

GARIKAI MUKUZE  
and  
ALEXIO KUTAPA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 25 and 27 January 2005

**Application For Dismissal In Terms Of s 160(2) Of The Criminal Procedure And  
Evidence Act [Chapter 9:07]**

Mr *Dururu*, for the applicants  
Mr *Godzi*, for the respondent

MAVANGIRA J: In early October 2002 the two applicants were arrested on a charge of armed robbery of a motor vehicle. On 14 October 2002 they appeared before a magistrate and were remanded in custody. In mid-April 2002 the applicants were indicated for trial before the High Court. Their co-accused, one Fanuel Mkandla was similarly indicted.

Although the trial was set down for 31 May 2004, it did not take off. One Runyararo Munhuweyi, a legal practitioner who was then representing the third accused person, that is, Alexio Katapa, in an affidavit filed in support of this application, states that the trial did not take off because the first accused, that is Garikai Mukuze had not yet been interviewed by his legal practitioner. On the other hand Benjamin Chidenga, a senior law officer in the Attorney-General's office who was tasked with prosecuting the matter, in his affidavit filed in opposition of the application, states that the trial did not commence due to the non-availability of defence lawyers as well as state witnesses.

The matter was then set down again for 13 September 2004. Again it failed to take off. Munhuweyi states in his affidavit that the first accused's legal practitioner applied before the Judge, to be excused as he was already in the middle of another *pro deo* matter. Furthermore, Mr Chidenga, the State counsel, did not come to court and after waiting for close to two hours, Mr Phiri from the Attorney-General's office came and explained that the Public Prosecutor who was handling the matter was unavailable. Chidenga in his affidavit merely states that he was meant to prosecute

the matter but Mr Phiri attended at court and the matter could not proceed because the first accused's legal practitioner recused himself from the case.

The learned judge's notes in the file indicate that Mr R. Gumbo for the first accused indicated that he was not ready. Mr Munhuweyi and Miss Maunganidze for the third and second accuseds respectively, were ready. Mr Gumbo indicated that sometime in April he got two *pro deo* matters. He had returned the instant one. On 8 September 2004 he got another notice to do the matter. He had thus come to apply to be excused. He had spoken to the Registrar. He had also only got the papers on the Friday at 2.00 p.m. He resided in Bindura. The notes also indicated that Mr Phiri advised the court that Mr Chidenga was not available. Mr Phiri said they had phoned Mr Chidenga but his phone battery was low. Mr Chidenga had not turned up for work.

The learned Judge's notes further indicated as follows:

"Witnesses available - all present except the complainant  
Everything was ready.

At the request of Mr Phiri, postponed to 4/10/04."

On 4 October 2004, again the trial did not take off. However, the applicants co-accused, Fanuel Mkandla pleaded guilty, was convicted and sentenced on that day. Subsequently the applicants were taken to the Magistrate's Court to appear before the magistrate in court 19 for trial on the same charge for which they had been indicted. This triggered the filing of an urgent chamber application by the applicants which was heard on 20 December 2004 culminating in judgment No. HH 2.2005. the learned Judge therein found that the transfer of the applicant's case to the magistrate was unlawful as it was done without an application and in any event the granting of such an application by the High Court is not provided for under section 161(1) of the Act. He then ordered as follows:

- "1. The applicants' criminal case HC 59-61/04 (Ref CRB 1276-7/04 is before the wrong court that is Harare Regional Court 19.
2. That the applicant's case number HC 59-61/04 be and is hereby reinstated before the High Court.
3. That the respondent cause the applicants to appear before the High Court sitting as a criminal court by not later than the 28<sup>th</sup> January 2005."

Apparently in a bid to comply with the above cited order the respondent caused the matter to be set down for the week commencing 24 January 2005.

It is pertinent to note that the learned judge at page 5 of the cyclostyled judgment referred to above said:

"The proviso to section 160(2) and section 160(3) provide (sic) 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 applicants' affidavits without affidavits from the investigating officer and the prosecutor who handled the case or an admission by the State that there are no valid reasons why the accused's case should not be dismissed. In this case the State did not submit opposing papers but Mr *Tokwe* appeared on short notice to defend the State's position without any documents on whether or not the application should be dismissed.

Mr *Dururu* conceded that a proper inquiry preferably before the High Court sitting as a criminal court is necessary before the applicant's case can be dismissed."

On 19 January 2005 the applicants filed the instant application wherein they seek an order in the following terms:

- "1. The applicants' criminal case number HC 59-61/04 be and is hereby dismissed.
2. The applicants be and are hereby discharged."

The applicants' affidavits in support of the application detail the history of the matter from the time of their arrest. Also filed in support of the application is Runyararo Munhuweyi's affidavit reference to which has already been made above.

The respondent filed a notice of opposition to which was attached an affidavit by Benjamin Chidenga. I have also already made reference to its contents.

It is the applicant's case that six months have elapsed since they were committed for trial before the High Court and as they have not been brought to trial yet, their case must, in terms of section 160(32) of the Criminal Procedure and Evidence act [*Chapter 9:07*], (the Act) be dismissed. It was submitted on their behalf that the State's failure to bring them to trial within the stipulated period was not occasioned by circumstances beyond the control of the Attorney-General. It was argued that as the applicants have always been in custody, they have always been available to stand trial as they were, at all relevant times, at the disposal of the State,

furthermore, that if any department of the State, was at fault, that would be tantamount to the Attorney-General's fault as all such departments are at the Attorney-General's "beck and call", he being the representative of the State who is not merely a passive participant but the prime mover in any prosecution of any criminal matter. It was submitted in paragraph 9 of the court application that the trial having failed to take place as detailed above, the case against the applicants is prescribed and should be dismissed. Mr *Dururu*, in his oral submissions and in response to the State counsel's submissions, submitted that the proviso to section 160(2) falls within the meaning of the phrase "...unless some other period is expressly provided by law....", in section 23(2) of the Criminal Procedure and Evidence Act (the Act).

Mr *Dururu* also submitted that by transferring the applicants' case to the Regional court, the Attorney-General abandoned his intention to proceed against the applicants in terms of the indicts that had been served by them for trial in the High Court and thereby abandoning the case.

Section 160(2) and (3) of the Act provides:

"(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, though circumstances beyond the control of the Attorney-General, not available and stand trial shall not be included as part of the period of six months referred to in this subsection.

(3) For the purpose of this section, a person shall not be deemed to have been committed for trial in any case in which the Attorney-General has in terms of section one hundred and one ordered a further examination to be taken, until such further examination has been completed.

The Attorney-General's stance as submitted by Mr *Godzi*, is that whilst six months have elapsed since the applicants' indictment for trial, the accused persons were not available to stand trial due to no fault on the part of the Attorney-General. Mr *Godzi* submitted that if an accused is not able to conduct his defence due to the non-availability of his legal practitioner he cannot argue that he was available to stand trial as it would not be possible for the trial to commence in the absence of his legal practitioner. The Registrar had dutifully arranged legal practitioners for the

accused persons and had the legal practitioner for the first accused not recused himself as stated above, the matter could have long been finalised.

The applicants were thus not available to stand trial through circumstances beyond the control of the Attorney-General and the proviso to subsection (2) of section 160 cannot therefore operate in favour of the applicants.

Mr *Godzi* also submitted that in terms of section 23 of the Act the case against the applicants can only prescribe after the lapse of twenty years from the time when the offence was committed. Further, that the dismissal provided for in section 160 (2) is not equivalent or tantamount to an acquittal but is akin to a removal from remand. He further submitted that had that been the intention of the legislature it would have clearly stated so in specific terms. In any event a person is acquitted only if he has tendered a plea of not guilty to a charge. If he tenders a plea of not guilty and thereafter further remand is refused, then he is entitled to a verdict but where he has not pleaded, he is not entitled to a verdict and cannot tender a plea of *autre fois acquit*. In any event, by virtue of Section 23 of the Act, the offence prescribes after twenty years and the qualification in Section 23(2) is not applicable *in casu*.

Mr *Godzi* also submitted that even if the Attorney General should be found to be partially to blame, the applicants are equally to blame because the first accused's legal practitioner was always not available on all the material occasions.

It is in my view important to ascertain the meaning or effect of the dismissal provided for in section 160(2) of the Act. Is it tantamount or equivalent to an acquittal or is it merely akin to a refusal of further remand in a case where the accused has not pleaded.

In terms of section 110(2) of the Act, on receipt of a written notice by the Attorney General, the magistrate shall commit an accused person for trial before the High Court and grant a warrant to commit him to prison, there to be detained till brought to trial before the High Court for the offence specified in the warrant or till admitted to bail or liberated in the course of law.

It is also in my view important to read subsection (2) of section 160 in conjunction with section 160(1) of the Act, which provides:

"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." (emphasis added)

Clearly section 160(2) is applicable in this matter because the applicants were committed for trial. The shorter Oxford English Dictionary gives the following meanings, amongst others, to the word "commit":

"consign to custody" and To consign officially to custody or confinement." This tallies with what actually happens in terms of section 110 of the Act, already referred to above.

In terms of subsection (1) of s160 the trial of a person committed for trial shall be heard on the date determined by the Attorney-General. However, in terms of the proviso thereto, the trial may take place on an earlier date. In terms of subsection (2) of 160 if the trial of the person referred to in subsection (1) does not take place after the expiry of 6 months, the case shall be dismissed. In terms of the proviso thereto however, this is permissible only where the accused was not available to stand trial at any stage during the six months period, due to circumstances within the control of the Attorney-General. In *casu*, the non-availability of the first accused's legal practitioner, cannot in my view be said to be a circumstance within the control of the Attorney-General. It is beyond the control of the Attorney-General. In my view by ensuring that the accused was provided with *pro deo* counsel, the Attorney-General did all that was in his power to do in respect thereof.

It is unfortunate that the respondent's papers do not give a full and clear explanation as to the non-availability of Mr Chidenga on 13 September 2004 as recorded in the learned Judge's notes made on that date. Without such explanation, the Attorney-General must, in my view, shoulder the blame for the consequences thereof. But that is the date on which the first accused's legal practitioner asked to be excused by the court. I therefore agree with Mr Godzi that the applicants and the respondents were equally to blame for the failure of the trial to take place at least on 13 September 2004. But the fact remains, in my view, that the non-availability of the applicants to stand trial by reason of the first accused's legal practitioner's non-availability, cannot be laid at the Attorney-General's door.

It seems to me however, that the fact cannot now be escaped that a period of 6 months has expired since the applicant's committal.

We still then come back to the question of what the effect of that dismissal is, as the applicants also seek an order for their discharge. The shorter Oxford English Dictionary gives the meanings, amongst others, to the word "discharge", "to clear of a charge or accusation; to exculpate, acquit." It also gives the following meanings, "to dismiss (one charged with an offence); to release from custody, liberate, to send away, let go."

Mr *Dururu* submitted that the dismissal contemplated herein is in effect an acquittal.

As stated above already, it is important to note that section 160 becomes relevant only because the applicants were on 14 April 2004 committed for trial. Furthermore as *Mr Dururu* submitted committal has serious consequences on the life liberty and livelihood of an accused and on his family and dependants. It must therefore have been for that reason that the legislature decided to enact the proviso in question. But the legislature also clearly spelt out, in clearly and unambiguous language that the "right of prosecution for any offence other than murder", shall "be barred by the lapse of twenty years from the time when the offence was committed", unless some other period is expressly provided by law."

In my view section 160(2) does not expressly provide for the prescription of "any offence other than murder" if a person committed for trial before the High Court on that offence is not brought to trial after the expiry of six months. The dismissal relates, in my view to the committal and the effects or consequences or implications thereof; such consequences or effects as appear, for example in section 110 already referred to above. In my view the dismissal relates to a release from committal and there can be no question of prescription having run by virtue of section 160(2). Section 160(2) does not qualify as and is not an express provision for the running of prescription as contemplated by section 23(2) when it states "unless some other period is expressly provided by law."

In my view section 160(3) is clearly of no relevance in this application and merits no further mention or discussion.

I thus find that section 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-*

*à-vis* the interests of the accused person. Indeed our constitution recognises the right of an accused person to be afforded a fair hearing within a reasonable time. In my view section 160(2) was enacted in that spirit and against such backdrop. But section 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 release from committal.

In the result and for the above reasons it is ordered as follows:

IT IS ORDERED:

That in terms of section 160(2) of the Criminal Procedure and Evidence Act, [Chapter 9:07], the applicants' case be and is hereby dismissed.