

**REPORTABLE (26)**

**TONGAI MATUTU**  
**v**  
**THE STATE**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, ZIYAMBI JA & PATEL AJA**  
**HARARE, MAY 13, 2013**

**The applicant in person**

***E Nyazama, for the respondent***

**ZIYAMBI JA:** At the end of the hearing the application was dismissed and it was indicated that reasons for the decision would follow in due course. These are the reasons.

This matter was referred to the Supreme Court by the Magistrate in terms of s 24(2) of the Constitution of Zimbabwe which provides as follows:

**“24 Enforcement of protective provisions**

(1) ....

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious”.

The referral came about in the following manner. On 8 February 2012, the applicant, who is a registered legal practitioner, appeared before the Magistrate in Gweru in response to a summons to answer a charge of Contravening s 16(2) (b) of the Public Order and Security Act [*Cap 11:17*]. The offence was allegedly committed on 25 June 2005.

When the charge was put to him, the applicant did not plead to it but instead made an application for the matter to be referred to the Supreme Court in terms of s 24(2). It was his intention to seek an order:

“For a permanent stay of prosecution in terms of the Constitution of Zimbabwe in Section 18(2) on the basis that my right to a fair trial, within reasonable time has been violated”.

He alleged that the charges emanated from an incident which occurred on 25 June 2005 in Zaka and that a warned and cautioned statement was recorded in July of the same year. The delay in bringing him to trial amounted to six years and eight months. The allegation was that the delay was attributable to the conduct of the State because he resides in Masvingo and has never removed himself from the jurisdiction of the courts. He averred that nothing could have been done by him to assert his rights especially as the matter was not brought to court on a remand hearing.

He alleged further that “the only [state] witness who is available” had his statement recorded on 26 June 2005. According to him, the investigations were then complete and the prosecution ought to have taken place at the latest in December 2007 when authority was granted by the Attorney General to prosecute. He alleged that the failure by the State to bring him to trial within a reasonable period constituted a violation of his constitutional right enshrined in s 18 of the Constitution.

The Prosecutor in response submitted that the delay “was not a deliberate act by the State”. In the first place, one of the state witnesses had died. Secondly, there was, on record, a letter dated 10 August 2008 wherein the applicant had requested that he be prosecuted by a person who did not know him; and thirdly, the applicant is a Deputy

Minister tasked with national duties and the police were having difficulties in effecting personal service of the summons on him. After the authority to prosecute was granted by the Attorney General in 2007, there was a shortage of resources and transport.

The Prosecutor further alleged that when the matter was due to be heard the Director of Public Prosecutions directed that the trial be heard in Gweru and not Masvingo. Most of the court officials declined to deal with the matter because they knew the applicant on professional grounds and, even on the date of the hearing, two court officials refused to entertain the matter on professional grounds. Accordingly the delay could not be wholly attributable to the State.

No evidence whether on affidavit or *viva voce* was led by the applicant in support of his allegations. This is totally unacceptable. In *S v Banga* 1995 (2) ZLR 297 this Court remarked 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.”

The Magistrate was satisfied that the raising of the question of the violation of the applicant’s constitutional right was not frivolous. He referred the matter to this Court. The referral was improper. This Court has so stated time and time again. As far back as 1995, it was said:

“It seems to me, also, that before permitting an accused person to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so”.<sup>1</sup>

The prosecutor must be given written and adequate notice of the accused person’s intention to make the application. The Magistrate must hear evidence from the applicant and the Prosecutor must be given an opportunity to cross examine the applicant and to lead any evidence it considers necessary after which the Magistrate must make a ruling based on the evidence. However this was not done. At the hearing before this Court, it was glaringly apparent that there were disputes of fact which needed to be resolved. It is the function of the referring court to resolve disputes of fact.

It goes without saying that a delay of seven years in prosecuting a criminal charge is presumptively prejudicial and would, generally speaking, trigger an inquiry by this Court into the constitutionality of the delay<sup>2</sup>.

However the applicant has placed no evidence before the Court from which it can be concluded that the delay in bringing him to trial is totally attributable to the State, has caused him prejudice and is a violation of his right to a fair trial. I stress here that the absence of evidence is fatal to the application. In *S v Banga*<sup>3</sup> it was held that the absence of *viva voce* evidence could be fatal to an applicant’s case because it

“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, ...

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<sup>1</sup> *S v Banga* supra at p302

<sup>2</sup> See *Gadzanai Nkomo & Anor v The State* SC 52/06

<sup>3</sup> *Supra* at p 301

and that it has impaired his ability to exonerate himself from the charge due to death, disappearance or forgetfulness of potential witnesses”.

The application in *casu*, having no evidential basis, is fatally defective.

**MALABA DCJ:** I agree

**PATEL AJA:** I agree

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