

THE STATE
versus
JOHNSON KUPEYAVEYA
and
BRIGHTON MANYARA
and
CHARLES JOSI
and
BIGBOY MASHIRI
and
JOSHUA TIZIRAYI

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 28 January 2013 and 20 May 2014

Assessors: 1. Mr. Barwa.
2. Mr. Gweme

Murder Trial

E. Mavuto, for the State
R. Chavhi, for the defence

BHUNU J: The five accused persons were jointly charged with 4 others with the murder of one Black Ali on 13 October 2005. The fourth accused has since absconded and there has been a separation of trials. At the commencement of their trial the remaining accused persons have objected to being put on trial on account of the inordinate delay in bringing them to trial for the offence charged.

They have thus applied for the charge to be quashed and an order permanently staying the proceedings. Section 18 (1) and (2) of the Lancaster House Constitution conferred on every person the right to the protection of the law and trial within a reasonable time. It read:

18 Provisions to secure protection of law

- (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.
[Subsection amended by section 3 of Act No. 4 of 1993 (Amendment No. 12)]

- (1a) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law.
[Subsection inserted by section 4 of Act No. 1 of 2009 (Amendment No. 19)]
- (2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

That provision has been retained under s 69 (1) of the current constitution which provides that:

“Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.”

Thus the only issue which arises is whether the delay is so unreasonable as to warrant quashing the charge and granting a permanent stay of prosecution on the same charge.

It is common cause that the accused persons were arrested and placed on remand some time in 2005. At the time they were brought up for trial in this Court they had been on remand for 7 years and 3 months. It has been submitted on their behalf that a delay of more than 7 years is manifestly inordinate so as to constitute a violation of their constitutional right to a fair hearing within a reasonable time enshrined in s 18 of the Constitution.

In the case of *In re Mlambo 1991 (2) ZLR 339* the Supreme Court held that a delay of 4 years amounted to an infringement of an accused person's right to a fair hearing within a reasonable time. In coming to that conclusion the Court was careful not to set a tariff as to what constitutes a reasonable time within which an accused person must be brought to trial. This is eminently reasonable because that time is variable depending on the circumstances and exigencies of each case. The factors for consideration in determining whether or not the accused's rights to a fair hearing within a reasonable time have been infringed are many and varied.

Some of the reasons given in the *Mlambo* case *supra* include, the reason for delay, the assertion of his rights by the accused person prejudice arising from the delay, and the conduct of both the prosecutor and the accused person in regard to the delay. I might as well add that the seriousness and complexity of the offence are important factors to take into consideration. This is for the simple reason that a serious complex matter would naturally take more time to investigate and try than a simple straight *forward* case. In *the Mlambo* case *supra*, the

accused was charged with a simple and straightforward case of theft from employer_whereas in this case the accused is charged with a serious case of murder.

Common sense dictates that normally it takes longer to investigate and bring to prosecution an order case than a simple theft. It therefore does not necessarily follow that if a delay of 4 years was held to be unconstitutional in the Mlambo case the same should be said of this case. Logically a distinction should be made between the two cases because they are different.

In this case the accused acting in consort and common purpose are alleged to have assaulted and killed the deceased with a rubber button, stick and switches. Because of the sanctity of human life the Court would hesitate to let a suspect go scot free on account of delay unless such delay is inordinate and wholly inexcusable.

The delay in this case amounts to 7 years 107 days. They were first placed on remand on 5 October 2005 until 5 years later when further remand was quite rightly refused by the presiding magistrate on account of delay. Such a lengthy delay is undoubtedly inordinate and prejudicial unless there is cogent reasonable justification for the delay. As determined in the case of *Watson v S* SC 17/06 the burden shifts onto to the State to give a reasonable explanation for the delay.

The State has attributed the delay to fuel shortages which occurred during the Zim-Dollar era. It is common knowledge that fuel shortages came to an end with the advent of the multi currency era in March 2009. That reason does not apply to the further delay of more than 4 years to date.

The State also sought to blame the delay on one of the accused persons who absconded and is on the wanted list. It also sought to blame the delay on the death of some of the accused persons. Both excuses do not wash because they could easily have been dealt with by a simple application for separation of trials as has happened now.

A delay of seven years in bringing an accused person to trial is unconscionably excessive. It subjects the accused person to severe mental anguish and untold mental torture which in itself is a form of punishment. Considering that the facts of this case point to culpable homicide nothing will be served by subjecting the accused persons to the rigors of a further gruelling trial. The justice of the case demands that prosecution on this charge be permanently stayed.

It is accordingly ordered that the prosecution of the accused persons Johnson Kupeyaveya, Brighton Manyara, Charles Josi, Bigboy Mashiri and Joshua Tizirayi for the murder of Black Ali be and is hereby permanently stayed.

The Prosecutor General, the State's Legal Practitioners
I Murambasvina Legal Practitioners, The Defence's Legal Practitioners