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 Mr. *Nyandoro* for the defence

BHUNU J: All the six accused persons are charged with treason. They are alleged to have conspired to unconstitutionally overthrow the lawful government of Zimbabwe in contravention of s 20 of the Criminal Law (Codification and Reform Act [*Cap 9:23*].

In the alternative they are alleged to have conspired to instigate members of the Zimbabwe Armed forces to rebel and overthrow the constitutionally elected government of Zimbabwe in contravention of s 20 of the Criminal Law (Codification and Reform Act [*Cap 9:23*].

The accused were arraigned before me and two assessors for trial on 4 of October 2010. At that trial they objected to being tried on the grounds that they had been improperly brought before us for trial.

The facts giving rise to their objection were to a large extent common cause. The undisputed facts are that the accused persons were initially indicted to the High Court for trial on the above charges by a magistrate on 4 June 2008 in terms of s 65 as read with s 66 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

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.

The accused were however not tried within the prescribed time limit prompting MUSAKWA J to dismiss the case and order their release from custody. The six accused were however, not released from custody because they are facing other charges for which they have been remanded in custody.

The seventh co-accused that was not facing any other charges was duly released in terms of MUSAKWA J's order. Since then he has not been located by the State.

Despite having been released for want of prosecution the six accused were subsequently re-indicted and remanded in custody in terms of s 65 as read with s 66 of the CP&E Act [*Cap 9:07*].

Aggrieved by their re-indictment and remand in custody the six accused appealed to this court arguing that their re-indictment and subsequent remand in custody was unlawful. They argued that in terms of s 321 as read with s 322 they were supposed to be brought to court by way of summons instead of being re-indicted.

The accused were subsequently placed before MUSAKWA J for trial. They however objected to the commencement of the trial arguing that the trial should be held in abeyance until the appeal had been determined. MUSAKWA J obliged and ordered on 27 July 2010 that the trial be postponed until the pending appeal had been determined

Despite MUSAKWA J's order the matter was subsequently placed before me for trial on 4 October 2010. They again objected to the commencement of the trial pointing to MUSAKWA J's order and raising the same arguments as previously presented before the learned judge.

The State countered that MUSAKWA J's order was premised or conditional upon the accused effectively and expeditiously prosecuting their appeal.

On 13 October 2010 I dismissed the accused's objection and ordered that the trial must proceed. They now apply for leave to appeal to the Supreme Court against my order.

In summary my reasons for dismissing the objection were as follows:

1. That all the six accused persons had failed to expeditiously and effectively prosecute their appeal within a reasonable time as was implicit in MUSAKWA J's order.

2. Section 65 as read with s 66 under which the magistrate re-indicted the accused overrides any other section in the Act including ss 321 and 322

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 date."

The effect of that section in my view is to render any irregularity nugatory and of no force or effect in relation to the bringing of the accused persons for trial before this court. I interpreted that section to mean that, once an accused person is brought before the High Court for trial the court is entitled to try him regardless of any irregularities including failure to observe the provisions of s 321 as read with s 322.

Whether the accused should be tried whilst they are out of custody or in custody in terms of s 321 as read with s 322 however, remains a live issue for determination by the appeal court. The appeal court's determination does not in my view affect this court's right to hear and determine the trial but only the accused's freedom while on trial. In dismissing the accused's objection to stand trial at this stage I was therefore not pre-empting the appeal court's decision.

The decision whether or not to try the accused in this court was not an issue before the re-indicting magistrate. For that reason the issue is not pending before the appeal court. That being the issue fell for determination by this court.

3. By dismissing the accused's objection I was also not overriding or reversing MUSAKWA J's order. On the contrary I was only interpreting and giving effect to the learned judge's order. I am sure that his Lordship did not mean that the accused could perpetually avoid trial by simply filing a notice of appeal and then deliberately refrain from prosecuting it within a reasonable time. By placing a time limit of six months within which an accused person must be tried the law maker meant that time was of the essence, for the adage "justice delayed is justice denied" is apt. To make matters worse the defence has not bothered to give any explanation for the delay nor have they indicated when they are going to effectively prosecute their appeal Reliance on the case of *Matanhire* v *BP Shell Marketing Services* (*Pvt*) 2005 (1) ZLR 140 was

therefore misplaced. That case in fact reinforces my position that this court may interpret its own decisions to avoid any ambiguity leading to absurdity.

4. A perusal of the record of proceedings tend to suggest that the defence is in the habit of filing appeals and then sitting parking them in the appeal court without making any follow ups. For instance on 18 November 2008 they were granted permission to refer a constitutional issue to the Supreme Court. By 18 June nothing had been done by way of a follow up to place the matter before the Supreme Court for determination. This prompted Mr *Tokwe* of the Attorney-General's Office to write in the following vain to the Criminal Registrar:

> "As you may recall our office has made numerous follow ups on the record, to the extent that, we have gone out of our way to assist in the photocopying of some portions of the records <u>despite the fact that it is the accused who applied to have their case referred to the Supreme Court. The Legal Practitioners of the accused seem not to be making a chase up on this matter</u>"

5. I accepted the State's submission that it was *dominus litis* in respect of the prosecution of the accused persons. I found that allowing the accused to dictate the pace and time when they will stand trial by taking their time in prosecuting their appeal to be absurd and wholly inconsistent with this well established legal principle.

   The determination which the accused intend to appeal against was made on 21 July 2010. To date that is to say, three months later they have neither requested that the record of proceedings be transcribed nor have they filed their heads of argument in preparation for the appeal hearing in terms of the rules of court.

6. Counsel for the defence submitted that as far as they are concerned MUSAKWA J is still seized with the matter because the case was initially placed before him for trial. As far as he is concerned the matter can only be tried by MUSAKWA J and no other judge. He therefore accused the State of judge shopping. The implication being that I am more likely to be biased against the accused than MUSAKWA J. Judges are however sworn to do justice without fear or favour. I am a strong adherent to that immutable rule of law and I believe the same applies to all my other fellow judges without exception.

   There is therefore no substance in counsel's submission that the matter can only be heard by MUSAKWA J. I consider that to be idle talk coming from senior counsel because it is an elementary rule of practice that no judicial officer becomes seized with

a matter until the accused has pleaded to the charge before him. This is an everyday common occurrence both in this court and in the lower courts. On the contrary, it appears to me that the defence is trying to fasten onto a judge whom they consider to have already accorded them what they believe to be a favourable result.

The accused have been in custody since May 2007 any further delay in bringing them to trial can only lead to a gross travesty of justice. It is in the best interest of the due administration of justice that this long outstanding matter be brought to finality.

From the foregoing, in my view it is highly unlikely and not in the least probable that a different court might come to a different conclusion thereby stalling the proceedings indefinitely with no prosecution of the appeal in sight.

That being the case the application for leave to appeal cannot succeed. **It is accordingly ordered that the application for leave to appeal to the Supreme Court be and is hereby dismissed.**

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