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ARTWELL CHIKUMBU
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, PATEL JA, GUVAVA JA,
HARARE, FEBRUARY 19, 2014 & FEBRUARY 17, 2015

W. Bherebende, for the applicant

T. Mapfuwa, for the respondent

GUVAVA JA: This is an application referred to this Court in terms of s 24 (2) of the old Constitution. The applicant seeks an order for a permanent stay of his prosecution on the basis that his rights in terms of s 18 (1) and (2) of the old Constitution have been violated owing to the delay in finalising his trial.

FACTUAL BACKGROUND

The facts which gave rise to this application are these. On 18 April 2005 the applicant attended the Independence Day Celebrations at a farm homestead in Featherstone. At around 14.00 hours of the same day the applicant had a misunderstanding with the deceased, Wilbert Mapurisa, concerning contributions towards the Independence Day

celebrations. At about 19.00 hours, the applicant approached the deceased where he was seated and eating some food. Without saying anything to him he suddenly attacked him. He kicked him on his back and stomach several times. The deceased fell to the ground, started vomiting and became unconscious.

The deceased was carried into one of the rooms at the homestead by people who were attending the celebrations. They rendered some first aid and he regained consciousness during the night. On the following day at about 07.00 hours the deceased was ferried to St Michael's hospital in Mamina for treatment where he was admitted due to the seriousness of his condition. On 21 April the deceased died.

A post mortem examination was conducted and the doctor found that the death was caused by severe peritonitis, perforated colon and blunt trauma consistent with a kick.

The applicant was arrested and charged with the crime of murder on 21 April 2005 and placed on remand at Chivhu Magistrates Court. He was granted bail after spending twenty days in custody.

On 4 April 2006 the murder charge was reduced to culpable homicide. The Attorney General's Office directed that the matter be tried before a Regional Magistrate at Chitungwiza Magistrates Court as there was no regional court at Chivhu. The trial failed to commence on a number of occasions. On 9 February 2009, when the matter was set down for trial, the applicant made an application for the matter to be referred to the Supreme Court in terms of s 24 (2) of the old Constitution on the basis that there had been an inordinate delay in finalising the trial. The applicant sought the following relief:-

"1. A declaration that the respondent had failed to prosecute the matter against him timeously and within a reasonable period in violation of his right as set out in section 18(2) of the Constitution of Zimbabwe.

2. An order that the prosecution of the applicant by the respondent be stayed permanently."

The trial magistrate determined that the application had merit and duly referred the matter to this Court.

RELEVANT CONSTITUTIONAL PROVISIONS

Section 18 of the old Constitution provides for equal protection of the law to all persons. The relevant provisions state as follows:-

"(1) Subject to the provisions of this Constitution every person is entitled to the protection of the law.

(2) 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."

In *S v Nhando & Ors* 2001 (2) ZLR 84 at 86 A-B (S) CHIDYAUSIKU ACJ (as he then was) quoting the case of *In Re Mlambo* 1991 (2) ZLR 339 (SC) and other cases decided by this Court, reaffirmed the factors to be taken into account in determining whether or not an applicant has been deprived of his right to a fair and speedy trial. He set these out as follows:

"(a) The length of the delay,

(b) The reasons for the delay;

(c) The assertion by the accused of his or her right to a trial; and

(d) The prejudice to the accused caused by the delay."

I will examine each of the above factors in turn.

THE LENGTH OF THE DELAY

The right to a hearing within a reasonable time is enshrined in the Constitution. Although the term "reasonable time" is not defined in the Constitution this depends on the circumstances of each case.

In the case of *In Re Mlambo* (supra) a delay of four years and seven months was held to be presumptively prejudicial. It was further held that the time frame commences from the date of arrest and that a withdrawal of charges before plea does not interrupt the time frame.

In the case of *Shumba v Attorney General* 1997 (1) ZLR 589 (S) a delay of six months was held to be too short to give rise to an enquiry.

In this case it was common cause that at the time that the application for referral was made there had been a delay of three years and ten months. Taking into account that this was not a particularly complicated case, the matter should have been finalised in a much shorter period. In the circumstances, it is my view that the delay in this case was presumptively prejudicial.

THE EXPLANATION FOR THE DELAY

The applicant was on remand from 21 April 2005 to 10 December 2007 when the charges were withdrawn before plea. It is not in dispute that the State failed to proceed to trial on 10 December 2007 because the witnesses failed to attend court. Thereafter a warrant for their arrest was issued and they were subsequently arrested and brought to court. It is

common cause that between 16 October 2008 and 10 November 2008 the matter could not proceed as the police could not locate the applicant at his residence. On 8 December 2008 the applicant's legal practitioners sought a postponement of the case as they had misplaced the State papers that they had been served with. The matter was postponed to 20 January 2009 for trial. On 20 January 2009 the matter did not proceed as the applicant's legal practitioner was not present necessitating the postponement of the matter to 9 February 2009.

On the evidence that is on the record, the State alleges that the delay is attributable to the applicant while the applicant alleges that it was the State that failed to prosecute him on time. It should be noted that although the police stated in their evidence that the matter failed to commence on a number of occasions because they could not locate the applicant, an examination of the evidence does not disclose why he could not be located. This issue was not considered during the hearing before the court *a quo*. The police diary logs do not indicate what efforts were made to serve the applicant with the summons. It is left open to conjecture that it could very well be that the applicant was merely not at his place of residence when they arrived to serve him. There is no indication on the papers that the applicant had put himself beyond the reach of the police.

From the record it is also clear that the State failed to prosecute the applicant because on several occasions the State witnesses failed to turn up even though the applicant was present. It is common cause that at some stage the State had to have a warrant of arrest issued against its own witnesses because they failed to attend court.

On 9 February 2009 when the trial was supposed to commence the applicant then made an application to have the matter referred to this Court arguing that his rights to a

speedy trial had been violated. It took the trial magistrate several months to determine the application. The application for referral was only granted on 1 September 2009.

On a careful examination of the reasons given for the delay in commencing the trial, it seems to me that the delay may be ascribed to both the applicant and the respondent. In these circumstances the applicant cannot rely on the delay as a reason for seeking a permanent stay of the criminal proceedings.

WHETHER THE APPLICANT ASSERTED HIS CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL

In order for this Court to properly determine whether or not the applicant is entitled to the relief that he seeks he must show that he asserted his rights to a speedy trial. In *S v Banga* 1995(2) ZLR 297 (S), it was held as follows:-

> "….the applicant must assert his right to a trial within a reasonable time. A failure to object along the way until the stage is reached when the State is able to commence the trial will lead to the inevitable inference that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that his eleventh hour protest was nothing more than a desperate tactic to avoid the outcome of the trial"

It is apparent that throughout this period the applicant did not demand a trial. No evidence was led on any attempts made by the applicant to object to the delay to bring him to trial. All he did was to make an application for a refusal for further remand until the State withdrew the matter before plea on 10 December 2007. There is no indication on the papers that he ever demanded that the matter be heard. To the contrary, it appears that he was more concerned about the demands upon his time when he attended court and therefore wanted the charges withdrawn against him.

It appears that the applicant may have been under the impression that once the charges against him were withdrawn such charges would then be forgotten.

WHETHER THE DELAY HAS PREJUDICED THE APPLICANT

When the applicant gave evidence on the possible prejudice he would suffer as a result of the delay, he stated that one of his defence witnesses had died and the other two could not be located. However there was no evidence placed on the record as to what efforts had been made to find these two witnesses.

He also testified that the anxiety had affected him to such an extent that at one stage he attempted to commit suicide by taking poison.

The delay in prosecuting a case will inevitably affect an accused person as he will have forgotten some of the evidence. Indeed the applicant in this case stated that it was difficult for him to remember the events of the case due to lapse of time. That this may be possible was conceded by the State. However, this is not unique to the applicant as the same difficulty will affect the State witnesses.

On the claim that it may be difficult to locate the two remaining defence witnesses no detail was given on the efforts that had been made to locate them.

DISPOSITION

In deciding whether or not to grant a stay in proceedings the Court must consider the various factors together. The applicant faces a very serious offence. It is not in dispute that a life was lost at the hands of the applicant.

The delay in prosecuting the matter was partly the fault of the applicant. He also did not assert his constitutional right to a speedy trial. Although Mr *Bherebhende*, for the applicant, submitted that the applicant would be prejudiced by the delay in prosecuting this matter, in my view, he did not show that his rights under s 18 of the old Constitution have been violated.

Accordingly the application must fail. It is hereby dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

PATEL JA: I agree

Bherebende Law Chambers, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners