THE STATE
versus
ALBERT MUGOVE MATAPO
and
NYASHA ZIVUKU
and
ONCEMORE MUDZURAHONA
and
EMMANUEL MARARA
and
PATSON MUPFURE
and
SHINGIRAI WEBSTER MUTEMACHANI

IN THE HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 4 October 2010 and 27 October 2010

Mr. *Zvekare,* with Mr *Nyazamba,* for the State
Mr. *Warara,* with M. *Nyandoro* for the defence

Assessors:

1. Mrs. Shava
2. Mr. Shenje

BHUNU J: The six accused persons are charged with treason as defined in s 20 of the Criminal Law (Codification and Reform Act [*Cap 9:23*], alternatively contravening s 30 of the Criminal Law (Codification and Reform Act [*Cap 9:23*] that is to say, causing disaffection among the Police Force or Defence Force.

In the main charge it is alleged that the six accused persons being citizens of Zimbabwe acting in consort and common purpose unlawfully and intentionally conspired to overthrow the Government of Zimbabwe during the period extending from June 2006 to 29 May 2007.

They are alleged to have unlawfully conspired to instigate members of the Zimbabwe National Army and Airforce of Zimbabwe to rebel and overthrow the constitutionally elected Government of Zimbabwe.

In the alternative but during the same period the accused are alleged to have unlawfully induced or attempted to induce members of the Defence Forces of Zimbabwe and Zimbabwe

Republican Police to withhold their services, loyalty and allegiance to the Government of Zimbabwe.

The accused were indicted for trial at the High Court by a magistrate on 4 June 2008 in terms of s 66 of the Criminal Procedure and Evidence Act [*Cap :907*].

Section 160 (2) requires that a person committed to the High Court for trial must be tried within a period of six months from the date of committal failure of which his case must be dismissed. It reads:

> "If a person referred to in subs (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".

The proviso to that section however states that in computing the six months duration any period during which such person is, through circumstances beyond the control of the Attorney-General, not available to stand trial shall not count as part of the six months period.

It is common cause that the six accused persons were not tried within the prescribed six month period prompting MUSAKWA J on 9 July 2010 to dismiss their case and ordered their release from custody in terms of s 160 (2) of the Act under case number, HH 142-10. The six accused were however, not released from custody because they were facing other charges for which they were remanded in custody. Their co accused one Rangarirai Mazivofa who was not facing any other charges was unconditionally released in terms of MUSAKWA J's order. The accused person has since not been located and he remains at large. I have since ordered that his name be stuck out from the charge sheet.

. The six accused were subsequently re-indicted by a magistrate for trial in the High Court in terms of s 65 as read with s 66 of the Act. Section 66 (2) requires the magistrate to commit the accused to prison upon indictment for trial in the High Court until granted bail or liberated according to due process of law. The indicting magistrate accordingly committed the six accused persons to trial.

The committal to prison pending trial did not go down well with the defence. They protested that it was wrongful and unprocedural to commit the accused to prison when their re-indictment had been occasioned by want of prosecution

Defence counsel accordingly appealed to this court pointing to s 321 as read with s 322 which provides as follows:

> "**321 Liberation of accused persons**

Any person who is acquitted on any indictment, summons or charge or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody.

322 Further proceedings against accused discharged for want of prosecution or whose recognizance has expired

(1) A person who—

(*a*) has been discharged in terms of section *three hundred and twenty-one* for want of prosecution; or

(b) has been admitted to bail but not duly brought to trial;

may be brought to trial in any competent court for any offence for which he was formerly committed to prison or

admitted to bail at any time before the period of prescription for the offence has run out:

Provided that, subject to subs (2), a person referred to in—

(*a*) paragraph (*a*) or (*b*) of this subsection shall not be liable to be committed to custody; or

(*b*) paragraph (*b*) of this subsection shall not be liable to find further bail; in respect of proceedings for an offence referred to in this subsection.

(2) A person referred to in subs (1) who was committed for trial for an offence referred to in that subsection may be prosecuted by the Attorney-General before the High Court for that offence, and if that person, having been duly served with an indictment and notice of trial, fails to appear at the time mentioned in such notice, the court may, on the application of the Attorney-General, issue a warrant for his arrest and detention in prison until he can be brought to trial or until he finds bail for his appearance to stand his trial on the said indictment".

I take the view that the issue as to whether or not the magistrate was correct in committing the accused to prison upon re-indictment is within the domain of the appeal court. The magistrate's order however remains lawful and binding among the parties until such time it has been upset by a competent court of competent jurisdiction

This court's mandate is simply to try the six accused persons who have been brought before it according to law. It has however, been vigorously argued that the court cannot proceed to try the accused because their indictment was irregular and to that extent unlawful for want of compliance with the provisions of s 321 as read with s 322 of the Act.

Section 65 (i) (v) of the Act provides that no irregularity in the

indictment process shall vitiate the trial proceedings before this court. It reads:

> "(v) No irregularity or defect in –
>
> (a) any proceedings referred to in s 66, or
> (b) any other matter relating to the bringing of an accused person before the High Court, shall affect the validity of the trial, but the court may, on the application of the prosecutor or the accused, adjourn the trial to some future day".

Apparently acting in terms of the above legal provisions MUSAKWA J ordered on 27 July 2010 that the trial be postponed *sine die* pending the appeal lodged by the accused persons against the decision to re-indict them.

With respect it appears to me that MUSAKWA J may have misunderstood the thrust of the accused's appeal. My understanding is that the accused are not questioning the State's right to re-indict them but their committal to prison upon re-indictment. That observation is however beside the point. The cardinal issue for determination is whether or not I am bound by my brother Judge MUSAKWA'S determination that the trial be postponed pending the outcome of the appeal lodged by the accused.

It is clear to me that MUSAKWA J's order was premised on the understanding that an appeal had been filed with this court and indeed that was my understanding of the submission from the defence. I was however surprised when State counsel submitted without any contradiction that there is in fact no pending appeal as alleged by the defence. All what has happened is that the accused have filed a notice of appeal. The order which they intend to appeal against was made on 21 July 2010. It is my considered view that when MUSAKWA J made his order postponing the trial until the outcome of the appeal it was implicit in the order that the accused had to prosecute their appeal within a reasonable time. This is because time is of the essence otherwise the six month period within which the accused must be brought to trial will again expire thereby again necessitating the dismissal of the accused and consequently discharge on a technicality rather than on the merits.

I am in total agreement with the State counsel that it is wholly undesirable that cases of this nature be determined on technicalities. I am sure that had MUSAKWA J known that by now the accused will not have taken effective steps to prosecute their appeal he would not have suspended the trial pending an appeal which is not being effectively prosecuted. I am therefore persuaded that MUSAKWA J's order has since overtaken by events in that the accused have failed to expeditiously prosecute their appeal within a reasonable time.

Bearing in mind that the accused are in prison not only because of this matter but also on account of a different matter altogether I can perceive no injustice or prejudice if they are tried whilst coming from prison.

As I have already stated this court's mandate is merely to try the accused regardless of where they are coming from. Since I have already ruled that the accused's re-indictment was not vitiated by any perceived procedural irregularities or defects real or imagined, I accordingly rule that the six accused persons are properly before this court for trial. It is in the interest of public policy and everyone concerned that this matter be brought to finality on the merits without any undue delay.

In the result it is accordingly ordered that counsel's objection to the commencement of the trial be and is hereby dismissed.

Attorney – General's Office, legal practitioners for the State
Warara & Associates, legal practitioners for the defence