C.R.B. 76-82/08

ALBERT MUGOVE MATAPO

and

NYASHA ZIVUKU

and

ONCEMORE MADZURAHONA

and

EMMANUEL MARARA

and

PATSON MUPFURE

and

SHINGIRAI WEBSTER MUTEMACHANI

and

RANGARIRAYI MAZIVOFA

versus

THE STATE

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 21, 29 June and 9 July 2010

Criminal Matter

C. Warara, for the applicants

C. Mutangadura, for the state

MUSAKWA J: The applicants are seeking the dismissal of the charge for which they were committed for trial on 4 June 2008 on the basis that they were not brought to trial within six months of such committal.

The facts as set out in Mr *Warara*'s founding affidavit are that the applicants were arrested on charges of contravening s 20 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. They have been in custody since 30 May 2007. On 4 June 2008 they were served with indictment papers for trial before the High Court on 7 July 2008.

Subsequent to the committal for trial the defence wrote to the prosecution on 5 June, 12 June and 2 July 2008. In the first two letters they sought to be furnished with documentation and witnesses' statements. In the last letter they were reminding the prosecution of the delay in being furnished with witnesses' statements and the difficulties defence counsel experienced in accessing the applicants in order to prepare their defence outline. There were no replies to those letters.

On the date of trial the matter could not be heard as the defence persisted with its complaints. The defence outline was later filed on 11 July 2008. On the other hand the state was notified of the defence's intention to raise a constitutional challenge against the charge that was preferred against the applicants.

On 5 August 2008 the constitutional issue was argued before HLATSHWAYO J who reserved judgment. Judgment was handed down on 18 November 2008 whereupon the matter was referred to the Supreme Court. The Supreme Court handed down its decision in which it dismissed the application on 7 December 2009.

Following the Supreme Court decision, the applicants' counsel personally attended at the offices of the Attorney-General where he requested that the matter be set down during the First Term of 2010. He was advised that it was not possible to set the matter down during that term.

In March 2010 the defence was notified of the setting down of the matter for 21 June 2010. During the course of the applicants' incarceration several applications for bail have been made. There was also an attempt to re-indict the applicants at the Magistrates Court a week before 21 June 2010. This was successfully resisted by the defence.

In his heads of argument, Mr *Warara* submitted that in terms of s 66 of the Criminal Procedure and evidence Act [*Cap 9:07*] the Attorney-General is *dominus litis* in respect of cases he decides to prosecute. In this respect a matter may be set down for trial even a year in advance.

He further submitted that in terms of s 160(2) an accused who has been committed for trial but not tried within six months is entitled to have his case dismissed. He also submitted that the provision in question is meant to protect an accused person from lengthy incarceration before he is brought to trial. The period in question should be six calendar months calculated in terms of the Interpretation Act [*Cap 1:01*].

Mr *Warara* further submitted that the reckoning of time is between the time accused persons were indicted and the trial date. That period should exclude the time the constitutional application was awaiting determination by the Supreme Court. That is the only time the applicants were not available for trial as the trial could not be set down whilst the constitutional application was still pending.

The State did not file an opposing affidavit. I must also point out that despite the State having been directed to file a response to the application by 28 June 2010 what were only filed were the State's submissions on the day of hearing. The court was made to understand that the officer who previously attended to this matter was ill-disposed. However, that does not absolve the State from its obligations. At the end of the day one cannot say the matter was opposed in the manner expected of a contested application because effectively all the averments that were made against the State in the applicants' founding affidavit went unanswered save for issues of law that were addressed in the submissions.

In its written response, the State in essence raised two aspects regarding the delay in the matter. Firstly, it is contended that the calculation of the period within which accused persons should have been brought to trial should take into account the times the High Court was on vacation. In this respect, it was submitted that the High Court was on vacation between 29 November 2009 and 12 January 2010 as well as between 1 April and 10 May 2010. The two vacations are taken as a period that was beyond the control of the Attorney-General as no trial

could be heard during those periods. Allied to this submission is the contention that the six months that entitle a dismissal of the case must run uninterrupted. In this respect counsel for the state cited the case of *Garikai Mukuze and Another v S* whose correct citation is 2005(1) Z.L.R 6(H).

The other contention is that state witnesses had to be secured first before the case was set down for trial. It was also submitted that between 29 March and 3 April 2010 a suspect was arrested on allegations of abetting the applicants in their attempt to escape from custody. This necessitated a delay as the matter had to be investigated. In this respect the suspect was tried and convicted on 8 April 2010.

Section 160 of the Criminal Procedure and Evidence Act provides that:

"(1) Except as is otherwise expressly provided in this Act as to the postponement or adjournment of a trial,
every person committed for trial or sentence whom the Attorney-General has decided to prosecute before the High Court shall be brought to trial on such date as may be determined by the Attorney-General:
Provided that the High Court may, on application by the accused and on good cause shown by him, order that
the trial shall take place on an earlier date than that determined by the Attorney-General.
(2) If a person referred to in subsection (1) is not brought to trial after the expiry of six months from the date
of his committal for trial, his case shall be dismissed:
Provided that any period during which such person is, through circumstances beyond the control of the Attorney-General, not available to stand trial shall not be included as part of the period of six months referred to in this subsection."

It is clear from a reading of the above provision that the prerogative of setting down a criminal matter for trial is that of the Attorney-General. The only time an accused person may be granted an earlier date is upon application before the court.

Subsection (2) does not provide for the reckoning of the six months period. Under such circumstances one has to have recourse to the Interpretation Act. In this respect s 33(6) of the Act provides that:

"In an enactment—
(*a*)…………………………;

(*b*)…………………………;
(*c*) a reference to a month shall be construed as a reference to a calendar month;
(*d*) ……………………….”

Since the Act does not define a calendar month, The Shorter Oxford English Dictionary defines it as:

“One of the twelve months into which the year is divided according to the calendar; also the space of time from any date (e.g. the 17th) of any month to the corresponding date (the 17th) of the next, as opposed to a lunar month of 4 weeks.”

Taking the above definition, in computing time in the present matter the court will take the date in any particular month to a corresponding date to any other month. Mr *Mutangadura* submitted that a calendar month is the beginning of the month to the end of that month. If one were to use that method it would present problems with any dates that fall between the beginning and the end of a particular month. It would leave such periods unaccounted for, which in my view was not the intention of the legislature when s 33 (6) was enacted.

The committal of an accused person for trial before the High Court occurs when the Attorney-General serves a written notice on a magistrate in terms of s 66(1) of the Criminal Procedure and Evidence Act. This is because in terms of s 65 no accused person shall be tried in the High Court unless he or she has been committed for trial by a magistrate for the offence charged in the indictment. On committal it is a requirement that the accused person be served with a list of witnesses the State intends to call plus a summary of the evidence of each witness sufficient to inform accused of all the material facts upon which the State relies. However, in practice the State invariably furnishes the accused with copies of the witnesses’ statements and any other relevant documents recovered, recorded or compiled during the course of investigations. The effect of committal is that an accused person is detained in prison in terms of s 66(2).

Mr *Mutangadura* argued that the period of six months must be uninterrupted and in his written submissions he referred to the case of *Garikai Mukuze and Another v S* (supra) in which he quoted the remarks of UCHENA J when he commented on s 160. This case was a precursor to

another decision of this court reported in 2005(1) Z.L.R 79(H) which involved the same accused persons. In the first matter the accused persons had filed a court application in which they sought the dismissal of the case against them in terms of s 160(2). Although they had been committed for trial their matter had subsequently been set down for trial in the Magistrates Court. Although UCHENA J did not order a dismissal on the basis that a proper inquiry needed to be conducted regarding the delay in prosecuting the matter, this is what the learned judge had to say in respect of the proviso to s 160 at p 11:

"The proviso to s 160(2) and s 160(3) provides for circumstances which interrupt the lapse of the six months period. If the six months period lapses without interruption then, the accused is entitled to a dismissal of his case. It must however, be noted that this can only be done when the court is satisfied there is no such interruption. This should be after hearing the reasons why the case did not get to trial within the stipulated period. In my view, dismissal cannot be ordered after a cursory inquiry based on the applicant's affidavits without affidavits from the investigating officer and the prosecutor who handled the case, or an admission by the State that there are valid reasons why the accused's case should be dismissed……."

When the same matter had been reinstated before the High Court and an application was made before the criminal court the facts were that accused persons had been remanded in custody in 2002. They were subsequently indicted for trial whose date was set for 31 May 2004. Initially trial failed to commence on account of the absence of State witnesses and *pro deo* counsel for one of the accused. Later the trial failed to proceed because one *pro deo* counsel had been excused from the case and the trial prosecutor was not in attendance. The matter failed to proceed on another date in October 2004.

Although MAVANGIRA J accepted that the absence of defense counsel was a factor beyond the control of the Attorney-General she also held that the unexplained absence of the trial prosecutor would be visited on the Attorney-General. Commenting on s 160 she had this to say at p 86:

"I thus find that s 160(2) is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period. It is also, in my view, meant to ensure that the Attorney-General ensures that trials of accused persons committed for trial are expeditiously conducted. There must be a balancing of the interests of society vis a vis the interests of the accused person. Indeed,

our constitution recognizes the right of an accused person to be afforded a fair hearing within a reasonable time. In my view, s 160(2) was enacted in that spirit and against such backdrop. But s 160(2) does not entitle the applicants to a discharge or acquittal nor does it relate to the running of prescription. It merely relates to the release from committal."

In the present matter I hold that from the time the applicants were committed for trial on 4 June 2008 the six months within which they should have been brought to trial immediately commenced to run. Between that date and when the constitutional application was heard the matter could not be tried because the defence had not been furnished with certain documents which were listed or described in correspondence addressed to the prosecution. The prosecution did not reply to the correspondence save that the requested witnesses' statements were availed a few days before the date of trial. In my view the period between committal and the hearing of the constitutional application should be counted as part of the six months within which the applicants should have been tried. This is because the Attorney-General cannot be heard to argue that those were circumstances beyond his control.

The two cases I have referred did not deal with the issue of reckoning of six months or the effect of interruption of that period. In my view the remarks by UCHENA J do not mean the six months must run uninterrupted and that any period preceding such interruption must be discounted. I say so because there would not have been the need for the proviso to ss (2). What it means then is that, if the aggregate period between an accused's committal and date of trial exceeds six months even though interrupted by some other circumstances which are beyond the control of the Attorney-General he is entitled to a dismissal.

I am fortified in my view by a phrase in the proviso, *viz* 'not available to stand trial'. When an accused person is committed for trial he automatically becomes available for trial. The only time he is not available for trial would be for example, if he is too ill or when the trial process is interrupted by some other process like an application for referral of a constitutional issue to the Supreme Court. Even when the State contends that at some stage investigations had to be conducted in relation to a suspect who attempted to facilitate the applicants' escape from

custody, it cannot be said they were not available to stand trial. In any event, the interruption amounted to only a few days and would thus be inconsequential.

In the same vein I am not persuaded that the fact that the High Court was on vacation on two occasions cited by the State constitutes a circumstance beyond the control of the Attorney-General. This is because it cannot be said the applicants were not available to stand trial. Whichever way you consider it, the argument that the court vacation interrupts the reckoning of time is dissipated when one takes into account the definition of a calendar month. I did not hear the State attempt to explain why the case could not be set down for trial during the First Term of 2010. It would not have required the High Court not being on vacation to set down a matter within six months that are required by s 160.

In light of the foregoing it is ordered that the case against the applicants be and is hereby dismissed.

Warara & Associates, the applicants' legal practitioners

Attorney-General's Office, respondent's legal practitioners