HB 229/17
HC (CRB) 82/17

THE STATE

Versus

ERNEST NCUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs Moyo and Mrs Dhlula
BULAWAYO 17 & 27 JULY 2017

Criminal Trial – Application for permanent stay of prosecution

Ms N. Ngwenya for the state
N. Mushangwe for the accused

MAKONESE J: This is an application for a permanent stay of prosecution made pursuant to the provisions of section 69 (1) of the Constitution of Zimbabwe (Amendment No. 20) 2013. The applicant appears in this court facing one count of murder and another count of attempted murder. The offences are alleged to have been committed on 23rd February 2004. A period of more than 13 years had lapsed since the commission of these offences. The applicant was arrested on 23rd February 2004 and remained in remand prison until his release on bail in April 2004. The applicant religiously appeared on routine remand at Gwanda Magistrates' Court until 2nd April 2007 when further remand was refused. He therefore remained on remand for a continuous period of 3 years.

Applicant avers that he had always been available at his rural home since the time of his arrest. For some reason, applicant was only indicted for trial on 18 May 2017. He was indicted for trial 13 years after the commission of the offences. It is not disputed that three of applicant's witnesses have since died due to the delay in bringing the matter to trial. These witnesses are George Ndlovu, Moses Ndlovu and Richard Nyoni. The applicant avers that these were crucial witnesses to his defence. Applicant contends, further, that due to the passage of time, some of the events are fading in his memory and that he is likely to suffer prejudice in the proper conduct of his defence.

The applicant submits that his constitutional right to a fair trial within a reasonable time has been infringed. That right as provided under section 69 (1) of the Constitution enjoins the state to bring any accused person before a court within a reasonable period. The applicant contends that a period of 13 years is inordinate and the court is entitled to order a permanent stay of prosecution. The applicant contends that this court has the jurisdiction to determine the matter.

The state was given due notice of the application for a permanent stay of prosecution. The state duly filed a comprehensive and somewhat detailed explanation of the several factors that caused the delay in bringing the applicant to trial within a reasonable time. The state generally alleges that the applicant could not be brought to trial within a reasonable time due to the huge back log of cases and due to a high staff turnover within the National Prosecuting Authority. The state alleges that the applicant did not assert his right to a speedy trial as he ought to have done.

The principles which govern applications of this nature are now well settled in this jurisdiction. They are set out in *Re: Mlambo* 1991 (2) ZLR 339 (S) and have since been applied in subsequent decisions, more particularly in *Hungwe & Ors* v *AG* S 50/94; *S* v *Mataruse* S 101/94; *S* v *Marisa* S 126/95; *S* v *Chikwinya* 1997 (1) ZLR 109 (H); *S* v *Banga* 1995 (2) ZLR 297 (S); *Matiashe* v *Mahwe NO & Anor* 2014 (2) ZLR 799 and *Jonathan Mutsinze* v *AG* CCZ 13/15.

The court must essentially consider the following factors; (a) the length of the delay (b) the reasons given by the state for such delay (c) whether the applicant asserted his rights to a speedy trial (d) the prejudice to the accused caused by the delay. In order to determine whether the delay is reasonable or not, the court must endeavour to strike a balance between these factors. In general, no one factor on its own justifies an inference that the delay is unreasonable. The balancing test involves balancing the conduct of both the state and accused on the one hand and the interests of justice. I shall now proceed to consider each of those requirements.

Length of the delay

At the time of his indictment the matter had not been brought to trial for a period of more than 13 years. Applicant was arrested in February 2004. He was placed on remand at Filabusi on 27th February 2004. The police referred the docket to the Attorney General's Office (now Prosecutor General) for set down in September 2004. The police docket was shuffled back and forth between the police and the office of the prosecution until the applicant was removed from remand on 2nd April 2007.

The state led evidence from Mrs Cheda, the Chief Public Prosecutor for Bulawayo who presented a statement before the court detailing the movement of the police docket. An excerpt from Mrs Cheda's statement explains the delays in the following terms:

> *"The accused who was on bail was removed from remand by the magistrate on 2April 2007. In August 2009 Mr Mabhaudi sent the docket back to the police to ascertain the whereabouts of the accused and witnesses. In November 2009 the police failed to locate all the parties. The police went back to check on the accused during the same month on three different occasions but failed to locate accused although they established through the wife that he was around. Police also established that the witnesses had moved away from Filabusi but their whereabouts could be traced. The docket was referred back to the Attorney General's Office in December 2009 for set down. Indict papers were prepared by Mr Mabhaudi. The accused was eventually indicted for trial on the 18th May 2017."*

It is clear from the sequence of events that the applicant was always available for trial. It is also clear that the reason for the delay is that the police were failing to locate witnesses. There is no explanation offered by the state for the delay between 2009 and 2017. It would seem to me that the police docket was being kept at the National Prosecuting Authority for a period of inactivity spanning 8 years. No explanation whatsoever is apparent from the evidence of Mrs Cheda, except that there was a backlog of cases. In my view, the delay of 13 years from the time of the commission of these offences to the date of indictment is certainly inordinate. The delay, as far as the court is concerned is unprecedented and presumptively prejudicial to the applicant.

The explanation for the delay

The applicant gave evidence under oath. He was subjected to extensive cross-examination. He explained that from the date of his arrest he has always been available to attend trial. He was arrested in February 2004 and was taken to remand at Filabusi Magistrates' Court on allegations of murder and attempted murder. He denied the allegations. He remained in custody until his release on bail in April 2004. He continuously attended remand court until 2nd April 2007 when further remand was refused. Applicant has remained at is rural home ever since. He has not relocated to any other residence at any stage. The explanation proffered by the state for the delay is that there has been a huge backload of cases. The running diaries prepared by the police reflect that the docket was ready for prosecution way back in 2009. From that stage on there is no credible explanation as to why the matter could not be set down for trial. It is my view that there is no reasonable and convincing explanation given by the state. The delay is clearly and utterly inexcusable. The delay is presumptively prejudicial. In the matter of *S* v *Banga*, the Supreme Court made a finding that a period of slightly over four years was presumptively long enough to trigger an enquiry into factors that go into the balance in the determination whether the delay in bringing he applicant to trial was reasonable. In the instant case, the delay of 13 years is definitely inordinate and in the absence of a reasonable explanation, the applicant's right to a trial within a reasonable time has been *prima facie* infringed. The explanation proffered by the state is far too general to give rise to a conclusion that that the delay is justifiable. I would venture to suggest that the delay was most likely caused by the state failing to put its house in order. I arrive at this conclusion by noting that the docket was ready for prosecution in 2009 and yet the applicant was indicted 8 years later in May 2017. It is my view that the balance of convenience should lean in favour of the applicant.

Whether the applicant asserted his rights

The applicant testified that he brought the issue of the delay of the prosecution of his matter to Public Prosecutors at Filabusi. On 2nd April 2007 further remand was refused. This was after applicant had remained on remand for 3 years. During this period applicant was reporting regularly at Filabusi Police and he was required to remain at his rural home at Nkankezi. The state did not disprove the applicant's claims that he had approached the

Prosecutor at Filabusi on several occasions demanding a trial date. Whilst the general proposition is that an applicant seeking a permanent stay of prosecution must show that he did attempt to assert his right to speedy trial, this duty demands that an applicant must demonstrate that he did not merely sit back and do nothing. In the instant case the evidence placed before the court indicates that the applicant discharged that burden by approaching Public Prosecutor and demanding a trial date. The applicant, in my view meets the requirements of assertion of his right to a speedy trial.

Prejudice caused by the delay

In assessing the question of prejudice the court must take into account all the circumstances which the right to a speedy trial was designed to safeguard. The applicant indicated that three of his defence witnesses have since died. These are persons who witnessed the incident that led to the commission of those offences. The state did acknowledge that their own independent investigations confirmed that these defence witnesses had indeed passed on. The state also intimated that some witnesses had left the Filabusi area. After a period of 13 years there can be no doubt that memory tends to fade with the passage of time. The witness' perception of events could not be as accurate and precise after a decade long delay. On his part the applicant did concede that he would be seriously handicapped in that most of the events of the fateful day as perceived are no longer fresh in his mind.

The applicant was aged 52 years at the time of the offence. He is now 65 years old and admittedly there is a reasonable possibility that his memory of events may not be as bright as a few years ago. In giving evidence in court the applicant struggled to give an account of how he felt being dragged to court 13 years later. The applicant testified that he has suffered from stigmatization resulting from these allegations. He has suffered emotionally and he has lost financially and materially as he tried to keep his family together. Applicant indicated that for the past 13 years he could not plan his future as he was aware that the offence he faced carried the ultimate punishment of a death penalty. The applicant appeared to be an emotional wreck and genuinely appeared distraught by the prospects of the trial commencing after such a length of

time and without his key defence witnesses. There can be no doubt that the applicant will be impaired in the conduct of his defence. That the applicant has suffered considerable anxiety over the 13 years period cannot be doubted.

In *Re: Mlambo*, GUBBARY (CJ) as he then was had this to say:

> "The right, therefore, recognizes that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual."

Disposition

A general principle in applications of this nature is that, whilst each case must be decided on its own merits, the grant of a permanent stay is an exceptional remedy. The Constitution in section 69 (1) entitles all persons to equal protection under the law, and the right to a fair and speedy trial. Once the right to a fair and speedy trial has been infringed, an applicant is ordinarily entitled to a permanent stay of prosecution. I have taken into account that on the admitted facts by both the defence and the state the delay of 13 years is inordinate and inexcusable. I have made the finding that there is no reasonable and acceptable explanation for the delay. The applicant evidently asserted his rights by demanding a trial date. In 2007 the applicant was removed from remand. In 2009 the docket was ready for set down and yet no credible explanation is given as to why the applicant was not indicted for trial. I did not accept the general explanation that there was a huge backlog of cases at the High Court. There is no indication at all that an attempt was made to set this matter for trial. I accept that there was actual prejudice suffered by the applicant arising from the delay. I hold the view that justice will not be served by dragging to court an accused person who in the last 13 years has lost three key defence witnesses. There can be no doubt that the applicant will be impaired in the conduct of his defence.

This court has the discretion to regulate its own proceedings. The court has a common law power to put a stop to any wrong done to an accused person. This includes the violation of an accused's rights to a fair and speedy trial. Where an infringement of this right has occurred,

the minimum remedy must be a stay of proceedings. From the aforegoing I am satisfied that the application for a permanent stay of proceedings is merited.

I, accordingly order that prosecution in this matter be and is hereby permanently stayed.

National Prosecuting Authority, state's legal practitioners
Mushangwe & Company, accused's legal practitioners