

REPORTABLE (10)

BERNARD MANYARA
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 & MARCH 9, 2015

J. Mambara, for the applicant

S. Fero, for the respondent

PATEL JA: The applicant in this matter seeks a permanent stay of prosecution in respect of a charge that arose more than 8 years ago. He claims that his right to a fair trial within a reasonable time, as enshrined in s 18(2) of the former Constitution, has been violated.

The applicant was arrested in November 2005 on a charge of converting to his own use a sum of ZW\$760,000,000.00 that was given to him by the complainant to purchase 30,000 litres of diesel and 8,000 litres of petrol. According to the submissions filed on his behalf before the Magistrates Court on 27 June 2011, he was detained but

later released and then arrested again in November 2007. At the end of 2008 he was taken off remand because the State was not ready to proceed. Following his further arrest in May 2011, he was summoned to appear in court on 20 June 2011, when he gave notice of his intention to apply for the matter to be referred to the Supreme Court in terms of s 24(2) of the former Constitution. The matter was then so referred by the Magistrates Court sitting at Harare on 8 July 2011.

It is averred on behalf of the applicant that the inordinate delay of 6 years in bringing the matter to trial was due to the State's lack of preparedness. It is also averred that he has been prejudiced by the passage of time, the inflation of the Zimbabwe Dollar and the subsequent changeover to the United States Dollar.

The State opposed the application for referral on the grounds set out in its response filed before the magistrate on 6 July 2011. It further opposed the request for permanent stay of proceedings in its heads of argument before this Court. In essence, it is averred that the matter is not properly before this Court because it consists only of the submissions filed in the Magistrates Court. There was no affidavit or evidence adduced in that court, nor was any hearing conducted before it, to enable the magistrate to determine whether or not the application was frivolous or vexatious. Additionally, no documentation was attached to the application to support the applicant's averments as to what transpired between 2005 and 2011. Consequently, neither the prosecutor nor the magistrate could test the veracity of the applicant's allegations. It is further argued for the respondent that this Court is handicapped by the lack of evidence in making a full

inquiry into and determining whether or not the applicant's right to a fair trial has been violated.

ISSUES FOR DETERMINATION

Having regard to the respondent's position, the preliminary question to be decided is whether or not this matter is properly before this Court in light of the procedure adopted by the applicant's counsel in making the request for referral in the Magistrates Court. Flowing therefrom is the related question as to whether or not, on the basis of the evidence on record, this Court can properly make a determination on the alleged violation of the applicant's right to a fair and speedy trial as guaranteed by s 18(2) of the former Constitution.

Mr *Mambara* for the applicant accepts that neither party filed affidavits or gave evidence before the Magistrates Court in relation to the factual and legal requirements to justify or negative a permanent stay of prosecution. The magistrate only considered the written submissions filed on behalf of the applicant before referring the matter to the Supreme Court. Nevertheless, Mr *Mambara* contends that there are sufficient details in those submissions to enable this Court to assess the relevant facts and decide the constitutional question referred for determination. If this is not possible, the way forward would be to refer the matter back to the Magistrates Court to hear evidence from both parties.

Mrs *Fero* for the respondent reiterates the position adopted by the State before the Magistrates Court, *viz.* that this Court, in the absence of the requisite evidence on record, cannot properly make any finding as to the reasons for the delay in commencing trial, whether or not the applicant asserted his rights, and the nature of the prejudice, if any, occasioned by the delay. She submits, however, contrary to the stance taken in the respondent's heads of argument, that the application should not be dismissed. Instead, the matter should be referred to the Magistrates Court for a full inquiry to hear evidence and make proper findings of fact in order to determine whether or not the application for referral is frivolous or vexatious.

PRINCIPLES GOVERNING REFERRAL

Where an accused person alleges any infringement of his or her right to a fair trial within a reasonable time, the factors that are to be ventilated and determined are now well settled. They are: the length of the delay; the reason or explanation and responsibility for the delay; the assertion of his or her rights by the accused; and prejudice to the accused arising from the delay. See *In re Mlambo* 1991 (2) ZLR 339 (S); *S v Nhando & Others* 2001 (2) ZLR 84 (S); *S v Nkomo* SC 52-06.

In order to enable a proper evaluation of the above-mentioned factors it is essential that evidence be led, primarily by the accused person, as to what transpired from the date of the charge to the date when referral of the alleged violation of rights is sought. The reasons for this were clearly articulated by Gubbay CJ in *S v Banga* 1995 (2) ZLR 297 (S) at 300G-301H as follows:

“Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 16 August 1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any actual prejudice had been suffered as a result of the delay. Such a fundamental omission on the part of the defence is fatal to the success of the application.

.....

Moreover, the absence of *viva voce* evidence completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, particularly where, as here, his liberty was not interfered with; and that it has impaired his ability to exonerate himself from the charge due to the death, disappearance or forgetfulness of potential witnesses. See *In re Mlambo supra* at 352G and 354D-E; *S v Demba* S-194-94; *S v Marisa supra* at p 9.

I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court.”

This reasoning has been subsequently adopted and applied by the Supreme Court on several occasions – see *Sivako v Attorney-General* 1999 (2) ZLR 271 (S); *S v Njobvu* 2007 (1) ZLR 66 (S) – and, more recently, by this Court in *Sengeredo v The State* CCZ 11-14, *per* Chidyausiku CJ.

PROPRIETY OF REFERRAL

I advert, firstly, to the notice of application for referral, filed on 27 June 2011, wherein it is stated that “the applicant’s affidavit and annexures will be used in support of the application”. It is common cause that no such affidavit was ever filed. All that was attached to the notice were the submissions prepared by his legal practitioners, the request for remand, a bail deposit receipt, the charge sheet and the complainant’s statement.

Following the application *cum* submissions, the State filed its opposing response, dated 6 July 2011, highlighting the procedural and evidential deficiencies besetting the application. Despite this, on 8 July 2011, the learned trial magistrate proceeded to issue his ruling (comprising a total of 4 lines) granting the application for referral to the Supreme Court. He did this without hearing argument from the parties or affording them an opportunity to present evidence on the factual circumstances bearing upon the application.

The only “evidence” from the applicant that was before the Magistrates Court consisted of the allegations and assertions contained in the written submissions attached to the application. According to those submissions, the applicant was first charged in November 2005 and only summoned to court for trial in June 2011. The obvious implication is that he was available to attend trial throughout that period. As against this are the averments contained in the complainant’s statement, dated 8 May 2011, to the effect that the applicant had run away to South Africa in 2005 and

only returned to Zimbabwe in 2011. As pointed out by Mrs *Fero*, this appears to tally with the police docket which shows that the applicant could not be located between 2005 and 2011.

There can be no doubt that all of the above assertions and counter-assertions should have been ventilated through *viva voce* evidence in order to determine the reasons and responsibility for the delay in bringing the applicant to trial. Equally necessary was the evidence necessary to demonstrate that the applicant did in fact assert his right to a speedy trial, that he has been prejudiced by the delay and the specific manner in which he has been prejudiced. Moreover, in respect of all of these factors, the State should have been given the opportunity to test the veracity of the applicant's position through cross-examination, in addition to being given the opportunity to adduce its own evidence to rebut that position.

DISPOSITION

It is abundantly clear from the foregoing that this Court would be severely handicapped, on the basis of the evidence on record, in attempting to make any meaningful finding on the relevant issues so as to determine the alleged violation of the applicant's right to a fair and expeditious trial. The evidentiary deficiencies *in casu* are fatal to the propriety of the proceedings before the Magistrates Court and its ruling referring the matter for determination by this Court.

In short, the application is fundamentally and fatally defective. Moreover, because it was defective as from its inception, I take the view that it is incurably defective and cannot be regularised. That being so, I do not think it appropriate, as proposed by both counsel, to remit the matter to the trial court for it to conduct the necessary inquiry into the relevant facts. It is of course open to the applicant, should he so deem fit upon proper advice, to institute a fresh application before that court in compliance with the established procedural requirements.

In the result, the application is dismissed. There shall be no order as to costs, none having been sought by the respondent.

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.

GUVAVA JA: I agree.

J. Mambara & Partners, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners