okot**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 5 July 1973

**Case Number:** 83/1973 (127/73)

**Before:** Saied J

**Sourced by:** LawAfrica

*[1] Criminal Practice and Procedure – Adjournment – Discretion of magistrate – Whether refusal to*

*adjourn proper.*

*[2] Criminal Practice and Procedure – No evidence offered by prosecutor – Dismissal of charge the*

*proper procedure – Magistrates’ Courts Act, s.* 121 (*U.*)*.*

**JUDGMENT**

**Saied J:** This is an appeal with leave of court by the Director of Public Prosecutions from the acquittal of the respondent by a magistrate under the provisions of s. 125 of the Magistrates’ Courts Act consequent upon being told by the police prosecutor that he was “not offering any evidence” as his witnesses were not present after the prosecutor’s earlier application for adjournment had been refused and he had been asked by the trial magistrate to proceed with the case.

The facts leading to this acquittal may briefly be stated. The respondent (who was the first accused) and another man Andrew A. Ocheng (the second accused) were jointly charged in one count with stealing by persons employed in the public service contrary to ss. 257 and 252 of the Penal Code. They first appeared in court on 28 September 1971 and pleaded not guilty. They were released on bail. Both attended court on three subsequent occasions on mention days, and on 31 January 1972 the hearing was set down for 15 March 1972. On that day the respondent was present with his defence counsel, but the second accused was absent. A warrant for his arrest was issued and the hearing adjourned till 12 April 1972. Now, the prosecutor informed the court that he “understood” that the second accused was a “mental case” and was detained “here”. He applied for adjournment on the ground that none of his witnesses, who had been “warned in court”, had appeared for unknown reasons. One of those witnesses was coming from Kabale and another from Kampala. He described his application as being “for the sake of justice”. The application was strongly opposed by the respondent’s counsel on the ground that as those witnesses had been warned to attend on the hearing day, their absence indicated that they were “not interested in the case”. He argued further that the defence was being put to great expense and the accused had been suspended from duty since the commencement of the proceedings.

In refusing the application the trial magistrate said,

“The prosecution had sufficient time to ensure that their witnesses turn up today. There has been no reason advanced to me by the prosecutor for his application for an adjournment. In view of the fact that the defence counsel opposes the application and in view of the fact that the case has been pending for almost eight months within nothing (*sic*) done to have the case heard coupled with the fact that the accused is on suspension, I refuse the application by the prosecutor for an adjournment and order that he proceeds with the hearing of the case as arranged by calling his witnesses to testify under s. 118 of M.C.A.”

The record of the proceedings thereafter reads:

“*Pros*.: I am not offering any evidence as my witnesses are not here.

*Mpungu*: I apply that the relevant order under s. 125 of M.C.A. be made as this is tantamount to there being no evidence against the accused.

*Court*: I n view of the fact that no case has been made out against the accused as a result of no evidence having been offered against him, I acquit him as prayed under s. 125 of M.C.A.”

The only ground of appeal is that the trial magistrate erred in law in acquitting the respondent under s.

125 of the Magistrates’ Courts Act 1970, when no evidence had been called by the prosecution owing to the absence of the prosecution witnesses and whose absence was no fault of the prosecution.

Mr. Tsekooko, a Senior State Attorney, submitted that the trial magistrate’s dismissal of the adjournment application was an improper exercise of his proper judicial discretion. Reyling on the case of *R. v. Ratilal Ganji*, 6 U.L.R. 237 cited in *Uganda v. Milenge*, [1970] E.A. 269, he argued that he should have exercised his discretion in either granting the adjournment which was being sought, or dismissing the charge under the provisions of s. 117 of the Magistrates’ Courts Act. He said that the acquittal in these circumstances occasioned a miscarriage of justice.

For the respondent, Mr. Gaffa submitted that as the trial magistrate could not speculate on the reasons for the absence of the prosecution witnesses, no good reason had been shown in favour of an adjournment. He maintained that the magistrate exercised his discretion properly and judicially. Relying on *Milenge’s* case he submitted that as the prosecutor had deliberately chosen not to offer any evidence there was no other course open to the court but to acquit the respondent.

Before I deal with the issues raised in this appeal I should like to mention the position of the second accused. It was undisputed that as he had not appeared at the time of the proceedings when the respondent was acquitted, any order to be made on this appeal will not affect him. Specific provision exists in the Magistrates’ Courts Act to deal with the suspected insanity of accused persons during a trial.

When the trial magistrate was informed that the second accused was a “mental case” and was detained “here”, he should have ordered his production and dealt with him according to the provisions of s. 111.

This was an irregularity, but I do not think that it renders the proceedings against the respondent a nullity.

A joint charge is several as well as joint. In *D.P.P. v. Merriman* (1972), 56 Cr. App. R. 766 the head-note with regard to the speech of Lord Diplock states:

“A joint charge against two or more defendants alleges against each defendant a separate offence committed on the same occasion and as part of the same transaction, the connection between the separate offences being no more than that, as against each defendant, not only his own physical acts, but also those of the other defendant, may be relied on by the prosecution as an actus reus of the offence with which he is charged.”

It follows that upon an indictment charging two persons jointly with an offence, such as stealing in dwelling house, either may be found guilty. Likewise, the absence of one of several persons who are accused together does not affect the validity of the conviction of those who appear – *Ex p. O’Brien*

*Dalton*, 28 I.R. 36. The same, I am sure, must apply with equal force to an acquittal. The charge against the second accused remains pending on the file. That accused must be produced before the court as soon as possible for an enquiry in accordance with s. 111, should he still be insane and incapable of making his defence, or otherwise for final disposal.

A court has power for “sufficient cause” to adjourn the hearing – s. 120 of the Magistrates’ Courts

Act. The trial magistrate did not accept the reasons advanced for an adjournment as “sufficient cause”.

Those witnesses had been warned to attend court, although who warned them is not clear from the record. I agree with the Senior State Attorney that it is not part of the duty of a prosecutor to physically bring his witnesses into the court. Witnesses are summoned to attend or, having attended, are warned by the court to attend on another date to which the hearing may have been adjourned. Some of them were coming from distant places. It is not uncommon for such witnesses to travel on a previous day to the trial.

Although the prosecutor did not know the reason for their absence, the only fact of their non-attendance after having been warned cannot and does not amount to sufficient cause. It was submitted that the prosecutor was perhaps inexperienced. I do not think this matters. If policemen are to prosecute they must know the provisions of the law before they enter the court. In all the circumstances, I am of the opinion that the trial magistrate exercised his discretion properly and judicially on the material which was before him.

The question is whether he was right in applying s. 125 of the Magistrates’ Courts Act and to acquit the respondent in the circumstances of this case. Mr. Tsekooko was of the opinion that he could have invoked the provisions of s. 117 of the Act. I think that this submission is misconceived, for this section deals with the absence of the prosecutor and not the witnesses. The prosecutor was present before the court. That section clearly has no application, *Eric Baingana v. Uganda*, Misc. Cr. App. (1971), M.B. 68.

*Milenge’s* case distinguished the facts from the case of *Ratilal Ganji*. There the accused was charged with reckless driving. The case was fixed for hearing and on the hearing day an Inspector of Police appeared for the prosecution. The main prosecution. The main prosecution witness, although warned to attend, failed to appear in time at the trial and the magistrate after calling upon the prosecution to prove their case which they could not do, proceeded to acquit the accused. The two judges on appeal held that the magistrate’s proper course was either to have adjourned the case or to have dismissed the charge under the provisions of s. 197 of the then Criminal Procedure Code. S. 197 is similar to s. 117 of the Magistrates’ Courts Act, except that, as already stated, the word “prosecutor” has been substituted for the word “complainant”. The judges, after referring to s. 197 which mentioned the absence of the complainant, continued to say:

“It seems to us that the position is substantially the same where the magistrate has before him merely a public prosecutor, whose function is simply to conduct the case and to examine the persons who are the true informants. If the latter are absent, and yet it is known that they are in existence and that their attendance can be secured, it seems to us little short of farcical to embark on a trial of the case and to acquit the accused, the complaint against him being wholly unheard.”

In *Milenge’s* case the State Attorney refused to call his witnesses who were present, and offered no evidence. Here, like *Ratilal Ganji’s* case, the witnesses were not present and an application for adjournment had been refused. The prosecutor had been called upon to lead evidence. Quite obviously he could not do so as none of his witnesses was present. He was pushed into a tight corner and obviously did not know what to do. He did the obvious and told the trial magistrate that he could not call evidence in the absence of his witnesses. It seems to me that the trial magistrate was swayed more by the submissions made by defence counsel rather than being guided by the law. He overlooked the existence of s. 121 of the Act which deals with non-appearance of parties after adjournment, and states that if the complainant shall not appear the court may dismiss the charge with or without costs as the court shall think fit. I can do no better than to recite from the judgment in *Ratilal Ganji’s* case which, with respect, states the position lucidly:

“If the learned magistrate had rightly assessed his powers and duty we think that he would have refused to proceed to what the respondent asks me to regard as a trial, and would have dismissed the charge unheard and have discharged the accused. What was done was done owing to a misconception by the learned magistrate of his powers and duty. We think that we cannot permit the present position to stand because of that misconception . . .”

I respectfully agree with this comment, and am of the opinion that the acquittal of the respondent in these circumstances was wrong in law. As in *Ratilal Ganji’s* case, I hold that as the acquittal should not have occurred I think it right to set aside that acquittal and to substitute therefore the order which should have been made at an earlier stage in the case, that is, an order dismissing the charge with the consequent discharge of the accused. I do so order and further direct that the file be remitted to the trial magistrate to consider the issue of the costs under the provisions of s. 121 of the Magistrate’s Courts Act.

*Order accordingly.*

For the appellant:

*Tsekooko* (Senior State Counsel)

For the respondent:

*FR Gaffa* (instructed by *Kirenga and Gaffa*, Kampala)