IN THE HIGH COURT OF SWAZILAND

Crim. Review Case No.93/94

In the matter between:

MOCHARD NELLY DIAMOND

and

REX

CORAM:	Hull, C.J. Zulman, J.
FOR THE CROWN:	The Director of Public Prosecutions
AMICUS CURIAE	Mr. Shilubane

Review Order
(2/9/94)

The accused has been charged with contravening the Arms and Ammunition Act, 1964 (No. 24 of 1964). The nature of the main charge is that he had in his possession unlawfully a Makarov pistol, it being averred that such a weapon is an "arm of war".

He has also been charged under that Act with the unlawful possession of two rounds of ammunition.

When the case (Criminal Case No. NHO 130/94) came before His Worship Mr. M.L.M. Maziya on 15th August 1994, at Nhlangano, the learned Senior Magistrate in the course of granting a postponement made an order releasing him, pending his trial, "on his own recognisances". To this order he attached two conditions. One was that the accused was to surrender his passport or travel documents to the police at Nhlangano. The other was that he "avails himself whenever so ordered

by the Court." I will take that to mean that the accused was to attend before a court of law as required on the charge, and pending its disposal. The Senior Magistrate has confirmed that the trial is still pending.

This decision attracted attention. The powers of courts to release accused persons pending their trials has been a matter of lively public interest since the promulgation of the Non-Bailable Offences Order, 1993 (Order No. 14 of 1993). That order, as amended subsequently, sets out in its schedule certain offences in respect of which the order, according to its tenor, provides that the High Court and the Magistrates Courts are not empowered to grant bail. The first at least of the two alleged gun offences to which the present case relates is specified in the schedule, though as will be seen this is for present purposes strictly irrelevant. The incidence of crimes of violence, especially those involving the use of firearms, is however currently a matter of grave public concern. The unlawful possession of a Makarov pistol and ammunition, if proved, is a serious matter, as the legislature has indicated by the heavy penalties that it has prescribed for such offences under the Arms and Ammunition Act, 1964. The real effect of the Senior Magistrate's decision was that pending his trial, the accused was released simply on his own word.

The fact that a magistrate makes a decision that may lead to controversy is in itself neither here nor there. It is the duty of a judicial officer to apply the law to the best of his ability and conscience without fear or favour, as his oath directs.

It is also to be noted that the accused first appeared before the Magistrate's Court on 4th July 1994. He was remanded in custody until 11th July "pending D.P.P.'s advice", according to the record. On that day he was again remanded until 19th July for the same reason, when trial was then set for 11th August. When the trial began, he pleaded not guilty to each charge. The case then proceeded. The prosecutor called his first two witnesses. Then, according to the record, he informed the court as follows:

"P/P (Mkhonta) states that he does not know what has happened to the

Force Armourer. He is told that the armourer has gone to three different places, though subpoenaed to be in attendance today. He (P/P) applies for a postponement of the matter."

That is an unsatisfactory reason for seeking a postponement. Unfortunately, it is the experience of the courts that it is not uncommon for trials to be held up for reasons of this nature. It is a very proper function of a magistrate to take all reasonable steps - within his legal powers - to expedite the trials of accused persons. To do so is to serve the ends of justice. The full court of this court, as recently as 17th August in Mncedisi Madi and Others v. The King (Criminal Case No. 150/94) (a judgment given just two days after the decision of the Senior Magistrate in this present case), observed that one corollary of the laws restricting bail is that everyone involved in the administration of justice must strive to ensure swifter trials.

In the present case, not surprisingly, defence counsel objected to a postponement. In granting an adjournment, the Senior Magistrate released the accused in the meantime on the terms already described.

Nevertheless a magistrate must act within the law.

This court has very wide powers of review of all subordinate courts of justice in Swaziland: see section 104(1)(a) of the Constitution; sections 2 and 4 of the High Court Act 1954, (No. 20 of 1954); and sections 75, 78-81, 84 and 93(2) of the Magistrate's Courts Act, No. 66 of 1938. It also has power to review decisions by magistrates in the exercise of its inherent jurisdiction to restrain illegalities by inferior courts: S. v. Mametja 1979(1) SA 767(T). The inherent jurisdiction will be exercised sparingly, especially before the conclusion of criminal proceedings before a magistrate : Walhaus v. Additional Magistrate Johannesburg 1959(3) SA 113(A). In the present case, however, the magistrate's decision goes only to the issue of bail, and not to the merits of the charges themselves. We think that it is an issue that is of sufficient importance and current public interest that we should review its legality mero motu, which we now do.

The point at issue here is, simply, whether a magistrate has jurisdiction to release an accused person, pending his trial or even during his trial, as the Senior Magistrate did in this case.

The Magistrates' Courts in Swaziland are constituted by section 3 of the Magistrates' Court Act. They are subordinate courts and they are statutory courts. Unlike the High Court, which is a superior court of record with unlimited original jurisdiction in criminal and civil matters, magistrates have no inherent jurisdiction. That jurisdiction, and their powers, are derived from and only from the statute law: see Connolly v. Ferguson 1909 T.S.195 in which it was said by Innes C.J. at page 198:

"But as we have laid down upon several occasions recently, magistrates' courts have no inherent jurisdiction such as the Superior Courts in this country possess. The jurisdiction of magistrates' courts must be deduced from the four corners of the statute under which they are constituted."

A statute may confer jurisdiction expressly on a Magistrate's Court. It may also do so by implication.

Though it deals with the criminal jurisdiction of magistrates, in Part IX, the Magistrates' Courts Act does not confer on them powers to release accused persons pending trial. However the Criminal Procedure and Evidence Act, 1938 (No. 67 of 1938) does empower Magistrates' Courts, expressly, to grant bail.

It does so in various circumstances which are set out throughout the Act. Thus in Part VII, dealing with preparatory examinations, section 74 provides that on committal for trial, the examining magistrate shall either "release him on bail where authorised by law" or commit him to prison. Section 82, in that Part, provides that no one may "insist" on bail until a warrant for commitment for trial or sentence is made out, but that the magistrate may (except in cases of treason or murder) admit an accused person to bail before the preparatory examination is conducted "upon such conditions as may seem reasonable and necessary in each particular case".

5/...

Part VIII of the Act deals specifically with bail. It is so headed. Sub-part A is concerned with bail after the preparatory examination is concluded. Section 95 provides that every person committed for trial or sentence in respect of any offence, except treason or murder, may in the discretion of the magistrate be admitted to bail. Section 97 enables an accused person to apply to a magistrate for bail after his commitment, and section 98(1) then goes on to provide:

"(1) Every magistrate to whom an application for bail is made under section 97 shall within five days thereof if the offence is bailable by him, fix the amount of the bail to be given or after consideration of such application may refuse to grant bail." (My emphasis added, here and below.)

Section 100, still in the same sub-part, refers in subsection (1) to "the recognisance which is taken" on the admission of an accused person under the preceding sections of Part VII, and goes on to say that it "shall" be taken either from the accused alone, or from the accused and one or more sureties, in the discretion of the court according to the nature and circumstances of the case.

Then in section 101, still in Sub-part A, provision is made for the forfeiture of a recognisance, and it is also provided that forfeiture shall have the effect of a judgment on the recognisance "for the amounts therein named."

The next sub-part in Part VII was formerly headed "B. - IN CASES TRIED BY MAGISTRATE'S COURTS". It provides in section 102(1) that if a criminal case before a magistrate's court is adjourned or postponed, the court may in its discretion admit the accused to bail "in manner herein provided".

Subsection (2) directs that in that event a recognisance "shall" be taken, again either from the accused alone or from the accused and one or more sureties, as the court may determine having regard to the nature and circumstances of the case. In subsection (4) there is a provision to the same effect as section 101, which again refers to the "amounts" named in the recognisance.

In 1991, by sections 7 and 8 of the Criminal Procedure and Evidence (Amendment) Act, 1991 (Act No. 14 of 1991) Sub-part B was subdivided, the original sub-part becoming "B(1)" and Sub-part B(2), relating to bail in respect of theft and kindred offences, being added. The new sub-part consists of a new section 102A. This provides in subsection(1) that notwithstanding the provisions of Sub-parts A and B(1), "the amount" of bail to be given in respect of theft or any kindred offence (as defined) is to be E500 if the value of the property involved "is" E2000, or one half of the value of the property if that value "exceeds" E2000.

Then in subsection (2), it provides that notwithstanding Sub-parts A and B(1), a magistrate "shall not admit to bail on recognisance" a person charged with such an offence if the value of the property "is E2000 or more".

In 1992, by section 2 of the Criminal Procedure and Evidence (Amendment) Act, 1992 (Act No. 8 of 1992), section 102A was amended further by adding after subsection (1), a new subsection (1) bis, which states:

> "(1) bis Notwithstanding any provisions of this Act the deposit of the amount of bail given under subsection (1) shall be made in cash only."

Sub-part C of Part VIII is headed "C - GENERAL FOR ALL CRIMINAL CASES". In that sub-part, section 103 (as amended by the 1991 Act) provides that subject to section 102A, the "amount" of bail to be taken in any case shall be in the discretion of the court, but it goes on to provide that no person shall be required to give "excessive" bail. Section 112 provides that a court may, except in the case of a bond for good behaviour, permit a person or someone on his behalf to deposit money instead of entering into a recognisance. This clearly encompasses, amongst other things, release on bail.

There are also other provisions in the subsequent Parts of the Criminal Procedure and Evidence Act, 1938, that relate to bail but, for present purposes, I do not think that it is necessary to refer to them.

The Act also contains, in section 57(4) a provision that specifically recognises and authorises the custom whereby a Swazi accused may be warned through his chief, sub-chief or headman to attend a preparatory examination before a magistrate. It does so, however, as an alternative to the issuing of a summons to attend; in other words it applies to Swazi accused persons who are not already in custody. A provision to the same effect, in respect of a charge before a magistrate, is contained in section 117(5): again, however, it applies as an alternative to a summons, in the case where the accused is not in custody.

There is no provision in the Criminal Procedure and Evidence Act, 1938, or in any other statute of which I am aware, that explicitly authorises a magistrate to release a person from custody simply on his own word or undertaking - in effect simply on a warning to him to attend court as required. In South Africa, it is otherwise. Landsdown and Campbell, South African Criminal Law and Procedure, Volume V, at page 343, in section X of the chapter relating to bail, refer to the fact that notwithstanding the absence of provision in the 1955 Criminal Procedure Act in that country, a practice had developed in the lower courts of releasing a person on "his own recognisances". That is the phrase also adopted by the Senior Magistrate in the present case. It is clear from the context that the authors, as the Senior Magistrate has done, use it to refer in effect to a release simply on warning. The authors go on to say that the 1977 South African Act recognised this practice, permitting a court "in lieu of bail" to release an accused person and to warn him to appear subsequently.

In section 72 of the later Act, as it now stands, the phrase "his own recognisances" is not employed but provision is made for the release of an accused person, in certain limited circumstances only, "only warning in lieu of bail". Section 72, as pointed out by Du Toit & Others - Commentary on the Criminal Procedure Act at page 10-2, is a "statutory embodiment of the earlier practice", and furthermore the "procedure of release on warning is aimed at supplanting bail where minor offences are at issue". Section 72 also provides for the punishment of an accused person who fails to appear at his trial where he has been properly warned to do so.

8/...

The Swaziland Criminal Procedure and Evidence Act, 1938, does not define the term "bail", and as indicated previously contains no provision which corresponds to section 72 of the South African Act." In Ndlangamandla v. R. 1979 - 81 SLR 6 (a decision of this court), Nathan C.J. had to consider the release, pending trial, of a young school boy on his "own recognisances", by which he also meant on a bare warning. The learned Chief Justice noted that sections 98(1) and 103 of the Act referred to the "amount" of bail. Referring also to Swift's Law of Criminal Procedure Second Edition, at page 149, and to Ex Parte Phillips; in re R. v. Phillips 1958(1) SA 803 (N), he concluded that the legislature, by using the word "bail" and referring to the "amount" of bail, must have intended that it involved a payment in money. Although the Director of Public Prosecutions in argument here has submitted otherwise, I am of the view (having regard to the whole context of his judgment) that the learned Chief Justice was not saying that bail necessarily required a cash deposit at the outset, but only that in the broader sense it involved an obligation with a monetary consequence. He was, however, saying as well that it could include release on payment of a cash deposit because that, in the end, was the basis on which he granted bail.

In Bell's South African Legal Dictionary, at pages 78-79 of the third edition, "bail" is defined in the following way:

".....the releasing of a prisoner from custody upon his entering into an undertaking or recognisance by himself alone, or by himself and one or more sureties according to the nature and circumstances of the case; the condition of the obligation being that the prisoner shall appear and answer to any indictment that may be presented against him, in any competent court,for the crime or offence wherewith he is charged, at any time within a specified period from the date thereof, and that he will accept service of any indictment and summons thereon at some certain place by him elected and expressed in the obligation. On the completion of such an obligation (which is only permitted and accepted in respect of bailable offences) the prisoner is released from custody and is said to be liberated on bail or admitted to bail."

(The text of the definition in fact emphasises "bail" in the last two places where the word occurs, for illustrative purposes.)

There are similar definitions in Swift (quoted by the learned Chief Justice in Ndlangamandla), in Classen, Dictionary of Legal Words and Phrases, in Volume 1 at page 165, and in Sisson, The South African Judicial Dictionary, at page 83.

Bell, at page 681, defines "recognisance" as meaning -

> " a written obligation executed before a magistrate or some other proper official, whereby a person binds himself, under some specified penalty, to perform some particular act or appear at some particular court or place, within a time or on a day named in the obligation."

In ordinary English usage, the meaning of recognisance is not restricted to an acknowledgement of a monetary debt. The Oxford English Dictionary (2nd Edition) (1988) Volume XIII at page 342 contains the following definition:

> "1. Law. A bond or obligation, entered into and recorded before a court or magistrate, by which a person engages himself to perform some act or observe some condition (as to appear when called on, to pay a debt, or to keep the peace; also a sum of money pledged as surety for such performance, and rendered forfeit by neglect of it."

(See also The Imperial Dictionary of the English Language (1903) Volume 111 page 635 and Webster's Third New International Dictionary (1993) page 1897, which contain definitions which are to similar effect.)

At common law, "bail" is in my view a generic concept, referring to the release of an accused person pending and on condition of his appearance at his trial or in submission to the judgment of an

appellate court - or, possibly, at some other form of judicial hearing. Notwithstanding that I may earlier have appeared to take a rather narrower view in Ngwenya v. The King (an unreported decision in 1992), I think that it is wide enough at common law to encompass release on a variety of bases - i.e. on his own recognisance; on those of himself and one or more sureties; or even (for I can see no reason in principle why it should not be so) on those of one or more sureties themselves. A recognisance at common law is not in my opinion limited to an obligation that is expressed in terms of some monetary consequence. In times past, sureties sometimes undertook the obligation of surrendering their own bodies in default of appearance by the accused. In modern practice, except in the case where an accused person is released on his own word, his own recognisance and those of his sureties (if any) may usually involve a monetary obligation of some sort - but release on his own word is a form of recognisance, one sanction being that he is liable to be arrested again at any time, if he does not honour the conditions on which his word is given. I think too that at common law, a recognisance as such may itself involve a deposit of money, either by the accused, or by him and one or more other persons, or by one or more other persons themselves. Such a deposit does not mean necessary that it is lost to the depositor. It may be given conditionally, under the terms of the depositor's recognisance. And apart from all of this I am also of the view that bail, at common law, may include release on a bare deposit of cash by one or more persons.

The South African authorities as a whole are not in my view inconsistent with this. The reference in Phillips (supra) to a recognisance as necessarily being an acknowledgement of debt is a very brief one. The weight of authority in my view favours a broader meaning. The fact that the 1977 South African Act refers to a warning as a means of release "in lieu of bail" is not determinative either, for that is in the context of a particular statute.

In Ndlangamandla (supra), Nathan C.J. was also concerned (as we are) to consider the meaning of "bail" as that word is used in a particular statute, namely the Criminal Procedure and Evidence Act, 1938. Ordinarily, when used in a statute relating to criminal procedure, it

will be given the meaning to be attributed to it by accepted usage in the context of that specialised field : see Unwin v. Hanson 1891 2QB 115, at page 119 per Lord Esher. In short, it will be given the meaning which it has at common law, in criminal procedure. But as Nathan C.J. held in Ndlangamandla, in the context of the Act itself, in empowering magistrates to grant bail in cases that are to be tried before them - and for that matter in cases where they are to commit accused persons for trial or sentence - the legislature clearly went further. It imposed additional statutory limitations on the jurisdiction that it was conferring on magistrates to grant bail. It did so by providing that they could only do so if the accused alone, or with or one or more sureties, entered into recognisances that involved a monetary condition. By virtue of section 112, cash deposits might be taken instead of the acknowledgment of a potential debt. But the Act does not contemplate, in my view, that a magistrate can release an accused person simply on his word, unaccompanied by any monetary commitment.

In his judgment the Senior Magistrate came to the view, after considering Ndlangamandla, and sections 98(1) and 103 of the Criminal Procedure and Evidence Act, 1938, that "bail" and "recognisance" are separate concepts. He also clearly formed the view that, but for the Non-Bailable Offences Order 1993, there could be no doubt that he had jurisdiction to release the accused in the way in which he did, i.e. "on his own recognisances" - his own word.

He then turned to consider whether or not, on its proper construction, the 1993 Order did curtail his jurisdiction. In doing so, he treated the order as a penal statute, indicating (after citing various authorities) that he would accordingly construe it strictly, in favour of the liberty of the individual. Thereafter, what he did essentially was to note that the 1993 Order does not mention a recognisance, and to pray in further aid section 18 of the Theft of Motor Vehicles Act, 1991. His argument in that respect was that by regulating bail in subsections (1) and (2) of that section, and then dealing separately with an accused person's own recognisance in the last subsection, the legislature itself had shown that it was aware that they were distinct things.

In the course of his judgment, the Senior Magistrate addressed the apparent anomaly, if he were right, that although he could not release the accused on bail, he could nevertheless do so on "his own recognisances". The anomaly can be illustrated a little more vividly. What he was really saying was that (if he were right) he could not release him on bail in money terms (such as a recognisance in the sum of E20,000) but he might nevertheless let him go on his own bare word. The Senior Magistrate dealt with this by referring to Oliver Wendell Holmes' observation to the effect that the life of the law has been based on experience rather than logic - though I should add that it is implicit in his reasoning, too, that he felt that his duty was to resolve any ambiguities or omissions in the order in favour of the individual, regardless of any consequences that were apparently illogical.

The Senior Magistrate also touched upon the constitutional status of the 1993 Order, expressing the views that it is a "mere" Order-in-Council, that the Council of Ministers (by whom he conceived it to have been promulgated) were acting as caretakers whose legislative powers were of a subsidiary nature, and that they could not override an Act of Parliament. No authorities were cited in his judgment for these opinions.

He concluded, on all of this, that the 1993 Order did not prohibit the release of an accused person on his own recognisances - i.e. on his own word. He then proceeded to make the order now in issue.

In my judgment, the learned Senior Magistrate acted wrongly in doing so.

For the reasons that I have already given, release on "one's own recognisances" in my view is not a form of release that is different in kind from release on bail. It is one method of release on bail. To the extent that it might be said to be relevant to the present matter, section 18 of the Theft of Motor Vehicles Act 1991 does not show that the legislature regards bail and recognisance as separate methods of release at all. That section does not confer a right to bail. What it does is to restrict the power of a magistrate to grant

bail in respect of the cases to which it applies. It does so first by stipulating minimum amounts of bail and then further, in the final subsection, by prohibiting the acceptance for bail purposes of a recognisance from the accused himself.

A magistrate's jurisdiction to release accused persons pending trial or appeal is conferred by the Criminal Procedure and Evidence Act, 1938. In respect of release pending trial before a Magistrate's Court it is, as I have shown, to be found in Part VIII, in Sub-parts B(1) and B(2), and also in Sub-part C.

Although at common law, release on one's own word is one way in which bail can be given, the Act (in the case of magistrates) restricts their jurisdiction to grant bail in cases being tried before them by requiring that they must, in doing so, require recognisances or cash deposits. With respect, I agree with Nathan C.J. that moreover, on the proper construction of the relevant sections of the Act, such a recognisance must be one which involves a monetary obligation. It need not involve an actual deposit of cash (except in any specific instances where the Act so requires), and in any event a magistrate can permit deposits of cash, instead of monetary recognisances, in cases to which section 112 applies.

Apart from these general limitations on the jurisdiction that the legislature has conferred on magistrates, it has also imposed other specific statutory limitations in particular situations, such as those relating to treason and murder, and those set out in section 102A, as well as those in section 18 of the Theft of Motor Vehicles Act, 1991.

But despite the existence of any practice that might have developed in the lower courts to such effect, a magistrate has no express jurisdiction under the Criminal Procedure and Evidence Act, 1938, to release an accused person from custody, pending his trial before him, on the accused person's "own recognisances" in the sense in which the Senior Magistrate did so and in the sense in which Nathan C.J. in Ndlangamandla and Lansdown and Campbell (supra) employed that expression - in other words, merely on his own word, or for that matter in any other manner not involving a monetary obligation. Moreover, in my view, no such jurisdiction can properly be deduced from the four corners of the Act.

14/...

For these reasons alone, I am of the view that the Senior Magistrate was wrong. The Non-Bailable Offences Order 1993, and any question of the strict construction of that order are strictly irrelevant. Magistrates, under the Criminal Procedure and Evidence Act 1938, do not possess the jurisdiction that the Senior Magistrate purported to exercise.

Although it is not strictly necessary on this review to express a view, I am also of the opinion that the Non-Bailable Offences Order 1993 (as amended) has abrogated the jurisdiction of magistrates to grant bail in any circumstances in respect of the offences set out in the schedule to the order.

It is proper that all courts, at any level, should have regard to constitutional rules of law. There is ample authority in other Commonwealth decisions for the proposition that the constitutionality of a statute should not be called lightly into question. As far as the Senior Magistrate is concerned, one immediate answer to the point to which he has adverted is that the full court of this court in Madi (supra) has since held that the effect of the Non-Bailable Offences (Amendment) Act, 1994 (Act No. 4 of 1994), was to invest the 1993 Order in any event with the status of an Act of Parliament. The full court expressly left open the question whether the 1993 Order and its later parliamentary amendment infringe any constitutional rule of law. That such an issue may arise is illustrated in Procedures in Criminal Law in Kenya by Momonyi Bwononga who cites at pages 112 and 113 the case of Margaret Magini Ngui v. R. (Criminal application No. 59 of 1985, High Court, Nairobi, unreported.) But it is an issue that can only be considered properly after full argument. As a matter of practice, a subordinate court should in my view be very cautious about reaching a conclusion that an enactment is unconstitutional. In practice it is unsatisfactory to come to such a serious decision on the apparent strength of one's own personal views, without the benefit of full argument and without citing authority.

That aspect of the matter aside, there is no doubt in my mind that on the strictest construction of the Non-Bailable Offences Order, 1993, the legislative authority intended - clearly and unquivocally - to

remove any jurisdiction to release persons charged with offences set out in its schedule, pending or during their trials: see also the recent judgment of the full court in Madi (supra(.

The construction of a statute turns ultimately on legal principles. The fact that the result may seem unusual is not in itself a reason for not applying such principles. It is, however, in my view a useful practical exercise for any judicial officer to weigh his initial conclusions by considering how sensible they seem to be to him. If he has serious misgivings on doing that, then I think it is salutary practical advice to pause and to think very hard about it. In the present case, having invoked Holmes' dictum, the Senior Magistrate with respect has rather turned it on its head. Assuming for the argument what is not the case, namely that bail and recognisance are distinct methods of release, it does not follow at all in logic that there is anything inconsistent in investing a judicial officer with the power to release a person on his own word (his own bare recognisance) but not the power to release him on a monetary commitment. Most people would however think that it would be rather silly to allow him to go free on his own word, but not if he or others on his behalf were to undertake a monetary commitment to ensure his attendance at trial. They would think so not for reasons of mere logic, but because of their own knowledge - through experience - of the ways of the world.

To the extent that they are empowered to grant bail, magistrates must also exercise their discretion sensibly. The Criminal Procedure and Evidence Act, 1938, contemplates this in its use of the words "regard being had to the nature and circumstances of the case" in section 102(3), and in the words to the same effect that appear in section 82.

On the other hand, as I hope I have recognised adequately at the beginning of this order, the learned Senior Magistrate was dealing in this case with a situation in which he had cause for concern. The accused was being tried on serious charges. The trial had commenced. Both he and the court were entitled to expect that it would proceed expeditiously. It ground to a halt because of conduct on the part of the prosecution.

There was good reason for the Senior Magistrate to be concerned, apart from any other consideration, because on one charge at least he could not grant the accused bail in the meantime. However, in my view, he addressed the problem in the wrong way. What he should have done, if he saw fit on reasonable grounds, was to require the trial to proceed. The pleas having been taken already, the accused would have been entitled then to a speedy conclusion and a verdict. In a case where no plea has been taken, but a magistrate comes to a view upon reasonable grounds that there has been undue delay on the part of the prosecution, it is always open to him to insist that the case is to proceed: see sections 139 and 144 of the Criminal Procedure and Evidence Act, 1938. Such powers must of course to be exercised sensibly, and reasonably. Except in trivial cases, it will always be right to give the prosecution prior warning that it is being put on terms.

In cases in which in the prosecution, in those circumstances, chooses to withdraw the charge, the court will then release the accused. In such a situation, the prosecution may re-arrest and re-charge the accused. But in my view, such a course of action in practice should be considered carefully and with restraint.

In the present matter, however and for the reasons given earlier, I propose that the order of the learned Senior Magistrate releasing the accused on his "own recognisances" be set aside, and to substitute an order that he is to be taken into custody again pending the completion of his trial, or until he is sooner released in accordance with law.

DAVID HULL
CHIEF JUSTICE

I concur.

pp R. Zulman

RALPH ZULMAN
JUDGE

17/...